

NO. 01-23-00362-CV

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

Candace Louise Curtis,
Appellant

V.

**Carl Henry Brunsting, Individually & As Independent Executor Of
The Estates Of Elmer H. Brunsting & Nelva E. Brunsting, Et Al**
Appellees

On Appeal from Probate Court No. Four
Harris County, Texas
C.A. No. 412249-401
The Honorable James Horowitz, Judge Presiding

Appellees' Brief

Oral Argument is not Necessary

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Preamble

This appeal is part of Appellant's ongoing vexatious litigation against her siblings arising from disputes over their parents' inter-vivos trust. Over a decade ago, Appellant began her litigation in federal court under diversity jurisdiction. Acting at various times *pro se* and through counsel, she voluntarily destroyed federal jurisdiction by adding a nondiverse party in her amended federal court complaint. Upon her request, the federal court sent her case to state court where it joined other estate-related intra-family litigation in Harris County Probate Court No. 4.

Acting at times *pro se* and at times through counsel, Appellant actively participated in the ongoing litigation in Probate Court No. 4 by, among other things, moving Probate Court No. 4 to accept the transfer of her federal court case, agreeing to an order consolidating a second state court case that she initiated into her brother Carl's case, and filing amended petitions. While fighting in Probate Court No. 4, Appellant also filed motions and new litigation in multiple federal courts, all of which were rejected by the federal district courts and the Fifth Circuit Court of Appeals. In Probate Court No. 4, Appellant challenged the court's subject matter jurisdiction, and lost, in 2019. She also lost on summary judgment and in a bill of review in 2022. She filed and withdrew a notice of appeal in 2022, but then sought mandamus from this Court, which it denied, also in 2022. Ignoring precedent, through an April 2023 notice of appeal of the same orders, Curtis now seeks a

different result. Her appeal is untimely, without merit, and should be resoundingly rejected.

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Note: Appellee, Carole Ann Brunsting, is a party, but did not participate in the preparation of this brief, and is a not signatory to this brief.

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Abbreviations & Record Citations

Probate Court No. 4:	Harris County Probate Court No. 4.
-401 Case:	C.A. No. 412249-401; <i>Carl Henry Brunsting, Individually & as Independent Executor of the Estates of Elmer H. Brunsting & Nelva E. Brunsting v. Anita Kay Brunsting, f/k/a Anita Kay Riley, Et Al</i> ; In Probate Court No. 4, Harris County, Texas (Candace Louise Curtis is also a plaintiff in this case).
-402 Case:	C.A. No. 412249-402; <i>Candace Louise Curtis v. Anita Kay Brunsting & Amy Ruth Brunsting</i> ; In Probate Court No. 4, Harris County, Texas (Candace Louise Curtis is a plaintiff in this case, and which case was subsequently consolidated by agreement of the parties (including Candace Louise Curtis) with the -401 case).
-404 Case:	C.A. No. 412249-404; <i>Plaintiff Candace Louise Curtis Statutory Bill of Review</i> ; In Probate Court No. 4, Harris County, Texas.
Appellant, Curtis, or Plaintiff/Curtis:	Candace Louise Curtis, Plaintiff in the -401, -402, & -404 cases, and the Appellant in this pending appeal.
Co-Trustees:	Appellees, Anita Kay Brunsting & Amy Ruth Brunsting.
Anita:	Appellee, Anita Kay Brunsting.
Amy:	Appellee, Amy Ruth Brunsting.
Carl:	Appellee, Carl Henry Brunsting.
Carole:	Appellee, Carole Ann Brunsting.
Elmer:	Decedent, Elmer H. Brunsting.
Nelva:	Decedent, Nelva E. Brunsting.

- Trust: The Restatement of the Brunsting Family Living Trust dated October 10, 1996, inclusive of its subsequent amendments, designations and appointments.
- L.R.: 2019 Local Rules of the Harris County Probate Courts.
- C.R.: Clerk's Record. The Clerk's Record was filed in one (1) volume. Citations to the Clerk's Record are parenthetically referenced by page. (CR 1) means Clerk's Record, Page 1.
- S.C.R.: Supplemental Clerk's Record. There is one (1) supplemental volume of the Clerk's record. Citations to the Supplemental Clerk's Record are parenthetically referenced by page. (S.C.R. 3) means Supplemental Clerk's Record, Page 3.
- R.R.: The Reporter's Record was filed in three (3) volumes and are parenthetically referenced by volume and page. (RR 1:1-3) means Reporter's Record, Volume 1, Pages 1-3.
- Curtis' Appendix: Matters or instruments set forth in Curtis' Appendix.
- App. Appendix: Matters or instruments set forth in Appellees' Appendix.

Curtis made numerous references to documents in other proceedings without providing copies of those documents for the record on this appeal. Even if it is appropriate for this Court to take judicial notice of filings in certain other proceedings, the burden of finding those filings should not fall on the Court or the responding parties. As a result, Curtis failed to provide a record sufficient for a review by this Court and, therefore, waived her right to complain on those issues for which a more complete record is required. *See Fredonia State Bank v. General Am. Life Ins.*, 881 S.W.2d 279, 283 (Tex. 1994)(appellate court will not search the record

for evidence the appellant cites or the trial court's ruling about which appellant complains).

Statement of the Case

This appeal challenges Harris County Probate Court No. 4's subject matter jurisdiction.

In February 2012, Appellant, a California resident, initiated federal court litigation against two of her Texas resident siblings – Anita and Amy. The federal court's jurisdiction was based on diversity. In 2014, Curtis requested leave to amend her complaint to add her other two Texas siblings – Carl and Carole. One sibling was added as a plaintiff. The other was added as a defendant. When Curtis' request was granted, she destroyed the federal court's diversity jurisdiction. Curtis also asked the federal court to remand/transfer her federal court case to a probate case pending in Probate Court No. 4 under C.A. No. 412,249, which involved the probate of her mother's will. The federal court granted both requests – an amendment that destroyed diversity jurisdiction, and a transfer/remand into Probate Court No. 4 in C.A. No. 412,249, which unwound a prior Fifth Circuit opinion regarding applicability of the “probate exception” in federal court on which Curtis relied.

Following its local rules, Probate Court No. 4 assigned Curtis' case to C.A. No. 412,249-401, which was a 2013 case filed by Carl against the Co-Trustees. After Curtis made additional filings, which were assigned to the -402 case, Probate

Court No. 4 signed an agreed order approved by all the parties (including Curtis) that consolidated Curtis' second state court case (the -402) into her brother's pending -401 case.

Over the next four years, Curtis grew dissatisfied with Probate Court No. 4 and so in October 2018 Curtis filed a plea to Probate Court No. 4's subject matter jurisdiction. The motion was denied because Probate Court No. 4 is a statutory probate court with both: (a) exclusive subject matter jurisdiction over probate proceedings regarding a last will and testament, and matters ancillary to a probate proceeding; and (b) concurrent subject matter jurisdiction over actions by or against a trustee, and/or actions that involve an inter vivos or testamentary trust.

Claiming subject matter jurisdiction was lacking, Curtis now appeals rulings from Probate Court No. 4 (the latest ruling having been ordered almost 19 months ago) in the hope that a ruling from this Court that Probate Court No. 4 had no subject matter jurisdiction will erase a host of negative rulings (properly) entered against her in Probate Court No. 4.

Statement on Oral Argument

Oral argument is not necessary because it would be an inefficient use of this Court's time and resources. The issues are straightforward, and oral argument will not aid the Court in making its decision. First, Appellant's appeal is untimely, a fact which is obvious from the orders designated in Curtis' notice of appeal. Second,

despite Curtis' claims to the contrary, there is no conflict to be resolved among authorities about a statutory probate court's exclusive subject matter jurisdiction over probate proceedings regarding a last will and testament and its concurrent subject matter jurisdiction over actions by or against a trustee, or actions that involve an inter vivos or testamentary trust.

Nevertheless, in the event this Court believes oral argument would be beneficial, then the Appellees stand ready and willing to orally argue this case.

Issues Presented

- I. The Standard of Review.
- II. Whether Curtis' appeal is untimely.
- III. Whether Harris County Probate Court No. 4 had subject matter jurisdiction over:
 - a. The Estate of Nelva E. Brunsting; the Trust; and/or the assets of the Estate of Nelva and the Trust.
 - b. The claims and causes of action originally asserted by Curtis in federal court and subsequently transferred/remanded, ***at her request***, to Probate Court No. 4, as well as those subsequently filed by Curtis in Probate Court No. 4.
 - c. The Co-Trustees counterclaims filed against Curtis in Probate Court No. 4, after Curtis' federal court case was transferred/ remanded.

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Statement of the Facts^{1,2}

This appeal arises from litigation among siblings over trust(s) established by their parents. (C.R. 90). Elmer and Nelva set up an inter vivos trust (C.R. 90). The named beneficiaries were their children Curtis, Carole, Carl, Anita, and Amy. (C.R. 91, § C). Anita and Amy became Co-Trustees at Nelva's death. (C.R. 39, ¶ 7). Curtis lives in California (C.R. 39, ¶ 7), and her siblings are Texas residents. (C.R. 220, as to Anita and Amy; *see also* 283-284, as to the other siblings).

Elmer died in 2009, and Nelva died in 2011. (C.R. 51, ¶ 64). Both of their wills were admitted to probate in Probate Court No. 4 – Elmer's under cause number 412,248 and Nelva's under cause number 412,249. (C.R. 39, ¶ 9).

Curtis initiated her litigation in 2012 in federal court in the Southern District of Texas, under diversity jurisdiction, asserting various trust-related claims against Anita and Amy as Co-Trustees. (C.R. 39, ¶¶ 8-9).³ Judge Kenneth Hoyt dismissed

1 Appellees included in their Appendix relevant documents from Probate Court No. 4 that Appellant did not include in the Clerk's Record. Appellees requested a Supplemental Clerk's Record from the trial court clerk and further requested those documents be delivered to this Court.

2 For a more detailed procedural history of Curtis' Multiple Legal Filings, *see* App. Appendix Tab 1.

3 *See* App. Appendix Tab 2, *Curtis v. Brunsting*, 704 F.3d 406 (5th Cir. 2013); *see also* App. Appendix Tab 1, ¶ 1, Procedural History of Curtis' Multiple Legal Filings.

the case on grounds that the “probate exception”⁴ precluded the federal court from exercising jurisdiction. (C.R. 39, ¶ 8)⁵ The Fifth Circuit reversed, concluding that the probate exception did not apply. (C.R. 39, ¶ 8).⁶

Notwithstanding the Fifth’s Circuit’s ruling, upon return to the federal district court, Curtis, first *pro se* and then through counsel, amended her complaint to add her other two siblings – Carl and Carole. (C.R. 283-284).⁷ The addition of the siblings destroyed diversity because Curtis added Carl, a Texas-resident, as a plaintiff, while the other three siblings were all Texas-resident defendants. (C.R. 283-284).⁸ Then, through counsel, Curtis moved for remand to Texas state court

4 The “probate exception” instructs federal courts to abstain from acting in probate matters. The Supreme Court described it thus, “the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.” (Emphasis added). *Curtis v. Brunsting*, 704 F.3d 406, 409 (5th Cir. 2013) (quoting *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006)). Nevertheless, once Curtis’ federal court case was remanded/transferred to Harris County Probate Court No. 4, the probate exception applied to further federal court proceedings because Trust and/or Estate property became subject to the custody of Harris County Probate Court No. 4. (Emphasis added).

5 See App. Appendix Tab 2, *Curtis*, 704 F.3d 406, 408, 2013 U.S. App. LEXIS 524; 2013 WL 104918; see also App. Appendix Tab 1, ¶ 2, Procedural History of Curtis’ Multiple Legal Filings.

6 See App. Appendix Tab 2, *Curtis*, 704 F.3d at 409-410; see also App. Appendix Tab 1, ¶ 3, Procedural History of Curtis’ Multiple Legal Filings.

7 See App. Appendix Tab 4, Judge Hoyt’s May 15, 2014 *Order Granting Plaintiff’s Motion to File First Amended Petition*; see also App. Appendix Tab 1, ¶¶ 4-5, Procedural History of Curtis’ Multiple Legal Filing.

8 See App. Appendix Tab 5, Judge Hoyt’s May 15, 2014 *Order Granting Plaintiff’s*

even though the case was initiated in federal court directly, not through removal. (C.R. 272-278).⁹ Nonetheless, Judge Hoyt gave Curtis what she wanted and remanded her case to Texas state Probate Court No. 4. (C.R. 283-284).¹⁰

While Curtis' 2012 litigation was pending in federal court, Carl brought his own trust-related lawsuit against the Co-Trustees in Probate Court No. 4 under C.A. No. 412,249-401. (C.R. 304-307). When Curtis' federal court litigation arrived in Probate Court No. 4 on "remand," it was initially received in Nelva's pending probate proceeding, which was C.A. No. 412,249. (C.R. 272-273).¹¹ Invoking probate court jurisdiction under the Estates Code, Curtis then requested that Probate Court No. 4 accept the remand as a transfer (C.R. 297-301),¹² and Probate Court No. 4 obliged. (C.R. 302-303).¹³ Probate Court No. 4 administratively assigned the federal case to the -401 case. (C.R. 302-303).¹⁴

Motion to Remand; see also App. Appendix Tab 1, ¶¶ 4-5, Procedural History of Curtis' Multiple Legal Filing.

9 *Id.*

10 *Id.*

11 *See* App. Appendix Tab 5, Judge Hoyt's May 15, 2014 *Order Granting Plaintiff's Motion to Remand*, which ordered a transfer of the 2012 federal case into Nelva Brunsting's probate case, which was docketed in Probate Court No. 4 under C.A. No. 412,249; *see also* App. Appendix Tab 1, ¶ 7, Procedural History of Curtis' Multiple Legal Filings.

12 *See* App. Appendix Tab 1, ¶ 8, Procedural History of Curtis' Multiple Legal Filings.

13 *See* App. Appendix Tab 1, ¶ 9, Procedural History of Curtis' Multiple Legal Filings.

14 *Id.*

In February 2015, Curtis filed in Probate Court No. 4 a copy of the federal court notice of preliminary injunction and master’s report, and an original and first amended petition.¹⁵ Those matters were assigned to the -402 case.¹⁶ In March 2015, Curtis agreed to the consolidation of the -402 case into the -401 case where Curtis and Carl had pending claims against the Co-Trustees. (C.R. 283-293).¹⁷

In 2016, Curtis brought another federal lawsuit, this time suing a probate judge, an associate probate judge, a court reporter, eleven lawyers, and two of her siblings.¹⁸ The case was assigned to Judge Alfred Bennett, who dismissed it, stating that Curtis’:

... allegations cannot be characterized as anything more than fanciful, fantastic, and delusional. Plaintiffs' allegations consist entirely of outlandish and conclusory factual assertions accompanied by a

15 See App. Appendix Tab 3, C.A. No. 412,249-402; *In re Estate of Nelva E. Brunsting, Deceased* (Curtis’ Notice of Injunction & Report of Master), Tab 6 (Curtis’ Original Petition), and Tab 7 (Curtis’ First Amended Petition); see also, App. Appendix Tab 1, ¶¶ 10, 11, and 12, Procedural History of Curtis’ Multiple Legal Filings.

16 *Id.* (see cause nos. assigned to each instrument).

17 See App. Appendix Tab 9, Probate Court No. 4 agreed order consolidating the -402 case into -401 case; see also App. Appendix Tab 1, ¶ 14, Procedural History of Curtis’ Multiple Legal Filings.

18 See App. Appendix Tab 10, *Curtis v. Kunz-Freed*, C.A. No. 4:16-CV-12969; 2017 U.S. Dist. LEXIS 220526, at *3 (S.D. TX. May 16, 2017); see also App. Appendix Tab 1, ¶¶ 15-16, Procedural History of Curtis’ Multiple Legal Filings; see also (C.R. 39, footnote 4). Curtis states in footnote 4 that the 2016 federal case and the appeal related thereto were “the only other matter filed” by Curtis. (C.R. 39, footnote 4). The statement is now false. In 2022 Curtis removed the -401 case to federal court, but the removal was denied and the case remanded back to Probate Court No. 4. See App. Appendix Tab 20, C.A. No. 4:22-CV-01129; *Candace Louise Curtis v. Amy Brunsting & Anita Brunsting*; Judge Rosenthal’s May 3, 2022 order remanding the federal case back to Probate Court No. 4.

formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts.¹⁹

The Fifth Circuit agreed with Judge Bennett, declaring Curtis' claims to be "fantastical' and often nonsensical," and also noted Curtis' claims were "frivolous and certainly do not rise to the level of plausibility that the law requires."²⁰

In 2018, shortly after the Fifth Circuit affirmed Judge Bennett, Curtis, through counsel, filed a plea to the jurisdiction in Probate Court No. 4 in the -401 case. (S.C.R. request pending).²¹ Probate Court No. 4 denied that plea in 2019. (C.R. 29-30).²² Curtis did not timely seek appellate review of the denial. Instead, Curtis filed a statutory bill of review nine months later under sub-docket no. -404. (C.R. 11, ¶

19 See App. Appendix Tab 10, *Curtis v. Kunz-Freed*, C.A. No. 4:16-CV-12969; 2017 U.S. Dist. LEXIS 220526, at 6; see also App. Appendix Tab 1, ¶¶ 15-16, Procedural History of Curtis' Multiple Legal Filings.

20 See App. Appendix Tab 11, *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 225; 2018 U.S. App. LEXIS 15317; 2018 WL 2750291; see also, App. Appendix Tab 1, ¶ 17, Procedural History of Curtis' Multiple Legal Filings.

21 The S.C.R. is pending with the Harris County Probate Clerk; see also App. Appendix Tab 12, Copy of Plea to the Jurisdiction filed on October 19, 2018 in the -401 case; see also, App. Appendix Tab 1, ¶ 18, Procedural History of Curtis' Multiple Legal Filings.

22 See App. Appendix Tab 13, Plea to the Jurisdiction denied by Probate Court No. 4 on February 14, 2019; see also, App. Appendix Tab 1, ¶ 19, Procedural History of Curtis' Multiple Legal Filings.

44),²³ which Probate Court No. 4 denied in March 2022 (C.R. 58).²⁴

Following the denial of the plea to the jurisdiction, Probate Court No. 4 issued two sanctions orders against Curtis in 2020. (S.C.R. request pending).²⁵ Whereupon, Curtis went back to Judge Hoyt in federal court and asked him to reinstate her 2012 federal case. Noting that Curtis was forum shopping, Judge Hoyt rejected her request,²⁶ and the Fifth Circuit affirmed that rejection.²⁷

Back in Probate Court No. 4, litigation continued, including motion practice on Co-trustees' motion for summary judgment against Curtis. (C.R. 31-34).²⁸ Probate Court No. 4 granted the Co-Trustees summary judgment in February 2022, (C.R. 31-34),²⁹ and Curtis' filed a motion to vacate, which Probate Court No. 4

23 See App. Appendix Tab 15, C.A. No. 412,249-404, *Plaintiff's Statutory Bill of Review* (filed on November 21, 2019); see also, App. Appendix Tab 1, ¶ 21, Procedural History of Curtis' Multiple Legal Filings.

24 See App. Appendix Tab 19, Ordering Denying the Bill of Review; see also App. Appendix Tab 1, ¶ 30, Procedural History of Curtis' Multiple Legal Filings.

25 S.C.R. is pending with the Harris County Probate Clerk; see also, App. Appendix Tab 14, Sanction Order dated July 23, 2019; see also Tab 16, Sanction Order dated December 12, 2019; see also App. Appendix Tab 1, ¶ 20 and 22, Procedural History of Curtis' Multiple Legal Filings.

26 See App. Appendix Tab 17, Judge Hoyt's September 23, 2020 order denying Curtis Rule 60 relief; see also *Curtis v. Brunsting*, 860 Fed. Appx. 332, 334-335 (5th Cir. 2021) (Per Curiam); App. Appendix Tab 1, ¶¶ 23-24, Procedural History of Curtis' Multiple Legal Filings.

27 See App. Appendix Tab 18, *Curtis v. Brunsting*, 860 Fed. Appx. 332, 336 (5th Cir. 2021) (Per Curiam); see also App. Appendix Tab 1, ¶ 26, Procedural History of Curtis' Multiple Legal Filings.

28 See App. Appendix Tab 1, ¶ 27, Procedural History of Curtis' Multiple Legal Filings.

29 See App. Appendix Tab 1, ¶ 29, Procedural History of Curtis' Multiple Legal Filings.

denied on April 19, 2022. (S.C.R. request pending).³⁰

Also in March 2022, Probate Court No. 4 denied Curtis' -402 bill of review case which attacked Probate Court No. 4's denial of her plea to the jurisdiction.³¹ In April 2022, Curtis again attempted to remove the -401 case to federal court.³² Judge Lee Rosenthal promptly rejected Curtis' removal finding that because Curtis, as plaintiff, had chosen to be in Probate Court No. 4, she would be held to her choice of forum and could not remove the case to federal court.³³

Following Judge Rosenthal's rejection, Curtis filed her first notice of appeal for the -401 case in May 2022.³⁴ In that prior appeal, Curtis sought review of the denial of her plea to the jurisdiction, the summary judgment granted by Probate

30 The S.C.R. is pending with the Harris County Probate Clerk; *see* Tab 27, Probate Court No. 4 order that denied Curtis' motion to vacate; *see also*, App. Appendix Tab 1, ¶ 33, Procedural History of Curtis' Multiple Legal Filings.

31 *See* App. Appendix Tab 19, Probate Court No. 4's order denying the Statutory Bill of Review; *see also* App. Appendix Tab 1, ¶ 30, Procedural History of Curtis' Multiple Legal Filings.

32 *See* App. Appendix Tab 20; C.A. No. 4:22-CV-01129; *Candace Louise Curtis v. Amy Brunsting & Anita Brunsting*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Lee H. Rosenthal presiding)(May 3, 2022 order of remand confirming removal); *see also* App. Appendix Tab 1, ¶ 32, Procedural History of Curtis' Multiple Legal Filings.

33 *See* App. Appendix Tab 20; C.A. No. 4:22-CV-01129; *Candace Louise Curtis v. Amy Brunsting & Anita Brunsting*; Judge Rosenthal's May 3, 2022 order remanding the federal case back to Probate Court No. 4, at 2; *see also* App. Appendix Tab 1, ¶ 34, Procedural History of Curtis' Multiple Legal Filings.

34 *See* App. Appendix Tab 22, C.A. No. 01-22-00378-CV; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; 1ST Court of Appeals opinion referencing Curtis first notice of appeal and dismissing same; *see also* App. Appendix Tab 1, ¶ 35, Procedural History of Curtis' Multiple Legal Filings.

Court No. 4, and various other rulings.³⁵ This first appeal was docketed in this Court under C.A. No. 01-22-00378-CV.³⁶ On August 2, 2022, Curtis’ moved to dismiss her appeal, which this Court granted on February 14, 2023.³⁷

Then, in July 2022, Curtis filed a mandamus action, which was docketed in the 1ST Court of Appeals under C.A. No. 01-22-00514-CV. In that mandamus proceeding, Curtis challenged the following orders of Probate Court No. 4: (1) a June 3, 2014 order granting Curtis’ Motion to Enter Remand as a Transfer and Order Accepting the Federal ‘Remand’ as a Transfer (emphasis added); (2) a February 14, 2019 order denying Curtis’ plea to the jurisdiction and pleas in abatement and declaring jurisdiction proper in Probate Court No. 4; (3) a February 25, 2022 order granting summary judgment in favor of the Co-Trustees; (4) a March 2, 2022 order denying Curtis’ statutory bill of review; and (5) a March 11, 2022

35 *Id.*

36 See App. Appendix Tab 22, C.A. No. 01-22-00378-CV; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; see also App. Appendix Tab 1, ¶ 37, Procedural History of Curtis’ Multiple Legal Filings.

37 See App. Appendix Tab 22, C.A. No. 01-22-00378-CV; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; 1ST Court of Appeals granting Curtis’ motion to dismiss her appeal; see also App. Appendix Tab 1, ¶ 39, Procedural History of Curtis’ Multiple Legal Filings.

order of severance.³⁸ This Court denied the mandamus in September 2022.³⁹

In April 2023, Curtis filed her second notice of appeal for the -401 case, which is the case *sub judice*.⁴⁰ Curtis again challenges the denial of her plea to the jurisdiction,⁴¹ with the hope that a finding of no subject matter jurisdiction will result in the reversal of eleven years of rulings, both requested by and adverse to her, including, but not limited to, the summary judgment entered against her in February 2022.⁴²

Summary of the Argument

Curtis asserts a lack of jurisdiction by Probate Court No. 4 over her claims but argues almost exclusively in her brief that jurisdiction was lacking for Carl's claims in which she was only a nominal defendant. Curtis reaches this erroneous conclusion by ignoring the statutory provisions establishing jurisdiction and attempting to conjure a conflict of authorities where one does not exist.

38 See App. Appendix Tab 21, C.A. No. 01-22-00514-CV; *Relator Candace Louise Curtis Petition for Writ of Mandamus*; see also App. Appendix Tab 1, ¶ 36, Procedural History of Curtis' Multiple Legal Filings.

39 *Id.*; see also App. Appendix Tab 1, ¶ 38, Procedural History of Curtis' Multiple Legal Filings.

40 (C.R. 365). The second notice of appeal is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401.

41 Curtis Brief, at 2.

42 *Id.*

Curtis is wrong about Probate Court No. 4's jurisdiction over Carl's claims, but those arguments are irrelevant to the jurisdiction of Probate Court No. 4 over Curtis' claims. Before Probate Court No. 4 granted the February 2022 summary judgment against Curtis, Curtis sought affirmative relief from Probate Court No. 4. After the summary judgment was granted, Curtis pivoted to now claim she never voluntarily sought relief in Probate Court No. 4.

The record, which Curtis has failed to adequately provide to this Court, confirms otherwise. A proper record shows Curtis has repeatedly lost attempts in multiple courts to reverse her losses in Probate Court No. 4, but now asks this Court in an untimely appeal to ignore the obvious jurisdiction of Probate Court No. 4 over the claims Curtis litigated there.

Argument

I. STANDARD OF REVIEW.

The standard of review for a challenge to a court's subject matter jurisdiction is a question of law reviewed *de novo*. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

Curtis' appeal in the case *sub judice* is premised on a challenge of Probate Court No. 4's subject matter jurisdiction. Although she attempts to appeal from an order denying her plea to the jurisdiction, an order entering summary judgment

against her, and “any other rulings subsumed within Cause No. 412249-401[,]”⁴³ Curtis does not provide the record to challenge those outcomes, and does not specifically challenge the substance or propriety of any of the orders entered by Probate Court No. 4. Instead, she challenges Probate Court No. 4’s jurisdiction to enter the orders as void *ab initio*. Because Probate Court No. 4 has subject matter jurisdiction, all Probate Court No. 4’s orders should stand as entered. Moreover, Curtis’ appeal is untimely and must be rejected for that reason as well.

II. CURTIS’ APPEAL IS UNTIMELY.

This appeal should be denied because it is untimely. Curtis appeals from a February 2019 order denying her plea to the jurisdiction, a February 2022 summary judgment, and “any other rulings subsumed within Cause No. 412249-401.”^{44, 45} Curtis filed two notices of appeal, one in May 2022 and one in April 2023.⁴⁶ Curtis’ notices of appeal were due in March 2019 for the plea to the jurisdiction, and April

43 Curtis’ Second Notice of Appeal, pgs. 1-2.

44 *Id.*

45 Curtis’ May 2022 notice of appeal does not state that she is appealing the trial court’s March 2, 2022 denial of her bill of review, which relitigated her plea to the jurisdiction. Even if she were appealing the March 2, 2022 order, her notice of appeal was too late. As for the notice of appeal for the bill of review, it was due April 1, 2022, but not filed until May 18, 2022, and then subsequently dismissed by this Court on February 14, 2023, per Curtis’ August 2, 2022 request.

46 *See* (C.R. 363) regarding the first notice of appeal, and (C.R. 365) regarding the second notice of appeal.

2022 for the summary judgment.⁴⁷ As this appeal was not filed until April 2023, it is unquestionably late and should be denied.⁴⁸

III. PROBATE COURT NO. 4 HAD SUBJECT MATTER JURISDICTION.

Curtis raises two arguments regarding the lower court’s (and thus this Court’s) subject matter jurisdiction. First, she claims that the federal court transfer/remand order she requested was ineffective. Second, she contends that the proceedings in the -401 probate court case were not ancillary to an estate being probated. Because her appeal is untimely, this Court need not consider Curtis’ substantive arguments, but if it does, only one conclusion can be reached—both arguments fail.

A. The Effect of the Federal Remand Order

In February 2012, Curtis, acting *pro se*, filed a federal court lawsuit under the federal court’s diversity jurisdiction. Still acting *pro se*, Curtis attempted to amend her complaint, but the attempt was denied by Judge Hoyt. Curtis then hired counsel who successfully moved Judge Hoyt for leave to amend to add Carl (as a plaintiff) and Carole (as a defendant), and subsequently, to “remand” Curtis’ claims to state

⁴⁷ TEX. R. APP. P. 26.1, a “notice of appeal must be filed within 30 days. . . .” As for Curtis’ reference to “any other rulings subsumed within Cause No. 412249-401,” the “any other rulings” phrase is too vague to identify which orders, whether they were final, and when a notice of appeal was due. Curtis’ failure to identify which orders are part of “any other rulings” and whether those were appealable is fatal to Curtis’ attempt to appeal those orders, whatever they may be.

⁴⁸ See *In re USAA*, 307 S.W.3d 299, 307 (Tex. 2010); *Jarrell v. Bergdorf*, 580 S.W.3d 463, 466 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

court because of the lack of diversity created by her amended complaint.

Curtis argues that the transfer/remand order was ineffective, *i.e.* that it could not and did not send her federal case to state court.⁴⁹ Curtis’ arguments elevate form over substance and, in any event, lead down a road that ends in one place—her litigation is over and not subject to review by any court, federal or state.

Curtis elevates form over substance when she argues that Judge Hoyt’s transfer/remand order was a non-event, even though he gave her what she twice requested (leave to amend and remand).⁵⁰ Once Judge Hoyt granted Curtis’ motion for leave to amend to add a diversity-destroying party, the proper action would have been to dismiss her case without prejudice.⁵¹

Nevertheless, on appellate review, the Fifth Circuit concluded that the effect was the same—dismissal from federal court, arrival in state court, and “proceed[ing] in the same manner as would have occurred after a proper dismissal without prejudice.”⁵² In other words, had Judge Hoyt dismissed the litigation without prejudice, Curtis would have had the option to file in state court, or cease to be a litigant, and had she filed in state court, her case would have ended up in Probate

49 Curtis Brief, pg. 37.

50 *See Curtis v. Brunsting*, 860 Fed. App’x 332, 336 (5th Cir. 2021) (Per Curiam).

51 *Id.*

52 *Id.*

Court No. 4, just like it did on “remand.”⁵³ Thus, regardless of how the federal case ultimately made it to Probate Court No. 4, whether dismiss/refile or remand/transfer, the case still arrives at the end of the state court road, where it is now — before this Court on an untimely appeal.

In an effort to avoid the fact that Probate Court No. 4 has subject matter jurisdiction, Curtis continues to argue that the “remand” order was ineffective and, therefore, her original lawsuit is still in federal court on the basis that a state court cannot receive a case on remand, if the state court case was never removed. The argument is without merit and the Fifth Circuit rejected it.⁵⁴ In other words, Curtis’ federal court litigation, even if it somehow existed, is also at the end of the federal court road.

The bottom line is this — Curtis either: (1) has a federal lawsuit that ended when the Fifth Circuit’s mandate issued; or (2) a state court lawsuit that ended when she failed to timely appeal the judgments she now attacks. There is no reason for this Court to reach Curtis’ second argument — that the -401 proceeding is not

⁵³ *Id.*

⁵⁴ Curtis’ attempts to obtain federal court jurisdiction have been denied twice by the Fifth Circuit and three federal district courts. *See* App. Appendix Tab 11, *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 225, 2018 U.S. App. LEXIS 15317, 2018 WL 2750291; App. Appendix Tab 18, *Curtis v. Brunsting*, 860 Fed. Appx. 332, 336; 2021 U.S. App. LEXIS 18417; 2021 WL 2550114; *see also* App. Appendix Tab 20, C.A. 4:22-CV-01129; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Lee H. Rosenthal presiding). Docket Ref. 14, Order remanding the case back to Probate Court No. 4.

ancillary to a probate proceeding, or that Probate Court No. 4 does not have concurrent jurisdiction — but in the unlikely event this Court reaches Curtis’ second argument, it should resoundingly reject it.

B. The -401 Proceeding is Ancillary to a Probate Proceeding.

Curtis contends that the -401 proceeding into which her federal lawsuit was transferred (at her request) is not properly before Probate Court No. 4 because it was not ancillary to a probate proceeding.⁵⁵ In effect, Curtis argues that Probate Court No. 4 did not have jurisdiction over Carl’s claims, with the presumed but unstated conclusion that if Probate Court No. 4 lacked jurisdiction over Carl’s -401 case, then Probate Court No. 4 also lacked jurisdiction over Curtis’ claims once transferred to Carl’s -401 case.⁵⁶ Curtis is mistaken.

Curtis’ argument fails because it is inadequately briefed and because whether Probate Court No. 4 had jurisdiction over Carl’s claims (it did) has no bearing on whether Probate Court No. 4 has jurisdiction over Curtis’ claims. *Compare* TEX. R. APP. P. 38.1(i) (requiring “clear and concise argument”) *with* Curtis’ Brief at 27-37 (omitting any argument about how a lack of jurisdiction over Carl’s claims leads to a lack of jurisdiction over her claims). Notably, Probate Court No. 4 had jurisdiction

⁵⁵ Curtis’ Brief at 22-37.

⁵⁶ *Id.*

over Curtis' claims under the Estates Code provisions for jurisdiction over trusts,⁵⁷ and under the Estates Code provisions for jurisdiction over probate and probate-related matters.⁵⁸

Curtis' brief fails to challenge the basis for jurisdiction over her own lawsuit, a lawsuit in which she affirmatively asserted the existence of probate jurisdiction.⁵⁹ See App. Appendix Tab 8 (Curtis' Second Amended Petition) (asserting jurisdiction under TEX. ESTATES CODE ANN. §§ 32.002(c), .005); *Tex. Ass'n of Bus. v. Tex. Air Cont. Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (placing burden of pleading jurisdiction on plaintiff).

Notwithstanding that Curtis' brief lacks specificity and addresses the wrong party's claims, the -401 case began as a lawsuit by Carl against the trustees of certain Brunsting inter vivos trusts, and Curtis' claims were subsequently joined in the -401 case.

The Estates Code provides that "All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising

⁵⁷ See App. Appendix Tab 24, TEX. ESTATES CODE ANN. §§ 32.005 - .007.

⁵⁸ See App. Appendix Tab 24, TEX. ESTATES CODE ANN. §§ 32.001, .002, and .005.

⁵⁹ Even assuming Probate Court No. 4 did not have jurisdiction over Carl's claims, the only effect that would have on Curtis' claims is that her claims would have remained before Probate Court No. 4 in the -402 cause number, where they were docketed after Probate Court No. 4 granted her request to accept the remand/transfer from federal court, instead of having been consolidated per an agreed order into Carl's -401 cause number.

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.” *See* TEX. EST. CODE § 32.001(a).⁶⁰ “In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction.” *See* TEX. EST. CODE § 32.001(d).⁶¹

“A probate court may exercise pendent jurisdiction and ancillary jurisdiction as necessary to promote judicial efficiency.” *See* TEX. EST. CODE § 32.001(b).⁶²

“In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested.” *See* TEX. EST. CODE § 32.005(a);⁶³ TEX. GOV’T CODE § 25.1031(c).⁶⁴ A “probate proceeding” includes, *inter alia*, the probate of a Will, with or without an administration, and issuance of letters testamentary and of administration. *See* TEX. EST. CODE § 31.001.⁶⁵ Furthermore, a statutory probate court has concurrent jurisdiction with the district court in:

60 *See* App. Appendix Tab 24, Text of TEX. ESTATES CODE ANN. §§ 32.001(a).

61 *See* App. Appendix Tab 24, Text of TEX. ESTATES CODE ANN. §§ 32.001(d).

62 *See* App. Appendix Tab 24, Text of TEX. ESTATES CODE ANN. §§ 32.001(b).

63 *See* App. Appendix Tab 24, Relevant text of TEX. EST. CODE, § 32.005(a).

64 During the entire pendency of this litigation, Harris County has had only four (4) statutory probate courts. *See* TEX. GOV’T CODE § 25.1031(c) prior to January 1, 2023. However, the Texas Legislature amended TEX. GOV’T CODE § 25.1031(c), which added a fifth statutory probate court.

65 *See* App. Appendix Tab 24, Text of TEX. EST. CODE, § 31.001.

- (2) an action by or against a trust;
- (3) an action involving an inter vivos trust, testamentary trust,

See TEX. EST. CODE § 32.007(2)-(3).⁶⁶

For docketing purposes, the local rules for the Harris County Probate Courts refer to matters that constitute a probate proceeding as “Core Matters” and related matters as “Ancillary Matters.”⁶⁷ More specifically, “Core Matters” are those matters principally concerned with the probate of a Will and an administration of the estate, and should be filed under the main cause number.⁶⁸

“Ancillary Matters that belong in a different file with an ancillary or related designation” include, but are not limited to, “Intervivos Trust Actions (settlor is decedent in probate proceeding in subject court)” and are given the original docket number plus a suffix beginning with “4”.⁶⁹

Nelva’s Will was admitted to probate on August 28, 2012, under C.A. No. 412,249. (C.R. 39, ¶ 9). It cannot be disputed that the probate of her Will is a probate proceeding. It also cannot be disputed that Nelva’s probate was properly in Probate

⁶⁶ *See* App. Appendix Tab 24, Text of TEX. EST. CODE, § 32.007(2)-(3).

⁶⁷ *See* Tab 23, Probate Court Local Rules, Relevant text of 2.5 and 2.6.

⁶⁸ *See* App. Appendix Tab 23, Probate Court Local Rules, Relevant text of 2.5 and 2.5.1.

⁶⁹ *See* App. Appendix Tab 23, Probate Court Local Rules, Relevant text of 2.4 and 2.6.5.

Court No. 4 because she was a resident of Harris County, Texas.⁷⁰

The question, then, is whether Curtis' claims, which became part of the -401 ancillary matter case, were truly ancillary to the pending probate proceedings. The answer is yes because per TEX. EST. CODE § 32.007(2)-(3), Curtis' claims constitute an "action . . . against a trustee," and, the Co-Trustees counterclaims against Curtis constitute an "action by . . . a trustee," and a probate court has concurrent jurisdiction over such claims, which means Curtis' challenge fails.

In response, Curtis argues that once Probate Court No. 4 dropped Nelva's probate from its active docket, there ceased to be a probate proceeding to which a -401 ancillary matter could attach. Once again, Curtis misconstrues the law, and the reasons are two-fold.

First, as *Lee v. Lee* makes clear, a statutory probate "court's trust jurisdiction is independent of its probate jurisdiction." 528 S.W.3d 201, 212 (Tex. App.—Houston [14TH Dist.] 2017 pet. denied). In an attempt to avoid the effects of *Lee*, Curtis argues there is a decisional split between *In re Hannah* and *Lee* where one does not exist. See *Lee*, 528 S.W.3d 201; *In re Hannah*, 431 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding).

Curtis cites *Hannah* as authority that Probate Court No. 4 lacked subject matter jurisdiction over Carl's -401 case and, therefore, by implication her case. See

⁷⁰ See App. Appendix Tab 26, Proof of Death & Other Facts, ¶¶ 1-2.

Curtis' Brief at 24, 29. More specifically, Curtis cites *Hannah* for the innocuous statement that a statutory probate court has subject matter jurisdiction over probate matters and matters related to a probate proceeding. *See id.* That is a correct statement of the law, but Curtis' premise that those are the only two categories of cases over which a statutory probate court is not correct. As shown above, per the TEX. ESTATES CODE and *Lee*, in addition to jurisdiction over probate matters and matters related to a probate proceeding, statutory probate courts have trust jurisdiction and pendant and ancillary jurisdiction to aid in decisional efficiency.

Furthermore, the two cases should be read in harmony because they both speak to different categories of cases over which probate courts have jurisdiction. *Hannah* addresses a statutory probate court's probate and probate-related jurisdiction in a venue related dispute. *Hannah*, 431 S.W.3d at 807-08. *Lee* provides that a statutory probate "court's trust jurisdiction is independent of its probate jurisdiction." 528 S.W.3d at 212. Those two cases both apply the jurisdiction provided to a statutory probate court through the Estates Code and the Trust code (the latter being contained in the Property Code). TEX. ESTATES CODE §§ 32.006-.007;⁷¹ TEX. PROP. CODE § 115.001.⁷²

Second, removal from an active docket is not closure. In order to close a

71 *See* App. Appendix Tab 24, Text of TEX. ESTATES CODE §§ 32.006-.007.

72 *See* App. Appendix Tab 25, Relevant text of TEX. PROP. CODE § 115.001

probate case or trust related lawsuit, the Court would have to enter an order under TEX. EST. CODE, ch. 362, and/or TEX. PROPERTY CODE §112.054, neither of which has occurred. Nor could closure occur in this case because the injunction requiring Probate Court No. 4's approval of financial transactions remains in place. As such, Probate Court No. 4 had jurisdiction and has never lost it. Therefore, Curtis' substantive arguments fail.

Conclusion & Prayer

This untimely filed appeal is an attempt to reverse orders that can no longer be attacked and to return the matters pending in C.A. No. 412249-401 to federal court. Curtis cannot return to federal court because three federal district court judges, in three different federal court proceedings, and two opinions from the U.S. Court of Appeals for the Fifth Circuit have already said there is no federal court jurisdiction.

Yet, even without the benefit of the federal court rulings, Curtis' claims belong in Probate Court No. 4 because the relief Curtis sought against the Co-Trustees was ancillary to Nelva's probate proceeding. In addition, Probate Court No. 4 had concurrent jurisdiction because there were claims by or against a Trustee, and there were claims that related to an inter vivos trust (*e.g.*, the Brunsting Family Trust).

Last, but not least, Curtis failed to provide an adequate record to this Court with the intent to obfuscate Probate Court No. 4's obvious and exclusive jurisdiction of Nelva's probate and matters ancillary to Nelva's probate, and Probate Court No. 4's concurrent jurisdiction of Curtis' claims against the Co-Trustees, and the Co-Trustees claims against Curtis.

For the foregoing reasons, Curtis' appeal should be denied.

Respectfully submitted:

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Certificate of Service

I certify that a true and correct copy of **APPELLEES' BRIEF** has been forwarded to the attorneys of record, and the Pro Se party, via this Court's electronic filing system, email, and/or certified mail, return receipt requested on this October 2, 2023.

// s // Stephen A. Mendel

Stephen A. Mendel

Certificate of Compliance

I certify that **APPELLEES' BRIEF** complies with the typeface and word count requirements set forth in the Texas Rules of Civil Procedure. This Brief has been prepared using Microsoft Word, in 14-point Times New Roman font for the text and 12-point Times New Roman font for footnotes. This Brief contains 6,399 words, determined by the word count feature of Microsoft Word, and excluding those portions exempted by TEX. R. APP. P. 9.4(i)(1).

This brief does not exceed the 15,000 word limit imposed by TEX. R. APP. P. 9.4(i)(2)(b).

// s // Stephen A. Mendel

Stephen A. Mendel

NO. 01-23-00362-CV

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

Candace Louis Curtis,
Appellant

V.

**Carl Henry Brunsting, Individually & As Independent Executor Of
The Estates Of Elmer H. Brunsting & Nelva E. Brunsting, Et Al**
Appellees

Affidavit of Stephen A. Mendel

&

Appellees' Appendix Index

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

Before me the undersigned authority, personally appeared Stephen A. Mendel, and after being duly sworn on his oath he deposed as follows:

1. My name is Stephen A. Mendel. I am over the age of twenty-one, competent to make this affidavit, and the facts stated herein are true, correct, and based on my personal knowledge.

2. My law firm and I have been involved in the litigation among the Brunsting siblings since November 14, 2014, and by virtue of that representation, I have personal knowledge of the federal and state court proceedings and the filings and rulings therein referenced in the briefs pending before this Court.

3. The Appellees' Appendix contains the instruments referenced below, each of which is a true and correct copy.

4. Tabs 23, 24, and 25 contain true and correct excerpts from the Local Rules of the Harris County Probate Courts (Tab 23), the Texas Estates Code (Tab 24), and/or the Texas Property Code (Tab 25), as the case may be.

5. Tabbed instruments are booked marked for the Court's convenience.

Appellees' Appendix Index

Tab 1 The Undisputed Procedural History of Curtis' Multiple Legal Filings.

Tab 2 *Curtis v. Brunsting*, 704 F.3d 406 (5th Cir. 2013).

Tab 3 C.A. No. 412,249-402; *In re Estate of Nelva E. Brunsting, Deceased*; Curtis' Notice of Injunction & Master's Report. (Note: the Master's Report, which was attached as Exhibit B was omitted for two reasons. First, the removal of Exhibit B reduced the page count for the Appellees' Appendix by forty-two (42) pages. Second, the Master's Report is not relevant to the issue of Probate Court No. 4's subject matter jurisdiction).

Tab 4 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 111, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to amend her complaint, which destroyed the Court's diversity jurisdiction.

- Tab 5 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 112, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion remand to C.A. no. 412,249, Probate Court No. 4.
- Tab 6 C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's Original Petition*. (Note: Curtis' original petition filed in the -402 case is the same as the petition filed in C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). The instrument is part of this Appendix to confirm that Curtis sought affirmative relief from Probate Court 4. However, the Appellees omitted the attachments to Curtis' original petition for two reasons. First, the removal of attachments to the original petition reduced the page count for the Appellees' Appendix by five hundred eighty-three (583) pages. Second, the attachments to the petition are not relevant to the issue of Probate Court No. 4's subject matter jurisdiction).
- Tab 7 C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's First Amended Petition*.
- Tab 8 C.A. No. 412,249; In re the Estate of Nelva E. Brunsting, Deceased; *Plaintiff's Second Amended Petition*.
- Tab 9 C.A. No. 412,249-402, Probate Court No. 4 agreed order of all parties (including Curtis) consolidating the -402 case into the -401.
- Tab 10 *Curtis v. Kunz-Freed*; 2017 U.S. Dist. LEXIS 220526, at *4, regarding C.A. 4:16-CV-01969; *Candace Louise Curtis & Rik Wayne Munson, Private Attorneys General Plaintiffs v. Candace Kunz-Freed, Et Al*; U.S. District Court, S.D. of Texas, Houston Division.
- Tab 11 *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 2018 U.S. App. LEXIS 15317, 2018 WL 2750291.
- Tab 12 C.A. No. 412,249-401; Curtis' the Plea to the Jurisdiction as to Probate Court No. 4. (S.C.R. requested).

- Tab 13 *See* (C.R. 29-30); Probate Court No. 4's Order Denying Pleas & Motions Filed by Candace Curtis.
- Tab 14 C.A. No. 412,249-401; Probate Court No. 4's July 23, 2019 sanctions order #1 issued against Curtis.
- Tab 15 C.A. No. 412,249-404; Curtis' Statutory Bill of Review filed in Probate Court No. 4.
- Tab 16 C.A. No. 412,249-401; Probate Court No. 4's December 12, 2019 sanctions order #2 issued against Curtis.
- Tab 17 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 139, Judge Hoyt's order referenced Curtis' Federal Rule 60b Motion seeking *ex parte* relief, and which order denied same.
- Tab 18 *Curtis v. Brunsting*, 860 Fed. Appx. 332; 2021 U.S. App. LEXIS 18417; 2021 WL 2550114.
- Tab 19 C.A. No. 412,249-404; Order denying Curtis' Statutory Bill of Review.
- Tab 20 C.A. 4:22-CV-01129; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Lee H. Rosenthal presiding). Docket Ref. 14, Order remanding the case back to Probate Court No. 4.
- Tab 21 C.A. No. 01-22-00514-CV; *Relator Candace Louise Curtis Petition for Writ of Mandamus*; Court of Appeals opinion denying mandamus.
- Tab 22 1ST Court of Appeals opinion that dismissed Curtis' first appeal under C.A. No. 01-22-00378-CV.
- Tab 23 Harris County Probate Court Local Rules:
L.R. 2.4 (Sub-File Nos.).
2.5 (Core Matters).
2.5.1 (Examples of Core Matters).

2.6 (Ancillary Matters in a separate file).
2.6.5 (Example of an Ancillary Matter).

Tab 24 Tex. Estates Code:

§ 31.001. Scope of “Probate Proceeding” for Purposes of Code.

§ 32.001. General Probate Court Jurisdiction; Appeals.

§ 32.002. Original Jurisdiction for Probate Proceedings.

§ 32.005. Exclusive Jurisdiction of Probate Proceeding in County with Statutory Probate Court.

§ 32.006. Jurisdiction of Statutory Probate Court with Respect to Trusts and Powers of Attorney.

§ 32.007. Concurrent Jurisdiction with District Court.


Tab 25 Tex. Prop. Code (Trust Code):

§ 112.054. Judicial Modification, Reformation, or Termination of Trusts.

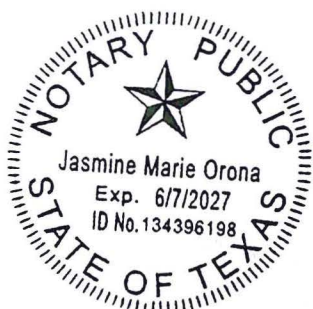
§ 115.001. Jurisdiction.

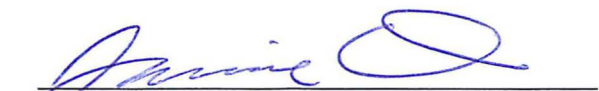
Tab 26 Proof of Death & Other Facts; C.A. No. 412,249; *Estate of Nelva E. Brunsting, Deceased*; Probate Court No. 4.

Tab 27 Probate Court No. 4 order that denied Curtis’ motion to vacate the summary judgment.


Stephen A. Mendel

SUBSCRIBED and SWORN before me, the undersigned Notary Public, by Stephen A. Mendel on this October 2, 2023, for the purposes and capacities set forth therein.




Notary Public In & For
The State of Texas

Tab 1

Tab 1

Tab 1

Undisputed Procedural History of Curtis' Multiple Legal Filings

The undisputed procedural history of Curtis' multiple legal filings, related in whole or in part to the death of her parents, Elmer and Nelva Brunsting, and/or her siblings, Anita, Amy, Carl, and Carole, is set forth below. This procedural history does not include every plea, pleading, motion, or other form of relief sought by Curtis. Rather, the intent is to give this Court an overall understanding of the extent to which Curtis will go to seek relief to which she is not entitled.

- 1 02/27/2012 Plaintiff/Curtis' very first instance of litigation started in the U.S. District Court, S.D. District of Texas, with her **408-page** *Plaintiff's Original Petition, Complaint, & Application for Ex Parte Temporary Restraining Order, Asset Freeze, Temporary & Permanent Injunction* against Anita Brunsting, Amy Brunsting, and Does 1-100. (Judge Kenneth M. Hoyt presiding).¹
- 2 03/08/2012 Judge Hoyt dismisses Curtis' federal court complaint under the probate exception.²
- 3 01/09/2013 Opinion by the U.S. Court of Appeals for the Fifth Circuit (hereinafter the "Fifth Circuit") ruling that the probate

¹ Appellees request that this court take judicial notice of the matters on file in C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). The original complaint is not included here because it is was subsequently amended, as provided herein.

² See App. Appendix Tab 2, *Curtis v. Brunsting*, 704 F.3d 406, 408 (5th Cir. 2013). The opinion sets forth Judge Hoyt's rulings; see also App. Appendix Tab 1, ¶ 1, Procedural

exception did not apply in Curtis' case as originally filed, but specifically pointing out that the probate exception would apply if there was property in the custody of a state probate court.³

By virtue of the fact that Curtis' federal court case was remanded/transferred to Harris County Probate Court No. 4, the probate exception applied to further federal court proceedings because Trust and/or Estate property became subject to the custody of Probate Court No. 4.

4 04/19/2013 Judge Hoyt issued a Memorandum & Order Preliminary Injunction,⁴ which provided in material part:

In essence, all [Trust] transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in the case.

5 05/09/2014 Plaintiff/Curtis sought leave from the federal court to file a *First Amended Complaint*.⁵

6 05/09/2014 Plaintiff/Curtis filed a *Motion to Remand* her federal court case to C.A. No. 412,249, Probate Court No. 4.⁶

7 05/15/2014 Judge Hoyt granted Curtis' leave to file her first amended complaint,⁷ which added her brother, Carl Brunsting, a Texas citizen, as a necessary party and involuntary plaintiff (Curtis'

3 See App. Appendix Tab 2, 704 F.3d at 409-410.

4 See App. Appendix, Tab 3, C.A. No. 412,249-402; *In re Estate of Nelva E. Brunsting, Deceased*, Curtis' Notice of Injunction & Report of Master.

5 See App. Appendix, Tab 4, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to amend her complaint.

6 See App. Appendix, Tab 5, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to remand the case to C.A. No. 412,249, Probate Court No. 4.

7 See App. Appendix, Tab 4, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to amend her complaint.

Appendix 2, ¶ 4), and her sister, Carole Brunsting, as a party defendant (Curtis' Appendix 2, ¶ 5), and granted Curtis' motion to remand the federal case to Probate Court No. 4.⁸ Judge Hoyt's order stated:

[Curtis] has sought and been granted leave to file her First Amended Petition, in which she has named additional necessary parties including Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting and Carole Ann Brunsting, which has destroyed diversity jurisdiction. [Curtis'] First Amended Petition also alleges questions of law and fact similar to those currently pending in Harris County Probate Court Number Four under Cause Number 412,249, and that the possibility of inconsistent judgments exists if these questions of law and fact are not decided simultaneously. . . . It is, therefore ORDERED that this case shall be and hereby is remanded to Harris County Probate Court Number Four, to be consolidated with the cause pending under Cause Number 412,429.⁹

- 8 05/28/2014 Invoking probate jurisdiction under the Estates code, Plaintiff/Curtis filed her Motion to Enter Transfer Order, which would place the federal court case in the -401 probate case.¹⁰
- 9 06/03/2014 Probate Court No. 4 issued an order that accepted the transfer of the 2012 federal court case.¹¹ In addition, Probate Court No. 4 ordered that "orders filed and entered in" the 2012 federal court case are transferred to Probate Court No. 4 under C.A.

⁸ See App. Appendix, Tab 5, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to remand the case to C.A. No. 412,249, Probate Court No. 4.

⁹ *Id.*

¹⁰ See (C.R. 297-301).

¹¹ See (C.R. 302-303).

No. 412249-401, which means the federal court Preliminary Injunction requiring federal court approval of Trust related financial transactions would be required by Probate Court No. 4. As of this appeal, Probate Court No. 4 retains jurisdiction over and the power to approve or disapprove of Trust related transactions, and there is no evidence to the contrary to prove the Preliminary Injunction has been lifted.

- 10 02/06/2015 Plaintiff/Curtis, through counsel, filed a *Notice of Filing of Injunction & Report of Master*, which was filed in the -402 case.¹²
- 11 02/09/2015 Plaintiff/Curtis, through counsel, filed *Notice of Filing of Plaintiff's Original Petition*, which was filed in the -402 case.¹³
- 12 02/10/2015 Plaintiff/Curtis, through counsel, filed *Notice of Filing of Plaintiff's First Amended Petition*, which was filed in the -402 case.¹⁴
- 13 02/12/2015 Plaintiff/Curtis, through counsel, filed her *Second Amended Petition*, which was filed in Nelva E. Brunsting's probate case under C.A. No. 412,249.¹⁵
- 14 03/16/2015 Plaintiff/Curtis, through counsel, agreed that C.A. No. 412,249-402 should be consolidated with 412,249-401, and Probate Court No. 4 enters an order that consolidates the cases into the -401 case.¹⁶

12 See App. Appendix, Tab 3, Notice of Filing of Injunction & Report of Master, which was filed in the -402 case.

13 See App. Appendix, Tab 6, C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's Original Petition*.

14 See App. Appendix, Tab 7, C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's First Amended Petition*.

15 See App. Appendix, Tab 8, C.A. No. 412,249; Estate of Nelva E. Brunsting, Deceased; *Plaintiff's Second Amended Petition*.

16 See App. Appendix, Tab 9, C.A. No. 412,249-402, Probate Court No. 4 agreed order

15 07/05/2016 Plaintiff/Curtis filed her second federal court case in U.S. District Court, S.D. of Texas (Judge Alfred H. Bennett presiding). In this 2016 case, Plaintiff/Curtis sued a sitting Probate Judge, a sitting Associate Probate Judge, a part-time visiting court reporter, eleven (11) attorneys, and two siblings. The complaint sought, *inter alia*, damages for alleged RICO violations by all the defendants.¹⁷

16 05/16/2017 Judge Bennett denied all of Plaintiff/Curtis' claims and causes of actions, stating:

Plaintiffs' Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants. In fact, Plaintiffs' allegations cannot be characterized as anything more than fanciful, fantastic, and delusional. Plaintiffs' allegations consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts. (Emphasis added).¹⁸

17 06/06/2018 The Fifth Circuit affirmed Judge Bennett's dismissal of Plaintiff/Curtis' suit, and agreed Plaintiff/Curtis' allegations were "fantastical' and often nonsensical," as well as "frivolous and certainly do not rise to the level of plausibility

of all parties (including Curtis) consolidating the -402 case into the -401.

17 See App. Appendix, Tab 10, *Curtis v. Kunz-Freed*; 2017 U.S. Dist. LEXIS 220526, at *4. Appellees request that this Court take judicial notice of the matters on file in C.A. 4:16-CV-01969; *Candace Louise Curtis & Rik Wayne Munson, Private Attorneys General Plaintiffs v. Candace Kunz-Freed, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Alfred H. Bennett Presiding).

18 See *id.* at *6.

that the law requires.¹⁹ (Emphasis added).

- 18 10/19/2018 Plaintiff/Curtis, through counsel, filed a plea to the subject matter jurisdiction of Probate Court No. 4.²⁰
- 19 02/14/2019 Probate Court No. 4 denied Plaintiff/Curtis' plea to the jurisdiction.²¹
- 20 07/23/2019 Probate Court No. 4 issued its first sanctions order against Plaintiff/Curtis.²²
- 21 11/21/2019 Curtis files a Statutory Bill of Review. The case was docketed in Probate Court No. 4 under C.A. 412,249-404. The bill of review challenged, *inter alia*, Probate Court No. 4's subject matter jurisdiction over Curtis' claims and causes of action, the summary judgment granted against Curtis in February 2022, and the sanctions issued against Curtis on July 23, 2019, and December 12, 2019.²³
- 22 12/12/2019 Probate Court No. 4 issued its second sanctions order against Plaintiff/Curtis.²⁴
- 23 07/17/2020 Plaintiff/Curtis filed a Federal Rule 60b Motion in the 2012 federal district court case (Judge Hoyt presiding) alleging fraud

19 See App. Appendix, Tab 11, *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 225, 2018 U.S. App. LEXIS 15317, 2018 WL 2750291.

20 (S.C.R. requested as to the Plea to the Jurisdiction, which was not produced by Curtis); see also App. Appendix, Tab 12, Curtis' Plea to the Jurisdiction as to Probate Court No. 4.

21 See (C.R. 29-30); see App. Appendix, Tab 13, Probate Court No. 4's Order Denying Pleas & Motions Filed by Candace Curtis.

22 (S.C.R. requested); see App. Appendix, Tab 14, July 23, 2019 sanctions order #1 issued against Curtis by Probate Court No. 4.

23 See App. Appendix Tab 15, Curtis' Statutory Bill of Review.

24 (S.C.R. requested); see App. Appendix, Tab 16, December 12, 2019 sanctions order #2 issued against Curtis by Probate Court No. 4.

upon the federal court, almost six (6) years after the federal court's initial order to permit Curtis to amend her pleadings to destroy diversity, and then, as indicated above, and per Curtis' request, transferred/remanded the 2012 case to Probate Court No. 4.²⁵

- 24 09/23/2020 Judge Hoyt denied Plaintiff/Curtis' Rule 60b Motion. In the Court's ruling, Plaintiff/Curtis' motion was described as "a means of 'forum shopping.'"²⁶ (Emphasis added).
- 25 10/23/2020 Plaintiff/Curtis appealed to the Fifth Circuit the denial of her Federal Rule 60b Motion.²⁷
- 26 06/21/2021 The Fifth Circuit affirmed Judge Hoyt's denial of Plaintiff/Curtis' Rule 60b Motion.²⁸
- 27 11/17/2021 Plaintiff/Curtis (noting herself as a plaintiff) filed in the -401 case a response to the defendant/co-trustees' motion for summary judgment.²⁹
- 28 02/23/2022 Plaintiff/Curtis (again noting herself as plaintiff) filed in the -401 case a response to defendant/co-trustees' motion to exclude her (Curtis') evidence and for further sanctions against her (Curtis).³⁰

25 See App. Appendix, Tab 17, Judge Hoyt order that referenced Curtis' Federal Rule 60b Motion seeking *ex parte* relief, and which order denied same.

26 See *id.*

27 See App. Appendix, Tab 18, *Curtis v. Brunsting*, 860 Fed. Appx. 332; 2021 U.S. App. LEXIS 18417; 2021 WL 2550114.

28 *Id.* at *8.

29 (C.R. 360). This fact is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401. The full instrument is not included here because it is not relevant to the subject matter jurisdiction issues currently on appeal before this Court.

30 (C.R. 361). This fact is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401. The full instrument is not included here because it is not relevant to the subject

- 29 02/25/2022 Probate Court No. 4 granted defendant/co-trustees' motion for summary judgment against Curtis.³¹
- 30 03/02/2022 Probate Court No. 4 denied Curtis' 2019 Statutory Bill of Review, which was pending in the -404 case.³²
- 31 03/28/2022 Plaintiff/Curtis (again noting herself as plaintiff) filed a motion in the -401 case to vacate the February 25, 2022 summary judgment.³³
- 32 04/07/2022 Plaintiff/Curtis filed her third federal court case, which was a removal action of the -401 case. Notwithstanding that Curtis has always been a plaintiff in her proceedings, Curtis claimed the federal court had diversity jurisdiction. The case was removed to the U.S. District Court, S.D. of Texas (Judge Lee H. Rosenthal presiding).³⁴
- 33 04/19/2022 Probate Court No. 4 denied Plaintiff/Curtis' motion to vacate or set aside the Probate Court's order for summary judgment.³⁵

matter jurisdiction issues currently on appeal before this Court.

31 (C.R. 31-34).

32 See App. Appendix, Tab 19, Order denying Curtis' Statutory Bill of Review pending in the -404 case.

33 See (C.R. 362). This fact is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401. The full instrument is not included here because it is not relevant to the subject matter jurisdiction issues currently on appeal before this Court.

34 Appellees request that this Court take judicial notice of the matters on file in C.A. 4:22-CV-00129; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Lee H. Rosenthal presiding); see also App. Appendix, Tab 20, Judge Rosenthal's order remanding the case back to Probate Court No. 4.

35 (C.R. 363). This fact is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401. The full instrument is not included here because it is not relevant to the subject matter jurisdiction issues currently on appeal before this Court.

34 05/03/2022 Judge Rosenthal issued an order that “removal is improper.” More specifically, Judge Rosenthal stated:

“[T]he well-established rule is that the plaintiff [who is Curtis], who chose the forum, is bound by that choice, and may not remove the case.” (Citations omitted). And because federal removal jurisdiction is determined on the basis of the pleadings on file when the case is removed, subsequent events—such as an agreement not to prosecute claims against a nondiverse party—cannot create or “restore” this [federal] court’s jurisdiction.”³⁶

35 05/18/2022 Curtis files her 1ST Notice of Appeal with this Court, and which was docketed under C.A. No. 01-22-00378-CV.³⁷

36 07/11/2022 Curtis files a Petition for Writ of Mandamus with the 1ST Court of Appeals. The Mandamus was docketed under C.A. No. 01-22-00514-CV. The Mandamus challenged Probate Court No. 4’s orders regarding: (1) a June 3, 2014 order *granting Curtis’ Motion to Enter Remand as a Transfer and Order Accepting the Federal ‘Remand’ as a Transfer* (emphasis added); (2) a February 14, 2019 order denying Curtis’ plea to the jurisdiction and pleas in abatement and declaring jurisdiction proper in Probate Court No. 4; (3) a February 25, 2022 order granting summary judgment in favor of the Co-Trustees; (4) a March 2, 2022 order denying Curtis’ statutory bill of review; and (5) a March 11, 2022 order of severance.³⁸

³⁶ See App. Appendix, Tab 20, Judge Rosenthal’s order remanding the case back to Probate Court No. 4.

³⁷ (C.R. 363). Appellees request that this Court take judicial notice of the matters on file under its docket no. C.A. No. 01-22-00378-CV. The first notice of appeal is referenced in the County Clerk’s Case Summary for C.A. No. 412,249-401. The instrument is not included here because it is not the current notice of appeal pending before this Court.

³⁸ See App. Appendix Tab 21, C.A. No. 01-22-00514-CV; *Relator Candace Louise Curtis Petition for Writ of Mandamus*; Court of Appeals opinion that confirms the mandamus and denies

- 37 08/02/2022 Curtis moves the 1ST Court of Appeals to dismiss her May 18, 2022 appeal.³⁹
- 38 09/08/2022 The 14TH Court of Appeals denied the Writ of Mandamus.⁴⁰
- 39 02/14/2023 1ST Court of Appeals dismissed Curtis' May 18, 2022 appeal.⁴¹
- 40 04/26/2023 Curtis files her 2ND Notice of Appeal with this Court, and which was docketed under C.A. No. 01-23-00362-CV.⁴²

* * * * *

same. Appellees request that this Court take judicial notice of the matters on file under its docket no. C.A. No. 01-22-00514-CV.

39 See App. Appendix Tab 22, Court of Appeals opinion confirming the motion to dismiss and dismissing Curtis' first appeal.

40 See App. Appendix Tab 21, C.A. No. 01-22-00514-CV; *Relator Candace Louise Curtis Petition for Writ of Mandamus*; Court of Appeals opinion denying mandamus.

41 See App. Appendix Tab 22, Court of Appeals opinion confirming the appeal and dismissing same.

42 (C.R. 365). The second notice of appeal is referenced in the County Clerk's Case Summary for C.A. No. 412,249-401.

Tab 2

Tab 2

Curtis v. Brunsting

United States Court of Appeals for the Fifth Circuit

January 9, 2013, Filed

No. 12-20164

Reporter

704 F.3d 406; 2013 U.S. App. LEXIS 524; 2013 WL 104918

CANDACE LOUISE CURTIS, Plaintiff-Appellant v. ANITA KAY BRUNSTING; DOES 1-100; AMY RUTH BRUNSTING, Defendants-Appellees

Subsequent History: Injunction granted at *Curtis v. Brunsting*, 2013 U.S. Dist. LEXIS 193158 (S.D. Tex., Apr. 19, 2013)

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Texas.

Counsel: CANDACE LOUISE CURTIS, Plaintiff - Appellant, Pro se, Martinez, CA.

For ANITA KAY BRUNSTING, AMY RUTH BRUNSTING, Defendants - Appellees: George William Vie, III, Mills Shirley, L.L.P., Houston, TX; Bernard Lilse Mathews, III, Green & Mathews, L.L.P., Houston, TX.

Judges: Before HIGGINBOTHAM, SMITH, and ELROD, Circuit Judges.

Opinion by: PATRICK E. HIGGINBOTHAM

Opinion

[*407] PATRICK E. HIGGINBOTHAM, Circuit Judge:

This appeal concerns the scope of the probate exception to federal subjectmatter jurisdiction in the wake of the Supreme Court's decision in *Marshall v. Marshall*.¹ The Plaintiff contends that, under *Marshall*, her claims for breach of fiduciary duty against the co-trustees of an inter vivos trust do not implicate the probate exception. We agree.

I.

In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation,

the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") appear to include pour-over provisions, providing **[**2]** that all property in each estate is devised and bequeathed to the Trust.² Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.

Candace Curtis, Anita Brunsting, and Amy Brunsting are siblings. In February 2012, Candace Curtis ("Curtis") filed a complaint in federal district court against Anita Brunsting and Amy Brunsting (collectively "the Defendants") based on diversity **[*408]** jurisdiction. In that complaint, she alleged that Anita and Amy, acting as co-trustees of the Trust, had breached their fiduciary duties to Curtis, a beneficiary of the Trust. Specifically, she alleged that Anita and Amy had misappropriated Trust property, failed to provide her documents related to administration of the Trust, and failed to provide an accurate and timely accounting. The complaint alleged claims for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional **[**3]** distress. Curtis sought compensatory damages, punitive damages, a temporary restraining order against "wasting the estate," and an injunction compelling both an accounting of Trust property and assets as well as production of documents and accounting records.

On March 1, 2012, the district court denied Curtis's application for a temporary restraining order and injunction because the Defendants had not been served with process. In the order, the district court judged noted that it "appears that the court lacks subject matter jurisdiction over the claim(s) asserted." On March 6, 2012, in response to the lis pendens Curtis had filed related to property in Texas and Iowa, Anita and Amy filed an emergency motion to remove the lis pendens. The motion noted that it was subject to the Defendants' contention that the federal district court lacked subject matter jurisdiction under the probate exception to

²The signed copies of the Brunstings' Wills are not included in the record, but Curtis provided unsigned copies, which we assume match the signed versions that have been admitted to probate.

¹547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).

federal court jurisdiction, an issue that the Defendants said would be raised in a separate Rule 12(b) motion to dismiss. On March 8, 2012, following a telephone conference with the parties, the district court judge entered a *sua sponte* order dismissing the case for lack of subject matter jurisdiction. [**4] In doing so, he concluded that the case falls within the probate exception to federal diversity jurisdiction. This appeal followed.

II.

This Court reviews *de novo* a district court's dismissal for lack of subject-matter jurisdiction.³

III.

Although a federal court "has no jurisdiction to probate a will or administer an estate,"⁴ in *Markham v. Allen*, the Supreme Court recognized that the probate exception does not bar a federal court from exercising jurisdiction over all claims related to such a proceeding:

[F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction over the probate or control of the property in the custody of the state court.

Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake [**5] to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.⁵

[*409] Sixty years later, in *Marshall v. Marshall*, the Supreme Court expressed concern with lower courts' interpretation of *Markham*, noting that "[l]ower federal courts have puzzled over the meaning of the words 'to interfere with the probate proceedings,' and some have read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate."⁶

³ *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. 2009).

⁴ *Markham v. Allen*, 326 U.S. 490, 494, 66 S. Ct. 296, 90 L. Ed. 256 (1946).

⁵ *Id.* (internal citations omitted).

Thus, the Supreme Court clarified the "distinctly limited scope" of the probate exception,⁷ explaining:

[W]e comprehend the 'interference' language in *Markham* as essentially a reiteration of the guiding principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does [**6] not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.⁸

The *Marshall* Court concluded that the federal district court had subject-matter jurisdiction, and the probate exception did not apply, reasoning: "[The claimant] seeks an *in personam* judgment against [the Defendant], not the probate or annulment of a will. Nor does she seek to reach a *res* in custody of a state court."⁹ After *Marshall*, the probate exception only bars a federal district court from (1) probating or annulling a will or (2) "seek[ing] to reach a *res* in custody of a state court" by "endeavoring to dispose of [such] property."¹⁰

As we see it, to determine whether the probate exception deprives a federal court of jurisdiction, *Marshall* requires a two-step inquiry into (1) whether the property in dispute is estate property within the custody of the probate court and (2) whether the plaintiff's claims would require the federal court to assume *in rem* jurisdiction over that property. If the [**7] answer to both inquiries is yes, then the probate exception precludes the federal district court from exercising diversity jurisdiction. Here, we find the case outside the scope of the probate exception under the first step of the inquiry because the Trust is not property within the custody of the probate court.

As a threshold matter, the probate exception only applies if the dispute concerns property within the custody of a state court. The federal court cannot exercise *in rem* jurisdiction

⁶ 547 U.S. at 311.

⁷ *Id.* at 310.

⁸ *Id.* at 311-12.

⁹ *Id.* at 312 (internal citations omitted).

¹⁰ *Id.* at 312-13.

over a res in the custody of another court. Both of the Brunstings' Wills were admitted to probate after the district court dismissed the case, and probate proceedings are ongoing.¹¹ However, nothing suggests that the Texas probate court currently has custody or *in rem* jurisdiction over the Trust. It likely does not. Assets placed in an inter vivos trust generally avoid probate, since [*410] such assets are owned by the trust, not the decedent, and therefore are not part of the decedent's estate.¹² In other words, because the assets in a living or inter vivos trust are not property of the estate at the time of the decedent's death, having been transferred to the trust years before, the trust is not in the [**8] custody of the probate court and as such the probate exception is inapplicable to disputes concerning administration of the trust. The record also indicates that there would be no probate of this Trust's assets upon the death of the surviving spouse.¹³ Finding no evidence that this Trust is subject to the ongoing probate proceedings, we conclude that the case falls outside the scope of the probate exception. The district court below erred in dismissing the case for lack of subject-matter jurisdiction.

IV.

For the reasons set forth above, we REVERSE the district court's dismissal of the case and REMAND for further proceedings. REVERSED AND REMANDED.

¹¹ At the time the district court dismissed the case, no probate proceedings had been initiated. As such, there was no possibility that the case fell within the probate exception. Nevertheless, we must consider whether, upon remand, the federal district court would have subject-matter jurisdiction now that probate proceedings are ongoing.

¹² See 3 TEX. PRAC. GUIDE WILLS, TRUSTS, AND EST. PLAN. § 10:83 ("Any property held in a revocable living trust is not considered a probate asset . . ."); 2 EST. TAX & PERS. FIN. PLAN. § 19:15 ("Avoidance of probate perhaps is the most publicized advantage of the revocable living trust."); 18 EST. PLAN. 98 ("Assets in a living trust are not subject to [**9] probate administration . . .").

¹³ Any assets "poured over" from the decedents' estates into the Trust would have to go through probate, but that does not change the fact that the Trust property over which the Defendants have been acting as Trustees would not be subject to probate, having been transferred to the Trust prior to the parents' deaths.

End of Document

Tab 3

Tab 3

**DATA ENTRY
PICK UP THIS DATE**

CAUSE No. 412,249 - 402

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

NOTICE OF FILING OF INJUNCTION AND REPORT OF MASTER

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files certified copies of an Injunction and Report of Master and would show the Court as follows:

1.

Plaintiff originally filed her Original Petition in the United States District Court for the Souther District of Texas, Houston Division, under Civil Action No. 4:12-CV-592. On April 19, 2013, the United States District Court entered a Memorandum and Order Preliminary Injunction in which it found that Anita Kay Brunsting and Amy Ruth Brunsting as Trustees had failed to act in accordance with the duties required by the Trust and enjoined them from disbursing any funds from any Trust accounts without prior permission of the court. *See Ex. A, Memorandum and Order Preliminary Injunction.* In that same order, the court determined to appoint an independent firm or account 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. *See Ex A, Memorandum and Order Preliminary Injunction.* Ultimately court appointed CPA William G. West filed his Report of Master dated July 31, 2013. *See Ex. B, Report of Master.*

2.

On May 15, 2014, the United States District Court entered an order transferring Civil Action 4:12-CV-00592 into Harris County Probate Court Number Four, Cause Number 412,249. *See Ex.*

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02182015-0818:PO170

C, Remand Order. That Order Granting Remand specifically provided that all ordered rendered by the United States District Court would carry the same force and effect the remand that they would have had if a remand had not been ordered. See Ex. C, Remand Order. This Court accepted the United States District Court Order of Remand June 3, 2014. See Order of Transfer, Court's file. As such, this Court has accepted the Injunction entered by the United States District Court.

3.

Plaintiff now files Exhibits A and B to make them part of the Court's record, having already been accepted via the May 15, 2014 and June 3, 2014 Remand and Transfer Orders.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Candace Curtis respectfully prays for such further relief to which she may show herself justly entitled.

Respectfully submitted,

ostrommorris, PLLC

BY: 

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Attorneys for Plaintiff





02162019:0818:0011

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 6th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
Houston, Texas 77079
281.759.3213
281.759.3214 (Facsimile)

Ms. Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

Jason B. Ostrom/
Nicole Sain Thornton

Jason B. Ostrom



Harris County



Exhibit A

021820510516120112



U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRUE COPY I CERTIFY
ATTEST:
DAVID J. BRADLEY, Clerk of Court
By M. Flores Clerk

CANDACE LOUISE CURTIS,

Plaintiff,

VS.

ANITA KAY BRUNSTING, *et al*,

Defendants.

§
§
§
§
§
§
§

CIVIL ACTION NO. 4:12-CV-592

**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

David J. Bradley



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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,

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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

W. H. Harris



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Nelva Erleen Brunsting



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.



Shirley M. ...

County Clerk Harris County, Texas



Exhibit B

0110119189-21029120





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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 4

Tab 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

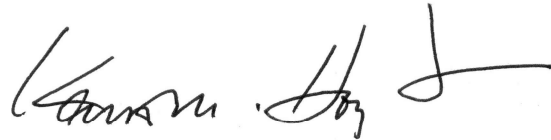
CANDACE LOUISE CURTIS, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, <i>et al</i> ,	§	
	§	
Defendants.	§	

ORDER GRANTING MOTION FOR LEAVE TO FILE FIRST AMENDED PETITION

On this day, the Court considered the plaintiff's motion for leave to file first amended petition. The Court, having considered the same, is of the opinion and finds that plaintiff's request to amend should be GRANTED.

It is therefore, ORDERED that the plaintiff is hereby granted leave to amend her original petition by filing her first amended petition in its stead.

SIGNED on this 15th day of May, 2014.



Kenneth M. Hoyt
United States District Judge

Tab 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, <i>et al</i> ,	§	
	§	
Defendants.	§	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

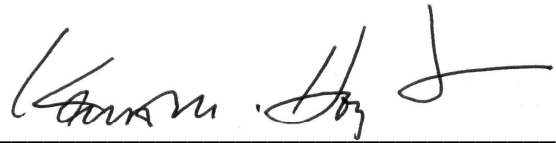
The matter before the Court is the Plaintiff's Motion to Remand. Plaintiff seeks remand of the case to state court on substantive and procedural grounds including a lack of complete diversity between the parties and the existence of similar questions of law and fact currently pending before Harris County Probate Court Number Four under Cause Number 412,249. The Court finds that the remand should be GRANTED.

The Court finds that Plaintiff originally filed her Petition against Defendants Anita Brunsting and Amy Brunsting as Co-Trustees of the Brunsting Family Trust and that diversity jurisdiction existed between Plaintiff and Defendants. Plaintiff has sought and been granted leave to file her First Amended Petition, in which she has named additional necessary parties including Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting and Carole Ann Brunsting, which has destroyed diversity jurisdiction. Plaintiff's First Amended Petition also alleges questions of law and fact similar to those currently pending in Harris County Probate Court Number Four under Cause Number 412,249, and that the possibility of inconsistent judgments exists if these questions of law and fact are not decided simultaneously. The Court further finds that no parties are opposed to this remand and that no parties have filed any objection thereto.

It is, therefore, ORDERED that this case shall be and hereby is remanded to Harris County Probate Court Number Four, to be consolidated with the cause pending under Cause Number 412,429.

It is further, ORDERED that all Orders rendered by this Court shall carry the same force and effect through the remand that they would have had if a remand had not been ordered.

SIGNED on this 15th day of May, 2014.

A handwritten signature in black ink, appearing to read "Kenneth M. Hoyt", written over a horizontal line.

Kenneth M. Hoyt
United States District Judge

Tab 6

DATA
PICK UP DATE

CAUSE NO. 412,249 -402

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

NOTICE OF FILING OF PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files a certified copy of her Original Petition and would show the Court as follows:

1.

On February 27, 2012 Plaintiff filed her Original Petition in the United States District Court for the Southern District of Texas, Houston Division, under Civil Action No. 4:12-CV-592. On May 15, 2014, the United States District Court entered an order transferring Civil Action 4:12-CV-00592 into Harris County Probate Court Number Four, Cause Number 412,249. *See Ex. A, Remand Order.* That Order Granting Remand specifically provided that all orders rendered by the United States District Court would carry the same force and effect after the remand that they would have had if a remand had not been ordered. *See Ex. A, Remand Order.* This Court accepted the United States District Court Order of Remand on June 3, 2014. *See Order of Transfer, Court's file.*

2.

Plaintiff now files Exhibit B, Plaintiff's Original Petition to make it part of this Court's record, having already been accepted via the May 15, 2014 Remand Order.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Candace Curtis respectfully prays for such further relief to which she may show herself justly entitled.

02112015:1341: P0058 02102015:1527:P0027

Stan Stanart



Sanford Phillips



Respectfully submitted,

ostrommorris, PLLC

BY: *[Signature]*
JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com
for R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com
6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 10th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
Houston, Texas 77079
281.759.3213
281.759.3214 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)

[Signature]
Jason B. Ostrom/
for R. Keith Morris, III

02102015:1527:P002B

8500:151:511:P005B





Exhibit A

02102015:1527: P0029

02112015:1541: P0060



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, <i>et al</i> ,	§	
	§	
Defendants.	§	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

The matter before the Court is the Plaintiff's Motion to Remand. Plaintiff seeks remand of the case to state court on substantive and procedural grounds including a lack of complete diversity between the parties and the existence of similar questions of law and fact currently pending before Harris County Probate Court Number Four under Cause Number 412,249. The Court finds that the remand should be GRANTED.

The Court finds that Plaintiff originally filed her Petition against Defendants Anita Brunsting and Amy Brunsting as Co-Trustees of the Brunsting Family Trust and that diversity jurisdiction existed between Plaintiff and Defendants. Plaintiff has sought and been granted leave to file her First Amended Petition, in which she has named additional necessary parties including Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting and Carole Ann Brunsting, which has destroyed diversity jurisdiction. Plaintiff's First Amended Petition also alleges questions of law and fact similar to those currently pending in Harris County Probate Court Number Four under Cause Number 412,249, and that the possibility of inconsistent judgments exists if these questions of law and fact are not decided simultaneously. The Court further finds that no parties are opposed to this remand and that no parties have filed any objection thereto.

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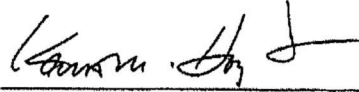
Shirley Roberts



It is, therefore, ORDERED that this case shall be and hereby is remanded to Harris County Probate Court Number Four, to be consolidated with the cause pending under Cause Number 412,429.

It is further, ORDERED that all Orders rendered by this Court shall carry the same force and effect through the remand that they would have had if a remand had not been ordered.

SIGNED on this 15th day of May, 2014.



Kenneth M. Hoyt
United States District Judge

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United States District Court
Southern District of Texas
FILED
FEB 27 2012
David J. Bradley, Clerk of Court

United States District Court
for the
Southern District of Texas

TRUE COPY I CERTIFY
ATTEST:
DAVID J. BRADLEY, Clerk of Court
M. Flores

CANDACE LOUISE CURTIS,
Plaintiff,

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§
§

VS.

Civil Action No. _____

ANITA KAY BRUNSTING, and
AMY RUTH BRUNSTING
And Does 1-100
Defendants

Jury Trial Demanded

PLAINTIFF'S ORIGINAL PETITION, COMPLAINT AND APPLICATION FOR EX
PARTE TEMPORARY RESTRAINING ORDER, ASSET FREEZE, TEMPORARY
AND PERMANENT INJUNCTION.

I.
Parties

1. Plaintiff, Candace Louise Curtis, is a citizen of the State of California.
Defendant Anita Kay Brunsting, is a citizen of the State of Texas and
Defendant Amy Ruth Brunsting a citizen of the State of Texas.

II.

Jurisdiction and Venue

2. This Court has federal subject matter and diversity jurisdiction of the
state law claims alleged herein pursuant to 28 USC §1332 (a) (1) - 28 USC
§1332 (b) and 28 USC §1332 (C) (2) in that this action is between parties who

David J. Bradley



are citizens of different states and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs.

3. The Res in this matter is the Brunsting Family Living Trust (the Trust). Known real property of the Trust is located in Texas and Iowa. No known actions have been previously filed with any court involving the Trust or the trust Res and neither the Will nor the Pour Over Will of either Settlor has been filed with any court for probate.

4. Defendant Anita Brunsting resides in the county of Victoria and Defendant Amy Brunsting resides in the county of Comal. The United States District Court for the Southern District of Texas is the proper venue under 28 USC §1391(a)(1).

III.

Nature of Action

5. This is a diversity action alleging breach of fiduciary duty, extrinsic and constructive fraud and intentional infliction of emotional distress. The nature of action in breach is focused upon failures to disclose and failures to give notice. Plaintiff reserves the right to amend this complaint to add additional causes at any time prior to judgment.

IV.

CAUSES OF ACTION COUNT ONE

Breach of Fiduciary Obligation

Breach of Trust

It is settled law that no more than affidavits are necessary to make a prima facie case, U.S. V. Kis, 658 F. 2d 536 (CA7, 1981 Cert den, 50 U.S.L.W. 2169 (1982)

89004:7561:51020120

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Michelle H. Harris



6. Attached Declaration of Candace Louise Curtis is incorporated herein by reference as if fully restated.

7. Plaintiff alleges that Defendant(s) Anita Brunsting and Amy Brunsting have accepted the appointment and are acting jointly as co-trustees for the Brunsting Family Living Trust (the Trust) of which I am a beneficiary and named successor beneficiary.

8. Defendant(s) Anita Brunsting and Amy Brunsting acting as co-trustees for the Trust owe a fiduciary duty to plaintiff, under the common law and under the property statutes of Texas, to provide all beneficiaries and successor beneficiaries of the Trust with information concerning trust administration, copies of trust documents, and semi-annual accounting. As co-trustees for the Trust both defendants owe a fiduciary duty to provide notice to all beneficiaries prior to any changes to the trust that would affect their beneficial interest.

9. Defendant(s) Anita Brunsting and Amy Brunsting acting individually and severally as co-trustees for the Trust have exercised all of the powers of trustees while refusing or otherwise failing to meet their first obligation under that power, to provide full, accurate, complete and timely accounting to the beneficiaries, to provide copies of material documents or other information relating to administration of the Trust, and to provide notice to all beneficiaries and successor beneficiaries of proposed changes to the trust that may tend to affect their beneficial interests.

10. Defendant(s) individually and severally damaged Plaintiff through their breach of fiduciary obligations. Upon information and belief, Defendant(s)

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Candace Curtis



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individually and severally benefited through their breach of fiduciary obligations to Plaintiff.

11. Defendant(s) Anita Brunsting and Amy Brunsting are liable for all of the damages, both general and special, caused by the breach of fiduciary duties owed to Plaintiff by Defendants.

12. Defendant(s) Anita Brunsting and Amy Brunsting are liable for punitive damages arising from wrongful acts constituting breach of fiduciary duties insofar as conduct in furtherance of wrongful acts as set forth above amounted to egregious and intentional and/or reckless conduct carried out by Defendant(s) as fiduciaries against Plaintiff, whom they intentionally kept in an inferior position of knowledge.

COUNT TWO

Extrinsic Fraud

13. Attached Declaration of Candace Louise Curtis and all previous allegations are incorporated herein by reference as if fully re-alleged and restated.

14. Defendant(s) Anita Brunsting and Amy Brunsting acting individually and severally as co-trustees for the Trust have refused or otherwise failed to meet their obligations to provide full, accurate, complete and timely accounting or to provide copies of material documents or notification of material facts relating to trust administration, the concealing of which constitutes extrinsic fraud.

Candace Curtis



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15. Defendant(s) individually and severally damaged Plaintiff through their breach of fiduciary obligations. Upon information and belief, Defendant(s) individually and severally benefited through their breach of fiduciary obligations.

16. Defendant(s) Anita Brunsting and Amy Brunsting are liable for all of the damages caused by the breach of fiduciary duties owed to Plaintiffs through their fraudulent concealment.

17. Defendant(s) Anita Brunsting and Amy Brunsting are liable for punitive damages arising from wrongful acts constituting breach of fiduciary duties insofar as conduct in furtherance of wrongful acts as set forth above amounted to egregious and intentional and/or reckless conduct carried out by Defendant(s) as fiduciaries against Plaintiff, whom they intentionally kept in an inferior position of knowledge.

COUNT THREE

Constructive Fraud

18. Attached Declaration of Candace Louise Curtis and all previous allegations are incorporated herein by reference as if fully re-alleged and restated.

19. Plaintiff alleges the existence of conflicts of interest in that both Defendant(s), acting individually and severally as co-trustees for the Trust, were at all times complained of herein, beneficiaries or successor beneficiaries of the Trust.

Candace Curtis



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20. Plaintiff further alleges the existence of conflicts of interest in that Anita Brunsting, while being a successor beneficiary to the Trust, held a general Power of Attorney for Settlor Nelva Brunsting, an original trustee who at some point resigned making Defendant Anita Brunsting her successor trustee.

21. Defendant Anita Brunsting acting as a successor trustee for the Trust has transgressed the limitation placed upon her authority by the Trust and by the rule of law and has refused or otherwise failed to meet her obligations to provide full, accurate, complete and timely accounting or to provide copies of material documents and facts relating to trust administration, the concealing of which, coupled with multiple conflicts of interest constitute manifest acts of constructive fraud.

22. Defendant(s) individually and severally damaged Plaintiff through their breach of fiduciary obligations. Upon information and belief, Defendant(s) individually and severally benefited through their breach of fiduciary obligations.

23. Defendant(s) Anita Brunsting and Amy Brunsting are liable for all of the damages caused by the breach of fiduciary duties owed to Plaintiff through their fraudulent concealment.

24. Defendant(s) Anita Brunsting and Amy Brunsting are liable for punitive damages arising from wrongful acts constituting breach of fiduciary duties insofar as conduct in furtherance of wrongful acts as set forth above amounted to egregious and intentional and/or reckless conduct carried out by Defendant(s) as fiduciaries against Plaintiff, whom they intentionally kept in an inferior position of knowledge.

Shirley Hight



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COUNT FOUR

Intentional Infliction of Emotional Distress

25. Attached Declaration of Candace Louise Curtis and all previous allegations are incorporated herein by reference as if fully re-alleged and restated.

26. Defendant(s) Anita Brunsting and Amy Brunsting acting individually and severally as co-trustees for the Trust have refused or otherwise failed to meet their obligations to provide full, accurate, complete and timely accounting or to provide copies of material documents and facts relating to trust administration.

27. Since the death of Nelva Brunsting, plaintiff has attempted verbally, via email, and by certified mail to obtain information from Defendant(s) regarding the Trust and the Trust's administration. Defendant co-trustee Amy Brunsting has remained totally silent and her part in the perceived fraud may be limited. Defendant co-trustee Anita Brunsting has been disingenuous and manipulative while avoiding answer and disseminating limited numbers of documents in piecemeal fashion. Defendant co-trustee Anita Brunsting is the principal defendant in this action.

28. As detailed in the attached Declaration of Candace Louise Curtis, Defendant(s) acted intentionally or recklessly and the conduct was both extreme and outrageous. The acts of Defendant(s) caused and continue to cause Plaintiff to suffer severe emotional distress.

Candace Brunsting



29. Defendant(s) Anita Brunsting and Amy Brunsting are liable to plaintiff for damages caused by their reprehensible and egregious acts of intentionally inflicting emotional distress and suffering upon Plaintiff.

V.

MEMORANDUM OF POINTS AND AUTHORITIES

For present purposes little more is needed than Restatement of the Law of Trusts 2nd

DISCLOSURE BY A FIDUCIARY/TRUSTEE OUTSIDE FORMAL DISCOVERY: NON-TRADITIONAL RULES AND ALTERNATIVE METHODS

1. INTRODUCTION

This paper contains an analysis of a trustee's duty to disclose information to trust beneficiaries. While it is outside the scope of this paper, many of these duties apply to other fiduciaries such as executors and administrators. The duty of a trustee to disclose information is an equitable duty. Enforcement of this duty should therefore be through an equitable remedy rather than by the formal legal remedies that are set forth in the Texas Rules of Civil Procedure and apply to legal causes of action. Many Texas courts, however, have trouble recognizing this distinction.

2. AN OVERVIEW OF THE TRUSTEE'S DUTY TO DISCLOSE

The Commentators

American Law Institute, *Restatement Of The Law, Trusts 2d*, §173 states that:

"The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him, or a person duly authorized by him, to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust."

William E. Fratcher, *Scott On Trusts*, §173 (Fourth Edition) states that:

"The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent."

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George Gleason Bogert and George Taylor Bogert,

The Law of Trusts and Trustees, § 961(Revised Second Edition) explain this duty in the following manner:

“The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is the mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. **If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines or equity entitle him, he must know what the trust property consists and how it is being managed.** (emphasis supplied)

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use. It further follows that the trustee is under a duty to notify the beneficiary of the existence of the trust so that he may exercise his rights to secure information about trust matters and to compel an accounting from the trustee. **For the reason that only the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary, the trustee’s denial of the beneficiary’s right to information consists of a breach of trust.** (emphasis supplied)

If the beneficiary asks for relevant information about the terms of the trust, its present status, past acts of management, the intent of the trustee as to future administration, or other incidents of the administration of the trust, and these requests are made at a reasonable time and place and not merely vexatiously, it is the duty of the trustee to give the beneficiary the information which he is asked. Furthermore, the trustee must permit the beneficiary to examine the account books of the trust, trust documents and papers, and trust property, when a demand is made at a reasonable time and place and such inspection would be of benefit to the beneficiary.”

2. The Cases

In examining Texas cases involving this duty it is important to distinguish between cases that relate to transactions where a trustee has some personal dealing with a beneficiary (which impose very harsh disclosure requirements) from those cases that relate to disclosure in general. The following cases relate to the general disclosure rules.

In *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. App. - San Antonio, 1975, writ ref’d n.r.e), the court stated that: “However, it is well settled that a trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust. 2 Scott, Trusts §173 (3rd. ed. 1967).”

Shannon v. Frost



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02112015:1541:P0072

In *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) the Texas Supreme Court held that: "As trustees of a trust and executors of an estate with Virginia Lou as a beneficiary, Jack Jr. and his mother owed Virginia Lou a fiduciary duty of full disclosure of all material facts known to them that might affect Virginia Lou's rights....The existence of strained relations between the parties did not lessen the fiduciary's duty of full and complete disclosure..... The concealment of a material fact by a fiduciary charged with the duty of full disclosure is extrinsic fraud."

30. FURTHER, the Texas legislature has codified the common law duty a trustee owes to a beneficiary in the Texas Property Code.

§ 113.060. INFORMING BENEFICIARIES. The trustee shall keep the beneficiaries of the trust reasonably informed concerning:

- (1) the administration of the trust; and
- (2) the material facts necessary for the beneficiaries

to protect the beneficiaries' interests.

Added by Acts 2005, 79th Leg., ch. 148, § 15, eff. Jan. 1, 2006.

§ 113.151. DEMAND FOR ACCOUNTING. (a) A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later. If the trustee fails or refuses to deliver the statement on or before the 90th day after the date the trustee receives the demand or after a longer period ordered by a court, any beneficiary of the trust may file suit to compel the trustee to deliver the statement to all beneficiaries of the trust.

The court may require the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiary's interest in the trust or the effect of the administration of the trust on the beneficiary's interest is sufficient to require an accounting by the trustee. However, the trustee is not obligated or required to account to the beneficiaries of a trust more frequently than once every 12 months unless a more frequent accounting is required by the court. If a beneficiary is successful in the suit to compel a statement under this section, the court may, in its discretion, 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.

(b) An interested person may file suit to compel the trustee to account to the interested person. The court may require the trustee to deliver a written statement of account to the interested person on finding that the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee.

Added by Acts 1983, 68th Leg., p. 3332, ch. 567, art. 2, § 2, eff. Jan. 1, 1984. Amended by Acts 2003, 78th Leg., ch. 550, § 3, eff. Sept. 1, 2003.

Handwritten Signature



(b) Notwithstanding Subsection (a)(9), a person other than a beneficiary who, without knowledge that a trustee is exceeding or improperly exercising the trustee's powers, in good faith assists a trustee or in good faith and for value deals with a trustee is protected from liability as if the trustee had or properly exercised the power exercised by the trustee.

Added by Acts 2005, 79th Leg., ch. 148, § 21, eff. Jan. 1, 2006.

**VI
PRAYERS FOR RELIEF**

- 32. **WHEREFORE**, Plaintiff prays for judgment and relief as follows, where applicable, including but not limited to the following:
- 33. Awarding compensatory damages in favor of Plaintiff against Defendant(s) for the damages sustained as a result of the wrongful conduct alleged as will be established through discovery or at trial, together with interest thereon, in an amount in excess of \$75,000 from each Defendant for each offense found,
- 34. Awarding punitive damages to Plaintiff against the Defendant(s) for the egregiously wrongful conduct alleged herein,
- 35. Granting declaratory and/or injunctive relief as appropriate,
- 36. Awarding legal fees and costs to plaintiff and,
- 37 Such other and further relief as the Court may deem equitable and proper.

REQUEST FOR EX-PARTE TEMPORARY RESTRAINING ORDER

- 38. Further, Plaintiff seeks an emergency order for injunctive relief and herein alleges irreparable harm will occur unless the court prevents the trustees from wasting the estate, and compels the trustees to produce a full, true and complete accounting of all assets.

02112015:1941:P0079 02102015:1527:P0042

Shirley H. Phillips



02112015:1541:P0074 02102015:1527:P0043

Financial Misconduct and Need for Accounting

39. A cursory review of the preliminary accounting spreadsheet of the Trust assets provided the Plaintiff reveals possibly significant discrepancies in the value of some trust assets, while other previously known trust assets are unaccounted for.

As trustees for the survivor's trust, created under the Brunsting Family Living Trust after the death of the first Settlor, Anita Brunsting and Amy Brunsting are responsible for maintaining accurate books and records for the survivor's trust created under the Brunsting Family Living Trust. Under the terms of the Trust trustees are to provide an accounting to the beneficiaries every 6 months. Even under Texas law an accounting to the beneficiaries is required annually. No proper accounting has ever been received.

40. Further, Anita Brunsting, holding Power of Attorney for Nelva Brunsting, and serving as successor trustee for the Nelva E. Brunsting Survivor's Trust, had an ongoing duty to account and, as a successor beneficiary of the Trust and its sub trusts, had an even greater level of loyalty and fidelity owed to the other four successor beneficiaries. Anita Brunsting had an ongoing obligation to report and account to the other successor beneficiaries, and to seek their approval before accepting gifts from Nelva Brunsting or the Trust.

41. By the acts alleged herein, Anita Brunsting and Amy Brunsting have breached fiduciary duties of loyalty, care and good faith owed directly to Plaintiff as co-trustees for the BFLT by acting in bad faith and for the purpose of benefiting themselves and harming Plaintiff; by misappropriating trust

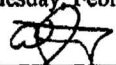
Shirley H. Wright



property; and by failing to keep and maintain accurate and reliable books and accounting records; and by failing to report on the administration of the Trust; and by failing to notice Plaintiff of actions adversely affecting Plaintiff's rights and beneficial interest in the Trust Res.

42. Due to the lack of proper inventory, accounting and disclosure it is imperative that this court act quickly to protect the Trust property and assets, and to ascertain the reasons for the trustees' refusal to answer and to account.

Tuesday, February 21, 2012


Candace Louise Curtis
1215 Ulfinian Way
Martinez, CA 94553
925-759-9020
occurtis@sbcglobal.net

02102015:1527:P0044

02112015:1841:P0075

Candace Curtis





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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 7

Tab 7

**DATA ENTRY
PICK UP THIS DATE**

PROBATE COURT 4

CAUSE NO. 412,249- 402

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

NOTICE OF FILING OF PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files a certified copy of her First Amended Petition and would show the Court as follows:

1.

On May 9, 2014, Plaintiff filed her First Amended Petition in the United States District Court for the Southern District of Texas, Houston Division, under Civil Action No. 4:12-CV-592. On May 15, 2014, the United States District Court entered an order transferring Civil Action 4:12-CV-00592 into Harris County Probate Court Number Four, Cause Number 412,249. *See* Ex. A, Remand Order. That Order Granting Remand specifically provided that all orders rendered by the United States District Court would carry the same force and effect after the remand that they would have had if a remand had not been ordered. *See* Ex. A, Remand Order. This Court accepted the United States District Court Order of Remand on June 3, 2014. *See* Order of Transfer, Court's file.

2.

Plaintiff now files Exhibit B, Plaintiff's First Amended Petition to make it part of this Court's record, having already been accepted via the May 15, 2014 Remand Order.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Candace Curtis respectfully prays for such further relief to which she may show herself justly entitled.

02112015:1538:P0069

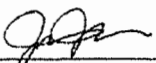
Stan Stanart



02112015:1536:P0070

Respectfully submitted,

ostrommorris, PLLC

BY: 

JASON B. OSTROM
(TBA #24027710)
jason@ostrommorris.com

for R. KEITH MORRIS, III
(TBA #24032879)
keith@ostrommorris.com

6363 Woodway, Suite 300
Houston, Texas 77057
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

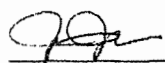
I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 6th day of February, 2015:

Ms. Bobbie Bayless
2931 Ferndale
Houston, Texas 77098
713.522.2224
713.522.2218 (Facsimile)

Ms. Darlene Payne Smith
1401 McKinney, 17th Floor
Houston, Texas 77010
713.752.8640
713.425.7945 (Facsimile)

Mr. Bradley Featherston
1155 Dairy Ashford Street, Suite 104
Houston, Texas 77079
281.759.3213
281.759.3214 (Facsimile)

Mr. Neal Spielman
1155 Dairy Ashford, Suite 300
Houston, Texas 77079
281.870.1124
281.870.1647 (Facsimile)



Jason B. Ostrom/
for R. Keith Morris, III

Shirley M. Harris



Debra Ann Harris

County Clerk Harris County, Texas



Exhibit A

02112015:1538:P0071



02/12/2015 1:50:06 PM P0072

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, <i>et al</i> ,	§	
	§	
Defendants.	§	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

The matter before the Court is the Plaintiff's Motion to Remand. Plaintiff seeks remand of the case to state court on substantive and procedural grounds including a lack of complete diversity between the parties and the existence of similar questions of law and fact currently pending before Harris County Probate Court Number Four under Cause Number 412,249. The Court finds that the remand should be GRANTED.


The Court finds that Plaintiff originally filed her Petition against Defendants Anita Brunsting and Amy Brunsting as Co-Trustees of the Brunsting Family Trust and that diversity jurisdiction existed between Plaintiff and Defendants. Plaintiff has sought and been granted leave to file her First Amended Petition, in which she has named additional necessary parties including Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting and Carole Ann Brunsting, which has destroyed diversity jurisdiction. Plaintiff's First Amended Petition also alleges questions of law and fact similar to those currently pending in Harris County Probate Court Number Four under Cause Number 412,249, and that the possibility of inconsistent judgments exists if these questions of law and fact are not decided simultaneously. The Court further finds that no parties are opposed to this remand and that no parties have filed any objection thereto.



It is, therefore, ORDERED that this case shall be and hereby is remanded to Harris County Probate Court Number Four, to be consolidated with the cause pending under Cause Number 412,429.

It is further, ORDERED that all Orders rendered by this Court shall carry the same force and effect through the remand that they would have had if a remand had not been ordered.

SIGNED on this 15th day of May, 2014.



Kenneth M. Hoyt
United States District Judge

02/12/2015 15:58:40 0073





Exhibit B

02112015:1538:P0074



02112015:1598:P0075

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

TRUE COPY I CERTIFY
ATTEST:

DAVID J. BRADLEY, Clerk of Court
By M. Flores Clerk

CANDACE LOUISE CURTIS,
PLAINTIFF

§
§
§
§
§
§
§
§

vs.

CIVIL ACTION No. 4:12-cv-00592
JUDGE KENNETH M. HOYT

ANITA KAY BRUNSTING,
AMY RUTH BRUNSTING,
AND DOES 1-100,
DEFENDANTS

JURY TRIAL DEMANDED

PLAINTIFF'S FIRST AMENDED PETITION

I. PARTIES

1. Plaintiff, Candice Louis Curtis is a citizen of the State of California.
2. Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has answered and appeared herein.
3. Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has answered and appeared herein.
4. Necessary Party and involuntary plaintiff is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas and is expected to waive the issuance of citation. He is being added to effectuate complete relief regarding the claims and to avoid the risk of inconsistent judgments being rendered.
5. Necessary Party is Carole Ann Brunsting, who is a citizen of the State of Texas, and who can be served with citation at 5822 Jason St., Houston, Texas 77074. She is being added to effectuate complete relief regarding the claims and to avoid the risk of inconsistent judgments being rendered.

David J. Bradley



02112015:1530:P0076

II. JURISDICTION AND VENUE

6. This Court had jurisdiction of the state law claims alleged herein pursuant to 28 USC § 1332(a)(1) – 28 USC § 1332(b), and 28 USC § 1332(C)(2) in that this action is between parties who are citizens of different states and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interests and costs. Jurisdiction may be destroyed if all necessary parties are joined.
7. The Res in this matter includes assets belonging to the Brunsting Family Living Trust ("Trust") and assets belonging to the Estate of Nelva Brunsting, Deceased, under the care and control of Necessary Party Carl Brunsting.

III. NATURE OF ACTION

8. This action arises out of the misappropriate and mismanagement of assets that belonged to Nelva Brunsting during her life and of assets that belonged to the Brunsting Family Trust, and the execution of invalid documents seeking to amend the Brunsting Family Trust.

IV. CAUSES OF ACTION

9. Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff, Carl Brunsting, and Carole Brunsting, a fiduciary duty, which includes: (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment

Shirley Howard



interest and costs of court.

10. Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.
11. Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.
12. Money Had and Received. Defendants have taken money that belongs in equity and good conscience to Plaintiff, and has done so with malice and through fraud. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.
13. Conversion. Defendants have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have

02112015:1536: P0077

Shirley H. Smith



02112015:1508:PO078

wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brusting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court costs, both individually and on behalf of the Decedent's Estate.

- 14. Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.
- 15. Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.
- 16. Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance

Nelva Brunsting



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02112015:1588:PO079

with the Texas Property Code.

V. JURY DEMAND

17. Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

18. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

OSTROM/Sain
A limited Liability Partnership

BY: /s/ Jason B. Ostrom
JASON B. OSTROM
(Fed. Id. #33680)
(TBA #24027710)
NICOLE K. SAIN THORNTON
(TBA #24043901)
5020 Montrose Blvd., Ste. 310
Houston, Texas 77006
713.863.8891
713.863.1051 (Facsimile)

Attorneys for Plaintiff



02/12/2015 1:58:00 PM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service on known Filing Users will be automatically accomplished through the Notice of Electronic Filing. Additionally, this document will be served by copy to any attorney-of-record for those parties in state court litigation.

/s/ Jason B. Ostrom
Jason B. Ostrom

Shirley Harris

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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 8

CAUSE NO. 412,249

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

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE PROBATE COURT:

COMES NOW, Plaintiff, Candace Louis Curtis, and files this Second Amended Petition and for cause of action would show as follows:

I. PARTIES

Plaintiff, Candace Louis Curtis is a citizen of the State of California.

Defendant Anita Kay Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant Amy Ruth Brunsting is a citizen of the State of Texas, who has made an appearance and can be served through her counsel of record.

Defendant is Carole Ann Brunsting, is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

Necessary Party is Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting, who is a citizen of the State of Texas who has made an appearance and can be served through her counsel of record.

II. JURISDICTION AND VENUE

This Court had jurisdiction pursuant to Sections 32.002(c) and 32.005 of the Texas Estates Code, Chapter 37 of the Texas Civil Practice and Remedies Code, and Chapter 115 of the Texas Property Code. Venue is proper pursuant to Section 33.002.

III. BACKGROUND

Elmer and Nelva Brunsting created the Brunsting Family Trust, and placed essentially all of their assets into this Trust, of which they were the trustees. The Trust became irrevocable and not subject to amendment upon Elmer's death in 2009, at which time Nelva became the sole trustee of the two trusts into which the Family Trust was divided: the Decedent's Trust and the Survivor's Trust. She also became the sole beneficiary of the Survivor's Trust and the primary beneficiary of the Decedent's Trust.

In 2010, Defendants Anita and Amy began taking steps to control the Trust assets and garner a larger share than their siblings. To that end, they caused Nelva to execute a Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment in June of 2010 in which she exercised her power of appointment over all the property held in the Nelva E. Brunsting Survivor's Trust as well as in the Elmer H. Brunsting Decedent's Trust. The June exercise of Power of Appointment went on to ratify and confirm all the other provisions of the Trust. Two months later, they caused Nelva to execute a second Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment, in which she attempted to exercise the very same power of appointment she had exercised in June without revoking the prior exercise – instead she ratified and confirmed the June 2010 Power of Appointment. This second Qualified Beneficiary Designation purports to remove Candy and Carl as the trustees of their own trusts, while not subjecting Amy and Anita to that same fate, and contains paragraphs of self-serving no-contest provisions.

Seemingly because the future power she had obtained for herself was insufficient, Anita had Nelva resign as Trustee in December of 2010, in Anita's favor. As Trustee, Anita made numerous transfers that far exceeded the scope of her powers. She conveyed to Carole 1,325 shares of Exxon stock out of the Decedent's Trust, and gave 1,120 shares of Exxon to Amy out of the Survivor's

Trust, plus 270 shares of Chevron stock (held in the names of Amy's children). To herself she transferred 160 shares of Exxon, plus 405 shares of Chevron (270 shares she placed in the name of her children). Anita also paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole.

Carole not only received hundreds of thousands dollars worth of stock and cash distributions, she also had access to a bank account that Anita funded with Trust monies and used that bank account for her own purposes. She routinely charged this Trust account for her personal groceries, gasoline, and other expenses despite not being a present income beneficiary of the Trust.

IV. CAUSES OF ACTION

Breach of Fiduciary Duty. Defendants Anita Brunsting and Amy Brunsting are Co-Trustees of the Trust and owed to Plaintiff a fiduciary duty, which includes : (1) a duty of loyalty and utmost good faith; (2) a duty of candor; (3) a duty to refrain from self-dealing; (4) a duty to act with integrity of the strictest kind; (5) a duty of fair, honest dealing; and (6) a duty of full disclosure. Defendants have violated this duty by engaging in self-dealing, by failing to disclose the existence of assets to Plaintiff, by failing to account to Plaintiffs for Trust assets and income, by failing to place Plaintiff's interests ahead of their own, and by making distributions that deviate from the strict language of the Trust. Defendants Anita breached this duty during Nelva's life by engaging in self-dealing and taking actions not permitted by the terms of the Trust, and thus is liable to the Estate and derivatively to Plaintiff for these breaches. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest and costs of court.

Fraud. Defendants Anita Brunsting and Amy Brunsting made misrepresentations of material facts with the intent that Plaintiff rely upon them, and Plaintiff did rely upon such misrepresentations to her detriment. Such misrepresentations included statements regarding the Trust, Trust assets, and

her right to receive both information and Trust assets. On information and belief, Defendants made fraudulent misrepresentations to Nelva Brunsting upon which she relied to her detriment and to the ultimate detriment of her Estate. Plaintiff seeks actual and exemplary damages, together with pre- and post-judgment interest both on behalf of herself, and on behalf of the Estate of Nelva Brunsting, Deceased.

Constructive Fraud. Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff and with Nelva Brunsting, Defendants owed Plaintiff and Nelva Brunsting legal duties. The breaches of the fiduciary duties discussed above and incorporated herein by reference constitute constructive fraud, which caused injury to both Nelva Brunsting's Estate and Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages individually and on behalf of Nelva Brunsting's Estate.

Money Had and Received. Defendants Anita, Amy and Carole have taken money that belongs in equity and good conscience to the Trust and derivatively to Plaintiff, and have done so with malice and through fraud, in part by representing that transfers to them were valid reimbursements. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and court costs.

Conversion. Defendants Anita, Amy and Carole have converted assets that belong to Plaintiff as beneficiary of the Brunsting Family Trust, assets that belong to the Brunsting Family Trust, and assets that belonged to Nelva Brunsting and that should be a part of her Estate. Defendants have wrongfully and with malice exercised dominion and control over these assets, and has damaged Plaintiff, the Brunsting Family Trust, as well as the Estate of Nelva Brunsting by so doing. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court

costs, both individually and on behalf of the Decedent's Estate.

Tortious Interference with Inheritance Rights. A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants Amy, Anita, and Carole, herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortiously interfered with Plaintiff's inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

Declaratory Judgment Action. The Brunsting Family Trust was created by Nelva and Elmer Brunsting, and became irrevocable upon the death of Elmer Brunsting. After his death, Nelva executed both the June and August Qualified Beneficiary Designations and Exercises of Testamentary Power of Appointment ("Modification Documents"), which attempted to change the terms of the then-irrevocable Trust. The Modification Documents fail because they attempted to change the terms of the Trust. Assuming without admitting that the June Modification Document is a valid Power of Appointment, then the August Modification Document fails because Nelva had already effectively appointed all of the Trust property in June; she never revoked that Power of Appointment, but actually affirmed it. Upon information and belief, Nelva did not understand what she was signing when she signed the Modification Documents, and signed them as a result of undue influence and/or duress. Plaintiff seeks a declaration that the Modification Documents are not valid, and further that the *in terrorem* clause contained therein is overly broad, against public policy and not capable of enforcement. Plaintiff further seeks a declaration as to her rights under the Brunsting Family Trust. Plaintiff contends and will show that she has brought her action in good faith.

Declaratory Judgment Action. The Family Trust Agreement governed all of the rights and

powers that Anita held as Trustee. Those rights and powers did not allow her to transfer out the shares of Exxon and Chevron stock. Her duties as a Trustee prevented her from distributing Trust Assets to some beneficiaries to the detriment and for the purpose of harming other beneficiaries. Plaintiff seeks a declaration that the distributions of Chevron Stock and Exxon Stock to Amy, Anita and Carole are void because Anita as Trustee exceeded the scope of her power in making those gifts.

Unjust Enrichment. Defendants Amy, Anita and Carole have all been unjustly enriched by their receipt of Chevron Stock, Exxon Stock, and cash from the Trust. None were entitled to the distributions of stock, and a majority of the cash transfers were for purposes not authorized under the scope of the Trust Agreement nor of the purposes they alleged to be for. Plaintiff seeks a declaration that the Defendants were unjustly enriched, and seeks the imposition of a constructive trust on the remaining Chevron Stock and Exxon Stock that remains in their possession, as well as on any cash or proceeds from the sale of said stock and on any cash distributions from the Trust.

Conspiracy. Upon information and belief, Defendants Anita, Amy and Carole all conspired to make improper withdrawals and distributions from the Trust, to decrease Plaintiff's inheritance and interest in the Trust, to enrich themselves at the expense of the Trust and other beneficiaries, and to conceal the impropriety of their actions. They should be found jointly and severally liable for the decrease in the Trust, and should be required to disgorge their ill-gotten gains.

Demand for Accounting. Plaintiff seeks a formal accounting from Defendants in compliance with the Texas Property Code.

V. JURY DEMAND

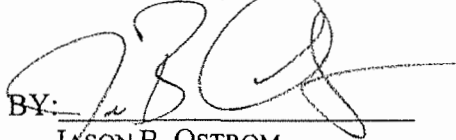
Plaintiff hereby makes her demand for a jury trial in this matter.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, actual and exemplary damages will be awarded to her and to the Estate of Nelva Brunsting, that pre- and post-judgment interest and costs of court will be assessed against the Defendants, and that she be granted such other and further relief to which she may show herself justly entitled.

Respectfully Submitted,

ostrommorris, PLLC

BY: 

JASON B. OSTROM
(TBA #24027710)

jason@ostrommorris.com

R. KEITH MORRIS, III
(TBA #24032879)

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6363 Woodway, Suite 300

Houston, Texas 77057

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

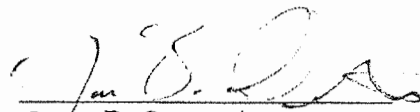
I hereby certify that a true and correct copy of the foregoing instrument was served in accordance with Texas Rule of Civil Procedure 21a on the following on the 27 day of January, 2015:

Ms. Bobbie Bayless
2931 Ferndale
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Jason B. Ostrom/
R. Keith Morris, III

Tab 9

03092015:0815:P0002

**DATA ENTRY
PICK UP THIS DATE**

FILED
3/5/2015 3:21:27 PM
Stan Stanart
County Clerk
Harris County

Page 1 of 4
Wednesday, September 27, 2023

PROBATE COURT 4

CAUSE No. 412,249 - 401

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

CAUSE No. 412,249 - 402

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

AGREED ORDER TO CONSOLIDATE CASES

On this day came to be considered the oral Motion to Consolidate Cases seeking to have the pleadings assigned to Cause Number 412,249-402 consolidated into Cause Number 412,249-401. The Court finds that the actions involve the same parties and substantially similar facts, and that they should be consolidated and prosecuted under Cause Number 412,249-401. It is, therefore,

ORDERED that Cause Number 412,249-402 is hereby consolidated into Cause Number 412,249-401. It is further,

ORDERED that all pleadings filed under or assigned to Cause Number 412,249-402 be moved into Cause Number 412,249-401.

SIGNED on this 16 day of March, 2015.

Carmelina Butts
JUDGE PRESIDING

FILED

MAR 16 2015

STAN STANART
COUNTY CLERK, HARRIS CO., TEXAS
BY [Signature] DEPUTY

[Signature]

County Clerk Harris County, Texas



Wanda Harris



APPROVED AS TO FORM:

ostrommorris, PLLC

[Handwritten Signature]

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(TBA #24032879)
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Attorneys for Candace Curtis

BY: *[Handwritten Signature]*

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Attorney for Drina Brunsting, Attorney in Fact
for Carl Brunsting

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Attorney for Carole Brunsting

80004:5180:51025030



APPROVED AS TO FORM:

ostrommorris, PLLC

[Handwritten signature]

BY: _____
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for Carl Brunsting

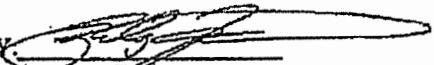
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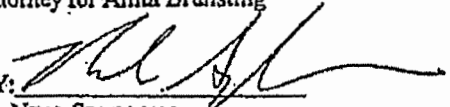
Sharon M. Hays



BY: 

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Attorney for Amy Brunsting

50004:CLB0:51026080





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 September 27, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 10



Positive

As of: September 25, 2023 2:48 PM Z

Curtis v. Kunz-Freed

United States District Court for the Southern District of Texas, Houston Division

May 16, 2017, Decided; May 16, 2017, Filed, Entered

CIVIL ACTION NO. 4:16-CV-1969

Reporter

2017 U.S. Dist. LEXIS 220526 *

CANDACE LOUISE CURTIS, et al, Plaintiffs, VS.
CANDACE KUNZ-FREED, et al, Defendants.

Subsequent History: Affirmed by *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 2018 U.S. App. LEXIS 15317 (5th Cir. Tex., June 6, 2018)

Core Terms

motion to dismiss, allegations, Immunity, frivolous

Counsel: [*1] Candace Louise Curtis, Plaintiff, Pro se, American Canyon, CA USA.

Rik Wayne Munson, Plaintiff, Pro se, American Canyon, CA USA.

For Candace Kunz-Freed, Albert Vacek, Jr., Defendants:
Cory S Reed, Thompson Coe Cousins Irons, Houston, TX USA.

For Bernard Lyle Matthews, III, Defendant: Bernard Lilse Mathews, III, Green and Mathews LLP, Houston, TX USA.

For Neal Spielman, Defendant: Martin Samuel Schexnayder, LEAD ATTORNEY, Winget, Spadafora & Schwartzberg LLP, Houston, TX USA.

For Bradley Featherston, Stephen A. Mendel, Defendants:
Adraon DeJohn Greene, LEAD ATTORNEY, Galloway Johnson Tompkins Burr And Smith, Houston, TX USA;
David Christopher Deiss, Galloway, Johnson, Tompkins, Burr & Smit, Houston, TX USA.

For Darlene Payne Smith, Defendant: Barry Abrams, LEAD ATTORNEY, Blank Rome LLP, Houston, TX USA.

For Jason Ostrom, Defendant: Jason B Ostrom, Attorney at Law, Houston, TX USA.

For Gregory Lester, Defendant: Stacy Lynn Kelly, LEAD ATTORNEY, Ostrom Morris LLP, Houston, TX USA.

For Jill Williard Young, Defendant: Rafe A Schaefer, Norton Rose Fulbright US LLP, Houston, TX USA.

For Christine Riddle Butts, Clarinda Comstock, Defendants:
Laura Beckman Hedge, Harris County Attorney's Office, Houston, [*2] TX USA.

For Toni Biamonte, Defendant: Laura Beckman Hedge, LEAD ATTORNEY, Harris County Attorney's Office, Houston, TX USA.

For Bobbie Bayless, Defendant: Bobbie G Bayless, LEAD ATTORNEY, Bayless Stokes, Houston, TX USA.

Anita Brunsting, Defendant, Pro se, Victoria, TX USA.

Amy Brunsting, Defendant, Pro se, New Braunfels, TX USA.

Judges: Honorable Alfred H. Bennett, United States District Judge.

Opinion by: Alfred H. Bennett

Opinion

ORDER

Before the Court are Defendants Candace Kunz-Freed and Albert Vacek Jr.'s (collectively, "V&F") Motion to Dismiss for Failure to State a Claim (Doc. #19), V&F's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. #20), Defendant Bobbie G. Bayless's ("Bayless") Motion to Dismiss (Doc. #23), Defendant Jill Willard Young's ("Young") Motion to Dismiss (Doc. #25), Defendant Anita Brunsting's ("Anita") Motion to Dismiss for Plaintiffs' Failure to State a Claim (Doc. #30), Defendant Amy Brunsting's ("Amy") Motion to Dismiss (Doc. #35), Defendants Stephen A. Mendel and Bradley E. Featherston's (collectively, "Mendel & Featherston") Motion to Dismiss (Doc. #36), Defendant Neal Spielman's ("Spielman") Motion to Dismiss (Doc. #39), Spielman's Motion to Dismiss Based on Lack of Subject [*3] Matter Jurisdiction (Doc. #40), Defendants Judge Christine Riddle Butts, Judge Clarinda Comstock, and Tony Baiamonte's (collectively, "Harris County Defendants")

Motion to Dismiss (Doc. #53), Defendant Jason Ostrom's ("Ostrom") Motion to Dismiss (Doc. #78), Defendant Bernard Lilse Mathews, III's ("Mathews") Motion to Dismiss (Doc. #81), Defendants Gregory Lester's ("Lester") Motion to Dismiss (Doc. #83), Defendant Darlene Payne Smith's ("Smith") Motion to Dismiss (Doc. #84), Plaintiffs' Responses to said Motions (Does. ##33, 34, 41, 45, 57, 62, 69, 85, 86, 87, 89), and various Defendants' Replies to Plaintiffs' Responses (Does. #55, 63, 90). Also before the Court are Young's Motion for Sanctions (Doc. #72), Plaintiffs' Motion for Consolidation (Doc. #43), Plaintiffs' Second Motion for Consolidation (Doc. #61), Young's Response in Opposition to Plaintiffs' Motions for Consolidation (Doc. #70), and Harris County Defendants' Response to Plaintiffs' Motions for Consolidation (Doc. #79).

Having considered the arguments and the applicable law, the Court grants V&F's Motion to Dismiss for Failure to State a Claim (Doc. #19), Bayless's Motion to Dismiss (Doc. #23), Young's Motion to Dismiss [*4] (Doc. #25), Anita's Motion to Dismiss (Doc. #30), Amy's Motion to Dismiss (Doc. #35), Mendel & Featherston's Motion to Dismiss (Doc. #36), Spielman's Motion to Dismiss (Doc. #39), Harris County Defendants' Motion to Dismiss (Doc. #53), Ostrom's Motion to Dismiss (Doc. #78), Mathews' Motion to Dismiss (Doc. #81), Lester's Motion to Dismiss (Doc. #83), and Smith's Motion to Dismiss (Doc. #84). As such, Plaintiffs' Motions for Consolidation are denied as moot. The Court also denies Young's Motion for Sanctions.

I. Background

Plaintiffs' Complaint appears to relate to a probate matter in Harris County Probate Court No. 4, which the Plaintiffs generically call "Curtis v. Brunsting." Specifically, Plaintiffs assert almost fifty "claims" against more than fifteen defendants—including eleven lawyers, two judges, and one court reporter. These purported "claims" consist of fantastical allegations that some or all of the Defendants are members of a secret society and "cabal" known as the "Harris County Tomb Raiders," or "The Probate Mafia." Plaintiffs' claims rest on the assertion that this purported shadow organization engages in "poser advocacy" as an "exploitation opportunity" to "hijack" "familial [*5] wealth." And, as far as the Court can tell, this "poser advocacy" allegedly occurred in the matter of "Curtis v. Brunsting."

II. Legal Standard

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the

pleader is entitled to relief.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007). In considering a 12(b)(6) motion to dismiss a complaint, courts generally must accept the factual allegations contained in the complaint as true. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982). The Court does not look beyond the face of the pleadings in determining whether the plaintiff has stated a claim under Rule 12(b)(6). Spivey v. Robertson, 197 F.3d 772, 774 (5th Cir. 1999). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations. [but] a plaintiff's obligation to provide the 'grounds' of his 'entitlement' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65 (citing Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)) (citations omitted). And, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965. The supporting facts must be plausible—enough to raise a reasonable expectation that discovery will reveal further supporting evidence. Id. at 1959.

"A document filed pro se is 'to be liberally construed,' . . . and 'a pro se complaint, however inartfully [*6] pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" See Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). Nevertheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts that set forth a claim currently cognizable in a federal district court. Weller v. Dep't of Soc. Servs., 901 F.2d 387, 390-91 (4th Cir. 1990).

III. Analysis

A. Failure to State a Claim

Plaintiffs' Complaint, even when liberally construed, completely fails to plead anything close to a plausible claim for relief against any of the alleged Defendants. In fact, Plaintiffs' allegations cannot be characterized as anything more than fanciful, fantastic, and delusional. Plaintiffs' allegations consist entirely of outlandish and conclusory factual assertions accompanied by a formulaic recitation of the elements of numerous causes of action unsupported by the alleged facts. Further, most of Plaintiffs' alleged "claims" are either based on statutes that do not create a private cause of action, or simply do not exist under Texas or Federal law.

In regards to Plaintiffs' alleged RICO claim, Plaintiffs fail to

plead any facts establishing they have standing under § 1964(c) to assert civil RICO claims against any of the Defendants because [*7] Plaintiffs fail to plead facts showing a recognizable injury to their business or property caused by the alleged RICO violations. See 18 U.S.C. § 1964(c) ("[a]ny person injured in his business or property by reason of a violation of [RICO] may sue"); *Allstate Inc. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015) (citing *Bridge v. Phoenix Bond & Indemn. Co.*, 553 U.S. 639, 654, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)) (stating that to plead standing a plaintiff "must show that the [RICO] violation was a but-for and proximate cause of the injury"). Plaintiffs have also failed to plead any facts establishing a plausible claim that any of the Defendants engaged in a "racketeering activity" sufficient to trigger the RICO statute. Accordingly, Plaintiffs' RICO claim fails as a matter of law.

As Plaintiffs' Complaint is completely devoid of any well-pleaded facts establishing a single plausible claim for relief against any of the named Defendants, the Court grants V&F's, Bayless's, Young's, Anita's, Amy's, Mendel & Featherston's, Spielman's, Ostrom's, Mathews', Lester's, and Smith's Motions to Dismiss for Failure to State a Claim.

B. Immunity

i. Attorney Immunity

Under Texas law, "attorneys are immune from civil liability to non-clients 'for actions taken in connection with representing a client in litigation.'" *Cantev Hanger, LLP v. Bvrd.*, 467 S.W.3d 477, 481 (Tex. 2015) (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). Plaintiffs' allegations against Defendants Young, [*8] Smith, Bayless, Spielman, Mendel & Featherston, and Mathews' ("Attorney Immunity Defendants"), at best, assert wrongdoing based solely on actions taken during the representation of a client in litigation. Such claims are clearly barred by attorney immunity. Accordingly, all of the Attorney Immunity Defendants' Motions to Dismiss are also granted on this ground.

ii. Judicial Immunity

Judicial Immunity entitles judges to absolute immunity from suit for acts undertaken in their judicial capacity, even if they are done maliciously or corruptly. *Price v. Porter*, 351 Fed. Appx. 925, 927 (5th Cir. 2009) (citing *Mireles v. Waco*, 502 U.S. 9, 10, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991)). The sole

exception is when a plaintiff alleges that a judge acted without jurisdiction or in a nonjudicial role. *Id.* Here, the allegations against Judges Butts and Comstock concern only actions taken in their judicial capacity. Accordingly, Judicial Immunity completely forecloses Plaintiffs' claims against Judge Butts and Judge Comstock.¹

C. Frivolous Complaint

As laid out above, Plaintiffs' allegations are frivolous because Plaintiffs have completely failed to allege any facts supporting the delusional scenario articulated in their Complaint, much less facts giving rise to a plausible [*9] claim for relief.

"District Courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint sua sponte even when the plaintiff has paid the required filing fee." *Fitzgerald v. First East Seventh Street Tenants*, 221 F.3d 362, 363-64 (2d Cir. 2000); *Pillay v. INS*, 45 F.3d 14, 16-17 (2d Cir. 1995); *Holman v. Wooten*, No. 4:09-1634—CWH, 2010 U.S. Dist. LEXIS 17193, 2010 WL 691263, at *2 (D.S.C. Feb. 24, 2010); *Larrimore v. Bank of New York Mellon*, No. 4:09-1647—TLW—TFR, 2009 U.S. Dist. LEXIS 115763, 2009 WL 4920776, at *2 (S.D.N.Y. Dec. 11, 2009); *McCracken v. Natale*, No. 04 Civ. 5456, 2008 U.S. Dist. LEXIS 102498, 2008 WL 5274317 (E.D.N.Y. Dec. 17, 2008). The Supreme Court, while never having directly ruled on the matter, has also stated (albeit in dicta) that federal courts have the inherent power to dismiss frivolous lawsuits. See *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 307-308, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) ("Statutory provisions may simply codify existing rights or powers. Section 1915(d), for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision.").

As Plaintiffs' allegations are undeniably legally insufficient to create a plausible claim, they are clearly frivolous (and borderline malicious). Along with Plaintiffs' absolute failure to plead a plausible claim for relief, most of the defendants are also entitled to attorney, judicial, or qualified immunity. Accordingly, Plaintiffs' claims are also dismissed via this Court's inherent ability to dismiss frivolous complaints. [*10]

¹In regards to Tony Baiamonte, a contract court reporter that was hired to steno-graphically record a single hearing in a probate proceeding, there are simply no factual allegations made against him within the complaint. Accordingly, it is difficult to determine whether immunity applies. Regardless, without any factual assertions as to Mr. Baiamonte, the Plaintiffs fail to state a plausible claim against him. Accordingly, Harris County Defendants' Motion to Dismiss is also granted on that ground.

D. Sanctions

Plaintiffs' passionate pleas to this Court during the December 15, 2016 Motion Hearing suggest that Ms. Curtis and Mr. Munson do not understand the legal shortcomings of their Complaint. The Court will therefore give Plaintiffs, as pro se litigants, the benefit of the doubt, and credit their filing of this lawsuit to their misunderstanding of applicable legal rules. Accordingly, the Court denies Young's Motion for Sanctions. That being said, Plaintiffs should now realize that all claims brought in this litigation—or any new claims relating to the subject matter of Plaintiffs' Complaint—lack merit, and cannot be brought to this, or any other court, without a clear understanding that Plaintiffs are bringing a frivolous claim. Accordingly, the Court cautions Plaintiffs from additional meritless filings.

IV. Conclusion

For the foregoing reasons, Defendants' Motions to Dismiss are GRANTED, Young's Motion for Sanctions is DENIED, Plaintiffs' Motions for Consolidation are DENIED as moot, and all of Plaintiffs' claims are DISMISSED WITH PREJUDICE.

It is so ORDERED.

MAY 16 2017

Date

/s/ Alfred H. Bennett

The Honorable Alfred H. Bennett

United States District Judge

Tab 11



Neutral

As of: September 25, 2023 2:50 PM Z

Curtis v. Kunz-Freed

United States Court of Appeals for the Fifth Circuit

June 6, 2018, Filed

No. 17-20360

Reporter

726 Fed. Appx. 223 *; 2018 U.S. App. LEXIS 15317 **; 2018 WL 2750291

CANDACE LOUISE CURTIS; RIK WAYNE MUNSON, Plaintiffs - Appellants v. CANDACE KUNZ-FREED; ALBERT VACEK, JR.; BERNARD LYLE MATTHEWS, III; NEAL SPIELMAN; BRADLEY FEATHERSTON; STEPHEN A. MENDEL; DARLENE PAYNE SMITH; JASON OSTROM; GREGORY LESTER; JILL WILLARD YOUNG; CHRISTINE RIDDLE BUTTS; CLARINDA COMSTOCK; TONI BIAMONTE; BOBBIE BAYLESS; ANITA BRUNSTING; AMY BRUNSTING; DOES 1-99, Defendants - Appellees

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:16-CV-1969.

Curtis v. Kunz-Freed, 2017 U.S. Dist. LEXIS 220526 (S.D. Tex., May 16, 2017)

Disposition: AFFIRMED.

Core Terms

probate, district court, allegations, frivolous, immunity

Counsel: CANDACE LOUISE CURTIS, Plaintiff - Appellant, Pro se, American Canyon, CA .

RIK WAYNE MUNSON, Plaintiff - Appellant, Pro se, American Canyon, CA.

For CANDACE KUNZ-FREED, ALBERT VACEK, JR., Defendant - Appellee: Andrew Johnson, Thompson, Coe, Cousins & Irons, L.L.P., Houston, TX.

BERNARD LYLE MATTHEWS, III, Defendant - Appellee. Pro se, Houston, TX.

For NEAL SPIELMAN, Defendant - Appellee: Martin

Samuel Schexnayder, Esq., Eron Floyd Reid, Winget, Spadafora & Schwartzberg, L.L.P., Houston, TX.

For BRADLEY FEATHERSTON, STEPHEN A. MENDEL, Defendants - Appellees: Adraon DelJohn Greene, Kelsi M. Wade, Galloway, Johnson, Tompkins, Burr & Smith, Houston, TX.

For DARLENE PAYNE SMITH, Defendant - Appellee: Barry Abrams, Joshua A. Huber, Blank Rome, L.L.P., Houston, TX.

JASON OSTROM, Defendant - Appellee, Pro se, Houston, TX.

For JASON OSTROM, GREGORY LESTER, Defendants - Appellees: Stacy Lynn Kelly, Ostrom Morris, P.L.L.C., Houston, TX.

For CHRISTINE RIDDLE BUTTS, CLARINDA COMSTOCK, TONI BIAMONTE, Defendants - Appellees: Keith Adams Toler, Esq., Assistant County Attorney, County Attorney's Office **[**2]** for the County of Harris, Houston, TX; Laura Beckman Hedge, County Attorney's Office, for the County of Harris, Houston, TX.

BOBBIE BAYLESS, Defendant - Appellee, Pro se, Houston, TX.

ANITA BRUNSTING, Defendant - Appellee, Pro se, Victoria, TX.

AMY BRUNSTING, Defendant - Appellee, Pro se, New Braunfels, TX.

For JILL WILLARD YOUNG, Defendant - Appellee: Robert Stanford Harrell, Mayer Brown, L.L.P., Houston, TX; Rafe A. Schaefer, Norton Rose Fulbright US, L.L.P., Houston, TX.

Judges: Before HIGGINBOTHAM, DENNIS, and COSTA, Circuit Judges.

Opinion

[*224] PER CURIAM:*

Candace Louis Curtis and Rik Wayne Munson sued more than fifteen individuals — the judges, attorneys, court officials, and parties from a probate proceeding in Harris County — alleging that the defendants collectively violated RICO, committed common law fraud, and breached their fiduciary duties. Plaintiffs contend that defendants are part of the "Harris County Tomb Raiders a.k.a Probate Mafia," which it alleges is a secret society of probate practitioners, court personnel, probate judges, and other elected officials who are running a "criminal theft enterprise" and "organized criminal consortium," designed to "judicially kidnap and rob the elderly" and [**3] other heirs and beneficiaries of their "familial relations and inheritance expectations." The district court dismissed all claims based on a number of often overlapping grounds: (1) judicial immunity, (2) attorney immunity, (3) failure to state a claim, and (4) the court's inherent power to dismiss frivolous complaints.

We review de novo a district court's dismissal under Rule 12(b)(6), Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 469 (5th Cir. 2016). Plaintiffs' appeal focuses [*225] on the dismissal of their RICO claim. They set forth the elements of that offense and attempt to address each one. But the factual allegations they use to support those elements are mostly, as the district court put it, "fantastical" and often nonsensical. We agree with the district court that the allegations are frivolous and certainly do not rise to the level of plausibility that the law requires.

AFFIRMED.

End of Document

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Tab 12

CANDACE LOUISE CURTIS	§	
Plaintiff,	§	Harris County Probate No. 4 No 412,249-402
v	§	Federal Civil Action No. 4:12-cv-00592
Anita Kay Brunsting,	§	
Amy Ruth Brunsting,	§	
Does 1-100	§	
Defendants.	§	

CARL HENRY BRUNSTING	§	
Individually and as independent executor	§	Harris County Probate No. 4
of the estates of Elmer H.	§	No 412,249-401
Brunsting and Nelva E. Brunsting	§	
	§	
vs	§	
	§	
ANITA KAY BRUNSTING f/k/a	§	
ANITA KAY RILEY, individually,	§	
as attorney-in-fact for Nelva E.	§	
Brunsting, and as Successor Trustee of	§	
the Brunsting Family Living Trust, the	§	
Elmer H. Brunsting Decedent's Trust, the	§	
Nelva E. Brunsting Survivor's Trust, the	§	
Carl Henry Brunsting Personal Asset	§	
Trust, and	§	
the Anita Kay Brunsting Personal	§	
Asset Trust;	§	
AMY RUTH BRUNSTING f/k/a AMY	§	
RUTH TSCHIRHART, individually and	§	
as Successor Trustee of the Brunsting	§	
Family Living Trust, the Elmer H.	§	
Brunsting Decedent's Trust, the Nelva E.	§	
Brunsting Survivor's Trust the Carl	§	
Henry Brunsting Personal Asset Trust,	§	
and the Amy Ruth Tschirhart Personal	§	
Asset Trust;	§	
CAROLE ANN BRUNSTING,	§	
individually and as Trustee of the	§	
Carole Ann Brunsting Personal	§	
Asset Trust; and Candace Louise Curtis	§	
as Nominal Defendant Only	§	

Plea to the Jurisdiction

1. Comes now Real Party in Interest, Candace Louise Curtis, herein respectfully moving this Honorable Court for an Order dismissing the above-titled and numbered action for want of subject matter jurisdiction.
2. This Court is without authority to determine the subject in controversy because Plaintiff's Petition does not show on its face that the Court has subject matter jurisdiction. Quite the contrary.
3. Bayless' complaint in 412,249-401, filed April 9, 2013, declares the jurisdiction for Plaintiff's cause of action to be Chapter 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code.
4. Bayless also cites to the venue provisions in Texas Civil Practices & Remedies Code §15.002(a)(1).
5. Bayless goes on to state that the purpose for the claims are 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.

Probate Proceedings

6. 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.
7. For Bayless’ suit to be subject to the jurisdiction and venue provisions of the Texas Estates Code, it must qualify either as a “probate proceeding” or a “matter related to a probate proceeding” as defined by the Estates Code. See, e.g., Tex. Est.Code §§ 32.001(a)¹, 33.002, 33.052, 33.101; see also Tex. Est.Code § 21.006 (stating procedure in Title 2 of the Estates Code “governs

¹See 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”

all probate proceedings”). Thus, we turn to the definitional provisions of the Estates Code.²

8. Tex. Est.Code § 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; and
- (7) a will construction suit.

9. It is clear from this list that none of Bayless’ claims fall within the provisions of § 31.001 and thus, by definition, are not probate matters.

² 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.”). Tex. Est.Code § 22.012: “estate” means a decedent's property...”

Matters Related to Probate Proceedings

10. 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.
11. Tex. Est.Code § 31.002(a), (b) & (c) “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.³
12. Tex. Est.Code § 31.002 MATTERS RELATED TO PROBATE PROCEEDING. (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;
 - (6) an action for trial of the right of property that is estate property;

³ IN RE: Julie HANNAH Court of Appeals of Texas, Houston (14th Dist.) No. 14–14–00126–CV.
Decided: May 13, 2014

- (7) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
 - (8) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.
13. Tex. Est.Code § 31.002 (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.
14. Tex. Est.Code § 31.002 (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.
Added by Acts 2009, 81st Leg., R.S., Ch. 1351 (S.B. 408), Sec.13(a), eff. January 1, 2014.
15. Respondents will likely argue that § 31.002(a)(8) and § 31.002(b)(3) apply because the matter before the Court involves the interpretation and administration of an inter vivos trust created by a decedent whose will has

been admitted to probate, but that is not the case here. In Tex. Est.Code §§ 31.002 (a)(8) and 31.002(b)(3) “decedent” is singular.

16. Not only is the Brunsting inter vivos trust an A/B trust, the action Bayless filed in the probate court was brought under the Texas Civil Practices & Remedies Code and not the Texas Estates Code, which is jurisdictionally fatal in and of itself.
17. There is no probate proceeding involving the Estate of Nelva Brunsting pending before this court, there never was and there never will be.
18. WHEREFORE, PREMISES CONSIDERED, Nominal Defendant and de jure federal Plaintiff Candace Louise Curtis asks the Court to set this matter for hearing and to dismiss the above-titled and numbered action with prejudice, after hearing, and for such other and further relief to which Movant may show herself entitled in law or in equity, including but not limited to sanctions, fees and costs.

Respectfully submitted,

//s//

Candace Louise Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to all known counsel of record and unrepresented parties in the manner required by the Rules on this 19th day of October 2018.

//s//

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Tab 13

No. 412,249-401

IN RE: THE ESTATE OF
NELVA E. BRUNSTING,
DECEASED

§
§
§
§
§

PROBATE COURT
NUMBER FOUR (4) OF
HARRIS COUNTY, TEXAS

ORDER DENYING PLEAS AND MOTIONS FILED BY CANDACE CURTIS

On this day, the Court considers the following pleadings filed by Candace Louise Curtis:

8/17/2018 "Plea in Abatement"
9/4/2018 "Addendum to Pleas in Abatement in Reply to Stephen Mendel"
10/8/2018 "Nominal Defendant's Verified First Amended Plea in Abatement"
10/19/2018 "Plea to the Jurisdiction"
2/5/2019 "Plaintiff Curtis' Response to Notice of Hearing, Motion for Clarification and
 to Dismiss; Special Exceptions, Motion in Limine and Memorandum of
 Points and Authorities in Support"

The Court, after considering the pleadings on file related to:

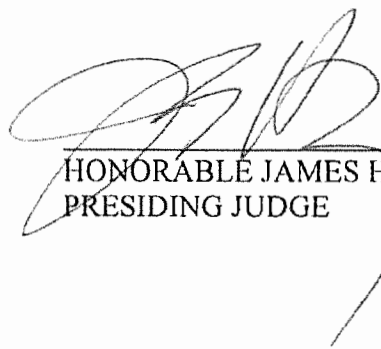
- 1) Civil Action No. 4:12-cv-00592 pending in the U.S. District Court for the Southern District of Texas, which was remanded to Harris County Probate Court No. 4 at the request of Candace Curtis, resulting in the U.S. District Court case being closed, remanded and terminated;
- 2) Cause No. 412,249-402, pending in Harris County Probate Court No. 4, into which the above-referenced U.S. District Court case was transferred on February 9, 2015, and in which Candace Curtis, by and through her counsel, signed an Agreed Docket Control Order and the March 16, 2015 Agreed Order to Consolidate Cases;
- 3) Cause No. 412,249-401, pending in Harris County Probate Court No. 4, initiated on April 10, 2013, and through which claims have been asserted by Carl Henry Brunsting,

individually and as Independent Executor of the Estate of Elmer H. Brunsting and Nelva E. Brunsting, naming all beneficiaries of the Estate, and counterclaims asserted by Carole Brunsting against Carl Brunsting, as Executor; and

- 4) Cause No. 2013-05455, filed by Carl Brunsting, as Executor of the Estate of Nelva Brunsting, in the 164th Judicial District Court of Harris County, Texas on January 29, 2013 against Candace Kuntz-Freed and Vacek & Freed as the only defendants (the "District Court Case"), which claims are the subject of a separate Order on Motion to Transfer District Court Proceedings to Probate Court No. 4 signed on even date herewith,

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 contributed to Trusts related to those Estates. The Court also finds that no other court has dominant jurisdiction regarding claims related to these Estates. Therefore, the Pleas in Abatement, the Plea to the Jurisdiction and all other relief requested by the pleadings first enumerated in this Order, filed by Candace Curtis, lack merit and should be, in all things, DENIED.

Signed on the 14 day of February, 2019.



HONORABLE JAMES HORWITZ
PRESIDING JUDGE

Tab 14

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS
_____	§	
	§	
CARL HENRY BRUNSTING, et al	§	
	§	
v.	§	
	§	
ANITA KAY BRUNSTING, et al	§	

**ORDER REGARDING
AMY BRUNSTING'S MOTION FOR SANCTIONS AND/OR CONTEMPT**

On the 28th day of June 2019, the Court considered Amy Brunsting's Motion for Sanctions and/or Contempt (the "Motion") pertaining to the conduct of Candace Louise Curtis ("Curtis"). In considering the Motion, the Court also considered Curtis' response of June 11, 2019, entitled "Response to the Fiduciary's Application for the Beneficiary to be Held in Contempt for Seeking to Enforce the Injunction Commanding the Trustee to Perform a Fiduciary Duty Owed to the Beneficiary with Petition for Partial Summary or Declaratory Judgment" ("Curtis's Response"). The Court also heard oral argument from the parties.

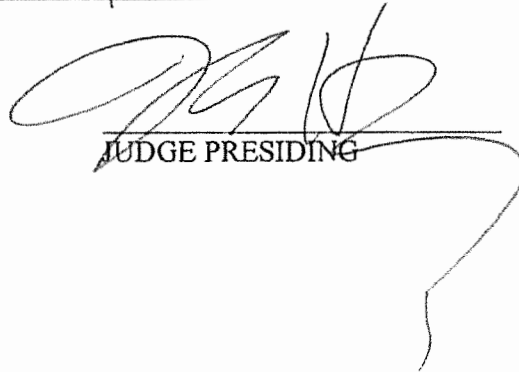
After considering the Motion, Curtis's Response and oral argument, the Court FINDS that it has jurisdiction of this proceeding; that the Motion has MERIT and is in all respects proper and sufficient; that Curtis was properly served and received proper notice of the proceeding; and that the Motion should be and is GRANTED. Therefore:

1. The Court FURTHER FINDS and ORDERS that Curtis is in CONTEMPT of the Court's Order of February 14, 2019 for the reasons presented in the Motion, including without limitation, via her March 20, 2019 and April 12, 2019 filings in the United States District Court for the Southern District of Texas – Houston Division in Case No. 4:12-CV-592, a matter confirmed as having been closed, remanded and terminated;

2. The Court FURTHER ORDERS, ADJUDGES and DECREES that as punishment for this contempt, Candace Curtis is fined the sum of \$ 500.00, payable to Diane Trautman, Harris County Clerk, Indigent Bond on or before the 1st day of September 2019; Program, Registry No. 28190
at 201 Caroline, 8th Floor, Room 800
Houston TX 77002
3. The Court, after considering the description of services, time, fees and costs described in the Affidavit of Neal E. Spielman, totaling ~~\$8,690.00~~ (representing \$7,505.00 @ 19 hrs x \$395.00/hr through and including the filing of the Motion and \$1,185.00 @ 3 hrs x \$395.00/hr in additional fees and expenses incurred after the filing of the Motion) FURTHER ORDERS, ADJUDGES and DECREES that as further punishment for this contempt and/or as a sanction conferred in accordance with its own initiative and inherent power and/or under CPRC §9.012, CPRC §10.004 and/or TRCP 13, Curtis must pay to Amy Brunsting the sum of \$ 1,975.00 to Amy Brunsting in care of her attorneys – Griffin & Matthews – at 1155 Dairy Ashford, Suite 300, Houston, Texas 77007 on or before the 1st day of September, 2019

FURTHER, in so far as Curtis's Response attempts to seek affirmative relief (including without limitation within the "Conclusion and Prayer" appearing on Page 6 of Curtis's Response) all such affirmative relief is DENIED.

SIGNED ON THIS THE 22nd DAY OF July, 2019.


JUDGE PRESIDING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 3rd day of July 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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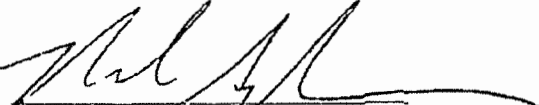
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NEAL E. SPIELMAN

Tab 15

Diane Trautman



No. 412249-404

PLAINTIFF CANDACE LOUISE CURTIS STATUTORY BILL OF REVIEW

	NO. 412,249	
ESTATE OF	§	
	§	
NELVA E. BRUNSTING,	§	
	§	
DECEASED	§	
Lead Case	CLOSED	Consolidated With

	NO. 412,249-401	
CARL HENRY BRUNSTING,	§	IN PROBATE COURT
INDIVIDUALLY AND AS	§	
INDEPENDENT EXECUTOR OF THE	§	
ESTATES OF ELMER H. BRUNSTING	§	
AND NELVA E. BRUNSTING	§	NUMBER FOUR (4)
	§	
vs.	§	
	§	
ANITA KAY BRUNSTING f/k/a	§	HARRIS COUNTY, TEXAS
ANITA KAY RILEY, individually,	§	
as attorney-in-fact for Nelva E. Brunsting,	§	
and as Successor Trustee of the Brunsting	§	
Family Living Trust, the Elmer H.	§	
Brunsting Decedent's Trust, the	§	
Nelva E. Brunsting Survivor's Trust,	§	
the Carl Henry Brunsting Personal	§	
Asset Trust, and the Anita Kay Brunsting	§	
Personal Asset Trust;	§	
AMY RUTH BRUNSTING f/k/a	§	
AMY RUTH TSCHIRHART,	§	
individually and as Successor Trustee	§	
of the Brunsting Family Living Trust,	§	
the Elmer H. Brunsting Decedent's Trust,	§	
the Nelva E. Brunsting Survivor's Trust,	§	
the Carl Henry Brunsting Personal	§	
Asset Trust, and the Amy Ruth Tschirhart	§	
Personal Asset Trust;	§	
CAROLE ANN BRUNSTING,	§	
individually and as Trustee of the	§	
Carole Ann Brunsting Personal Asset Trust;	§	
and as a nominal defendant only,	§	
CANDACE LOUISE CURTIS	§	



Shirley Harris



	NO. 412,249-402
CANDACE LOUISE CURTIS	§
	§
vs.	§
	§
Anita and Amy Brunsting	§
<hr/>	
	NO. 412,249-403
CARL HENRY BRUNSTING,	§
INDEPENDENT EXECUTOR OF THE	§
ESTATES OF ELMER H. BRUNSTING	§
AND NELVA E. BRUNSTING	§
vs.	§
	§
CANDACE L. KUNZ-FREED AND	§
VACEK & FREED, PLLC f/k/a	§
	§
<hr/>	

STATUTORY BILL OF REVIEW

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ORIGINAL BILL OF REVIEW

TO THE HONORABLE JUDGE OF SAID COURT:

1. The procedure prescribed by Title 2 of the Texas Estates Code governs all probate proceedings.¹ Title 2 contains Subtitles A-P covering sections § 31.001 to § 753.002.

CONTEST TO PROCEEDINGS

2. Title 2 Subtitle A governs contests to proceedings in a probate court. Pursuant to Title 2 Subtitle A § 55.001, a person interested in an estate may, at any time before the court decides an issue in a proceeding, file written opposition regarding the issue. The person is entitled to process for witnesses and evidence, and to be heard on the opposition, as in other suits.²

3. Title 2 Subtitle F governs procedures for the correction of Orders or Judgments in “probate proceedings”.

4. Pursuant to Title 2 Subtitle F § 55.251(a)

An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.

5. § 55.251 (b) provides that a bill of review to revise and correct an order or judgment may be filed *within two years of the date the order or judgment was entered.*

¹ Tex. Estates Code § 21.006

² Added by Acts 2009, 81st Leg., R.S., Ch. 680 (H.B. 2502), Sec. 1, eff. January 1, 2014





6. The February 14, 2019 Order denying Plaintiff Curtis October 19, 2018 Plea to the Jurisdiction, and denying Plaintiff Curtis' October 8, 2018 Verified Plea in Abatement that incorporated the August 17, 2018 plea and the September 4, 2018 Addendum by reference, is hereby challenged. All Orders entered in 412249-401 are herein challenged as *void ab initio*³ for want of subject matter jurisdiction, as hereinafter more fully appears.

STANDING

7. Petitioner, Candace Louise Curtis, the de jure co-trustee for the sole devisee named in the Wills of Elmer and Nelva Brunsting, is an interested person within the meaning of § 22.018 of Title I of the Texas Estates Code and does herein make timely appearance by Bill of Review for correction of Orders, Rulings and the Docket, as authorized by Tex. Est. Code § 55.251 (a) & (b).

APPLICABLE LAW AND STANDARD OF REVIEW

"A bill of review is a separate, independent suit to set aside a judgment that is no longer subject to a motion for new trial or appealable. Woods v. Kenner, 501 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There are two types of bills of review: equitable and statutory. See id. at 191. Sheilah petitioned for a statutory bill of review. The purpose of a statutory bill of review is "to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by the probate court." Nadolney v. Taub, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

"We review a trial court's ruling on a petition for statutory bill of review for an abuse of discretion, indulging every presumption in favor of the trial court's ruling. Woods, 501 S.W.3d at 190; see also

³ ab initio "before beginning"





*Ablon v. Campbell, 457 S.W.3d 604, 608 n.8 (Tex. App.—Dallas 2015, pet. denied) (concluding that standard of review for trial court's ruling on statutory bill of review is abuse of discretion); Chavez v. Chavez, No. 01-13-00727-CV, 2014 WL 5343231, at *2 (Tex. App.—Houston [1st Dist.] Oct. 21, 2014, no pet.) (mem. op.) (same). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles.” Woods, 501 S.W.3d at 190. In re Ludington, NO. 01-16-00411-CV, at *7-8 (Tex. App. Jan. 19, 2017)*

*“Ordinarily, we review the denial of a bill of review under an abuse of discretion standard. Temple v. Archambo, 161 S.W.3d 217, 224 (Tex. App.—Corpus Christi 2005, no pet.)” Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

*“Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); Tex. Nat. Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002).” Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

JUDICIAL NOTICE

8. Judicial Notice is governed by Article II of the Texas Evidence Code. Petitioner herein moves the Court pursuant to §§ 201 & 202 of the Evidence Code to take Mandatory Judicial Notice of the relevant portions of the record as follows:

9. First Petitioner moves the court to take judicial notice that no Finding of Fact and Conclusion of Law after Hearing regarding any substantive issue related to the Brunsting Trust Controversy has ever been entered in this court and Petitioner objects to all unsworn testimony and unsupported assertions of any attorney to the contrary. Petitioner further moves the court to take judicial notice of:





- A. The docket in 412248, 412249, 412249-401, 412249-402 and 412249-403
 - a. Dockets show the “Estates of *Elmer and Nelva Brunsting*” are “closed”
 - b. No actions seeking to reopen the estates were ever filed and limitations bar such action at this juncture.
 - c. The Docket has Candace Louise Curtis listed as “Defendant”. No claims were filed against PLAINTIFF CURTIS in the seven and one half years between the filing of Curtis’ breach of fiduciary action in the Southern District of Texas February 27, 2012 and Kunz-Freed’s October 16, 2019 Motion to Appoint a Personal Representative in the “Estates of Elmer and Nelva Brunsting”.

- B. The Wills of Elmer and Nelva Brunsting
 - a. Call for independent administration
 - b. Sole devisee is the family trust
 - c. The Wills were not challenged and challenges are now barred by limitations.

- C. The August 28, 2012 Orders admitting the Wills of Elmer and Nelva Brunsting and appointing Carl Henry Brunsting Independent Executor of the Decedents’ Wills and Estates.
 - a. These Orders were not challenged.

- D. The March 27, 2013 Orders approving the Inventory, appraisement and list of claims in each estate.
 - a. These Orders were not challenged and no changes have been made to either inventory.





- E. The Drop Orders issued April 4, 2013, removing the estates from this Court's active docket.
 - a. These Orders were not challenged, these estates have never been reopened and limitations have long since expired.

- F. The Petition filed by Carl Henry Brunsting Individually and as Independent Executor on April 9, 2013 in 412249-401.
 - a. A challenge to Jurisdiction can be raised at any time, is subject to neither doctrines of laches nor statutes of limitations, does not fall prey to the "*Not Pressed Not Passed upon Below*" rule and can even be raised for the first time on appeal.

- G. The Preliminary Federal Injunction Issued April 19, 2013, that was made a part of this Court's record on February 6, 2015 in Case 412249-402 PBT-2015-42743.

- H. The May 22, 2014 Order granting Plaintiff attorney's motion to remand.
 - a. Mr. Spielman stood before the Court on his client's motion for sanctions June 28, 2019 disingenuously claiming Curtis federal case had been closed and terminated. The record shows the 4:12-cv-592 matter was remanded to this court for "*consolidation*" with the case pending here. Curtis v Brunsting was assigned docket Number 412249-402. (See Local Rules 2 – 2.9)

- I. The February 19, 2015 Resignation of Carl Brunsting.
 - a. After resigning as independent executor Carl has never bifurcated his personal claims as a trust beneficiary from claims alleged to belong to "estate of Elmer and Nelva Brunsting".
 - b. Candace Curtis is not Carl et al.





- J. The March 5, 2015 Case 412249-401 PBT-2015-76288 Agreed Order to Consolidate Cases, entered with no motion and no hearing, with no one representing the “estates of Elmer and Nelva Brunsting”. Curtis v Brunsting thus vanished into “estates of Elmer and Nelva Brunsting”, estates that had been closed more than two years⁴.

THE WILLS OF ELMER AND NELVA BRUNSTING

10. The wills of Elmer and Nelva Brunsting both contain a provision for independent administration:

“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.”

11. This same language is mirrored in the August 28, 2012 Orders appointing Carl Henry Brunsting Independent Executor for both estates.

⁴ See Tex. Est. Code § 55.251 (b)





Defendant Kunz-Freed’s Motion to Appoint Personal Representative or Administrator

12. Plaintiff has spent several years in Harris County Probate Court No. 4, with the Honorable Judge Christine Butts failing to rule on anything and then ceasing to appear, handing the reins of Probate Court No. 4 over to Associate Judge Clarinda Comstock.

13. Meanwhile, Vacek & Freed, the estate planning attorney defendants, have been neatly “sequestered” in the Harris County District Court with no one to prosecute the claims against them.

14. A March 4, 2019 decision entered in the Southern District of Texas by Chief Judge Lee Rosenthal in *Johnston v. Dexel* 373 F. Supp. 3d 764, 786 (S.D. Tex. 2019) is relevant here. *Johnston v. Dexel*, *supra*, is a matter arising out of Harris County Probate Court No. 4, in which current Associate Judge **Clarinda Comstock was a Defendant**,⁵ represented by Thompson Coe attorneys **Zandra Foley and Cory Reed**.

15. Zandra Foley and Cory Reed now come before this court representing the estate planning attorney Defendants and seeking appointment of a Personal Representative or Administrator to represent “the estates of Elmer and Nelva Brunsting”, complaining that the case against their client had been pending for an extended period of time (2,448 days), in which Probate Court No. 4 refused or otherwise failed to appoint an estate representative to prosecute their estate planning clients, Candace Kunz-Freed et al., in the Harris County District Court.

⁵ Filed September 27, 2016 in Liberty County



Lee H. Rosenthal



CLOSING THE INDEPENDENT ADMINISTRATION

16. Independent administration of estates is governed by the Texas Estates Code Title 2, Subtitle I Chapters 401-405.

Tex. Est. Code § 402.001

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, appraisement, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisement, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.^{6,7}

17. The question of when an independent probate administration closes⁸ was addressed by the Honorable Lee H. Rosenthal in Johnston v. Dexel. It should be noted that there was no pour over will in Dexel, but there are pour over Wills in the Brunsting Trust controversy.

⁶ Independent administration of estates was formerly governed by the Texas Probate Code §§ 145-154A (Vernon 1980 and Vernon Supp. 1991). Section § 402.001 is a restatement of § 151 (b) . . . The filing of such an affidavit shall terminate the independent administration and the power and authority of the independent executor, but shall not relieve the independent executor from liability for any mismanagement of the estate or from liability for any false statements contained in the affidavit.

⁷ The purpose of administration is to satisfy the decedent's debts and to distribute the remainder of the estate in accordance with the testator's wishes. See generally William J. Marschall, Jr., Independent Administration of Decedents' Estates, 33 Tex.L.Rev. 95, 116 (1954).

⁸ "An independent administration is to close, and the authority of the personal representative is to terminate, when the estate has been settled." 1 TEXAS PRACTICE GUIDE PROBATE § 5:59 (2018) The executor may file a formal report or notice to close the administration after: [A]ll of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the independent executor's possession will permit, when there is no pending litigation, and when the independent executor has distributed to the distributes entitled to the estate all assets of the estate, if any, remaining after payment of debts.





"Texas law permits a person to state in her will that "no other action shall be had in the probate court in relation to the settlement of the person's estate [other] than the probating and recording of the will and the return of any required inventory, appraisal, and list of claims of the person's estate." TEX. EST. CODE § 401.001(a). This language creates an independent administration, allowing the estate's executor to take "any action that a personal representative subject to court supervision may take with or without a court order." Id. § 402.002.

After the probate court has entered "the order appointing an independent executor," and "the inventory, appraisal, and list of claims has been filed by the independent executor and approved by the court," the executor or interested parties may not take further actions in the probate court, "except where this title specifically and explicitly provides for some action in the court." Id. § 402.001.

*The independent administration's purpose is to "free an estate of the often onerous and expensive judicial *29 supervision which had developed under the common law system, and in its place, to permit an executor, free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay." Corpus Christi Bank & Tr. v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969); see Eastland v. Eastland, 273 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("The primary distinction between an independent administration and a dependent administration is the level of judicial supervision over exercise of the executor's power.").*

The independent executor's task is to pay claims against the estate and distribute the remaining assets under the will, a settlement agreement, or the Texas Estates Code. See TEX. EST. CODE § 403.051(a) ; Ertel v. O'Brien , 852 S.W.2d 17, 20–21 (Tex. App.—Waco 1993, writ denied) ("An independent executor is charged with the duty of paying the claims against the estate subject to the order and classification set out in the Probate Code."); cf. In re Roy , 249 S.W.3d 592, 596 (Tex. App.—Waco 2008, no pet.) ("As trustee of the estate's property, the executor is subject to high fiduciary duties."). "An independent administration is to close, and the authority of the





personal representative is to terminate, when the estate has been settled." 1 TEXAS PRACTICE GUIDE PROBATE § 5:59 (2018)."

18. Estates Code § 402.001 is a restatement of § 145(h) of the former Probate Code. This provision forecloses the executor and all interested persons from taking "further action" in the probate court except to the extent the code authorizes the probate court to take cognizance of matters "incident to an estate".

*In re Estate of Aguilar, No. 04-13-00368-CV, at *2-3 (Tex. App. Feb. 19, 2014) ("rejected the argument, asserting, "This section of the code does not deny the probate court's jurisdiction over a contested claim against an estate served by an independent executor." Id. Noting a probate court retains general jurisdiction to hear matters incident to an estate, this court held "[t]he probate court has subject matter jurisdiction over independent executors." Id. at 719; see also Columbia Rio Grande Regional Hosp. v. Stover, 17 S.W.3d 387, 393 (Tex. App.—Corpus Christi 2000, no pet.) (concluding section 145(h) does not deprive a probate court of jurisdiction over an independent administration); In re Estate of Lee, 981 S.W.2d 288, 291-92 (Tex. App.—Amarillo 1998, pet. denied) (rejecting jurisdictional challenge based on section 145(h) and holding probate court had jurisdiction to consider claim filed by independent executrix). "*

19. The claims that are authorized and the cases supporting continued action in the probate court, involve claims against the executor and challenges to rights in property within the decedent's estate, none of which are relevant here. There have been no challenges to the will devising to the trust. There have been no challenges to the inventory or the list of claims nor to the drop order closing the "estates" and all of those things were res judicata and beyond review many years ago. Want of jurisdiction however, is never beyond review, is not subject to the not pressed not passed upon below rule and can be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex. Air. Control Bd.*, 852 S.W.2d 440, 445 (Tex.1993).





20. The “estate” poured over into the trust under the directive of the will. The rights in said property vested in the trust immediately at the death of the testator and the right of possession was complete with the Order approving the Inventory.

21. It is unnecessary to debate whether the matter filed five days after the estate was dropped from the active docket is a matter “incident to an estate”, as one pivotal issue has received unanimous agreement from all courts of appeal.

*("The pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it."); Garza v. Rodriguez, 18 S.W.3d 694, *5 698 (Tex. App.—San Antonio 2000, no pet.) ("Before a matter can be regarded as incident to an estate ... a probate proceeding must actually be pending."). Lawton v. Lawton NO. 01-12-00932-CV (Court of Appeals For the First District of Texas Mar. 6, 2014)*

22. Filing of a Bill of Review does not, in and of itself, reopen a closed estate. It is unnecessary to look further as no Bill of Review seeking to reopen the estate was ever filed and the closing of the estate at this juncture cannot be disturbed.

"a bill of review seeking to reopen an estate closed long ago does not render the estate "pending" as that word is used in section 5B of the Probate Code. In re Kenedy Mem'l Found., 159 S.W.3d at 143, Id. at 143-46. " n.21 (Tex. 2010), Frost Nat. Bank v. Fernandez, 315 S.W.3d 494, 505 n.21 (Tex. 2010)

23. No one has challenged the approved inventory and no one has raised claims of adverse interests in rights to property within the inventory of the estate. The controversy among trustees and beneficiaries of the inter vivos trusts is not a probate matter.





24. The law of the case was established with the Findings of Fact and Conclusions of Law after hearing and preliminary injunction entered in the Southern District of Texas⁹ and the unanimous opinion of the Fifth Circuit Court of Appeal published *Curtis v Brunsting* 704 F.3d 406. The doctrine of collateral estoppel precludes re-litigation of those issues.

JURISDICTION OVER TRUST PROCEEDINGS

25. District courts and statutory probate courts are the only courts with jurisdiction over trust proceedings. See Texas Property Code Ann. § 115.001 (West Supp. 2005); Schuele, 119 S.W.3d at 825.

26. The jurisdiction of the District Court over trust proceedings is exclusive except for the authority granted to a probate court by Subsection (d):

§ 115.001 (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...

27. The exception to the exclusive jurisdiction of the District Court provided by subsection § 115.001 (d) is limited to matters “*incident to an estate*” and apply only when a probate proceeding relating to such estate is actually “*pending*” in the probate court. See: *Baker v. Baker NO. 02-18-00051-CV (Tex. App. Sep. 6, 2018)(emphasis added)*

⁹ Made a part of this Courts record on 2015-02-06 in Case 412249-402 PBT-2015-42743





*A "probate proceeding" includes an application, petition, motion, or action regarding estate administration, id. § 31.001(4) (West 2014), and a claim "related to the probate proceeding" includes an action for trial of the right to property that is estate property. Id. § 31.002(a)(6), (c); see also Wallace v. Wallace, No. 05-17-00447-CV, 2017 WL 4479653, at *3 (Tex. App.—Dallas Oct. 9, 2017, no pet.) (mem. op.). However, to trigger a statutory probate court's exclusive subject-matter jurisdiction over a cause "related to the probate proceeding," a probate proceeding must already be pending. See Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) (recognizing that "a court empowered with probate jurisdiction may only exercise its probate jurisdiction over 'matters incident to an estate' when a probate proceeding relating to such matter is already pending in that court" (quoting Bailey v. Cherokee Cty. Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993) (op. on reh'g))); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) ("[B]efore a matter can be regarded as incident to an estate . . . a probate proceeding must actually be pending.").*

28. *Narvaez v. Powell* 564 S.W.3d 49 (Tex. App. 2018))(emphasis added)

A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX.ESTATES CODE ANN. § 32.001(b). In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court. See Frost National Bank, 315 S.W.3d at 506. That requisite is satisfied here. Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the non-probate claims and the claims against the estate. See Shell Cortez Pipeline Co. v. Shores , 127 S.W.3d 286, 294 (Tex.App.—Fort Worth 2004, no pet.), citing Sabine Gas Trans. Co.





v. Winnie Pipeline Co. , 15 S.W.3d 199, 202 (Tex.App.—Houston [14th Dist.] 2000, no pet.) ; Goodman v. Summit at W. Rim, Ltd. , 952 S.W.2d 930, 933 (Tex.App.—Austin 1997, no pet.) (holding that probate court can exercise "ancillary" or "pendent" jurisdiction over a claim only if it bears some relationship to the estate). That is, probate courts exercise their ancillary or pendent jurisdiction over non-probate matters only when doing so will aid in the efficient administration of an estate pending in the probate court. Shell Cortez Pipeline , 127 S.W.3d at 294-95.

- 29. Valdez v. Hollenbeck 465 S.W.3d 217 (Tex. 2015)

Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 506 (Tex. 2010) (acknowledging that a court may exercise its probate jurisdiction over "matters incident to an estate" only when a probate proceeding is already pending in that court (quoting Bailey v. Cherokee Cnty. Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993))); In re Sims, 88 S.W.3d 297, 304 n. 3 (Tex. App.—San Antonio 2002, orig. proceeding) (same); Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) (same).

- 30. Herring v. Welborn 27 S.W.3d 132 (Tex. App. 2000) (emphasis added)

Once a probate proceeding is under way, the statutory county court's authority to deal with all matters incident to an estate is triggered. See Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex.App.-Dallas 2000, no pet.) (allowing a partition proceeding among heirs to proceed in a county court at law because no probate proceeding was pending in the statutory probate court). "In other words, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it."

DOMINANT JURISDICTION





31. In Kunz-Freed's March 8, 2016 objection to Plaintiff Curtis' motion to transfer the District Court case to Probate Court 4, Kunz-Freed raises the issue of Dominant Jurisdiction and was correct. Such a transfer was improper and the motion should have been denied. Kunz-Freed argued as follows:

III.

ARGUMENTS AND AUTHORITIES

A. Ms. CURTIS' MOTION TO TRANSFER SHOULD BE DENIED

3.1 The general common law rule in Texas is that the court in which suit is first filed acquires dominate jurisdiction to the exclusion of other coordinate courts. Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974); Cleveland v. Ward, 285 S.W. 1063 (Tex. 1926); Hardy v. McCorkle, 765 S.W.2d 910, 913 (Tex. App.-Houston (1st Dist.) 1989, orig. proceeding). In this case, the first lawsuit was the District Court suit, which would therefore be the court of dominate jurisdiction. Although Carl could have certainly filed similar claims against V&F in the Probate Proceeding, he decided to file separate proceedings. The principle of dominant jurisdiction dictates that this case should not be transferred arbitrarily once a lawsuit has been assigned to a particular court. Republic Royalty Co. v. Evins, 931 S.W.2d 338, 342 (Tex. App.- Corpus Christi 1996, no writ). To allow Ms. Curtis to now obtain a transfer of the legal malpractice suit at this juncture only encourages improper forum shopping."

32. In *Mayfield v Peek* 546 S.W.3d 253 (Tex. App. 2017) it was determined that:

A court exercising original probate jurisdiction also has jurisdiction over "matters related to the probate proceeding" as specified in former Section 4B of the Probate Code. Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 4A, 2009 TEX.GEN.LAWS 4273, 4275 (formally codified at TEX.PROB.CODE ANN. § 4A, now repealed and replaced with TEX. EST.CODE ANN. § 32.001(a)(West 2014)). § 4B





in turn provided that in a county with no statutory probate court, but a county court at law exercising original probate jurisdiction, one of the matters that can be “related” to a probate proceeding is the “interpretation and administration of an inter vivos trust created by the decedent whose will has been admitted to probate in the court.” Id. at § 4B(3)(now codified at Tex. Est.Code ANN. 31.002(b)(3)). Though the textual grant of jurisdiction is not as broad as that given to a district court, it might fairly encompass Mayfield's claim because the transfer of property is an aspect of administration of a trust.

From these authorities, we discern that the Trust Claim could have been heard by the 271st District Court, or one of the county courts at law for Wise County if they were exercising original probate jurisdiction. As to the Trust Claim, the issue is not one of exclusive jurisdiction, but rather dominant jurisdiction. In re Puig, 351 S.W.3d 301, 305 (Tex. 2011)(“When the jurisdiction of a county court sitting in probate and a district court are concurrent, the issue is one of dominant jurisdiction.”)

The Texas Supreme Court explains dominant jurisdiction this way:

The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts. As a result, when two suits are inherently interrelated, a plea in abatement in the second action must be granted. This first-filed rule flows from principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues. The default rule thus tilts the playing field in favor of according dominant jurisdiction to the court in which suit is first filed.

33. Incident to an Estate see Tex. Est. Code § 31.001

An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate. English v. Cobb, 593 S.W.2d 674, 676 (Tex. 1979); Falderbaum v. Lowe, 964 S.W.2d 744, 747 (Tex.App.-Austin 1998, no writ). Suits incident to an estate include those seeking to recover possession of or collect damages for conversion of property. Lucik v. Taylor, 596 S.W.2d 514, 516 (Tex. 1980).



34. 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; and*
- (7) *a will construction suit.*

35. In the absence of the Legislature's inclusion of a matter in the types of claims a court exercising probate jurisdiction can hear, we use the "controlling issue test" to determine whether the matter falls within the court's jurisdiction. See *In re Puig*, 351 S.W.3d 301, 304 (Tex. 2011). Under that test, a suit is "incident to an estate when the controlling issue is the settlement, partition, or distribution of the estate." *Id. Dowell v. Quiroz*, 462 S.W.3d 578, 582-83 (Tex. App. 2015)

36. An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate. *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).



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37. Closing Procedures are not required of an independent executor, § 405.012. The Order approving the inventories and the Drop Orders issued April 4, 2013 completed the pour over process and the right of possession was vested. That was more than six years ago.

38. The trust does not pour over into the estate but quite the contrary. Settling the Brunsting trust can have no effect on the settlement, partitioning or distribution of the “estates of Elmer and Nelva Brunsting” and by that definition the Brunsting Trust controversy is not a matter “incident to the estate”.

Although courts generally do not lose subject matter jurisdiction once it attaches, a probate court is a specialized court that can lose jurisdiction over matters incident to an estate if it loses jurisdiction over the probate matters. See Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.). In other words, once an estate closes, incident claims are pendent or ancillary to nothing, and the probate court loses jurisdiction. Id.; see also Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) (“the pendency of a probate proceeding is a requisite for a court’s exercise of jurisdiction over matters related to it”); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) (“before a matter can be regarded as incident to an estate ... a probate proceeding must actually be pending”)

In Texas, the pendency of a probate proceeding is a requisite for a court’s exercise of jurisdiction over matters related to it. In Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581 (Tex. 1993), the Texas Supreme Court stated that a trial court must have a probate case pending to exercise its jurisdiction over matters “incident to an estate.” See also In re Estate of Hanau, 806 S.W.2d at 904 (court lost jurisdiction to remove independent executrix after estate was closed). We hold that the probate court may only exercise “ancillary” or “pendent” jurisdiction over a claim that bears some relationship to the estate. Once the estate settles, the claim is “ancillary” or “pendent” to



Shirley M. Hight



nothing, and the court is without jurisdiction. Goodman v. Summit at West Rim, Ltd. 952 S.W.2d 930 (Tex. App. 1997) (emphasis mine)

39. See Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co. 528 S.W.3d 201 (Tex. App. 2017)

"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)).

The purpose of independent administration is to free the independent executor from judicial supervision by the probate court and to effect the distribution of an estate with minimal costs and delays. Sweeney v. Sweeney, 668 S.W.2d 909, 910 (Tex. App.—Houston [14th Dist.] 1984, no writ); Burke v. Satterfield, 525 S.W.2d 950, 955 (Tex. 1975). The Estates Code codifies this purpose by directing that after an independent executor is appointed and the inventory has been approved, "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." "TEX. EST. CODE ANN. § 402.001. In re Estate of Aguilar No. 04-13-00038-CV (Tex. App. Feb. 19, 2014).

Texas Estates Code § 34.001

40. Texas Estates Code § 34.001 is referred to as the snatching statute. However, a judge of a statutory probate court "may transfer" to the judge's court from a district... court a cause of action related to a probate proceeding "pending" in the statutory probate court. There is no probate proceeding "pending" in this court.





THE TESTAMENTARY TRUST OF THE TESTATOR

41. When a person dies without leaving a valid will they are said to have died intestate. Any assets belonging to such individual at the time of death form a testamentary trust which is created by operation of law¹⁰, to be administered and disposed of according to the laws of intestate succession.

§ 101.001(b), Subject to Section 101.051, the estate of a person who dies intestate vests immediately in the person's heirs at law.

42. When a person dies leaving a valid will, the assets belonging to the individual at the time of death are held under a testamentary trust¹¹ and administered and disposed of according to the directives contained in the person's will.

43. Texas Estate Code § 22.012 defines "Estate" to mean a "decedent's property" as it exists originally and as the property changes in form. Subtitle C (§101.001 through §124.006), controls passage and possession of a decedent's estate.

§ 101.001 (a) Subject to Section 101.051, if a person dies leaving a lawful will:

(1) all of the person's estate that is devised by the will vests immediately in the devisees;

44. Tex. Est. Code § 101.051 (a) states that a decedent's estate vests in accordance with Section 101.001 (a) subject to the payment of various debts and

¹⁰ A testamentary trust of the decedent is created by operation of law Tex. Est. Code § 101.003

¹¹ A testamentary trust of the testator is created by operation of law § 101.003



obligations owed by the decedent prior to distributing the residual estate to the heirs or devisees as the case may be.

45. We are not talking about inheritance expectancy. Tortious interference with inheritance expectancy is not a recognized cause of action in Texas¹² and all three of the attorneys who filed such claims in this court know better as a matter of law.

46. We are talking about vested property interests (§ 101.001) in the corpus of an inter vivos trust (§ 254.001) and that question was already pending before two other courts when the April 4, 2013 drop order closed the “estates of Elmer and Nelva Brunsting” in this court. That was five days before ancillary matter No. 412249-401 was filed “ancillary” or “pendent” to nothing.¹³

DEVISE TO TRUST

47. When a person dies leaving a valid will devising to a trust, property devised to the trust described by Subsection (a) of Tex. Est. Code § 254.001 is not held under a testamentary trust of the testator but immediately¹⁴ becomes part of the corpus of the trust to which the property is devised and must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendments.

48. According to *Texas. Property Code § 111.004*, The term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property.

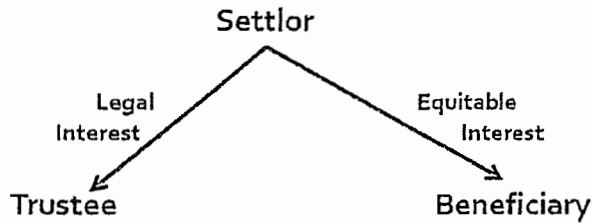
¹² See Neal Spielman’s own admission in Case 4:16-cv-01969 Document 40 Filed in TXSD on 10/03/16 Page 4 of 6

¹³ Goodman v. Summit at West Rim, Ltd. 952 S.W.2d 930 (Tex. App. 1997)

¹⁴ The reference dates for determining “immediate” are November 11, 2011 for the vesting of property rights and April 4, 2013 for the closing of the residual estate and vesting of the right of possession. See *Johnston v Dexel et al.*



John Lee Harris



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49. The fundamental distinction between a trust agreement and an ordinary business contract is in the *separation of legal and equitable title*. The trustee is merely the depository of the bare legal title. The trustee is vested with legal title and right of possession of the trust property (the res) but holds it in a fiduciary capacity for the benefit and enjoyment of the beneficiaries, who are vested with equitable title to the trust property.

As this Court and the Tyler Court have explained, a trustee is merely the depository of the bare legal title. City of Mesquite v. Malouf, 553 S.W.2d 639, 644 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.); Faulkner v. Bost, 137 S.W.3d 254, 258 (Tex. App.—Tyler 2004, no pet.). "When a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners." Malouf, 553 S.W.2d at 644. "The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property." Faulkner, 137 S.W.3d at 258-59. The trustee has fiduciary duties to hold and manage the property for the benefit of the beneficiaries. TEX. PROP. CODE §§ 113.051, 113.056(a) (West 2007). In general, a trustee "owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty and fidelity over the trust's affairs and its corpus." Herschbach v. City of Corpus Christi, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied); see InterFirst Bank Dallas, N.A. v. Risser, 739

¹⁵ Drawing Courtesy of Doctor Gerry Beyer, Regent Professor of Law, Texas A & M University



Shirley A. Smith



*S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). Scott argues the trust document excused him from the obligation to perform such duties. Martin v. Martin, No. 06-10-00005-CV, at *8-9 (Tex. App. Mar. 20, 2012)*

50. The Indenture is the instrument that expresses the fiduciary relationship governing the trustee with respect to the trust property. It is the indenture that defines the fiduciary obligations the trustee owes to the beneficiary with respect to the trust property.

DEFENDANTS MOTION TO APPOINT A PERSONAL REPRESENTATIVE

51. Chapter 404 of Subtitle I of Title 2 of the Texas Estates Code governs the question of appointing a successor administrator who succeeds an Independent Executor. Section § 404.004(a) allows the appointment of an administrator to succeed an independent executor only where the independent executor has ceased to serve “*leaving unexecuted parts or portions of the will*”.

52. If assets otherwise belonging to a testamentary trust of the testator immediately vest in the trustees for the trust and become a part of the corpus of the trust at the death of the testator and, if the Order approving the Inventory immediately vests the right of possession in the trustee, what *parts or portions of the pour over will remained unexecuted when the drop order issued?*

POUR OVER PROCEDURES

53. Nelva Brunsting’s Will is a pour over will devising solely to the family inter vivos trust. There are no other specific bequeaths. The pour over procedures are prescribed by Texas Estates Code § 254.001 et. seq.,

Texas Estates Code § 254.001(a) & (c)(1)&(2)





§ 254.001(a) *A testator may validly devise property in a will to the trustee of a trust established or to be established (1) during the testator's lifetime by... the testator and another person, ...*

§ 254.001(c) *Unless the testator's will provides otherwise, property devised to a trust described by Subsection (a) is not held under a testamentary trust of the testator. The property:*

(1) becomes part of the trust to which the property is devised; and

(2) must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendment to the instrument made before or after the testator's death.

54. At the time of death, any property belonging to the Decedent forms a testamentary trust¹⁶.

Under Texas law, during the period of administration, the decedent's estate in the hands of the executor or administrator constitutes a trust estate. The executor or administrator is more than a stake-holder, or the mere agent as a donee of a naked power of the heirs, legatees, and devisees. He has exclusive possession and control of the entire estate. He is charged with active and positive duties. He is an active trustee of a trust estate. Jones v. Whittington, 194 F.2d 812, 817 (10th Cir. 1952); see also Morrell v. Hamlett, 24 S.W.2d 531, 534 (Tex. Civ. App. — Waco 1929, writ ref'd) (estate property under administration is held in trust). Bailey v. Cherokee County Appraisal Dist, 862 S.W.2d 581, 584 (Tex. 1993)

55. To argue that the independent executor of the estate is the real party in interest to claims against the estate planning attorneys is the equivalent of arguing that a testamentary trust of the testator was formed. This theory is in direct contradiction to the express language of the statute prescribing the pour over

¹⁶ The executor is trustee for a testamentary trust created by operation of law § 101.003



Shirley H. Hurd



procedures and defeats the main purposes for the pour over process which is, unified administration and the avoidance of probate.

56. It would make sense that no testamentary trust (decedent’s estate) would be created when the will devises exclusively to an existing trust, as any properties belonging to the Decedent at the time of death immediately become a part of the corpus of the trust and are to “*be administered and disposed of according to the provisions of the instrument establishing the trust.*”¹⁷

The concept of the "pour-over" is not difficult. It is simply a dispositive provision which directs that all or part of an estate is to be added to the corpus of an existing trust, to be administered according to and without the necessity of reiteration of the terms of the trust. The basic goal is to furnish a simple mechanism for adding the poured-over assets to the corpus of the existing trust in order to secure a unified administration of assets with whatever minimization of administrative expenses or detail is thus possible. In re Blount, 438 B.R. 98 (Bankr. E.D. Tex. 2010) (emphasis added)

57. It has been said that there is no shorter interval of time than from when a testator dies and his estate passes to the devisees under his will.¹⁸ Because the property rights, including the right of claims, immediately became a part of the corpus of the trust at the death of the testator, any argument that the claims filed in the District Court belonged to the decedent’s estates after the inventory, appraisal and list of claims was approved, would defeat the purpose for this

¹⁷ Formerly Texas Probate Code § 37, section 37 deals with passage of title upon intestacy and under a will. The pertinent part of that section states “When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will . . . shall vest immediately in the devisees or legatees of such estate . . . ; subject, however, to the payment of the debts of the testator. . . . Tex.Prob. Code Ann. § 37 (West Supp. 1996). An ownership interest in property vests in a beneficiary immediately upon the death of the testator. See *Kelley v. Marlin*, 714 S.W.2d 303, 305-06 (Tex. 1986); *Johnson v. McLaughlin*, 840 S.W.2d 668, 671 (Tex.App. — Austin 1992, no writ).

¹⁸ *Hardy v. Bennefield* 368 S.W.3d 643 (Tex. App. 2012); *In re Estate of Catlin*, 311 S.W.3d 697, 703 (Tex.App.-Amarillo 2010, pet. denied)



Wanda H. Hark



estate plan and negate the purpose and effect of § 254.001, the law such plans are made in reliance on. The rules governing statutory interpretation do not allow for prerogatives.¹⁹

CONVERSION IS NOT CONSOLIDATION

58. *Candace Louise Curtis v Amy and Anita Brunsting 4:12-cv-592* is not the “*Estate of Nelva Brunsting*”,²⁰ nor is it a matter incident thereto.

59. *Candace Louise Curtis v Amy and Anita Brunsting* No. 4:12-cv-592, filed Southern District of Texas February 27, 2012, was remanded from the Southern District of Texas to Harris County Probate Court No. 4 in June 2014, to be “*consolidated with the case pending there*”²¹ and was assigned ancillary Cause No. 412249-402.

60. The March 5, 2015 “Agreed Order to Consolidate Cases” is evidence of conversion, which is not a consolidation by any legal standard or measure.²² WHO WAS REPRESENTING estate of Nelva Brunsting when this conversion agreement was signed?

61. *Candace Louise Curtis v Amy and Anita Brunsting* No. 412249-402 is NOT *Carl Brunsting et al.*, No. 412249-401

¹⁹ The seminal rule of statutory construction is to presume that the legislature meant what it said. *Seals v. State*, 187 S.W.3d 417, 421, No. PD-0678-04, 2005 WL 3058041, 2005 Tex.Crim.App. LEXIS 1966 (Tex.Crim.App. Nov. 16, 2005)

²⁰ *Curtis v Brunsting* 704 F.3d 406 (January 9, 2013)

²¹ ORDER OF TRANSFER, SIGNED JUNE 3, 2014 Film code number PBT-2014-184792. There was no case pending in this court to consolidate with and the order accepting remand is void as a matter of law.

²² See Rule 2 - 2.9 of the Local Rules of the Probate Courts



62. *Candace Louise Curtis v Amy and Anita Brunsting is Candace Louise Curtis v Amy and Anita Brunsting and no other cause!*

DEFENDANT ANITA AND AMY BRUNSTINGS RESPONSE TO MOTION TO APPOINT PERSONAL REPRESENTATIVE

63. There is no core “estate” pending in this court and matters relating to the Brunsting trust were not properly brought before this court.

64. On May 19, 2019 alleged trustee Amy Brunsting’s attorney Neal Spielman filed a motion for sanctions seeking a judgment of contempt “due to the conduct of Candace Louise Curtis” and alleging that:

“Curtis is in contempt of this Court's Order Denying Plea and Motions filed by Candace Curtis dated February 14, 2019. Curtis has ignored this Court's findings and orders as to her meritless jurisdictional arguments.”

Curtis' dogged pursuit of these meritless claims, both before and after entry of the Order Denying Pleas and Motions filed by Candace Curtis reveals a disrespect for judicial authority; evidences an intent to exacerbate an already emotionally-charged matter; and continues a pattern of behavior that is either intentionally designed to harass, to waste Estate/Trust assets, and/or is recklessly pursued without regard to the law or the facts.

65. In Mr. Spielman’s motion for sanctions he says of Plaintiff Curtis: “*At best, she fails to comprehend the legal process*”²³.

ADMISSIONS

²³ It should be noted that Pro Se Plaintiff Curtis obtained a unanimous opinion from the federal Fifth Circuit Court of Appeal in this case, published *Curtis v Brunsting* 704 F.3rd 406 (Jan. 9, 2013), wherein the Fifth Circuit Court of Appeal held that there was subject matter jurisdiction in the Southern District of Texas.



W. L. Harris



66. Mr. Spielman argued at the hearing on his motion for sanctions that he was forced to waste valuable time reading Plaintiff Curtis’ “frivolous pleadings” and yet on Monday November 4, 2019, Spielman and Mendel filed Defendants Amy and Anita Brunsting’s untimely response to Kunz-Freed’s motion to appoint a personal representative, in which they adopt a Plaintiff Curtis argument.

“Because both Wills gift, devise and bequeath all property and estate to the Brunsting Family Living Trust, there is no need for such an appointment. As a result, Kunz-Freed’s Motion to Appoint Personal Representative of Administrator should be denied...”

“A “Successor Executor” is not required.

The claims against Kunz-Freed are assets of the Brunsting Family Living Trust, and therefore are subject to the control of the Co-Trustees.”

67. Unfortunately, counsel has failed to follow this reasoning through to the unyielding deductions that flow therefrom and, thus, fail to perceive how their new found revelation raises problems of substantial significance.

68. If there was an “estate pending” in this court the appointment of a representative would be necessary and would have been necessary several years ago, but has not been necessary since the administrative closing of the “estate” April 4, 2013 vested the right of possession of those claims in the trustees.

69. Defendants do not cite to any authority for their sudden realization that the claims belong to the trustees and not the estate. Thus, while adamantly calling Plaintiff Curtis’ pleadings “frivolous”, they fail to realize the unavoidable conclusion that flows from page one paragraph two of Plaintiff Curtis’ June 6,





2019 reply²⁴ to Defendant Amy Brunstings May 5, 2019 Motion for Sanctions. Paragraph 2 cites to Texas Estates Code § 254.001 which contains the pour over procedures.

70. The rights of claims belong to the trustees and not a testamentary trust of the testator (estate).

Temporary Administrator Gregory Lester

71. Mr. Lester's January 14, 2016 "*Report of Temporary Administrator Pending Contest*" never even mentions the pour over wills or the drop orders. However, Mr. Lester did have the following to say about the vacancy in the office of executor in regard to the District Court suit:

"A Notice of Vacancy of Party and Motion to Abate Proceeding was filed by counsel for Carl Henry Brunsting. Carl Henry Brunsting has filed a resignation as executor of the aforementioned estates. Until a successor executor is appointed, there is no plaintiff to pursue the action against Defendants and no plaintiff to respond to Defendants' summary judgment motions. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting must be resolved prior to resolving the claims against Defendants"

72. While Mr. Lester never mentioned the pour over, will he did spend a great deal of time focusing on the **no contest clause** in the alleged August 25, 2010 "*Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment under Living Trust Agreement*" (8/25/2010 QBD/TPA) containing corruption of blood provisions.

²⁴ The title to this instrument is an explanation of the proper direction in which fiduciary obligations flow





73. The Brunsting Trust is not an asset within the inventory of any decedent's estate and is not "incident" to any estate. *A Temporary Administrator's fiduciary authority and obligations do not extend to non-probate assets.* See *Punts v. Wilson*, No. 06-03-144-CV, 2004 WL 1175489, at *3 (Tex. App.-Texarkana May 28, 2004, no pet.) (holding independent executor owed no fiduciary duty to residuary beneficiary concerning accounts not included in decedent's estate)." In re *Harden*, No. 02-04-122-CV, at *1 (Tex. App. Jul. 15, 2004).

74. Looking back at the September 28, 2017 Fee Application of Temporary Administrator Gregory Lester we see that Mr. Lester spent more time with Defendants' attorneys than with all the other parties combined.

75. Mr. Spielman followed up the Temporary Administrator's report at the "status conference" before Associate Judge Clarinda Comstock on March 9, 2016, making a big deal out of what Mr. Lester said in his report and, as can be seen in the opening lines, Defendants clearly have their fiduciary obligations flowing in the wrong direction.

"Neal Spielman" March 9, 2016 Hearing Page 15:

*6 But the point here, Judge, is there seems
7 to be no accountability on Ms. Curtis' behalf for the
8 amount of money that is being spent in this case.
9 Parties have, in the past, suggested, oh, let's not
10 worry about the attorneys fees because that will all
11 even out at the end of the story when everybody decides
12 to divide by five, the corpus of the trust, and the
13 winning parties or the prevailing parties can --
14 everything can be adjusted through the division of that
15 estate.*





16 But, Your Honor, if you look at what Mr.
17 Lester recommended/suggested/reported in his report,
18 there's now the very real possibility that there isn't
19 going to be a divide-by-five scenario because of the
20 no-contest clauses that are recognized as being properly
21 drawn by the Vacek & Freed Law Firm. And if that
22 happens, Judge, then the trust is now spending its own
23 money from those people, whether it be three or four,
24 that are still going to get a portion of the estate, a
25 portion of the trust proceeds when this is all said and
Page 16

1 done.

2 I'm rambling just a bit only because it's
3 such a circular discussion - is how do we get this case
4 finished, given, given the backtracking from everybody's
5 willingness to vest Mr. Lester with the authority to
6 proceed, and now the one person who doesn't like what he
7 said, after she filed motions for summary judgment that
8 are direct contradiction to the conclusions that he
9 reached. The very constant of having to come down here
10 and respond to those, to those motions for summary
11 judgment, the amount of money that that will waste is
12 insulting, is offensive to the parties.

13 I'd love to come up with a creative idea
14 to create some accountability, perhaps, if it comes in
15 the form of a sanction or perhaps it comes in the form
16 of some kind of bond being posted so that if it turns
17 out that one of the parties who is blowing things up as
18 it were and creating this increased attorneys fees, no
19 longer has an interest in the estate with which we can
20 even that out by the end of the day. Perhaps if Ms.
21 Curtis is ordered to post a bond against her claims or
22 to protect against the ability -- our ability to recover
23 fees from her if, as and when she loses her case,
24 perhaps then we can move forward with additional
25 hearings, additional motions and so forth.

1 Keep in mind, Judge, that it's not

2 simply -- it's not as simple as getting a date for Ms.





3 Curtis' summary judgment motions. There's been no
4 discovery, in terms of depositions done in this case,
5 not the least of which will be depositions from,
6 perhaps, even from the lawyers in the other district
7 court case who drafted the documents that can explain
8 what all went into those documents, what Nelva
9 Brunsting's state of mind was at the time. There's no
10 way to respond to those summary judgment motions right
11 now without the full weight of the discovery process
12 moving forward and all of the money that that's going to
13 cost.

76. In Defendant Amy Brunsting's Response to Defendant Candace Kunz-Freed's Motion to Appoint Personal Representative we find the following commentary on the Temporary Administrator's Report:

"The Temporary Administrator was charged with evaluating the merits of various claims, including the claims asserted against Kunz-Freed. The Temporary Administrator prepared a Report for the Court, as instructed. However, since that Report was submitted, there has been no further indication from the Court as to its ultimate use or purpose.

Without a clearer understanding as to its ultimate use or purpose, it would appear that the expenditure of the associated funds was nothing more than a "waste" of Trust funds. Regardless of how many beneficiaries remain, and who they may be, The Brunsting Family Living Trust should not be further burdened by the costs of an appointed, third-party successor executor."

77. Tex. Est. Code § 404.004(a) only allows the appointment of an administrator to succeed an independent executor where the independent executor has ceased to serve "leaving unexecuted parts or portions of the will". The estates are closed and have been closed. The Temporary Administrator's Report fails to identify any "unexecuted portions of the will".





78. The trust is not the estate, is not liable to the estate and, should have never been depleted to pay a temporary administrator that cannot even properly determine that his role as temporary representative for the “decedent’s estate” is defined by the will.

79. While Plaintiff Curtis’ reply to Amy Brunsting’s motion for sanctions only cited Estates Code § 254.001, it is clear from the Defendant’s statements that they have not followed through to the inescapable conclusions that follow.

Catch-22²⁵

1. Under the un-ruptured law of the trust Amy and Anita are not trustees.

The Trust Code provides that, in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party "if a trustee is serving at the time the action is filed." In re Webb, 266 S.W.3d 544, 548-49 (Tex. App.-Fort Worth 2008, pet. denied); see Tex. Prop. . §§ 111.004, 115.011.

80. Not only has Amy argued that the instruments drafted by Vacek & Freed are valid, but in order *for Amy to have standing* to sue V&F for malpractice as the representative of “the trust”, Amy would have to be a trustee. However, in order to prevail on those claims Amy would have to show that the instruments drafted by Vacek & Freed after Elmer became NCM are invalid, which in turn would show that Amy is not a trustee and has no standing to prosecute those claims from the onset. This is not to say that Anita and Amy do not have their own individual malpractice claims against the Vacek and Freed attorneys. They most certainly do, but not as trustees.

²⁵ A paradox or problematic situation for which the only solution is denied by a circumstance inherent in the problem itself. (See “Paradox of the Court”, a.k.a. *the counter dilemma of Euathlus*)





81. The recent admission by Defendants Amy and Anita Brunsting in their answer to Defendant Kunz-Freed's motion, calls for a quote from Plaintiff Curtis' June 12, 2019 RESPONSE TO THE FIDUCIARY'S APPLICATION FOR THE BENEFICIARY TO BE HELD IN CONTEMPT:

Page 6 Para. 17

"At this juncture, regardless of the way they are styled, the theories pled or the parties named, lawsuits arising from a common nucleus of operative facts have been filed in three separate courts. Whether or not either state court action properly involved the Brunsting Trusts when filed, and whether or not either state court can render a binding judgment under the conditions present here, is a valid inquiry better had before trial than after."

82. The conclusion that the "*Estates of Elmer and Nelva Brunsting*" are not proper party plaintiffs to claims belonging to the trustees for the devisee invariably invokes jurisdictional questions. It should be clear from Defendants' own claims that Plaintiff Curtis' pleadings raising questions of who owns the rights of claims and what court should hear them²⁶ are not as frivolous as Defendants would have the court believe. They certainly were not questions raised with the intention to harass or delay.

The Drop Orders

83. Defendants have never mentioned the Drop Orders. The Drop Orders that were issued the day the inventories were approved are conclusive evidence that the

²⁶ 2018-08-17 Plea in Abatement page 4 "*Public policy does not favor the wasting of judicial or private resources. Permitting a case to proceed in the wrong court necessarily "costs private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings"* Prudential, 148 S.W.3d at 136





delay between the vesting of property rights (§ 101.001) and the right of possession had transpired with the approval of the inventory (§ 402.001) and that the estate was administratively closed with the drop order.

The "general rule is that a remainder vests when there is a person in being who has an immediate right to possession of property upon termination of an intermediate estate with only the right of possession postponed" and observing that "vested remaindermen are 'interested persons' under the Trust Code and can bring a cause of action for breach of fiduciary duty" against trustee. Summary of Snyder v. Cowell, No. 08-01-00444-CV (Tex. App. Apr. 10, 2003) from Aubrey v. United Heritage Credit Union, NO. 03-16-00233-CV TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN Apr 12, 2017

84. Defendants Amy and Anita Brunsting **claim to be co-trustees** for the devisee trust, but those claims have never seen a hearing in this or any other court and are based upon the argument that improperly made changes to an irrevocable trust are valid.

85. The estate closed more than seven years ago. The period in which a competent trustee could have substituted as a plaintiff for claims belonging to the devisee trust have long since expired and clearly have not been pursued due to the alleged co-trustees own malfeasance and/or incompetence. Thus again we are presented with the same issue confronting the court In Re XTO Energy Inc. 471 S.W.3d 126 (2015).

Texas courts have held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." See, e.g., In re Estate of Webb, 266 S.W.3d 544, 552 (Tex.App. — Fort Worth 2008, pet. denied); Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.). Despite this



Shirley H. Hark



broad language, a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so. To allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory.

Even Goebel concedes that the trustee's refusal to bring suit must be wrongful for her to be allowed to step into the trustee's shoes and maintain a suit on the Trust's behalf. See RESTATEMENT (SECOND) OF TRUSTS § 282 (AM. LAW INST. 1959) (if trustee improperly refuses or neglects to bring an action against a third person, beneficiary can maintain suit in equity against trustee and third person). What is less clear is the standard applied to determine whether the trustee's action is wrongful.

*We have found no Texas cases addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue. Generally, when a trustee is given discretion with respect to the exercise of a power, a court may not interfere except to prevent an abuse of discretion. See RESTATEMENT (SECOND) OF TRUSTS § 187. A power is discretionary if a trustee may decide whether or not to exercise it. See *Caldwell v. River Oaks Trust Co.*, No. 01-94-00273-CV, 1996 WL 227520, at *12 (Tex.App. — Houston [1st Dist.] May 2, 1996, writ denied) (not designated for publication). When a trustee is granted the authority to commence, settle, arbitrate or defend litigation with respect to the trust, the trustee is authorized, but not required, to pursue litigation on the trust's behalf. See *DeRouen v. Bryan*, No. 03-11-00421-CV, 2012 WL 4872738 at *4 (Tex.App. — Austin Oct. 12, 2012, no pet.) (mem.op.); see also RESTATEMENT (SECOND) OF TRUSTS § 177 cmt c ("It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise."). Based on the language of the trust code and the trust indenture in this case, we conclude Bank of America's authority to determine whether to file suit on behalf of the Trust was discretionary.*





86. Defendant Amy Brunsting’s assertions that she should prosecute the claims against Defendant Kunz-Freed certainly appear to indicate Amy’s agreement that prosecuting the claims would not be unreasonable.

“B. If a successor executor is required, it must be Amy Brunsting.

Because all estate assets "pour-over" into the Brunsting Family Living Trust, there is no need for a successor executor.”

87. However, Amy’s expressed desire to be appointed executrix falls a little short of explaining how the conflicting interests involved in her request for appointment fails to be dispositive of that motion. Unsurprisingly, all of the alternatives presented in Defendants “PRAYER”, assume subject matter jurisdiction in the probate court.

In Terrorem

88. While Defendant’s solution involves diminishing the number of trust shares by eliminating beneficiaries’ property interests, they claim to base this theory on the notion that the elimination of beneficial interests is for the protection of beneficial interests and is the trustee’s duty. This theory is based upon very vague assertions of...

“a number of different terms, conditions and instructions to be implemented and followed by the trustees and beneficiaries. Included among these terms, conditions and instructions were rules intended for the "protection of beneficial interests", including without limitation rules dictating that the Founders' instructions were not to be contested²⁷.

²⁷ Amy Brunsting's & Anita Brunsting's November 4, 2019 Original Counterclaim page 2 of 8





89. Amy and Anita’s claims that “*Carl and Curtis have taken actions*” that trigger the forfeiture provisions, and that “*Carl and Curtis' actions*” in triggering the forfeiture provisions were without just cause and were not in good faith” and claims that “*By their actions*”, Carl and Curtis have forfeited their interests in the trust, is the same vague general language used throughout their dialog.

90. Allegation of a violation of a forfeiture clause requires a specificity these claims appear to be oblivious to.

Ard v. Hudson NO. 02-13-00198-CV (Tex. App. Aug. 20, 2015)

*In terrorem [or forfeiture] clauses are intended to dissuade beneficiaries under a will or trust from filing vexatious litigation, particularly as among family members, that might thwart the intent of the grantor by making the gifts under the instrument conditional on the beneficiaries not challenging the validity of the instrument. In terrorem clauses are strictly construed to avoid forfeiture when possible. Thus, courts have enforced in terrorem clauses only when the intention of a suit is to thwart the grantor's intention. In re Estate of Boylan, No. 02-14-00170- CV, 2015 WL 598531, at *2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op.) (citations and internal quotation marks omitted).*

91. Bringing legal action to enforce the trust and protect beneficial interests is not the type of action that seeks to thwart the grantor's intention, but is the exercise of the beneficiary’s right and a fiduciary obligation of the Plaintiff in the case in point.

"An action to remove a trustee, like an action to remove an executor, is not an effort to vary the grantor's intent. Conte v. Conte, 56 S.W.3d 830, 833 (Tex. App.—Houston [1st Dist.] 2001, no pet.).





"We join our sister courts in holding that a beneficiary has an inherent right to challenge the actions of a fiduciary and does not trigger a forfeiture clause by doing so.

*But that inherent right would be worthless absent the beneficiary's corresponding inherent right to seek protection during such an ongoing challenge of what is left of his or her share of the estate or trust assets, and any income thereon, that the testator or grantor, as the case may be, intended the beneficiary to have. We therefore also hold that a beneficiary exercising his or her inherent right to challenge a fiduciary may seek injunctive and other relief, including the appointment of a receiver, from the trial court to protect what the testator or grantor intended the beneficiary to have without triggering the forfeiture clause. *See, e.g., Lesikar v. Moon, 237 S.W.3d 361, 370-71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); McLendon v. McLendon, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied), disapproved on other grounds, Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382 (Tex. 1997), overruled on other grounds, Torrington Co. v. Stutzman, 46 S.W.3d 829, 840 & n.9 (Tex. 2001).*

Forfeiture provisions, or in terrorem clauses, in wills and trusts are to be strictly construed, and forfeiture is to be avoided if possible. In re Estate of Schiwetz, 102 S.W.3d 355, 365 (Tex.App. — Corpus Christi 2003, pet. denied).

*A breach of a no contest clause should be declared only when the acts of the parties come within the express terms of the clauses. Id. A lawsuit challenging the testamentary capacity of the testatrix is a type of contest that will result in forfeiture. See In re Estate of Hammill, 866 S.W.2d 339, 343 (Tex.App.-Amarillo 1993, no pet.). In re Montez, No. 04-07-00089-CV, at *1 (Tex. App. Dec. 12, 2007)*

Second, we question whether a forfeiture clause that prohibited a trust beneficiary from suing the trustee for fraud and intentional self-dealing would be valid. The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship. McLendon v. McLendon, 862 S.W.2d 662, 679 (Tex.App.-Dallas 1993, writ denied) (trial court erred in failing to grant declaratory judgment that in





terrorem clause did not apply to beneficiary's action against executors of estate for fraud and breach of fiduciary duty). Texas Commerce Bk. v. Wood, 994 S.W.2d 796, 805 (Tex. App. 1999)

92. There is substantial question as to what instruments constitute “the trust” as clearly noted by the Honorable Judge Kenneth Hoyt in his April 19, 2013 Findings of Fact and Conclusions of Law after Hearing and Order for Preliminary Injunction.²⁸ However, questions surrounding the devisee are not properly before this court, as these are not issues incident to settling estates that were closed long ago and this is not the dominant court to assert original jurisdiction over those matters.

SANCTIONS

A void judgment does not create any binding obligations

93. This Court’s Orders in the -401 proceeding are *void ab initio* for want of subject matter jurisdiction. Although a party may appeal a void judgment, he or she is not required to do so.

"It is one thing to say that a void order may be appealed from but it is another thing to say that it must be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded. An order which must be appealed from before it is ignored can hardly be characterized as 'void' and binding on no one." Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 830 (1961)." Metro. Tra. Aut. v. Jackson, 212 S.W.3d 797, 803 n.3 (Tex. App. 2007).

94. *Leedy v. Leedy*, 399 S.W.3d 335, 340 (Tex. App. 2013)

²⁸ Made a part of this Courts record on 2015-02-06 in Case 412249-402 PBT-2015-42743



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“A judgment is void only when the issuing court had no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court.” Browning v. Placke, 698 S.W.2d 362, 363 (Tex.1985). As Kedren points out, there is authority indicating that estoppel cannot prevent a party from challenging subject matter jurisdiction. See Shirley v. Maxicare, Tex., Inc., 921 F.2d 565, 568–69 (5th Cir.1991) (holding accepting benefits under judgment did not bar party from challenging subject matter jurisdiction); Rhodes v. State, 240 S.W.3d 882, 891 (Tex.Crim.App.2007) (“ ‘One who accepts the benefits of a judgment, decree, or judicial order is estopped to deny the validity or propriety thereof, or of any part thereof, on any grounds; nor can he reject its burdensome consequences.’ The only exception to this principle is for challenges to the subject-matter jurisdiction of the court rendering the judgment.”) (quoting Corpus Juris Secundum); Ex parte Williams, 65 S.W.3d 656, 658–59 (Tex.Crim.App.2001) (Keller, P.J., concurring) (examining civil authority and concluding that void judgments are not immune from estoppel considerations unless the invalidity of the judgment is due to a lack of subject matter jurisdiction); 31 C.J.S. Estoppel and Waiver § 172. Leedy v. Leedy, 399 S.W.3d 335, 340 (Tex. App. 2013)

Void for Vagueness

95. Even if the Court had subject matter jurisdiction, as a point of clarification, there were three different movants to three different motions to improperly transfer the District Court docket to probate Court 4. This Court’s February 14, 2019 Order did not specifically identify which of the three movants was the particular “movant” the Order was addressing with its command to transfer that docket and bear the costs.

96. Reason would dictate it would be the party responsible for filing portions of the same suit in separate courts and then moving to have them consolidated in the wrong court. That would not be Plaintiff Curtis.



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97. That would be attorney Bobbie G. Bayless' July 14, 2015, Motion to Transfer the District Court case to Probate Court Four (4) in which she herself admitted the actions she filed in divergent courts were related:

"The District Court Case is related to the probate proceedings and indeed to this cause of action. The issues in the District Court Case and this case are related and the damages sought in each action are potentially impacted by the other. Many of the same witnesses and some of the same evidence will also be used in both cases."

98. This clearly raises a question. Why would counsel seeking remedy for a client file related causes of action in separate courts where the damages sought in each action would be potentially impacted by the other and, where the same witnesses and some of the same evidence would be relevant to both causes? The answer appears to be abundantly obvious. Both state court actions were legally invalid lawsuits preemptively filed for the purpose of interfering with the real party's traditional right to choice of forum, an unethical tactic well known to Thompson Coe attorneys.²⁹

99. Bobbie G. Bayless had no business dragging the Brunsting inter vivos trusts into a probate court under any theory.³⁰ In discussing the federal policy of abstention in regard to applications for anti-suit injunctions seeking to enjoin state court proceedings, the Fifth Circuit Court of Appeal had this to say: (*emphasis mine*)

²⁹ Thompson Coe attorneys were chastised by the Texas Supreme Court for this same conduct on January 25, 2019, *In re Houston Specialty Ins. Co.* 569 S.W.3d 138 (Tex. 2019)

³⁰ Texas Property Code - PROP § 112.035 (a), (g)(1)(A), (B)(i)





Where the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism. See Moses H. Cone Hosp., 460 U.S. at 21-22, 103 S.Ct. at 940 (fact that substantial proceedings have occurred is a relevant factor to consider in deciding whether to abstain). In fact, by filing a state suit after a federal action has been filed, the state plaintiff can be viewed as attempting to use the state courts to interfere with the jurisdiction of the federal courts. We agree with Royal that if we were to hold that Jackson applied in this scenario, litigants could use Jackson as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action. Neither Jackson nor the concerns underlying it mandate such a result. Royal Ins. Co. of America v. Quinn-L Cap. Corp. 3 F.3d 877, 886 (5th Cir. 1993)

100. "If" the Estate of Nelva Brunsting is not a proper party plaintiff "then" *Estate of Nelva Brunsting vs Candace Kunz-Freed et al.*, was not properly filed in the District Court by the real party in interest. "If the "estate of Nelva Brunsting" was closed when ancillary matter 412249-401 was filed, "then" ancillary matter 412249-401 was neither properly filed in that court by the estate, nor properly filed by Carl individually, as no estate was pending in the probate court. The independent executor had not yet been relieved of liability and Tex. Est. § 402.001 removed standing from Carl in both capacities, as the trust is not incident to an estate pending in that court and appears to have been already in the dominant possession of two other courts when those claims were filed.

101. What does all this say about abuse of the judicial process by the attorneys?

Under Texas law, the filing of a fictitious suit constitutes contempt by counsel, Tex.R.Civ.P. 13, and may serve as the basis for a host of sanctions, including dismissal with prejudice. Tex.R.Civ.P. 215 2b(5). Nor does our Texas judiciary lack the ability to reject collusive litigation. Felderhoff v. Felderhoff, 473 S.W.2d 928, 932 (Tex. 1971)





("We believe that our laws and judicial system are adequate to ferret out and prevent collusion. . . ."); cf. Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985)

102. It seems rather apparent that these state court actions were improperly filed for the purpose of interfering with the jurisdiction of the federal court and depriving the real party of the traditional right to choice of forum.

Want or Excess of Jurisdiction

103. Disobedience of an Order issued without or in excess of jurisdiction constitutes no punishable wrong. *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (recognizing that lack of subject matter jurisdiction may be raised at any time, including in action to enforce underlying judgment, if void for lack of jurisdiction); *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (stating that only void judgment, which includes judgment rendered by court lacking subject matter jurisdiction, may be collaterally attacked); *Stewart v. USA Custom Paint Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). *Glassman v. Goodfriend*, 347 S.W.3d 772, 778-79 (Tex. App. 2011)

"The jurisdiction of all Texas courts ... derives from the Texas Constitution and state statutes. Absent an express constitutional or statutory grant, we lack jurisdiction to decide any case." In re Allcat Claims Serv., L.P., 356 S.W.3d 455, 460 (Tex.2011) (citing *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex.1996) (per curiam)).

104. This Court terminated its plenary powers by its own hand when it approved the inventory and administratively closed the estate on April 4, 2013.

Judicial action taken after the trial court's plenary power has expired is void. Sw. Bell Tel. Co., 35 S.W.3d at 605; *State ex. rel Latty v. Owens*, 907 S.W.2d 484, 486 (Tex.1995); see also *Scott & White*





Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 n. 2 (Tex.1996) (declaring that court cannot issue sanctions order after its plenary power has expired); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990) (defining a void judgment as one rendered when a court has no jurisdiction over the parties or subject matter, no jurisdiction to render judgment, or no capacity to act as a court).

105. A trial court has inherent power to sanction bad faith conduct *during the course of litigation that interferes with administration of justice or the preservation of the court's dignity and integrity*. *Onwuteaka v. Gill*, 908 S.W.2d 276, 280 (Tex.App.-Houston [1st Dist.] 1995, no writ); *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex.App.-Houston [1st Dist.] 1994, writ denied); *see Eichelberger v. Eichelberger*, 582 S.W.2d 395, 399 (Tex.1979). The power may be exercised to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of the court. *See Lawrence v. Kohl*, 853 S.W.2d 697, 700 (Tex.App.-Houston [1st Dist.] 1993, no writ. These core functions include hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgments, and enforcing judgments. *See Dallas Cnty. Constable Pct. 5 v. KingVision Pay-Per-View, Ltd.*, 219 S.W.3d 602, 610 (Tex.App.-Dallas 2007, no pet.).

106. The inherent power to sanction, however, has limits. *Gill*, 908 S.W.2d at 280. Because inherent power is “ ‘shielded from direct democratic controls, [it] must be exercised with restraint and discretion.’ ” *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1475 (D.C.Cir.1995) , *quoted in Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir.1998) (internal quotation omitted). Inherent power exists only to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process,





such as significant interference with the core judicial functions of Texas courts. See *Lawrence*, 853 S.W.2d at 699–700.

107. Inherent power is not a substitute for plenary power. See *Lane Bank Equip. Co. v. Smith So. Equip.*, 10 S.W.3d 308, 311 (Tex.2000) (citing *Hjalmarson v. Langley*, 840 S.W.2d 153, 155 (Tex.App.-Waco 1992, orig. proceeding)). Consequently, a court cannot rely on its inherent power to issue sanctions after its plenary power has expired. *Scott & White Mem'l Hosp.*, 940 S.W.2d at 596 & n. 2.

CONCLUSION

108. Probate is covered under Title 2 of the Estates Code, guardianship is governed under Title 3 and definitions are in Title 1. Trusts are covered under Subtitles A-C of Title 9 of the Texas Property Code, which is a different set of books entirely. The Brunsting Trust is not an asset of any probate estate.

109. There was no administration of any core estate “pending” in the probate court on April 9, 2013 when ancillary action 412249-401 was filed. Therefore, ancillary action number 412249-401 was filed "ancillary" or "pendent" to nothing, and this court was without jurisdiction to take cognizance of those claims.

110. There was no administration of any core estate “pending” in the probate court on June 6, 2014 when the Order Accepting Remand of Candace Louise Curtis No. 4:12-cv-592 from the federal court to Probate Court No. 4 was entered and the remand was received by this court "ancillary" or "pendent" to nothing.

111. The District Court action was not filed by a proper party plaintiff (real party in interest) and there was no administration of the estates “pending” in the probate





court on April 4, 2019 when this Court entered an Order to transfer the District Court case to the probate court.

112. This court could not exercise ancillary jurisdiction over the Brunsting trust because cause No. 412249-401 involving the Brunsting trust controversy is not incident to an estate,³¹ nor was an estate “pending” in the probate court when 412249-401 was filed.

113. This court cannot exercise its original jurisdiction over an inter vivos trust already in the custody of another court.

114. The Estates of Elmer and Nelva Brunsting are not the real party in interest to claims involving the trust administration and neither state court action was properly filed by a plaintiff with standing. If they were valid at the time filed, a competent co-trustee would have substituted for the interim Plaintiff long ago.

115. Defendants are not trustees and have performed no affirmative duties for the benefit of the other beneficiaries. Quite the contrary, Defendants have held the property of the other beneficiaries conditional on the other beneficiaries surrendering a portion of their property to pay for Defendants’ own transgressions. At the same time Defendants continued making in Terrorem threats based upon vague conclusory assertions.

116. This Court’s jurisdiction over the Brunsting Trust was not properly invoked and therefore this Court is without subject matter jurisdiction.

³¹ The remedial estate is incident to the trust as the trust is the sole devisee. The estate is not a beneficiary of the trust and neither are the attorneys.



117. The Estates of Elmer and Nelva Brunsting are closed and any action on the motion to appoint a personal representative is immediately appealable, Eastland v. Eastland 273 S.W.3d 815 (Tex. App. 2008) (Cited 22 times with 1 Legal Analyses).

Further, Plaintiff sayeth naught.

Candice Schwager

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ATTORNEY FOR
CANDACE LOUISE CURTIS



Steph A. Mendel



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to all known counsel of record and unrepresented parties in the manner required by the Rules on this Tuesday, November 19, 2019.

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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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 16

NO. 412,249-401

ESTATE OF

NELVA E. BRUNSTING,

DECEASED

CARL HENRY BRUNSTING, et al

v.

ANITA KAY BRUNSTING, et al

§
§
§
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§
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§
§
§
§
§

IN PROBATE COURT
NUMBER FOUR (4) OF
HARRIS COUNTY, TEXAS

ORDER GRANTING
AMY BRUNSTING'S MOTION FOR SECOND CONTEMPT
AND ADDITIONAL SANCTIONS

On the 12th day of December 2019, the Court considered Amy Brunsting's Motion for Second Contempt and Additional Sanctions (the "Motion") pertaining to the conduct of Candace Louise Curtis ("Curtis"). The Court also considered Curtis' response (if one) and entertained oral argument.

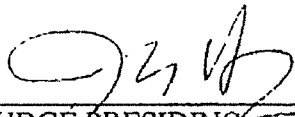
After considering the Motion, Curtis's Response (if one) and oral argument, the Court FINDS that it has jurisdiction of this proceeding; that the Motion has MERIT and is in all respects proper and sufficient; that Curtis was properly served and received proper notice of the proceeding; and that the Motion should be and is GRANTED. Therefore:

1. The Court FURTHER FINDS and ORDERS that Curtis is in CONTEMPT of the Order Regarding Amy Brunsting's Motion for Sanctions and/or Contempt of July 23, 2019 for the reasons presented in the Motion;
2. The Court FURTHER ORDERS, ADJUDGES and DECREES that as punishment for this second contempt, Candace Curtis is fined the sum of \$500.00, payable to Diane Trautman, Harris County Clerk, Indigent Bond Program, Registry No. 28190 at 201 Caroline St. 8th Floor, Room 800 on or before the 15th day of January, 2019, 2020 Houston TX 77002
3. ~~In light of the issues presented in the Motion and the Court's finding of a second contempt by Curtis, FURTHER ORDERS, ADJUDGES and DECREES that as~~

~~Further punishment for this contempt and/or as a sanction conferred in accordance with its own initiative and inherent power and/or under CPRC §9.012, CPRC §10.004 and/or TRCP 13, the Court strikes any and all affirmative claims for relief asserted by Curtis against any party in this matter, and dismisses all such claims. The affirmative claims to which this ruling applies include, but are not limited to the claims set forth in Curtis' live pleading – Plaintiffs' Second Amended Petition of January 27, 2015 (and/or any supplemented or subsequently amended version thereof).~~

4. ~~The Court, FURTHER ORDERS, ADJUDGES and DECREES that as further punishment for this contempt and/or as a sanction conferred in accordance with its own initiative and inherent power and/or under CPRC §9.012, CPRC §10.004 and/or TRCP 13, Curtis must pay to Amy Brunsting the sum of \$7,505.00 to Amy Brunsting in care of her attorneys – Griffin & Matthews – at 1155 Dairy Ashford, Suite 300, Houston, Texas 77079 on or before the _____ day of _____, 2019.~~

SIGNED ON THIS THE 12 DAY OF December, 2019.



JUDGE PRESIDING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 5th day of November 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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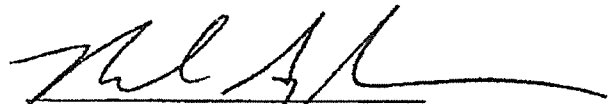
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NEAL E. SPIELMAN

Tab 17

ENTERED

September 30, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
and	§	
CARL BRUNSTING,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-0592
	§	
ANITA KAY BRUNSTING, AMY RUTH	§	
BRUNSTING and DOES 1-100, <i>et al</i> ,	§	
	§	
	§	
	§	
Defendants.	§	

ORDER

Before the Court is the plaintiff’s, Candace Louise Curtis, *ex parte* motion for relief pursuant to Federal Rules of Civil Procedure, Rule 60(b)(6) and (d)(3). It is the plaintiff’s position that the “judgment” to remand and/or close this case constituted an abuse of discretion and was clearly erroneous. *See Kennedy v. Texas Utilities*, 179 F.3d 258, 265 (5th Cir. 1999)(quotation omitted). The Court is of the opinion and holds that, while remand to the state court (Probate Court) was an incorrect method or mode for transmission, the order accomplished what was requested by the plaintiff [DE 109] and the Court now lacks jurisdiction.

The Court is also of the opinion that the plaintiff’s *ex parte* motion for relief was not timely filed because:

- a. the plaintiff had knowledge of (or a means to discover) the complained of activities in 2014, as those activities were occurring;
- b. the plaintiff had knowledge of (or a means to discover) the complained of activities throughout 2014 and 2015, while represented by counsel;

- c. the plaintiff had knowledge of the complained of activities in 2016; and did not pursue her claims for Rule 60 relief within a reasonable time;
- d. the complained of actions as described in the Ex Parte Motion for Relief, including this Court's May 2014 transfer/remand [Doc. 112], do not constitute a Fraud Upon the Court as the complained of actions do not reveal the existence of a "grave miscarriage of justice" and do not impact the integrity of the judicial process, and further have already been addressed in Civil Action No. 4:16-cv-01969 and determined to be frivolous, "fantastical" and "often nonsensical";
- e. the plaintiff's *ex parte* motion for relief is presented as a means of "forum hopping" her jurisdictional arguments, as previously addressed and denied in Probate Court Number Four of Harris County, Texas in Cause No. 412,249-401;
- f. the transfer/remand of the plaintiff's claims to Probate Court Number Four [Doc. 112] was within this Court's powers and authority, not only due to the plaintiff's inclusion of additional parties, but also to avoid the possibility of conflicting judgments; that the use of the term "remand" was synonymous with a general use of the word "transfer"; or, alternatively, constitutes harmless error as the same result could have occurred by other means, methods, procedures and mechanisms;
- g. this Court ceded jurisdiction of the plaintiff's claims and its Orders, including without limitation the Orders represented by Doc. 45 and Doc. 87, to Probate Court Number Four of Harris County, Texas; and
- h. the preliminary injunction issued by this Court [Doc. 45] is to be enforced in Probate Court Number Four of Harris County, Texas, as determined in the sole and absolute discretion of Probate Court Number Four of Harris County, Texas, and which determination may include modification or termination as determined in the sole and absolute discretion of Probate Court Number Four of Harris County, Texas. It is not a "final judgment" of this Court, and did not require or contemplate the distribution of trust income to beneficiaries prior to the final resolution of the disputes between the parties.

It is, therefore, ORDERED that the plaintiff's *ex parte* motion is Denied.

It is so Ordered.

SIGNED on this 23rd day of September, 2020.



Kenneth M. Hoyt
United States District Judge

Tab 18



Neutral

As of: September 25, 2023 2:44 PM Z

Curtis v. Brunsting

United States Court of Appeals for the Fifth Circuit

June 21, 2021. Filed

No. 20-20566 Summary Calendar

Reporter

860 Fed. Appx. 332 *; 2021 U.S. App. LEXIS 18417 **; 2021 WL 2550114

CANDACE LOUISE CURTIS, Plaintiff—Appellant, versus ANITA KAY BRUNSTING; AMY RUTH BRUNSTING, Defendants—Appellees.

LexisNexis® Headnotes

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [****1**] Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:12-CV-592.

Disposition: AFFIRMED.

Core Terms

district court, orders, amended complaint, requested relief, state court, pro se, consolidate

Case Summary

Overview

HOLDINGS: [1]-The district court did not abuse its discretion by denying plaintiff's request for relief under *Fed. R. Civ. P. 60(b)(6)* because her request for relief was not brought within a reasonable time as plaintiff had knowledge of (or a means to discover) the complained of activities as early as 2014 yet waited more than two years to request relief initially; [2]-The district court's denial of plaintiff's request for relief from the amendment and remand orders was not an abuse of discretion because plaintiff had not met her burden of proving fraud on the court, under *Rule 60(d)(3)*, as, although her counsel's post remand performance might not have been satisfactory to plaintiff, she had not shown that her prior counsel asked for the amendment and remand in an unconscionable plan to improperly influence the court in its decision.

Outcome

Judgment affirmed.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN1 Standards of Review, Abuse of Discretion

An appellate court reviews the district court's denial of a request for relief under *Fed. R. Civ. P. 60(b)(6)* and *Rule 60(d)(3)* for abuse of discretion.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment. Order or Proceeding > Newly Discovered Evidence

HN2 Grounds for Relief from Final Judgment, Order or Proceeding, Fraud, Misconduct & Misrepresentation

A *Fed. R. Civ. P. 60(d)(3)* motion is subject to the same standard of review as a *Rule 60(b)* motion.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Extraordinary Circumstances

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment. Order or Proceeding > Fraud, Misconduct & Misrepresentation

HN3 Grounds for Relief from Final Judgment, Order

or Proceeding, Extraordinary Circumstances

Fed. R. Civ. P. 60(b) lists several grounds upon which a final judgment, order, or proceeding may be set aside. Subsections one through five are specific, while subsection six is a general clause permitting relief for other valid grounds. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for any other reason that justifies relief. Fed. R. Civ. P. 60(b)(6). The U.S. Court of Appeals for the Fifth Circuit has consistently held that relief under Rule 60(b)(6) is mutually exclusive from relief available under subsections (1)-(5). This means that the reason for relief set forth in the other subsections of Rule 60(b) cannot be the basis for relief under Rule 60(b)(6). Accordingly, relief under this subsection is granted only if extraordinary circumstances are present and those circumstances are not covered by another Rule 60(b) ground. A Rule 60(b)(6) motion must be made within a reasonable time. Fed. R. Civ. P. 60(c)(1).

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

HN4 [📄] Grounds for Relief from Final Judgment, Order or Proceeding, Fraud, Misconduct & Misrepresentation

Claims of fraud are explicitly covered by Fed. R. Civ. P. 60(b)(3) and Rule 60(d)(3).

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Void Judgments

HN5 [📄] Grounds for Relief from Final Judgment, Order or Proceeding, Void Judgments

Fed. R. Civ. P. 60(b)(4) specifically provides for relief when a judgment is void.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

HN6 [📄] Grounds for Relief from Final Judgment, Order or Proceeding, Fraud, Misconduct & Misrepresentation

Fed. R. Civ. P. 60(d)(3) allows the court to set aside a judgment for fraud on the court. Fed. R. Civ. P. 60(d)(3). A

request for Rule 60(d)(3) relief is not subject to any time limitation. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court. It is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.

Counsel: Candace Louise Curtis, Plaintiff - Appellant, Pro se, American Canyon, CA.

For Anita Kay Brunsting, Defendant - Appellee: Stephen Anthony Mendel, Mendel Law Firm, L.P., Houston, TX .

For Amy Ruth Brunsting, Defendant - Appellee: Neal Evan Spielman, Griffin & Matthews, Houston, TX.

Judges: Before Wiener, Southwick, and Duncan, Circuit Judges.

Opinion

[*334] PER CURIAM:*

Candace Louise Curtis, acting *pro se*, appeals from the district court's denial of her motion for relief from two district court orders entered in May 2014. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, Curtis filed a *pro se* complaint in federal court against her sisters, Anita Kay Brunsting and Amy Ruth Brunsting, concerning their administration of the Brunsting Family Living Trust. The complaint sought damages, a temporary restraining order, and an injunction to protect trust assets. The district court dismissed the case *sua sponte* under the probate exception to diversity jurisdiction. A panel of this court reversed and remanded. See Curtis v. Brunsting, 704 F.3d 406 (5th Cir. 2013). Following remand, the district court entered a preliminary injunction requiring the trustees to [**2] provide an accounting of trust assets and to obtain court approval of transactions regarding trust assets, among other things.

In May 2013, still acting *pro se*, Curtis filed an amended complaint without leave of court. She also requested the involuntary joinder of her brother, Carl Brunsting, as a plaintiff. She sought to have the federal court order the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

joinder of Carl's related pending state-court action. The district court struck Curtis's amended complaint and denied the request for joinder of parties and claims. Later that year, the district court ordered Curtis to retain counsel.

After retaining counsel, Curtis filed two motions that led to the court orders from which she now seeks relief. In May 2014, on Curtis's behalf, her counsel filed a motion for leave to file an amended complaint. The amended complaint would add her brother, Carl, as a necessary party and involuntary co-plaintiff, even though doing so would destroy complete diversity. Expecting a lack of diversity, Curtis's counsel simultaneously filed a "motion to remand" the case to Texas's Harris County Probate Court Number Four so that the case could be consolidated with Carl's pending lawsuit in Texas state court. [*3]

On May 15, 2014, the district court granted leave to file the amended complaint. It also granted the purported motion to remand, reasoning that the lack of complete diversity and the need to avoid inconsistent judgments in related lawsuits warranted remand and consolidation. The Harris County Probate Court accepted the "remand," and later consolidated the lawsuits.

About two years later and after discharging her counsel, Curtis began a *pro se* effort to obtain relief from the orders and reinstate her federal case. On August 3, 2016, she filed a motion for relief based on Federal Rule of Civil Procedure 60(b)(3), 60(b)(6), and 60(d)(3). She argued that the defendants perpetrated a fraud on the court by agreeing to the remand and then refusing to honor the federal injunction and other orders of the federal district court. She also accused her former counsel of seeking remand "to obstruct justice in pursuit of attorney fees." In essence, she asked the district court to reinstate the federal case. The court took no action on the motion.

More than two years later, in March 2019, Curtis sought to have the defendants and their counsel held in contempt for violating the federal injunction. The district court held a telephonic hearing and entered an [*4] order denying Curtis's show-cause [*335] motion. The district court explained that it was "of the opinion that, having transferred the case to Harris County Probate Court, it no longer ha[d] jurisdiction of the case." Curtis did not appeal from that order.

On July 17, 2020, after hiring a new attorney, Curtis filed another motion seeking relief from the district court's 2014 amendment and remand orders, this time relying only on Rule 60(b)(6) and Rule 60(d)(3). In that motion, Curtis argued that her own prior counsel's conduct, including pursuing amendment and remand, constituted a fraud on the court. She

again asked the court to reinstate the federal case. Then, on August 28, 2020, Curtis filed an emergency motion to reopen the case.

The district court conducted a telephonic hearing and reopened the case for the limited purpose of considering Curtis's July 2020 motion for relief. The district court denied the motion for several reasons, including: (1) her request was untimely; (2) her prior counsel's conduct does not amount to a fraud on the court; (3) the transfer/remand was permissible; and (4) the district court ceded jurisdiction over the case to the Texas state court. This appeal followed.¹

DISCUSSION

HN1 [¶] We review [*5] the district court's denial of Curtis's request for relief under Rule 60(b)(6) and Rule 60(d)(3) for abuse of discretion. Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 871 (5th Cir. 1989).² We will separately address those two subsections of Rule 60.

I. Rule 60(b)(6)

HN3 [¶] Rule 60(b) lists several grounds upon which a "final judgment, order, or proceeding" may be set aside. Subsections one through five are specific, while subsection six is a general clause permitting relief for *other* valid grounds. Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir. 1990). "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "This Court has consistently held that relief under 60(b)(6) is mutually exclusive from relief available under [sub]sections (1)-(5)." Hesling v. CSX Transp., Inc., 396 F.3d 632, 643 (5th Cir. 2005). This means that "[t]he reason for relief set forth" in the other subsections of Rule 60(b) "cannot be the basis for relief under Rule 60(b)(6)." Hess v. Cockrell, 281 F.3d 212, 215 (5th Cir. 2002) (quotation marks and citation omitted). Accordingly, "[r]elief under this [sub]section is granted only if extraordinary

¹The attorney who represented Curtis in 2020 is no longer participating in this case, and Curtis is proceeding *pro se* in this appeal.

²HN2 [¶] A Rule 60(d)(3) motion is subject to the same standard of review as a Rule 60(b) motion. Haskett v. W. Land Servs., Inc., 761 F. App'x 293, 295 & n.1 (5th Cir. 2019). The "fraud on the court" provision was formerly under Rule 60(b), but a 2007 amendment to the Federal Rules of Civil Procedure moved the provision to Rule 60(d). The change was "stylistic only." Id. at 295 n.1 (quoting Fed. R. Civ. P. 60 advisory committee's notes to the 2007 amendment).

circumstances are present" and those circumstances are not covered by another Rule 60(b) ground. Hesling, 396 F.3d at 642 (citation omitted) (first alteration in original). A Rule 60(b)(6) motion must be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1).

Curtis's July 2020 motion alleged that "[t]he ground for this petition is fraud upon the court." [**6] The motion explained that "[t]he misconduct upon which this petition [**336] for relief is based is not merely an unconscionable plan preventing [Curtis] from fully and fairly litigating her case, but a willful and callous scheme designed to improperly influence the court in its decision." To the extent Curtis's current claim is of fraudulent conduct by the defendants, as her 2016 motion alleged, Rule 60(b)(6) is not a basis for relief because, as we discuss in the next section of this opinion, HN4 [¶] claims of fraud are explicitly covered by Rule 60(b)(3) and Rule 60(d)(3). See Hess, 281 F.3d at 215-16.

Curtis's July 2020 motion also contended that the district court's remand order is "void as a matter of law." Rule 60(b)(6) is not a basis for relief for that assertion because HN5 [¶] Rule 60(b)(4) specifically provides for relief when a judgment is void. See *id.*

All that is left is the conduct of Curtis's prior counsel. Regardless of the merits of the underlying claim, which we do not decide, the district court did not abuse its discretion in concluding that her request for relief was not brought within a reasonable time, as is required by Rule 60(c)(1). As the district court explained, Curtis "had knowledge of (or a means to discover) the complained[-]of activities" as early as 2014 yet waited more than [**7] two years to request relief initially.

The district court did not abuse its discretion by denying Curtis's request for relief under Rule 60(b)(6).

II. Rule 60(d)(3)

HN6 [¶] Curtis also seeks relief under Rule 60(d)(3), which allows the court to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). A request for Rule 60(d)(3) relief is "not subject to any time limitation." Rozier v. Ford Motor Co., 573 F.2d 1332, 1337-38 (5th Cir. 1978). "Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court." *Id.* at 1338 (citation omitted). "[I]t is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Id.* (citation

omitted).

Curtis's prior counsel sought to add Curtis's brother as a plaintiff and consolidate the two lawsuits in Texas state court. Curtis tried to accomplish almost the same thing one year earlier when acting *pro se*; in 2013, she filed an amended complaint, and then sought to add her brother as a coplaintiff and consolidate the two cases in federal court. Although her counsel's post "remand" performance might not have been satisfactory to Curtis, she has not shown that her prior counsel asked for [**8] the amendment and remand in an "unconscionable plan . . . to improperly influence the court in its decision." *Id.* The district court's denial of Curtis's request for relief from the amendment and remand orders was not an abuse of discretion.

* * *

It is true that in 2014, the district court should have dismissed without prejudice instead of ordering a remand to state court. Nevertheless, the court did exactly what Curtis's attorney requested. Further, the district court's amendment and remand orders resulted in further proceedings in state court, allowing the case to proceed in the same manner as would have occurred after a proper dismissal without prejudice.

Curtis has not met her burden of proving fraud on the court, and the court did not abuse its discretion by declining to vacate these orders for any other reason.

AFFIRMED.

End of Document

Tab 19

Teneshia Hudspeth



CAUSE NO. 412,249-404

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

ORDER DENYING CANDACE LOUISE CURTIS'
PETITION FOR BILL OF REVIEW

On February 14, 2019, the Court signed an Order Denying Candace Louise Curtis' Plea to the Jurisdiction filed October 19, 2018 and Candace Louis Curtis' Verified Plea in Abatement. Nine plus months later, on November 21, 2019 Candace Louise Curtis filed her Statutory Bill of Review complaining of the February 14, 2019 Order.

Having considered the Statutory Bill of Review filed by Candace Louise Curtis, the responsive pleadings and Brief in Response to her Bill of Review, the evidence if any, and the applicable law, the Court is of the opinion that the Bill of Review should be DENIED. It is therefore,

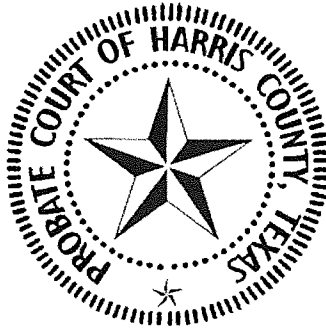
ORDERED that the Statutory Bill of Review filed by Candace Louis Curtis is DENIED. By this Order, the Court disposes of all claims, causes of action, and parties under Cause No. 412,249-404. This is a final judgment.

SIGNED this 3/2/2022 day of March, 2022.

Kathleen S. Stone

cc Presiding Judge





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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 20

ENTERED

May 03, 2022

Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CANDACE LOUISE CURTIS,

Plaintiff/Counterdefendant,

VS.

AMY RUTH BRUNSTING and ANITA
KAY BRUNSTING,

Defendants/Counterplaintiffs.

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CIVIL ACTION NO. H-22-1129

ORDER

Candace Curtis and Carl Brunsting sued their siblings, Anita Brunsting and Amy Brunsting, in state probate court, alleging misconduct related to the administration of a family trust. Anita and Amy Brunsting filed counterclaims, alleging that Candace Curtis and Carl Brunsting had forfeited their interests as beneficiaries of the trust. (Docket Entry No. 1, at 15). Anita and Amy Brunsting later dismissed their counterclaim against their brother, Carl, leaving only the counterclaim against their sister, Candace. (*Id.*, at 16).

The probate court granted summary judgment to Anita and Amy Brunsting finding that Candace Curtis had “forfeited her interest as a beneficiary of the Trust, by taking one or more actions in violation of the Trust.” The probate court ordered that Candace Curtis “take-nothing by way of her claims against Amy [and] Anita,” and ordered her to pay attorneys’ fees to Amy and Anita Brunsting “in an amount to be subsequently determined.” (*Id.*, at 17). Candace Curtis now seeks removal from the probate court for this court to determine the remaining issue of attorneys’ fees, arguing that the “full diversity of citizenship among the parties [was restored]” when the counterclaim against Carl Brunsting was dismissed. (*Id.*, at 18).

Removal is improper. Candace Curtis filed her claims against Anita and Amy Brunsting in state court. “[T]he well-established rule is that the plaintiff, who chose the forum, is bound by that choice, and may not remove the case.” *Scott v. Commc’ns Servs., Inc.*, 762 F. Supp. 147, 150 (S.D. Tex. 1991). And because federal removal jurisdiction is determined on the basis of the pleadings on file when the case is removed, subsequent events—such as an agreement not to prosecute claims against a nondiverse party—cannot create or “restore” this court’s jurisdiction.

This civil action is remanded to the Probate Court No. 4 of Harris County, Texas. The pending motions, (Docket Entries No. 7 and 9), are denied.

SIGNED on May 3, 2022, at Houston, Texas.

A handwritten signature in black ink, reading "Lee H. Rosenthal". The signature is written in a cursive style with a large, sweeping flourish at the end.

Lee H. Rosenthal
Chief United States District Judge

Tab 21

Opinion issued September 8, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-22-00514-CV

IN RE CANDACE LOUISE CURTIS, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

On July 11, 2022, relator, Candace Louise Curtis, filed a petition for a writ of mandamus challenging the following trial court orders: (1) a June 3, 2014 order granting relator’s “Motion to Enter Remand as a Transfer and Order Accepting the federal ‘remand’ as a Transfer,” (2) a February 14, 2019 order “denying [r]elator’s plea to the jurisdiction and pleas in abatement and declaring jurisdiction proper in the probate court,” (3) a February 25, 2022 order granting summary judgment in favor of real parties in interest, Amy Ruth Brunsting and Anita Kay Brunsting, in

their individual capacities and as the co-trustees of The Brunsting Family Living Trust, (4) a March 11, 2022 order of severance, and (5) a March 2, 2022 order denying relator’s “Statutory Bill of Review.”¹

We deny relator’s petition for writ of mandamus. Any pending motions are dismissed as moot.

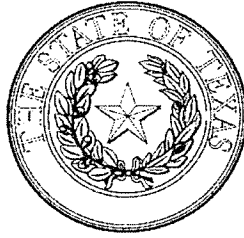
PER CURIAM

Panel consists of Justices Kelly, Rivas-Molloy, and Guerra.

¹ The underlying case is *Carl Henry Brunsting, individually and as independent executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting v. Anita Kay Brunsting, formerly known as Anita Kay Riley, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent’s Trust, the Nelva E. Brunsting Survivor’s Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust; Amy Ruth Brunsting, formerly known as Amy Ruth Tschirhart, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent’s Trust, the Nelva E. Brunsting Survivor’s Trust, the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust; Carole Ann Brunsting, individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, Candace Louise Curtis*, Cause No. 412249-401, in the Probate Court No. 4 of Harris County, Texas, the Honorable James Horwitz presiding.

Tab 22

Opinion issued February 14, 2023



In The
Court of Appeals
For The
First District of Texas

NO. 01-22-00378-CV

CANDACE LOUISE CURTIS, Appellant

V.

AMY RUTH BRUNSTING AND ANITA KAY BRUNSTING, Appellees

**On Appeal from Probate Court No. 4
Harris County, Texas
Trial Court Case No. 412249-401**

MEMORANDUM OPINION

Appellant, Candace Louise Curtis, filed a notice of appeal on May 18, 2022. On August 2, 2022, appellant filed a letter stating that she “knowingly and voluntarily withdraws her appeal” and she “desire[s] to withdraw her notice of appeal.” We construe appellant’s letter as a motion to dismiss the appeal.

No other party has filed a notice of appeal and no opinion has issued. *See* TEX. R. APP. P. 42.1(a)(1), (c). Appellant's motion does not include a certificate of conference stating that appellant conferred, or made a reasonable attempt to confer, with appellees, Amy Ruth Brunsting and Anita Kay Brunsting, regarding the relief requested in the motion. *See* TEX. R. APP. P. 10.1(a)(5). However, more than ten days have passed, and no party has expressed opposition to appellant's motion. *See* TEX. R. APP. P. 10.3(a)(2).

Accordingly, the Court grants appellant's motion and dismisses the appeal. *See* TEX. R. APP. P. 42.1(a)(1), 43.2(f). We dismiss any other pending motions as moot.

PER CURIAM

Panel consists of Justices Landau, Countiss, and Guerra.

Tab 23

Tab 23

Local Rules of the Probate Courts Of Harris County, Texas

2.4 Sub-File Numbers. All matters relating to an estate or guardianship administration shall have only the sequential docket number. All ancillary matters shall be assigned the original docket number plus a suffix commencing with 4. For example, the Estate of Mary Doe, Deceased, shall be assigned number 123,456. An ancillary matter shall be assigned cause number 123,456-401. The Clerk shall maintain separate files for each sub-file number concerned with the administration of the estate are "core matters" and should be filed under the main cause number:

2.5 Core Matters that belong in the principal file. Those matters that are principally concerned with the administration of the estate are "core matters" and should be filed under the main cause number:

* * *

2.5.1 Probate of wills, issuance of letters testamentary, administration and guardianship;

2.6. Ancillary Matters that belong in a different file with an ancillary or related case designation Those contested matters that bear no direct relationship to the administration of the estate and that would have the possibility of becoming an independently-tried lawsuit (each potentially with its own docket control and discovery schedules, etc.):

* * *

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

Tab 24

Tab 24

Texas Estates Code Jursidictional Provisions

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.
-

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.

Sec. 32.002. Original Jurisdiction for Probate Proceedings.

* * *

(c) In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings.

* * *

Sec. 32.005. Exclusive Jurisdiction of Probate Proceeding in County with Statutory Probate Court.

(a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court.

(b) This section shall be construed in conjunction and in harmony with Chapter 401 and Section 402.001 and all other sections of this title relating to independent executors, but may not be construed to expand the court's control over an independent executor.

* * *

Sec. 32.006. Jurisdiction of Statutory Probate Court with Respect to Trusts and Powers of Attorney.

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;
 - (3) an action by or against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
 - (4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.
-

Sec. 32.007. Concurrent Jurisdiction with District Court.

A statutory probate court has concurrent jurisdiction with the district court in:

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;

(2) an action by or against a trustee;

(3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by *Section 123.001, Property Code*;

(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;

(5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and

(6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Tab 25

Tab 25

Texas Property Code §§ 112.054 & 115.001

Texas Property Code § 112.054

§ 112.054 Judicial Modification, Reformation, or Termination of Trusts

(a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;

* * *

Texas Property Code § 115.001

§ 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:

* * *

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

(1) a statutory probate court;

* * *

Tab 26

[Signature]

County Clerk Harris County, Texas



PROBATE COURT #4

NO. 412.249

ESTATE OF	§	IN	PROBATE	COURT
NELVA E. BRUNSTING,	§	NUMBER	FOUR (4)	OF
DECEASED	§	HARRIS	COUNTY,	T E X A S

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. Nelva E. Brunsting ("Decedent") died on November 11, 2011, in Houston, Harris County, Texas, at the age of 85 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 to or adopted by Decedent after the date of the Will.
6. Decedent was never divorced.
7. The Independent Executor named in the Will is Elmer H. Brunsting, but he predeceased Decedent in 2009. 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.

082820121125110064



Shirley Howard

County Clerk Harris County, Texas



SIGNED this 28th day of August, 2012.

Drina Brunsting
DRINA BRUNSTING

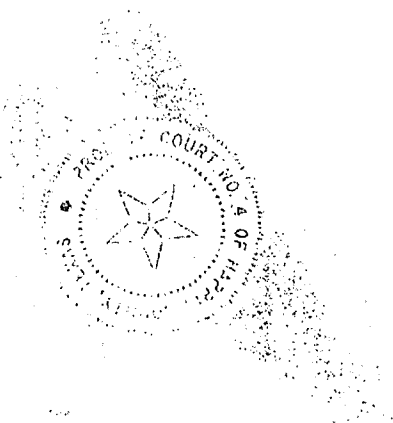
SUBSCRIBED AND SWORN TO BEFORE ME by DRINA BRUNSTING, this 28th day of August, 2012, to certify which, witness my hand and seal of office.

STAN STANART, County Clerk

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

By *Stan Stanart*
Deputy

08282012:135:PO050



FILED
2012 AUG 28 AM 10:09
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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



Tab 27

Teneshia Hudspeth



NO. 412,249-401

CARL HENRY BRUNSTING, et al	§	IN PROBATE COURT
v.	§	NUMBER FOUR (4) OF
ANITA KAY BRUNSTING, et al	§	HARRIS COUNTY, TEXAS

**ORDER DENYING
MOTION TO VACATE OR SET ASIDE FEBRUARY 25, 2022 ORDER**

Before the Court is Plaintiff Candace Louise Curtis's Motion to Vacate or Set Aside February 25, 2022 Order. After considering the Motion, the Response filed by Co-Trustees, Amy Brunsting and Anita Brunsting, the Court's file, and argument of counsel, the Court **FINDS** that Plaintiff Candace Louise Curtis's Motion to Vacate or Set Aside February 25, 2022 Order is **WITHOUT MERIT**. It is, therefore, **ORDERED** that:

Plaintiff Candace Louise Curtis's Motion to Vacate or Set Aside February 25, 2022 Order is **DENIED**.

SIGNED ON THIS THE _____ DAY OF _____, 2022.

Signed on: 04/19/2022
7:43:05 AM

JUDGE PRESIDING

cc





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 October 2, 2023

Teneshia Hudspeth, County Clerk
Harris County, Texas

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



2. My law firm and I have been involved in the litigation among the Brunsting siblings since November 14, 2014, and by virtue of that representation, I have personal knowledge of the federal and state court proceedings and the filings and rulings therein referenced in the briefs pending before this Court.

3. The Appellees' Appendix contains the instruments referenced below, each of which is a true and correct copy.

4. Tabs 23, 24, and 25 contain true and correct excerpts from the Local Rules of the Harris County Probate Courts (Tab 23), the Texas Estates Code (Tab 24), and/or the Texas Property Code (Tab 25), as the case may be.

5. Tabbed instruments are booked marked for the Court's convenience.

Appellees' Appendix Index

Tab 1 The Undisputed Procedural History of Curtis' Multiple Legal Filings.

Tab 2 *Curtis v. Brunsting*, 704 F.3d 406 (5th Cir. 2013).

Tab 3 C.A. No. 412,249-402; *In re Estate of Nelva E. Brunsting, Deceased*; Curtis' Notice of Injunction & Master's Report. (Note: the Master's Report, which was attached as Exhibit B was omitted for two reasons. First, the removal of Exhibit B reduced the page count for the Appellees' Appendix by forty-two (42) pages. Second, the Master's Report is not relevant to the issue of Probate Court No. 4's subject matter jurisdiction).

Tab 4 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 111, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion to amend her complaint, which destroyed the Court's diversity jurisdiction.

- Tab 5 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 112, Judge Hoyt's order dated May 15, 2014, granting Curtis' motion remand to C.A. no. 412,249, Probate Court No. 4.
- Tab 6 C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's Original Petition*. (Note: Curtis' original petition filed in the -402 case is the same as the petition filed in C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). The instrument is part of this Appendix to confirm that Curtis sought affirmative relief from Probate Court 4. However, the Appellees omitted the attachments to Curtis' original petition for two reasons. First, the removal of attachments to the original petition reduced the page count for the Appellees' Appendix by five hundred eighty-three (583) pages. Second, the attachments to the petition are not relevant to the issue of Probate Court No. 4's subject matter jurisdiction).
- Tab 7 C.A. No. 412,249-402; In re the Estate of Nelva E. Brunsting, Deceased; *Notice of Filing of Plaintiff's First Amended Petition*.
- Tab 8 C.A. No. 412,249; In re the Estate of Nelva E. Brunsting, Deceased; *Plaintiff's Second Amended Petition*.
- Tab 9 C.A. No. 412,249-402, Probate Court No. 4 agreed order of all parties (including Curtis) consolidating the -402 case into the -401.
- Tab 10 *Curtis v. Kunz-Freed*; 2017 U.S. Dist. LEXIS 220526, at *4, regarding C.A. 4:16-CV-01969; *Candace Louise Curtis & Rik Wayne Munson, Private Attorneys General Plaintiffs v. Candace Kunz-Freed, Et Al*; U.S. District Court, S.D. of Texas, Houston Division.
- Tab 11 *Curtis v. Kunz-Freed*, 726 Fed. Appx. 223, 2018 U.S. App. LEXIS 15317, 2018 WL 2750291.
- Tab 12 C.A. No. 412,249-401; Curtis' the Plea to the Jurisdiction as to Probate Court No. 4. (S.C.R. requested).

- Tab 13 *See* (C.R. 29-30); Probate Court No. 4's Order Denying Pleas & Motions Filed by Candace Curtis.
- Tab 14 C.A. No. 412,249-401; Probate Court No. 4's July 23, 2019 sanctions order #1 issued against Curtis.
- Tab 15 C.A. No. 412,249-404; Curtis' Statutory Bill of Review filed in Probate Court No. 4.
- Tab 16 C.A. No. 412,249-401; Probate Court No. 4's December 12, 2019 sanctions order #2 issued against Curtis.
- Tab 17 C.A. 4:12-CV-00592; *Candace Louise Curtis v. Anita Kay Brunsting, Et Al*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Kenneth M. Hoyt presiding). Docket Ref. 139, Judge Hoyt's order referenced Curtis' Federal Rule 60b Motion seeking *ex parte* relief, and which order denied same.
- Tab 18 *Curtis v. Brunsting*, 860 Fed. Appx. 332; 2021 U.S. App. LEXIS 18417; 2021 WL 2550114.
- Tab 19 C.A. No. 412,249-404; Order denying Curtis' Statutory Bill of Review.
- Tab 20 C.A. 4:22-CV-01129; *Candace Louise Curtis v. Amy Ruth Brunsting & Anita Kay Brunsting*; U.S. District Court, S.D. of Texas, Houston Division (Hon. Lee H. Rosenthal presiding). Docket Ref. 14, Order remanding the case back to Probate Court No. 4.
- Tab 21 C.A. No. 01-22-00514-CV; *Relator Candace Louise Curtis Petition for Writ of Mandamus*; Court of Appeals opinion denying mandamus.
- Tab 22 1ST Court of Appeals opinion that dismissed Curtis' first appeal under C.A. No. 01-22-00378-CV.
- Tab 23 Harris County Probate Court Local Rules:
L.R. 2.4 (Sub-File Nos.).
2.5 (Core Matters).
2.5.1 (Examples of Core Matters).

2.6 (Ancillary Matters in a separate file).
2.6.5 (Example of an Ancillary Matter).

Tab 24 Tex. Estates Code:

§ 31.001. Scope of “Probate Proceeding” for Purposes of Code.

§ 32.001. General Probate Court Jurisdiction; Appeals.

§ 32.002. Original Jurisdiction for Probate Proceedings.

§ 32.005. Exclusive Jurisdiction of Probate Proceeding in County with Statutory Probate Court.

§ 32.006. Jurisdiction of Statutory Probate Court with Respect to Trusts and Powers of Attorney.

§ 32.007. Concurrent Jurisdiction with District Court.


Tab 25 Tex. Prop. Code (Trust Code):

§ 112.054. Judicial Modification, Reformation, or Termination of Trusts.

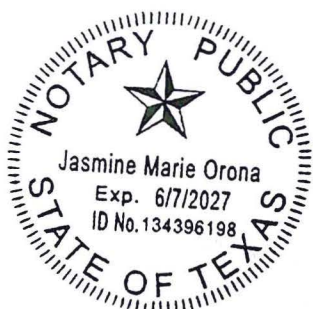
§ 115.001. Jurisdiction.

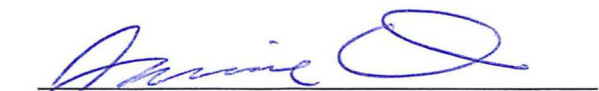
Tab 26 Proof of Death & Other Facts; C.A. No. 412,249; *Estate of Nelva E. Brunsting, Deceased*; Probate Court No. 4.

Tab 27 Probate Court No. 4 order that denied Curtis’ motion to vacate the summary judgment.


Stephen A. Mendel

SUBSCRIBED and SWORN before me, the undersigned Notary Public, by Stephen A. Mendel on this October 2, 2023, for the purposes and capacities set forth therein.




Notary Public In & For
The State of Texas