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Liability of the trustee for breach of trust, in the present case, is based upon bad faith, deliberate fraud, failure to account, failure to disclose, failure to perform fiduciary obligations and intentionally adverse acts performed with a reckless indifference toward the interest of the beneficiary, including but not limited to self-dealing, co-mingling, negligent loss of assets and gross mismanagement resulting in the payment of excess taxes.

*B.C. v. Steak N Shake Operations, Inc.*, 613 S.W.3d 338, 348 (Tex. App. 2020) (“[w]hen a complete absence of evidence is alleged, the reviewing court must include the entire record within its scope of review.").”)

2015-07-13 Case 412249-401 Curtis Response to No-evidence motion PBT-2015-227757.pdf

Here’s my plan. Call Anita to testify. If she is unavailable or unable to answer we call Amy and if Amy is unavailable or unable to answer we call fee expert Stephen Mendel who, as Anita’s counsel, claims entitlement to fees for - [Defending and enforcing “the trust”]

**“The Trust”** is comprised of the corpus [$], the instruments that define the obligations of the trustee [fiduciary] and the rights of the beneficiary [cestui que] in relation to the trust corpus or res. [contract of indenture]

The oath of fealty is sworn to before the Lord [Settlor] by one who accepts the trust [Trustee] and the oath sworn is to honor the intentions of the trust Settlor as it relates to safe keeping and the cestui que’s enjoyment of the trust property. The reason for creating this arrangement was to avoid the brutal death taxes demanded by the church and the crown in the ecclesiastical courts [probate]. The key was in the separation of legal and equitable title and that aspect continues today. Controversies over the remnants of the “estate” would be transferred to the Chancery. Probate was about authentication of instruments, identification of heirs and doing the math to extract the taxes and that was all.

In order get around the Feeoff’s King Henry campaigned for his (trust busting) statute of uses which was passed in 1535. This is where the line of inquisition begins.

*B.C. v. Steak N Shake Operations, Inc.*, 613 S.W.3d 338, 348 (Tex. App. 2020) (“[w]hen a complete absence of evidence is alleged, the reviewing court must include the entire record within its scope of review.").”)

Defendant co-trustees have the burden of bringing forth evidence to show they have performed the obligations of the office they claim to occupy. They can’t do that unless they can articulate the obligations and therein lies the tar pit.

1. To date, Anita Brunsting has refused to honor any of the obligations of the office she claims to occupy.
2. While malevolently refusing to honor the prohibitive and affirmative commands therein.
3. , Anita had assumed sole control over the assets before the passing of the last Settlor and
4. **Affidavit of Trust**

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1. Action for Contempt of Court,
2. Breach of Fiduciary Duties,
3. Fraud,
4. Conversion,
5. Verified Accounting and Enforcement of Trust
6. Article I[[1]](#footnote-1) identifies the beneficiaries and successor beneficiaries
7. Article III[[2]](#footnote-2) contains the provisions for altering or amending the family trust
8. Article IV[[3]](#footnote-3) identified the initial and successor trustees
9. Article VII[[4]](#footnote-4) dictates division of the assets into two separate shares at the passing of the first Settlor, a Decedents irrevocable share and a Survivors amendable and revocable share.
10. Article VIII[[5]](#footnote-5) controls administration of the Survivors trust share.
11. Article IX[[6]](#footnote-6) controls administration of the Decedent’s trust share.
12. Article X[[7]](#footnote-7) governs distribution of the trust assets in to five separate but equal shares at the passing of the last Settlor.
13. Article XI[[8]](#footnote-8) governs protection of beneficial interests
14. Article XII[[9]](#footnote-9) Defines the powers of the trustees and the limits placed upon the exercise of the powers granted.
15. Article XIII[[10]](#footnote-10) is the Article governing definitions and Article XIV[[11]](#footnote-11) governs miscellaneous matters.
16. Upon the April 2009 death of ELMER BRUNSTING, two trusts were created: with the property being divided into two shares: The Survivor’s and Decedent’s trusts, Restatement Article VII, Section B.
17. Article VIII Section D provides that the Survivor’s trust SHALL terminate at the Surviving Founder’s death and
18. Article IX Section D provides that the Decedent’s trust SHALL terminate at the Surviving Founder’s death.
19. Upon the surviving founder’s death, November 11, 2011, both trusts terminated and were required to be distributed in accordance with Article X, dividing all trust property by five and distributing 1/5 of the total assets to each beneficiary:
20. Article X Section B governs the distribution of CANDACE LOUISE CURTIS’ share and states that it shall be held in trust with the trustee distributing as much of the net income and principal of CURTIS’ personal asset trust which the trustee deems necessary for her health, education, maintenance and support—for her lifetime. CANDACE CURTIS’ right to the net income and principal of the trust is not alienable, voluntarily or involuntarily other than the execution of a testamentary power of appointment, valid living trust, or last will and testament—which is not at issue in this case.

Clearly the settlors made the BRUNSTING FAMILY LIVING TRUST and specifically, CANDACE CURTIS’ share—unalienable and not subject to creditors, including judgment creditors semi-annual accounting. As co-trustees for the Trust both defendants owe a fiduciary duty has.

Malicious, deliberate, arrogant and belligerent contempt

Disclosure vs Discovery vs Privilege

To answer these questions in the trustee beneficiary context, little more is needed than resort to the Restatement of the Law of Trusts 2nd

# Candace Curtis federal court claims are not probate claims

Candace Curtis sued Anita Brunsting, Amy Brunsting and Does 1-100 in the Southern District of Texas [ROA 219-247] alleging four civil torts (1) Breach of Fiduciary Obligations [ROA 222], (2) Extrinsic Fraud [ROA 223], (3) Constructive Fraud [ROA 224] and (4) Intentional Infliction of Emotional Distress [ROA 226].[[12]](#footnote-12) None of these causes qualify as a recognized "probate proceeding" pursuant to statutory definitions, Tex. Est. Code § 31.001, and none of these tort claims qualify as matters related to a probate proceeding as defined by Tex. Est. Code § 31.002(c).

# Carl Brunstings probate Court Claims are not probate claims

None of the rights asserted or remedies prayed for in Carl’s original petition have been prosecuted to a substantive determination: (1) Demand for trust accounting, (2) Breach of fiduciary duties (3) Conversion of trust property (4) Negligence (5) Tortious Interference with trust Inheritance (6) Constructive trust (7) Civil Conspiracy (8) Fraudulent Concealment and (9) injunctive relief to preserve trust assets, do not qualify as a recognized "probate proceeding" pursuant to statutory definitions, Tex. Est. Code § 31.001 and none of Carl Brunsting’s causes of action qualify as matters related to a probate proceeding as defined by Tex. Est. Code § 31.002(c).

## Stasis by Artifice

What is more disconcerting than the complete want of jurisdiction, is the duration of stasis. After more than ten years, none of the causes of action listed in Carl Brunsting’s original petition [ROA 5-24][[13]](#footnote-13) has obtained any substantive resolution at all. In fact, the beneficiary’s property is still being held hostage to the Co-Trustees demands for their attorney fees to be paid from the trust corpus, which means “paid for by the beneficiary”. They can coerce an agreement but they have no statutory basis for claiming they are entitled to fees from “the trust” beneficiary.

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

## An attorney is not entitled to recover fees for representing his own interests, rather than those of his client.

“'An attorney who attempts to represent adverse and conflicting interests, though he acts in good faith, forfeits his right to recover attorney's fees from a party whose interest he has not wholly represented.'” Golob v. Stone, 322 S.W.2d 560, 569 (Tex. Civ. App. 1959)

## Scienter

Rule of Professional Conduct 1.06 provides that "a lawyer shall not represent a person if the representation . . . reasonably appears to be or become adversely limited by . . . the lawyer's or law firm's own interests." *Id.* at 1.06(b)(2). Comment 1 to Rule 1.06 states, "Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." *Id.* at cmt. 1. Comment 5 states that "[t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client" and "a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." *Id.* at cmt. 5. *Easily v. State*, 248 S.W.3d 272, 289 (Tex. App. 2008)

TEX. DISCIPLINARY R. PROF'L. CONDUCT 3.03(a)(1), Prohibits a lawyer from making a false statement of material fact to a tribunal.

Rule of Professional Conduct 1.06 provides that "a lawyer shall not represent a person if the representation . . . reasonably appears to be or become adversely limited by . . . the lawyer's or law firm's own interests." *Id.* at 1.06(b)(2). Comment 1 to Rule 1.06 states, "Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." *Id.* at cmt. 1. Comment 5 states that "[t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client" and "a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." *Id.* at cmt. 5.

*Easily v. State*, 248 S.W.3d 272, 289 (Tex. App. 2008)

The Preliminary Injunction issued in the Southern District of Texas established that Anita’s *failure to act in accordance with the duties required by the Trust*, [ROA 263] is what caused the litigation to be brought and that Anita had failed to established separate trusts for each beneficiary, as required under the Trust, even though more than two years had expired since her appointment [ROA 262]. The reason for that is on record with the appointment of a Special Master [ROA 264-267]. Anita, as sole trustee, for more than two years, had failed to establish and maintain books and records and was unable to provide required trust accountings. Article XII Section E requires semi-annual accounting reports [ROA 156][[14]](#footnote-14)

Where litigation is caused by the trustee’s misconduct, the trustee is not entitled to recover attorney’s fees out of the trust. 76 AM.JUR.2D TRUSTS §673. See also Tindall v. State, 671S.W.2d 691, 693 (Tex. App.–San Antonio 1984,writ ref’d n.r.e.) If a beneficiary is successful in a suit to compel an accounting, the court may award all or part of the costs of court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.” TEX. TRUST CODE §113.151(a).

The Defendant Co-Trustee Appellees insistence upon misstating the Appellants causes as being all about their alleged QBD and their perpetual threats and in Terrorem claims, based upon this alleged QBD with its corruption of blood provisions [ROA 203], only shows that Anita caused litigation to be brought for the purpose of advancing a theory [ROA 31-34] that, if true, would enlarge her share, in direct violation of the No Contest Clause [ROA 143-144] in the 2005 Restatement.

According to the Restatement, the trust split into two separate shares at the passing of Elmer Brunsting, Article VII [ROA 112]. For convenience these shares are referred to as the Survivors trust and the Decedent’s trust. The Survivors trust share was to be administered pursuant to Article VIII and the Decedents trust share was to be administered pursuant to Article IX.

The Survivors trust share terminated at the passing of Nelva Brunsting, the last Settlor to pass, (Article VIII Section D) [ROA 121] and the Decedents trust share also terminated at the passing of Nelva Brunsting November 11, 2011, (Article IX Section D) [ROA 126].

There is no evidence that the Defendants Co-Trustees performed their obligation to distribute the assets of the trust into five separate shares [ROA 262] but abundant evidence that they never intended to.

Regardless of how those shares were to be managed, their failure to account, failure to distribute income, Interrorem threats and their motions for sanctions and to suppress judicially compelled fiduciary disclosures provides sufficient ground to conclude scienter.

## Death Penalty Sanctions

“When reviewing an order for sanctions, we examine the entire record to determine whether the trial court's sanctions were proper. See Am. Flood Research, Inc., v. Jones, [192 S.W.3d 581, 583](https://casetext.com/case/american-flood-research-inc-v-jones#p583) (Tex. 2006). ” Daniels v. Indemnity Ins., 345 S.W.3d 736, 741 (Tex. App. 2011)

Candace Curtis informa pauperis [affidavit](http://www.probatemafia.com/Brunsting/2022-02-21%20Candace%20Affidavit%20re%20sanctions.pdf) re sanctions has never been rebutted and counsel made it clear that she was appearing pro bono.

If Estates Codes 32.005, 32.006 and 32.007 provide statutory probate court jurisdiction, these will be the only estates code statutes in use. Everything else will be found in the civil practice and remedies code and the property code.

The Defendant Co-Trustees are in breach of trust. They have challenged the Settlors intentions and they are in wrongful possession of assets belonging to the other cestui que. Tex. Prop. Code § 112.052

Sec.A112.052.AATERMINATION. A trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. If an event of termination occurs, the trustee may continue to exercise the powers of the trustee for the reasonable period of time required to wind up the affairs of the trust and to make distribution of its assets to the appropriate beneficiaries. The continued exercise of the trustee’s powers after an event of termination does not affect the vested rights of beneficiaries of the trust.

Amended by Acts 1983, 68th Leg., p. 3332, ch. 567, art. 2, Sec. 2,

eff. Jan. 1, 1984

None of the Defendants/appellees “original counter claims” *[ROA 304-311]* qualify as a recognized "probate proceeding" as defined at Tex. Est. Code § 31.001, and none of these tort claims qualify as matters related to a probate proceeding as defined by Tex. Est. Code § 31.002(c). None of this could have any potential to produce a tangible effect on an estate administration even if one was pending.

The word "pending" does not describe a closed estate. "[T]he final distribution of an estate's assets after all debts and claims against the estate are paid results in the closing of the estate." 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.); see also Pugh v. Turner, 145 Tex. 292, 197 S.W.2d 822, 826 (1946); In re Hanau, 806 S.W.2d 900, 903 (Tex.App.-Corpus Christi 1991, orig. proceeding [leave denied]). Thus, an estate that is closed cannot simultaneously be considered pending because in order to close the estate, all debts, claims, and distributions must be settled and completed. Cf. Tex. Commerce Bank-Rio Grande Valley, N.A. v. Correa, 28 S.W.3d 723, 727 (Tex.App.-Corpus Christi 2000, pet. denied) (concluding estate in which administration was closed could not be considered "pending" probate proceeding)

## Probate is an action in rem.

Tex. Est. Code § 32.001

(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.

## Probate is a matter relating to a decedent's estate

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

## Trusts are matters of equity

Tex. Prop. Code § 115.001

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

**BURDEN OF PROOF AND BRINGING FORTH EVIDENCE**

A fiduciary “has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.” Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied)[[15]](#footnote-15). Additionally, when a plaintiff alleges self-dealing by the fiduciary as part of a breach-of-fiduciary-duty claim, a presumption of unfairness automatically arises, which the fiduciary bears the burden to rebut. See Houston v. Ludwick, No. 14-09-00600-CV, 2010 WL 4132215, at \*7 (Tex. App.— Houston [14th Dist.] Oct. 21, 2010, pet. denied) (mem. op.); Chappell, 37 S.W.3d at 22

## TRANSFERRING CASE FROM DISTRICT COURT IMPROPER

As explained below, [section 34.001](https://casetext.com/statute/texas-codes/estates-code/title-2-estates-of-decedents-durable-powers-of-attorney/subtitle-a-scope-jurisdiction-venue-and-courts/chapter-34-matters-relating-to-certain-other-types-of-proceedings/section-34001-transfer-to-statutory-probate-court-of-proceeding-related-to-probate-proceeding) allows a probate court to reach out and transfer to itself qualifying lawsuits pending in another court:

A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to the judge's court from a district, county, or statutory court a cause of action related to a probate proceeding pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.

Tex.Est.Code Ann. [§ 34.001(a)](https://casetext.com/statute/texas-codes/estates-code/title-2-estates-of-decedents-durable-powers-of-attorney/subtitle-a-scope-jurisdiction-venue-and-courts/chapter-34-matters-relating-to-certain-other-types-of-proceedings/section-34001-transfer-to-statutory-probate-court-of-proceeding-related-to-probate-proceeding). Aguilar v. Morales, 658 S.W.3d 702, 704 n.4 (Tex. App. 2022)

With no pending probate administration pending, in a cause of action related to the District Court action the District Court would have exclusive and original jurisdiction over this controversy.

Anita caused litigation by failing to account as required by the trust instruments, failing to disclose unprotected trust instruments as required under the common law and failing to disclose her self-dealing and co-mingling transactions [ROA 258-263]. Candace Curtis sued Anita Brunsting, Amy Brunsting and Does 1-100 in the Southern District of Texas [ROA 219-247] alleging four civil torts (1) Breach of Fiduciary Obligations [ROA 222], (2) Extrinsic Fraud [ROA 223], (3) Constructive Fraud [ROA 224] and (4) Intentional Infliction of Emotional Distress [ROA 226].

All four of these causes can be established by an examination of the record beginning with the preliminary Injunction [ROA 258-263] and concluding with the Report of Special Master,[[16]](#footnote-16) appointed due to Anita’s failure to produce an accounting for trust assets [ROA 264-267] and transactions. The preliminary injunction [ROA 258-263] in combination with the Report of Special Master [Case 4-12-cv-592 Doc 62] establish all three elements of Anita’s breach of fiduciary[[17]](#footnote-17) and her failure to account and failure to disclose established intrinsic and extrinsic fraud.[[18]](#footnote-18) The only thing remaining to be done after September 2013 was termination of the Nelva E. Brunsting Trust share and the Elmer H. Brunsting trust share and establish five new trust shares by dividing and distributing the assets. There is scienter in the willful intent to deceive constituting actual fraud, malice and bad faith. There nothing in the probate case record to suggest any of this qualifies as a recognized "probate proceeding" or as a matter “related to a probate proceeding”.

## Just Cause for Judicial Action: To compel specific performance

Where litigation is caused by the trustee’s misconduct, the trustee is not entitled to recover attorney’s fees out of the trust. 76 AM.JUR.2D TRUSTS §673. See also Tindall v. State, 671S.W.2d 691, 693 (Tex. App.–San Antonio 1984,writ ref’d n.r.e.) If a beneficiary is successful in a suit to compel an accounting, the court may award all or part of the costs of court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.” TEX. TRUST CODE §113.151(a).

* 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).”

## Extrinsic Fraud

* 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.”

# Jurisdiction

“It is well established law that jurisdiction cannot be created by waiver or by agreement.” *Gaddy v. State*, 433 S.W.3d 128, 142 (Tex. App. 2014) citing *Puente v. State,* [71 S.W.3d 340, 343](https://casetext.com/case/puente-v-state-8#p343) (Tex.Crim.App.2002); *Garcia v. Dial,* [596 S.W.2d 524, 527](https://casetext.com/case/garcia-v-dial#p527) (Tex.Crim.App.1980) (orig. proceeding).

“It is fundamental that jurisdiction cannot be conferred by agreement nor can lack of jurisdiction be waived. Duncan v. Tweedy, [582 S.W.2d 614](https://casetext.com/case/duncan-v-tweedy) (Tex.Civ.App.-Dallas 1979, no writ).” *Carroll v. Couch*, 624 S.W.2d 398, 399 (Tex. App. 1981)

“It is fundamental that jurisdiction cannot be conferred by agreement, nor can the lack of jurisdiction be waived. Scheetz v . Bader, [251 S.W.2d 427](https://casetext.com/case/scheetz-v-bader) (Tex.Civ.App.--Galveston 1952, writ ref'd). ” *Haase v. Greutzmacher*, 521 S.W.2d 666, 666 (Tex. Civ. App. 1975)

“Unlike jurisdiction, improper venue may be waived by failure to object or may be acquired by consent. *See Watson*, 601 S.W.2d at 351.” *Fain v. State*, 986 S.W.2d 666, 684 (Tex. App. 1999)

A court without jurisdiction may not act. 16 TEX.JUR.3d Courts § 32. A court must always assure itself that its jurisdiction is proper whenever and however its jurisdiction comes into question. Id. § 33. Jurisdictional questions must even be noticed by a court on its own motion. Id. Moreover, jurisdiction may not be conferred by agreement of the parties. Id. § 35.

Neither is it proper for a Texas court to render advisory or hypothetical opinions. California Products, Inc. v. Puretex Lemon Juice, Inc., [160 Tex. 586](https://casetext.com/case/california-products-inc-v-puretex-lemon-juice-inc), [334 S.W.2d 780](https://casetext.com/case/california-products-inc-v-puretex-lemon-juice-inc) (1960). Until our jurisdiction is established, we should not address the second motions now before us.

Wdsworth Bus-Willowbrook v. Connell, 775 S.W.2d 663, 669 (Tex. App. 1989)

Because jurisdiction is fundamental, a court of appeals is required, sua sponte, to determine whether it has jurisdiction. H.E. Butt Grocery Co. v. Bay, Inc.,[808 S.W.2d 678, 679](https://casetext.com/case/he-butt-grocery-v-bay-inc#p679) (Tex.App. — Corpus Christi 1991, writ denied); Zoning Board of Adjustment of the City of Lubbock v. Graham Assoc., Inc.,[664 S.W.2d 430, 433](https://casetext.com/case/zoning-bd-of-adj-v-graham-assoc#p433) (Tex.App. — Amarillo 1983, no writ). While the parties would like us to consider and rule on the points of error dealing with the construction of the "Unitized Formation" clause and, assuming we rule in Appellees' favor, remand the open liability questions for determination in the trial court, this we cannot do. Appellate jurisdiction cannot be created by the court or the litigants by consent, stipulation, or waiver. Welder v. Fritz,[750 S.W.2d 930, 932](https://casetext.com/case/welder-v-fritz#p932) (Tex.App. — Corpus Christi 1988, no writ).

Texaco Inc. v. Shouse, 877 S.W.2d 8, 11 (Tex. App. 1994)

“Texas courts considering [section 115.001(a)](https://casetext.com/statute/texas-codes/property-code/title-9-trusts/subtitle-b-texas-trust-code-creation-operation-and-termination-of-trusts/chapter-115-jurisdiction-venue-and-proceedings/subchapter-a-jurisdiction-and-venue/section-115001-jurisdiction) and its predecessor, Texas Trust Act article 7425b-24(A), have consistently held that those statutes provide the exclusive list of actions "concerning trusts" over which a district court has jurisdiction.” *Mobil Oil v. Shores*, 128 S.W.3d 718, 724 (Tex. App. 2004)

## Standing

If Carl is lacking in capacity he could not sue or be sued and required an attorney ad litem to bring suit.

# Statutory Probate Court

Wills, no further action

Local Rules 3 years

Texas Estates Code § 402.001, no further action

Interfere with independent administration

## Tex. Gov't Code § 25.0003 – Jurisdiction

(e) In a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction.

Tex. Gov't Code § 25.1031 (c) Harris County has the following statutory probate courts:

(1) Probate Court No. 1 of Harris County, Texas;

(2) Probate Court No. 2 of Harris County, Texas;

(3) Probate Court No. 3 of Harris County, Texas; and

(4) Probate Court No. 4 of Harris County, Texas.

## Tex. Gov't Code § 25.0022

**(a)** "Statutory probate court" has the meaning assigned by Chapter 22, Estates Code.

## Texas Estates Code § 22.007

(c) "Statutory probate court" means a court created by statute and designated as a statutory probate court under Chapter 25, Government Code. For purposes of this code, the term does not include a county court at law exercising probate jurisdiction unless the court is designated a statutory probate court under Chapter 25, Government Code.

Tex. Gov’t Code § 25.0021, confines the limited jurisdiction of a statutory probate court to include only four subjects: probate, guardianship, eminent domain and certain matters under the Health and Safety Code.

## Tex. Gov't Code § 25.0021 – Jurisdiction

**a)** If this section conflicts with a specific provision for a particular statutory probate court or county, the specific provision controls, except that this section controls over a specific provision for a particular court or county if the specific provision attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

**(b)** A statutory probate court as that term is defined in Section 22.007(c), Estates Code, has:

**(1)** the general jurisdiction of a probate court as provided by the Estates Code; and

**(2)** the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under:

**(A)** Section 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, or 714.003, Health and Safety Code;

**(B)** Chapter 462, Health and Safety Code; or

**(C)** Subtitle C or D, Title 7, Health and Safety Code.

Tex. Gov't Code § 25.1034 is an example of a specific provision designating Harris County Probate Courts Number 3 and 4 as having primary and secondary responsibility for mental illness proceedings.

Tex. Gov't Code § 25.1034 - Harris County Probate Court Provisions

**(b)** The Probate Court No. 3 of Harris County has primary responsibility for mental illness proceedings and for all administration related to mental illness proceedings, including budget preparation, staff management, and the adoption of administrative policy. The Probate Court No. 4 of Harris County has secondary responsibility for mental illness proceedings.

Sec. 32.005[[19]](#footnote-19) 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[[20]](#footnote-20) 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.

[**Former Probate Code § 5(e)]**

Sec. 32.007[[21]](#footnote-21). 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.

# A frequent recurrence to first principles

*Whorton v. State*, 69 Tex. Crim. 1, 19-20 (Tex. Crim. App. 1913)

"Although the counsel on both sides rely upon the rules of law as respectively presented by them, it is obvious that the great argument, whether expressly developed or not, by which those rules are sought to be discovered, interpreted and enforced, consists in an appeal to the sense of justice of the court. The opinion of the court in this case does not yield to the force of that appeal. Having written it, I avail myself of the opportunity afforded by this application, to present my own views upon the foundation and force of this appeal to the sense of justice of the court, whether used as an influencing consideration, in interpreting and enforcing the rules of law, or directly urged as the basis of judicial action. A frequent recurrence to first principles is absolutely necessary in order to keep precedents within the reason of the law. (Italics mine.)

"Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.

"Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

"The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract, as determined by any man, or set of men, whose duty it may have been to adjudge them.

"Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law. (Italics mine.)

"A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

"To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequence they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights. These views will, of course, be understood as relating to my own convictions of duty, and as being the basis of my own judicial action." (Italics mine.)

In thus stating the rules of law, drawing the distinction between abstract or substantial justice, if you please, no better statement has been made. If so it has not come under the observation of the writer, and the above quotation comes from the pen of the great Roberts. If he had not written anything else as an opinion than the above, or if his great mind had not thrown light upon any other page of judicial history, this quotation is enough to have immortalized his name and memory as a great judge. In these latter days, where the great principles and rules of law are sought to be diverted from their high office and position in the machinery of government, this language of Judge Roberts is peculiarly applicable. It is necessary to at least occasionally refer to the first principles of law, right and justice in order that the jurisprudence of our country may be kept pure and uncontaminated by strenuosity or other outside influences that seek to attack the citadel of liberty or bring about its fall. I do not know that anything could be added to what Judge Roberts said. I doubt if the precision, accuracy and strength of the proposition will ever be stated in finer language or in terser strength. It affords the writer pleasure occasionally to go back to first principles and see what the great fathers of our jurisprudence wrote and what they thought is meant by constitutional government in this country. This may be out of joint and harmony with the times, but it is right; and right, truth and justice in the end will prevail. I shall be content to agree with the great judges who have written along this line heretofore and let whatever of work, writing, and conviction of the right attributable to me in the judicial history of my country go hand in hand with the above quotation from Judge Roberts.

Whorton v. State, 69 Tex. Crim. 1, 19-20 (Tex. Crim. App. 1913)

# Pour-over, Independent administration and Anciallary Jurisdiction?

1. Is the pendency of a probate, guardianship, mental health, or eminent domain proceeding a prerequisite for a court's exercise of jurisdiction over related matters?

One must make frequent reference to first principles when interpreting statute as legal propositions are composed of nouns, verbs, adjectives and adverbs etc. in a subject-predicate syntax and are among the few sciences allowed to be explained in this way with the provisio that said terms must always issue in accordance with First Principles requiring universal application.

Contemporary English employs terms that are nouns, in one syntax, and verbs in another. Failure to maintain awareness of the distinctions reduces our Law to a muddle of nonsense. Trust is just such a term, being noun in one syntax and verb in another while also being the description of a relationship involving obligations of the trustee owed to the beneficiary in relation to the rights of the beneficiary in the thing held in trust, a.k.a. the corpus. This is equally true when answering the question of whether or not a pending probate proceeding is a prerequisite to a probate court's exercise of jurisdiction over related matters.

Q: Is the pendency of a probate, guardianship, mental health, or eminent domain proceeding a prerequisite for a court's exercise of jurisdiction over related matters?

**If it is not related to an ongoing proceeding, what would it be related to?** “Proceeding” means taking place, happening, ongoing, continuing, ensuing, continuing as planned.

# REMAND

A case may be remanded only to the court from which it was removed and the federal district court does not have the authority to remand a case originally brought in federal court. See First National Bank of Pulaski v. Curry, [301 F.3d 456, 467](https://casetext.com/case/first-nat-bank-of-pulaski-v-curry#p467) (6th Cir. 2002).

“Remand' means `send back.' It does not mean `send elsewhere.'” *Taliaferro v. Goodyear Tire*, 265 F. App'x 240, 244 (5th Cir. 2008)

## **Remand is void and Order accepting remand as a transfer is void**

## Remand, transfer or refile?

1. Can a cause of action in the federal court be remanded to a state court from which it had not been removed? NO
2. Can a cause of action in the federal court be transferred to a state court? NO
3. Can a state court transfer a federal action to itself? No
4. Mendel knew in 2015 that there was a problem with the federal remand but he didn’t file [his fee statement](http://www.probatemafia.com/Brunsting/2022-04-08%2002-12%20Exhibit%20q%20Anita%E2%80%99s%20(Mendel)%20attorney%20Fee%20Disclosure.highlight.pdf) in the probate court, he filed it in the Southern District of Texas. He uses his disingenuous cover page in effort to give the illusion that Candace sued her sibling in the probate court when Candace only filed two lawsuits and those were both filed in the Southern District of Texas. ([1](http://www.probatemafia.com/Brunsting/2012-02-27%20Case%20412-cv-592%20Curtis%20Original%20Federal%20Complaint.pdf)), ([2](http://www.probatemafia.com/Brunsting/2016-07-05%20Case%204-16-cv-01969%20Harris%20County%20RICO_Complaint%20Doc%201.pdf)) and yet, after the honest services fraud case was dismissed, every word out of Mendel’s mouth was “VEXATIOUS”.

# Consolidation?

# Counter Claims?

# Ransom Demands are Not Confidential Communications

## Crime Fraud Exception

* Henderson v. State, 962 S.W.2d 544, 552-53 (Tex. Crim. App. 1998)

(“One federal court has indicated that a communication is covered by the crime-fraud exception if it merely "reflect[s] an ongoing or future unlawful or illegal scheme or activity." X Corp. v. Doe, 805 F. Supp. 1298, 1307 (E.D.Va. 1992), affirmed, 17 F.3d 1435 (4th Cir. 1994). Whatever persuasive value this district court opinion has, such value is seriously undercut by the fact that the federal system has no formulated counterpart to the Texas attorney-client privilege rule; federal privilege doctrine is derived solely from common law. See Fed. R. Ev. 501. Moreover, the weight of authority addressing the issue appears to favor the contrary position. The D.C. and Second Circuits have held that the crime-fraud exception requires that the communications be in furtherance of criminal activity rather than merely "related" to it. U.S. v. White, 887 F.2d 267, 271 (D.C. Cir. 1989); In Re Richard Roe, Inc., 68 F.3d 38, 40 (2nd Cir. 1995) . Several other states addressing the issue have held that the client must seek the attorney's advice or assistance in furtherance of his criminal conduct for the crime-fraud exception to apply. Purcell v. Dist. Atty. for Suffolk Dist., 424 Mass. 109, 676 N.E.2d 436, 440-441 (1997); Kleinfeld v. State, 568 So.2d 937, 939-940 (Fla.App. 4 Dist. 1990); In the Matter of Nackson, 114 N.J. 527, 555 A.2d 1101, 1105-1106 (1989). See also Robert P. Mosteller, Child Abuse Reporting Laws and Attorney Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 DUKE L.J. 203, 246 (1992). Based upon the above discussion, we cannot conclude that the crime-fraud exception can be satisfied by the mere pendency of ongoing criminal activity or the mere threat of future activity. The attorney's services must be sought or used to further the activity in question. ”)

## Misapplication of Fiduciary Property

* Misapplication of fiduciary property by Anita Brunsting

Now, if you find from the evidence beyond a reasonable doubt that Anita Brunsting, in Harris County, Texas, on or about and between November 14, 2014 and July 3, 2023, did then and there intentionally, knowingly or recklessly misapply property, to wit: United States Currency, checks or money, of the value of more than $300,000, that Anita Brunsting held as a fiduciary, in a manner that involved substantial risk of loss to . . . the owners of said property, and the persons for whose benefit the property was held, by dealing with said property contrary to the agreement under which the defendant held the property, to wit: by withdrawing various amounts of money on numerous occasions during said period of time from the said trust and from other financial accounts belonging to said owners, for professional and fiduciary services that were not rendered or were of little or no benefit to the said owners, and at a rate of compensation that exceeded the amount clearly stated in the trust agreement, and that was clearly unreasonable for the services rendered;

And you further find that the Defendant, Stephen Anthony Mendel, in Harris County, Texas, on or about and between November 14, 2014 and July 3, 2023, with the intent to promote, aid or assist the commission of the misapplication of fiduciary property by Anita Brunsting, did then and there promote, aid or assist the said Anita Brunsting in the commission of misapplication of fiduciary property, then you will find the defendant "Guilty" as a party to the offense of Misapplication of Fiduciary Property as alleged in the indictment.

# No Contest Clause

1. Can a no contest clause be used to prevent a trust beneficiary from bringing a judicial action to compel the trustee to perform their fiduciary obligations?
2. Can a no contest clause be used to prevent a trust beneficiary from bringing a judicial action to compel the trustee to account for trust assets?
3. Can a no contest clause be used to prevent a trust beneficiary from bringing a judicial action to compel the trustee to disclose information affecting the beneficiary’s rights in trust property?
4. Can a no contest clause be used to prevent a trust beneficiary from bringing a judicial action to redress misapplication of fiduciary property?
5. Can a no contest clause be used to prevent a trust beneficiary from bringing a judicial action to determine the validity of changes made to an irrevocable trust?

# An AB living trust that has become irrevocable by its own terms cannot be altered or amended by the settlor

Can the remaining settlor of an AB living trust that has become irrevocable by its own terms, possess a testamentary power to alter or amended at death what they could not amend during their life time? This is the recipe for a bait and switch. The notion that a “Surviving Settlor” would have a testamentary power to revoke an irrevocable living trust is a contradiction already settled by the legislature.

*Texas Trust Code Sec.112.051 REVOCATION, MODIFICATION, OR AMENDMENT BY SETTLOR. (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it*.

# A frequent recurrence to first principles

"Although the counsel on both sides rely upon the rules of law as respectively presented by them, it is obvious that the great argument, whether expressly developed or not, by which those rules are sought to be discovered, interpreted and enforced, consists in an appeal to the sense of justice of the court. The opinion of the court in this case does not yield to the force of that appeal. Having written it, I avail myself of the opportunity afforded by this application, to present my own views upon the foundation and force of this appeal to the sense of justice of the court, whether used as an influencing consideration, in interpreting and enforcing the rules of law, or directly urged as the basis of judicial action. *A frequent recurrence to first principles is absolutely necessary in order to keep precedents within the reason of the law.* (Italics mine.)

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"Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

"The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract, as determined by any man, or set of men, whose duty it may have been to adjudge them.

*"Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.* (Italics mine.)

"A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

*"To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequence they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights. These views will, of course, be understood as relating to my own convictions of duty, and as being the basis of my own judicial action."* (Italics mine.)

In thus stating the rules of law, drawing the distinction between abstract or substantial justice, if you please, no better statement has been made. If so it has not come under the observation of the writer, and the above quotation comes from the pen of the great Roberts. If he had not written anything else as an opinion than the above, or if his great mind had not thrown light upon any other page of judicial history, this quotation is enough to have immortalized his name and memory as a great judge. In these latter days, where the great principles and rules of law are sought to be diverted from their high office and position in the machinery of government, this language of Judge Roberts is peculiarly applicable. It is necessary to at least occasionally refer to the first principles of law, right and justice in order that the jurisprudence of our country may be kept pure and uncontaminated by strenuosity or other outside influences that seek to attack the citadel of liberty or bring about its fall. I do not know that anything could be added to what Judge Roberts said. I doubt if the precision, accuracy and strength of the proposition will ever be stated in finer language or in terser strength. It affords the writer pleasure occasionally to go back to first principles and see what the great fathers of our jurisprudence wrote and what they thought is meant by constitutional government in this country. This may be out of joint and harmony with the times, but it is right; and right, truth and justice in the end will prevail. I shall be content to agree with the great judges who have written along this line heretofore and let whatever of work, writing, and conviction of the right attributable to me in the judicial history of my country go hand in hand with the above quotation from Judge Roberts.

*Whorton v. State*, 69 Tex. Crim. 1, 19-20 (Tex. Crim. App. 1913)

# Statutory Construction

## Statues must be read in para materia

II. Standard of Review

Statutory construction is a legal question we review de novo. In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute. See State, Texas Parks and Wildlife Dept. v. Shumake, [199 S.W.3d 279, 284](https://casetext.com/case/state-v-shumake-3#p284) (Tex. 2006). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired. [TEX. GOV'T CODE § 311.011(b)](https://casetext.com/statute/texas-codes/government-code/title-3-legislative-branch/subtitle-b-legislation/chapter-311-code-construction-act/subchapter-b-construction-of-words-and-phrases/section-311011-common-and-technical-usage-of-words). Otherwise, we construe the statute's words according to their plain and common meaning, Texas Department of Transportation v. City of Sunset Valley, [146 S.W.3d 637, 642](https://casetext.com/case/tx-dept-of-transp-v-city-of-sunset-valley#p642) (Tex. 2004), unless a contrary intention is apparent from the context, Taylor v. Firemen's and Policemen's Civil Service Commission of City of Lubbock, [616 S.W.2d 187, 189](https://casetext.com/case/taylor-v-fmns-plns-cvl-serv-comm-lubbock#p189) (Tex. 1981), or unless such a construction leads to absurd results. Univ. of Tex. S.W. Med. Ctr. v. Loutzenhiser, [140 S.W.3d 351, 356](https://casetext.com/case/u-of-texas-sw-medical-ctr-v-loutzenhiser#p356) (Tex. 2004); see also Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc., [145 S.W.3d 170, 177](https://casetext.com/case/texas-prot-reg-serv-v-mega-child-care#p177) (Tex. 2004) (noting that when statutory text is unambiguous, courts must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results). We presume the Legislature intended a just and reasonable result by enacting the statute. [TEX. GOV'T CODE § 311.021(3)](https://casetext.com/statute/texas-codes/government-code/title-3-legislative-branch/subtitle-b-legislation/chapter-311-code-construction-act/subchapter-c-construction-of-statutes/section-311021-intention-in-enactment-of-statutes). When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language. See St. Luke's Episcopal Hosp. v. Agbor, [952 S.W.2d 503, 505](https://casetext.com/case/st-lukes-episcopal-hosp-v-agbor#p505) (Tex. 1997); Ex parte Roloff, [510 S.W.2d 913, 915](https://casetext.com/case/ex-parte-roloff#p915) (Tex. 1974).

### Expressio unius

The legal maxim Expressio unius est exclusio alterius is an accepted rule of statutory construction in this state. In State v. Mauritz-Wells Co. [141 Tex. 634](https://casetext.com/case/state-v-mauritz-wells-co), [175 S.W.2d 238](https://casetext.com/case/state-v-mauritz-wells-co) (1943), this court held that "it is a settled rule that the express mention or enumeration of one person, thing, consequence or class is equivalent to an express exclusion of all others." [175 S.W.2d at 241](https://casetext.com/case/state-v-mauritz-wells-co#p241). Similarly, as was recognized in Bryan v. Sundberg, 5 Tex. 418, 422-23 (1849):

"[W]hen the Legislature have undertaken to enumerate what shall be received, the enumeration must, we think, be taken to include all that was intended, and consequently to exclude all that is not included in the enumeration . . . . 'And where a statute limits a thing to be done in a particular form it includes in itself a negative, viz, that it shall not be done otherwise.'"

Johnson v. Second Injury Fund, 688 S.W.2d 107, 108-09 (Tex. 1985)

### Context

We review issues of statutory interpretation de novo. See Loaisiga v. Cerda, [379 S.W.3d 248, 254–55](https://casetext.com/case/loaisiga-v-cerda-1#p254) (Tex.2012). Our primary objective when interpreting a statute is to give effect to the Legislature's intent. Molinet v. Kimbrell, [356 S.W.3d 407, 411](https://casetext.com/case/molinet-v-kimbrell#p411) (Tex.2011). We begin with the statute's text and the presumption that the Legislature intended what it enacted. Fresh Coat, Inc. v. K–2, Inc., [318 S.W.3d 893, 901](https://casetext.com/case/fresh-coat-inc-v-k-2-inc#p901) (Tex.2010). Legislative intent is best expressed by the plain meaning of the text unless the plain meaning leads to absurd results or a different meaning is supplied by legislative definition or is apparent from the context. Tex. Lottery Comm'n v. First State Bank of DeQueen, [325 S.W.3d 628, 635](https://casetext.com/case/lottery-comn-v-state-bank-of-dequeen#p635) (Tex.2010). When the text of the statute is clear and unambiguous, we apply the statute's words according to their plain and common meaning unless a contrary intention is apparent from the statute's context. Molinet, 356 S.W.3d at 411.

Proper statutory construction requires that statutory language be considered in context. See Franklin, 579 S.W.3d at 386 ; Wagner , 539 S.W.3d at 306.

Our primary objective when construing a statute is to ascertain and give effect to the legislature's intent. State v. Shumake, [199 S.W.3d 279, 284](https://casetext.com/case/state-v-shumake-3#p284) (Tex.2006). We seek that intent “first and foremost” in the statutory text. Lexington Ins. Co. v. Strayhorn, [209 S.W.3d 83, 85](https://casetext.com/case/lexington-ins-co-v-strayhorn#p85) (Tex.2006). Particularly important here is that we must consider the words in context, not in isolation. See Jaster v. Comet II Constr., Inc., [438 S.W.3d 556, 562–63](https://casetext.com/case/jaster-v-comet-ii-constr#p562) (Tex.2014); State v. Gonzalez, [82 S.W.3d 322, 327](https://casetext.com/case/state-v-gonzalez-7#p327) (Tex.2002); see also [Tex. Gov't Code Ann. § 311.011(a)](https://casetext.com/statute/texas-codes/government-code/title-3-legislative-branch/subtitle-b-legislation/chapter-311-code-construction-act/subchapter-b-construction-of-words-and-phrases/section-311011-common-and-technical-usage-of-words) (West 2013) (providing that words and phrases shall be read in context). Thus, in determining the meaning of a statute, a court must consider the entire act, its nature and object, and the consequences that would follow from each construction. Sharp v. House of Lloyd, Inc., [815 S.W.2d 245, 249](https://casetext.com/case/sharp-v-house-of-lloyd-inc#p249) (Tex.1991). A court should not assign a meaning to a statutory provision that would be inconsistent with other provisions of the same act, even though it might be susceptible to such a construction standing alone. See Tex. Dep't of Transp. v. Needham, [82 S.W.3d 314, 318](https://casetext.com/case/texas-dept-of-transp-v-needham#p318) (Tex.2002). Indeed, “[i]nterpretations of statutes which would produce absurd results are to be avoided.” Sharp, [815 S.W.2d at 249](https://casetext.com/case/sharp-v-house-of-lloyd-inc#p249). Accordingly, we begin our analysis with the statute's words and then consider the apparent meaning of those words within their context. Statutory construction presents a question of law that we review de novo. Shumake, [199 S.W.3d at 284](https://casetext.com/case/state-v-shumake-3#p284).

In re E.C., 444 S.W.3d 760 (Tex. App. 2014)

Tex. Gov't Code § 311.005

“**(13)** "Includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded. Tex. Gov't. Code § 311.005”

There is a split among the various courts of appeal holding opposing views such that if one is correct the other cannot be. The earlier case, *In re Hannah*, 431 S.W.3d 801 (Tex. App. May 13, 2014)[[22]](#footnote-22) was argued under the probate code. The opinion was issued shortly after the Estates Code became operative and the opinion references the estates code. The contrary line of cases begins with Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legac... 528 S.W.3d 201 (Tex. App. August 1, 2017).

1. Federal 5th Circuit holds Candace Curtis causes of action do not invoke probate exception
2. Independent administration of wills that Pour-over into living trust
3. Approved Inventory containing no property of any worth
4. Claims listed on the inventory are not “claims” within the meaning of the estates code
5. A Probate Proceeding is an action in rem
6. Tort claims are in personam
7. In order for an action to qualify as a matter related to a probate proceeding there must be a probate proceeding actually pending in the probate court
8. In order for a probate proceeding to actually pending in the probate court there must be an estate and the estate must be represented by a duly appointed representative

The word "pending" does not describe a closed estate. "[T]he final distribution of an estate's assets after all debts and claims against the estate are paid results in the closing of the estate." 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.); see also Pugh v. Turner, 145 Tex. 292, 197 S.W.2d 822, 826 (1946); In re Hanau, 806 S.W.2d 900, 903 (Tex.App.-Corpus Christi 1991, orig. proceeding [leave denied]). Thus, an estate that is closed cannot simultaneously be considered pending because in order to close the estate, all debts, claims, and distributions must be settled and completed. Cf. Tex. Commerce Bank-Rio Grande Valley, N.A. v. Correa, 28 S.W.3d 723, 727 (Tex.App.-Corpus Christi 2000, pet. denied) (concluding estate in which administration was closed could not be considered "pending" probate proceeding).

In re John G. Kenedy Memorial Found, 159 S.W.3d 133, 144 (Tex. App. 2004)

1. Counter claims are compulsory, Tex. R. Civ. P. 97(a), and waived when not brought with an original answer
2. In Terrorem is a shield for the purpose of protecting the Settlors intent, it is not a sword to facilitate fiduciary theft by preventing enforcement of the obligations of the trustee by the beneficiary
3. Attorneys holding the beneficiaries trust property hostage to ransom demands while making disinheritance threats is extortion, money laundering, misapplication of fiduciary property, exploitation of elderly and disabled beneficiaries, abuse of process, obstruction of justice and just plain heinous
4. Defendant Co-Trustees are either in breach of an active trust or wrongful possession of the assets of a passive trust.
5. Action filed in the probate court were for the express purpose of interfering with the jurisdiction of the federal courts
6. Due process requires an evidentiary hearing and a meaningful opportunity to be heard
7. Nolo Prosequi – No evidence of a bonafide intention to prosecute the tort claims filed in the probate court. See Local Rules

# Breach or Wrongful Possession?

1. Either (1) “the trust” contains specific affirmative duties that the trustees are required to perform for the benefit of the beneficiaries or, (2) “the trust” does not contain specific affirmative duties that the trustees are required to perform for the benefit of the beneficiaries. It is an either/or proposition. One answer is dispositive while the other leads to a series of IF/THEN propositions the answers to which the beneficiary does not have to guess.

IF “the trust” contains specific affirmative duties that the trustees are required to perform for the benefit of the beneficiaries THEN, what are the affirmative duties required of the trustees by the trust AND, Have those affirmative duties been performed or not?

1. If “the trust” does not contain specific affirmative duties that the trustees are required to perform for the benefit of the beneficiaries then it is a “passive trust” [[23]](#footnote-23) and both legal and equitable title to trust assets merged in the beneficiary, thus dissolving “the trust” relationship, at the passing of the second settlor.

If “the trust” does not contain specific affirmative duties that the trustees are required to perform for the benefit of the beneficiaries, have the trustees delivered or distributed the property to the legal and equitable title holders as required by law or are they in wrongful possession?

1. Either distributions of trust property made by the trustee while the second Settlor was still living were authorized by a specific section of the trust or they were not authorized distributions. (misapplication of fiduciary)
   1. Either there are specific sections of “the trust” that authorize each “gift” the trustee made or the distribution was unauthorized and a breach of trust.
2. Distributions labeled as “trustee compensation” were either, reasonable and necessary to the administration of the obligations of the trustee *to act for the sole benefit of the beneficiary* as detailed supra or the distributions were improper.
3. Either, accurate books and records of accounts listing income, expenses, distributions and outstanding obligations of the trust were assembled and maintained by Anita as sole trustee between 12/21/2010 and 4/09/2013 or they were not. As shown by the injunction and the Report of Special Master, books and records of accounts listing income, expenses, distributions and outstanding obligations of the trust were not assembled and maintained by Anita as sole trustee.
4. Candace Curtis made it clear, in her [October 15, 2021 Answer](http://www.probatemafia.com/Brunsting/Tab%2037%202021-10-15%20Plaintiff%20Candace%20Louise%20Curtis%20Answer%20to%20Defendants%20Counter%20Claims.pdf) to Defendants’ November 5, 2021 [Motion for Summary Judgment](http://www.probatemafia.com/Brunsting/Tab%2076%202021-11-05%20Co-Trustees'%20Motion%20for%20Summary%20Judgment.pdf), that she would not launder the attorneys extractions under a contract agreeing to call it fees for legal services when we already have a contract called “the trust” that we have been unable to enforce.

### Undermine Federal Jurisdiction

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. Royal Ins. Co. of America v. Quinn-L Cap. Corp., 3 F.3d 877, 886 (5th Cir. 1993)

A scheme designed to subvert the jurisdiction of a United States Court breeds disrespect for and threatens the integrity of our judicial system.

# Qui Bono?

Ten Years and a $1,000,000+ in Attorney Fees

Ten Years and a $1,000,000+ in Attorney Fees without so much as a declaratory judgment, or even a hearing to determine what instruments we are talking about when we say “the trust”**.**

Who could benefit from Bayless filing against the bait and switch estate planning attorneys in one court and the entire family of trust beneficiaries in another? (The vulnerable generational asset transfer locators sequestered in one theater and the money cow hostages in another)

At a deposition July 3, 2015, [[Tab 74](http://www.probatemafia.com/Brunsting/Tab%2074%202015-02-03%20Case%202013-05455%20BRUNSTING,%20CARL%20H.-1%20Deposition%20of%20Carl%20H.%20Brunsting.pdf), [p.77](http://www.probatemafia.com/Brunsting/Tab%2074%20Pages%2077-78%20from%202015-02-03%20Case%202013-05455%20BRUNSTING,%20CARL%20H.-1%20Deposition%20of%20Carl%20H.%20Brunsting.pdf) ln 16-25] Carl testified that he had already paid attorney Bayless a quarter of a million dollars. That was more than eight years ago and none of Carl’s claims have been resolved. First of all, Bayless does not have a client with standing in any court and after taking a quarter of a million dollars from her disabled client, Carl doersn’t even have a lawsuit.

All of the attorney ransom demands are made in mediation where it is confidential. They never filed their fee claims in the probate court even though Mendel and Speilman both declared themselves an expert witness on attorney fees. After they pulled their severance, non-suit, summary judgment, disinheritance game Candace filed notice of removal to the SDTX. [Mendel](http://www.probatemafia.com/Brunsting/2022-04-08%2002-12%20Exhibit%20q%20Anita%E2%80%99s%20(Mendel)%20attorney%20Fee%20Disclosure.pdf) and [Speilman](http://www.probatemafia.com/Brunsting/2022-04-08%2002-15%20Exhibit%20R%20Amy%E2%80%99s%20(Spielman)%20attorney%20fee%20disclosures.pdf) both filed their fee statements in that court.

* Mendel Law Firm [Case 4:22-cv-01129 Document 2-12](http://www.probatemafia.com/Brunsting/2022-04-08%2002-12%20Exhibit%20q%20Anita%E2%80%99s%20(Mendel)%20attorney%20Fee%20Disclosure.pdf) Filed on 04/08/22 in TXSD Page 10 of 56

“1/9/2015 BEF Reviewed correspondence re proposed deposition dates; reviewed file re injunction and problems with the federal court remand or case that was never removed, J. Ostrom nonsuit of injunctive relief, and trust barriers to such injunction.”

This is a very interesting entry from January 2015 recognizing a problem with the federal remand, proposing dates for depositions and noting a plan for attorney Ostrom to non-suit the federal injunction, undermining his client’s case even further. There are some extreme and absurd fee claims in this instrument.

## Carl’s incapacity and Agreement between Bayless, Mendel and Spielman to Avoid IME and Guardianship proceedings against Carl

* Spielman Case 4:22-cv-01129 Document 2-15 Filed on 04/08/22 in TXSD Page 17 of 52

5/19/2015 NES Follow-up telephone conference(s) with Anita's counsel regarding counsel's recent discussion with Anita, discussing plan to proceed with IME for Carl to assist in determination of whether guardian is needed for Carl, discuss pursuing summary judgment on "undue influence" issue, discuss status of proceedings for appointment of independent successor executor

5/29/2015 NES Review draft of proposed Motion for No Evidence Summary Judgment and prepare memorandum to Anita's counsel regarding possible edits to same; review memorandum from counsel regarding possible agreement from Carl's attorney regarding IME in lieu of Motion and hearing

They acted on this agreement in 2015 but did not make it public until December 5, 2021 when they filed their [Rule 11 Agreement](http://www.probatemafia.com/Brunsting/Certified%2018210428-%20C%23%204%20Rule%2011%20Agreement%202021-12-05.pdf) not to proceed with any controversy between them but to push for the settlement contract to launder their extorted ransom. Bayless, Mendel and Spielman never intended to proceed against each other. Everything they have done has prevented remedy and proves their actions were motivated by self-interest. Nothing they have done has been in the interests of their clients.

## Attorney Fee Demands

* 2014-12-05 Anita objection to Ostrom Motion for distribution. Co-trustees no fees pleading Page 1

1. Distributions to pay legal-fee creditors are not authorized by the trust and, therefore, the motions must be denied. · ·
2. Distributions to pay legal-fee creditors are prohibited by the trust and, therefore, the motions must be denied.

## Retainer Agreement

Defendant Co-Trustees have never disclosed their contract with counsel. Anita is not shown on Mendel’s billing statement to have paid Stephen Mendel anything. If Anita’s contract with Mendel states that his fees are to be paid from “the trust”, Anita and Mendel violated the preliminary injunction in entering into such an agreement without approval from a Court of competent jurisdiction.

## Anita’s Intimidation Tactics

2022-04-08 [Spielman’s fee entries](http://www.probatemafia.com/Brunsting/2022-04-08%2002-15%20Exhibit%20R%20Amy%E2%80%99s%20(Spielman)%20attorney%20fee%20disclosures.pdf) show Anita threatened Carl with a Guardianship action in order to coerce capitulation. This was the same [undue influence](http://www.probatemafia.com/Brunsting/2011-03-08%20Anita%20email%20-%20Mom%20listens%20to%20reason%20re%20signing%20papers.pdf), Anita and Freed [used against Nelva](http://www.probatemafia.com/Brunsting/2010-11-17%20Freed%20email%20re%20Nelva%20Competence%20-%20Capacity.pdf) when [Nelva discovered Anita’s treachery with Freed](http://www.probatemafia.com/Brunsting/2010-10-28%20Exhibit%20Carole%20email%20overhearing%20Nelva%20on%20phone%20with%20Freed.pdf). If Anita truly believed that Carl needed protection, she would have filed a motion rather than make threats to coerce capitulation from Drina.

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

Where litigation is caused by the trustee’s misconduct, the trustee is not entitled to recover attorney’s fees out of the trust. 76 AM.JUR.2D TRUSTS §673. See also Tindall v. State, 671S.W.2d 691, 693 (Tex. App.–San Antonio 1984,writ ref’d n.r.e.) If a beneficiary is successful in a suit to compel an accounting, the court may award all or part of the costs of court and all of the suing beneficiary’s reasonable and necessary attorney’s fees and costs against the trustee in the trustee’s individual capacity or in the trustee’s capacity as trustee.” TEX. TRUST CODE §113.151(a).

Mendel also states his [$537,000 ransom](http://www.probatemafia.com/Brunsting/2022-04-08%2002-12%20Exhibit%20q%20Anita%E2%80%99s%20(Mendel)%20attorney%20Fee%20Disclosure.pdf) does not include him having to defend himself in the RICO suit (**July 5, 2016 – June 28, 2018**) but he has fifteen pages of billing entries and there was [no activity in the probate court](http://www.probatemafia.com/Brunsting/Tab%2024%20Docket%20in%20412249-401%20Certified%202019-08-22.pdf) between July 5, 2016 and June 28, 2018. ([See page 11](http://www.probatemafia.com/Brunsting/Tab%2024%20Docket%20in%20412249-401%20Certified%202019-08-22(1).pdf))

## Standing

There are dual persona considerations raising separate questions of standing as to each and raising questions as to which persona we can attribute the acts, omissions, rights, claims and relief sought. Carl Brunsting Individually vs Carl Brunsting Independent Executor, and Defendant’s Anita Brunsting and Amy Brunsting as Co-Trustees vs Anita Brunsting and Amy Brunsting in their individual capacity as Trust Beneficiaries (a conflict of interests that requires a higher standard of fiduciary duty to the non-Co-Trustee beneficiaries)

# Fiduciary Obligations and Standards of Performance

* Murphy v. Canion, 797 S.W.2d 944, 948 (Tex. App. 1990)

“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the `disintegrating erosion' of particular exceptions. [Citation omitted] Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”

A trustee may not lend trust funds to himself or to an affiliate. [TEX.PROP.CODE ANN. Sec. 113.052(a)](https://casetext.com/statute/texas-codes/property-code/title-9-trusts/subtitle-b-texas-trust-code-creation-operation-and-termination-of-trusts/chapter-113-administration/subchapter-b-duties-of-trustee/section-113052-loan-of-trust-funds-to-trustee) (Vernon 1984). Nor may the trustee lend trust funds to the trustee's employer or to a director, officer or employee of the trustee. And, so long as a person acts as a trustee, that person has the obligations and duties of a fiduciary. Maykus, supra. See 4 A. Scott, Law of Trusts, Sec. 334, at 2644-48, (3rd Ed. 1967). See Smith v. Bolin, 153 Tex. 486, 271 S.W.2d 93 (1954). A trustee is definitely required to conduct himself, in his trustee affairs, with scrupulous good faith and fidelity when dealing with the interests of his beneficiary. It is equally imperative upon a trustee, in his dealings with the trust property, not to use the trust property, corpus or income in his own private business. The trustee must not make any incidental profits for himself, nor is he to acquire or obtain any pecuniary gain from his high, fiduciary position. This is true because the beneficiary is entitled to claim the advantages gained by the fiduciary relationship and to hold the trustee chargeable for losses occurring from the violation of the trustee's fiduciary duties. Pershing v. Henry, [236 S.W. 213](https://casetext.com/case/pershing-v-henry) (Tex.Civ.App. — Amarillo 1921) aff'd 255 S.W.2d 382 (Tex.Comm'n App. 1923, judgmt adopted).

### No Trustee Attorney Contracts

Defendants have failed to produce evidence of a contract with their respective counsel and would appear to seek to blend their individual personas as beneficiaries with the powers granted to trustees without regard for the obligations of trustees or the boundaries placed upon the exercise of the powers granted. Defendant Anita Brunsting and Defendant Amy Brunsting do not have the same rights and liabilities as Co-Trustee Defendant Anita Brunsting and Co-Trustee Defendant Amy Brunsting. These are four separate and distinct personas and if counsel represents both persona, we will need to see the contracts and segregated claims for fees for legal services to determine whether any portion can be attributed to trust administration.

### No Power of Attorney for Carl in the Record

There is nothing in the record showing that Drina Brunsting is in possession of a Durable Power of Attorney for her husband Carl, or when she may have acquired a Power of Attorney or how. If Carl is disabled, he cannot make legal decisions and cannot sue or be sued and in all such instances, Carl would require both a “Guardian Ad Litem” and an “Attorney Ad Litem”.

## Attorney Ad Litem

Tex. Est. Code § 1002.002

Current with legislation from the 2023 Regular Session effective as of June 7, 2023.

Section 1002.002 - Attorney Ad Litem

"Attorney ad litem" means an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, an unborn person, or another person described by Section 1054.007 in a guardianship proceeding.

Tex. Estates § 1002.002

Amended by Acts 2013, 83rd Leg. - Regular Session, ch. 982,Sec. 1, eff. 1/1/2014.Added by Acts 2011, 82nd Leg., R.S., Ch. 823, Sec. 1.02, eff. 1/1/2014.

## Guardian Ad Litem

A guardian ad litem is the personal representative of an individual subject to a disability who is appointed to protect the interests of the disabled person in any lawsuit where that individual is a party. 30 Tex.Jur.2d Infants Sec. 71 (1962). A guardian ad litem is recognized only for specific purposes, and his powers are limited to matters connected with the suit in which he is appointed. Wright v. Jones, 52 S.W.2d 247, 251 (Tex.Com.App. 1932, holding approved); American National Bank of Beaumont v. Biggs, [274 S.W.2d 209, 228-229](https://casetext.com/case/american-natl-bank-of-beaumont-v-biggs#p228) (Tex.Civ.App. Beaumont 1954, writ ref'd n.r.e.).

Recent rumor has it that Drina produced a POA dated February 12, 2015. Let’s recap:

* June 3, 2014 Order accepting transfer of the federal case was signed [ROA 274, & 302]
* February 3, 2015 Carl was deposed by Vacek & Freed in the District Court CAUSE NO. 2013-05455 164th Judicial District Court. (Audio & Video) JOB NO. 177755 US LEGAL SUPPORT 713-653-7100
* February 9, 2015 “estate of Nelva Brunsting No. 412249-402” was opened [ROA 29 para 2]
* February 12, 2015 Carl is alleged to have given Drina POA (Not in probate records)
* February 17, 2015 Carl files substitution of Drina [ROA 25-26]
* February 20, 2015 An Agreed Docket Control Order was signed [ROA 27-28]
* March 9, 2015 an agreed order to consolidate “*estate of Nelva Brunsting No. 412249-402*” with “*estate of Nelva Brunsting No. 412249-401*” was signed, closing the -402 file. [ROA 289]

### There is No Personal Representative for any estate

It is well-settled that the personal representative of the estate of a decedent is ordinarily the only person entitled to sue for the recovery of property belonging to the estate. Tex. Estates Code § 351.054(a) ("an executor or administrator may sue to recover property, debts, or damages."); *see also Shepherd v. Ledford* , 962 S.W.2d 28, 31 (Tex. 1998) ; *Frazier v. Wynn* , 472 S.W.2d 750, 752 (Tex. 1971) ; *Chandler v. Welborn* , 156 Tex. 312, 318, 294 S.W.2d 801, 806 (1956) ; *Ford Motor Co. v. Cammack* , 999 S.W.2d 1, 4 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

### Carl’s probate court claims are the same as those listed on the approved Inventory.

The sole devisee was not subject to possession and administration by the executor as the “estate” had no vested interest in property owned by the family trust and no tangible interest in the trust controversy, as was claimed in the inventory.

What was the remedy prayed for? (See In re Hannah) Everything is TRUST! There was never a property interest being sought on behalf of an estate! The inventory, appraisement and list of claims asserts that the listed claims may produce additional assets for the estate but this is a non-sequitur as all right, title and interest in the estate poured-over into the trust with the approval of the inventory and any actions involving the trust could not possibly enrich the estate.

The verified inventory approved by the probate court, lists all property belonging to the estate that has come into the possession of the independent executor and it contains only one item of property subject to an in rem proceeding, a 2000 Buick Lesabre with a high Kelley Blue Book value of $worthless. The other items listed are in personam claims bearing no relation to the in rem “estate” but relating entirely to the family trust (Sole Devisee) in which the trustees and beneficiaries are the real parties in interest.

There has never been an evidentiary hearing in the probate court and in ten years nothing has been produced except more than half a million dollars in extraction demands from the attorneys, demanding their fees be paid from “the trust” and they insist on laundering the ransom under a settlement contract that would label their graft as “fees for legal services”. It should also be noted that absolutely none of the affirmative commands to the trustee under the trust have been performed and excess taxes of more than $130,000 have been paid as a direct result of the Co-Trustees failure to distribute the income to the beneficiary’s.

The motions to appoint a successor to the independent executor are the equivalent of an admission that these claims were brought on behalf of an estate that no longer existed. The estate never had a property interest in the outcome. Thus, a "real and substantial controversy involving a genuine conflict of tangible interests" did not exist between Bayless, Mendel, Spielman and the Vacek Law Firm and the probate theatrics were merely hypothetical, a/k/a “staged”. These attorneys were not acting on behalf of their clients but in pursuit of their own interests at the expense of their duty to the court and to justice and at expense of their client and the other parties.[[24]](#footnote-24)

[In re Allen, 658 S.W.3d 772, 776](https://casetext.com/case/in-re-allen-6182148?tab=keyword&jxs=tx) (Tex. App. 2022) (“we conclude that the provisions of Chapter 361—which govern the resignation and appointment of "personal representatives"—are not the only relevant provisions when, as here, a testator has opted for an independent administration of his estate. In that situation, section 404.005(a) of the Code is the controlling provision in the Estates Code that gives a trial court the authority to appoint a successor independent administrator who is not named in the will.”)

Upon the filing of an application for the appointment of a guardian over a person or his estate and until the guardianship is settled and closed, the administration of the estate is considered "one proceeding for purposes of jurisdiction and is a proceeding in rem." TEX. PROB. CODE ANN. § 604 (Vernon 2003). Wood v. Dalhart, 259 S.W.3d 229 (Tex. App. 2008)

Wood v. Dalhart, 259 S.W.3d 229, 230 (Tex. App. 2008)

**In re Hannah** 431 S.W.3d 801 (Tex. App. 2014) Decided May 13, 2014 (14th Dist.) Houston

**In re Davidson** 485 S.W.3d 927 (Tex. App. 2016) Decided Apr 6, 2016 (12th Dist,) Tyler, Texas

**Narvaez v. Powell** 564 S.W.3d 49 (Tex. App. 2018) Decided Jul 13, 2018 (8th Dist.) El Paso

**Mortensen v. Villegas** 630 S.W.3d 355 (Tex. App. 2021) Decided Feb 1, 2021 (8th Dist.) El Paso

VS.

**Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.** 528 S.W.3d 201 (Tex. App. 2017) Decided Aug 1, 2017 (14th Dist.) Houston

## Persona

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

Carl Henry Brunsting in his individual capacity is a stranger to his rights or liabilities as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting.

Trust beneficiary Anita Brunsting is a stranger to Co-Trustee Anita Brunsting and trust beneficiary Amy Brunsting is a stranger to Co-Trustee Amy Brunsting. Defendant Anita Brunsting and defendant Amy Brunstings’ omissions and complete failure to perform the obligations mandated by Art XII Section E ***[ROA 156]***, Article VIII Section D ***[ROA 121]***, Article IX Section D ***[ROA 126]*** and Article X, ***[ROA 86-173]*** are breaches of the Defendant Co-Trustees fiduciary obligations. However, their acts of aggression towards the other beneficiaries were not the acts of loyal fiduciaries performing their obligations under the trust but the actions of beneficiaries, clothed under the label “Co-Trustee”, using in Terrorem as a sword to enlarge their share rather than as a shield to protect the Settlors intentions. The powers granted to trustees by the restatement foreclose any such conduct by a trustee. See Art XII B ***[ROA 147]***

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

All of Anita’s thefts were done as an individual, not in the capacity of trustee.

A trustee may not lend trust funds to himself or to an affiliate. [TEX.PROP.CODE ANN. Sec. 113.052(a)](https://casetext.com/statute/texas-codes/property-code/title-9-trusts/subtitle-b-texas-trust-code-creation-operation-and-termination-of-trusts/chapter-113-administration/subchapter-b-duties-of-trustee/section-113052-loan-of-trust-funds-to-trustee) (Vernon 1984). Nor may the trustee lend trust funds to the trustee's employer or to a director, officer or employee of the trustee. And, so long as a person acts as a trustee, that person has the obligations and duties of a fiduciary. Maykus, supra. See 4 A. Scott, Law of Trusts, Sec. 334, at 2644-48, (3rd Ed. 1967). See Smith v. Bolin, 153 Tex. 486, 271 S.W.2d 93 (1954). A trustee is definitely required to conduct himself, in his trustee affairs, with scrupulous good faith and fidelity when dealing with the interests of his beneficiary. It is equally imperative upon a trustee, in his dealings with the trust property, not to use the trust property, corpus or income in his own private business. The trustee must not make any incidental profits for himself, nor is he to acquire or obtain any pecuniary gain from his high, fiduciary position. This is true because the beneficiary is entitled to claim the advantages gained by the fiduciary relationship and to hold the trustee chargeable for losses occurring from the violation of the trustee's fiduciary duties. Pershing v. Henry, [236 S.W. 213](https://casetext.com/case/pershing-v-henry) (Tex.Civ.App. — Amarillo 1921) aff'd 255 S.W.2d 382 (Tex.Comm'n App. 1923, judgmt adopted).

## Self-Dealing Verboten

Provisions in an instrument creating the trust can relieve the trustee of certain duties, restrictions, responsibilities, and liabilities imposed on him by statute. Tex.Rev.Civ.Stat.Ann. art. 7425b-22 (Texas Trust Act). However, the language of a trust instrument cannot authorize self-dealing by a trustee, because that would be contrary to public policy. Langford v. Shamburger, [417 S.W.2d 438](https://casetext.com/case/langford-v-shamburger-1) (Tex.Civ.App.-Fort Worth 1967, writ ref'd n.r.e.). This limitation should include any situation in which a trustee used the position of trust to obtain an advantage by action inconsistent with the trustee's duties and detrimental to the trust. Neither can an exculpatory provision in the trust instrument be effective to relieve the trustee of liability for action taken in bad faith or for acting intentionally adverse or with reckless indifference to the interests of the beneficiary. Restatement (Second) of Trusts § 222 (1959).

(The cited provision is now contained in Tex.Prop. Code Ann. § 113.059 (Vernon 1984).)

Carl Henry Brunsting in his individual capacity is a stranger to his rights or liabilities as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting. What any of this has to do with administration of the “estate of Nelva Brunsting” remains a mystery? The lion’s shares of the remaining assets are in the Elmer H. Brunsting irrevocable trust and Carl’s April 9, 2013 petition ***[ROA 5-24]*** missed the four year statute of limitations for bringing claims on behalf of Elmer’s estate by eight days.[[25]](#footnote-25) There has never been a full, true and complete accounting performed and defendant Co-Trustees have never produced a balance sheet. See comments of Candice Schwager and Carole Brunsting at hearing on Carole Brunsting’s emergency motion for trust distribution.***[Reporters Record Vol 1 of 3]***

Anita and Amy as Co-Trustees vs Anita and Amy as Trust Beneficiaries (**conflict of interests**)

Nonetheless, being the only remaining Defendant Candace Curtis, a California resident, filed Notice of Removal on April 8, 2022 ***[ROA 363]***. In response Defendant Co-Trustees counsel filed opposition in the SDTX exhibiting fee account claims that were never filed in the probate court.[[26]](#footnote-26) [[27]](#footnote-27)

# Summary Judgment

II. Standard of Review

To be entitled to traditional summary judgment, a movant must establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c) ; Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding , 289 S.W.3d 844, 848 (Tex. 2009). Once the movant produces evidence entitling it to summary judgment, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact. Walker v. Harris , 924 S.W.2d 375, 377 (Tex. 1996).

A trial court's entry of summary judgment is subject to de novo review by an appellate court. Provident Life & Accident Ins. Co. v. Knott , 128 S.W.3d 211, 215 (Tex. 2003). In performing the required review, we deem as true all evidence which is favorable to the non-movant, indulge every reasonable inference to be drawn from the evidence, and resolve any doubts in the non-movant's favor. Valence Operating Co. v. Dorsett , 164 S.W.3d 656, 661 (Tex. 2005). "When the trial court does not specify the basis for its ruling, as is the case here, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious."See Merriman v. XTO Energy, Inc. , 407 S.W.3d 244, 248 (Tex. 2013). Lee v. Rogers Agency, 517 S.W.3d 137, 144 (Tex. App. 2016)

# Candy

Liability of the trustee for breach of trust in the present case is based upon self-dealing, bad faith, and intentionally adverse acts or reckless indifference toward the interest of the beneficiary.

# Active Trust

G. BOGERT G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 973, at 462-64 (2d ed. 1983). Similarly we question whether a settlor should be able to deprive any significant beneficiary of the statutory right to seek an accounting.

A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot force the trustee to any particular line of conduct with regard to the trust property or sue for breach of trust. The trustee may do as he likes with the property, and the beneficiary is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for a breach.

Id. § 973, at 467. The same considerations apply to a settlor's attempt to deprive some beneficiaries of an accounting while granting that right to others. We do not read Beaty v. Bales, [677 S.W.2d 750](https://casetext.com/case/beaty-v-bales) (Tex.App. — San Antonio 1984, writ ref'd n.r.e.), to hold otherwise. The court there did say, "In Texas, unless there are provisions under the terms of an express trust, the Texas Trust Act generally grants to the district court original jurisdiction to require an accounting by the trustee." Id. at 754. See TEX.TRUST CODE ANN. § 115.001 (Vernon 1984). But Beaty did not purport to hold that a settlor could deprive a court of the power to require an accounting, an issue that was not before the court. Hollenbeck v. Hanna, 802 S.W.2d 412 (Tex. App. 1991)

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Under well-settled law a trustee bears personal liability on her contracts unless she expressly stipulates to the contrary. E.g., Longhart Supply Co. v. Zweifel,[39 S.W.2d 959, 959](https://casetext.com/case/longhart-supply-co-v-zweifel#p959) (Tex.Civ.App. — El Paso 1931, no writ). This principle has been codified into statutory form: "The plaintiff may sue the trustee individually if the trustee made the contract and the contract does not exclude the trustee's personal liability." TEX.PROP.CODE ANN. § 114.084(a) (Vernon 1984). Nacol v. McNutt, 797 S.W.2d 153, 155 (Tex. App. 1990)

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# Dry Trust

It is well settled that one who desires to create an express, private trust must give his trustee affirmative powers and duties. In the absence of such powers and duties the trust is passive or dry, and legal title, not merely an equitable interest, passes to the cestui que trust. There is respectable authority that the duty of executing a deed to a named cestui que trust is not such a duty as will prevent title from vesting immediately. Bogert, Trusts and Trustees, 2d Ed., § 206. See Moore v. City of Waco, [85 Tex. 206](https://casetext.com/case/moore-v-city-of-waco), [20 S.W. 61](https://casetext.com/case/moore-v-city-of-waco) (1892); Brown v. Harris, [7 Tex. Civ. App. 664](https://casetext.com/case/brown-v-harris-19), [27 S.W. 45](https://casetext.com/case/brown-v-harris-19) (1894); Clark v. Wisdom, [403 S.W.2d 877](https://casetext.com/case/clark-v-wisdom) (Tex.Civ.App., Corpus Christi 1966). Bohn v. Bohn, 420 S.W.2d 165, 172 (Tex. Civ. App. 1967)

## Texas property Code

### Sec.A112.032.AAACTIVE AND PASSIVE TRUSTS; STATUTE OF USES.

(a) Except as provided by Subsection (b), title to real property held in trust vests directly in the beneficiary if the trustee has neither a power nor a duty related to the administration of the trust.

(b)The title of a trustee in real property is not divested if the trustee’s title is not merely nominal but is subject to a power or duty in relation to the property. Amended by Acts 1983, 68th Leg., p. 3332, ch. 567, art. 2, Sec. 2, eff. Jan. 1, 1984.

# Merger

"A trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject entrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party."

That definition applies to a testamentary trust. However, the definition adopted by the author is sufficiently comprehensive to embrace all manner of trusts, including not only express trusts but also implied trusts resulting trusts and constructive trusts, which seem to have been created by courts of equity after the doctrine of express trust had first obtained. The author defines a "trust" as "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence." And in section 24 the author states that implied, resulting, and constructive trusts are predicated upon a judicial presumption arising out of the language of an instrument or transaction of the parties or some fiduciary relation between them that a trust was intended by them. Id. §§ 25, 26, and 27. When there are three parties to an express trust, for example a testamentary trust, the cestui que trust takes no part in its creation, and the benefits he receives do not arise from a contract on his part, nor does he have any voice in the management of the estate by the trustee. Under such conditions, it is clear that he cannot be held liable personally for debts incurred by the trustee. For a like reason **the beneficiary of an implied trust, a resulting trust, or a constructive trust, is not personally liable for obligations incurred by the trustee**.

It is essential to the creation of an express trust that the legal and equitable titles be separated, and that the legal title be vested in the trustee and the equitable title in the cestui que trust; and the authorities all agree that, when both of these titles unite in the same person, the trust terminates. It is also true that the settlor in such a trust ordinarily cannot be a trustee also, although under some circumstances he may occupy the dual relation of settlor and beneficiary or cestui que trust”. *McCamey v. Hollister Oil Co.*, 241 S.W. 689, 695 (Tex. Civ. App. 1922)

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# PATTERN

The front end is an estate planning bait and switch that follows the “[How to Steal Your Family Inheritance](http://www.probatemafia.com/Brunsting/How%20to%20steal%20your%20family%20inheritance.pdf)” road map.

The back end is a money cow hostage ransom scheme where the suckers are held in stasis while the attorneys use illicit no-contest clause threats in effort to coerce a “settlement agreement” that would launder their ransom,

# RANSOM

Ransom: a consideration paid or demanded for the release of someone or something from captivity

Rhetoric: insincere or [grandiloquent](https://www.merriam-webster.com/dictionary/grandiloquence) language

“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’

’The question is,’ said Alice, ‘whether you can make words mean so many different things.’

’The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.”

― Lewis Carroll, Through the Looking Glass

## UNDUE INFLUENCE

# THE TRUST IS EITHER ACTIVE OR PASSIVE.

# TRUST ELEMENTS

# IN TERROREM

In terrorem clauses are to be strictly construed and forfeiture avoided if possible. In re Estate of Hamill, [866 S.W.2d 339, 342](https://casetext.com/case/estate-of-hamill-in-re#p342) (Tex. App.—Amarillo 1993, no pet.).

Here, Jane did not contest or attack the validity of the trust. She brought a declaratory judgment claim seeking the proper construction of the terms of the trust and a breach of fiduciary duty claim to determine whether Bill had administered the trust in accordance with those terms.

We do not construe the language of the in terrorem clause as prohibiting a beneficiary from instituting legal action against a trustee for breach of his fiduciary duties. "The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship." McLendon v. McLendon, [862 S.W.2d 662, 679](https://casetext.com/case/mclendon-v-mclendon-1#p679) (Tex. App.—Dallas 1993, writ denied). Nor do we construe the in terrorem clause as prohibiting a suit seeking to construe terms of the trust, because such a suit affirms the validity of the trust. See In re Estate of Hamill, [866 S.W.2d at 341](https://casetext.com/case/estate-of-hamill-in-re#p341) n.1 (in terrorem clauses typically make gifts conditional on the beneficiary not challenging the validity of the instrument).

*In terrorem 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 testator. See Di Portanova , 402 S.W.3d at 715 (citing Gunter v. Pogue , 672 S.W.2d 840, 842–43 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) ); Ferguson v. Ferguson , 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, pet. denied). If the intention of a suit is to thwart the testator's intention, the in terrorem clause should be enforced. See id. (citing Ferguson , 111 S.W.3d at 599.); see also Estate of Boylan , No. 02-14-00170-CV, 2015 WL 598531, at \*2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) ("Courts have enforced in terrorem clauses only when the intention of a suit is to thwart the grantor's intention"). We narrowly construe in terrorem clauses to avoid forfeiture, while also fulfilling the testator's intent. Di Portanova , 402 S.W.3d at 716 (citing McLendon v. McLendon , 862 S.W.2d 662, 678 (Tex*. App.—Dallas 1993, writ denied) ). [Odom v. Coleman](https://casetext.com/case/odom-v-coleman?jxs=tx&p=1&q=suing%20trustee%20does%20not%20trigger%20in%20Terrorem&sort=relevance&type=case&ssr=false&scrollTo=true&find=&resultsNav=false#p633) 615 S.W.3d 613 (Tex. App. 2020)

## Amy and Anita Brunsting’s Original Counter Claims

If the intention of a suit is to thwart the settlor's intention, the in terrorem clause should be enforced. Ferguson, 111 S.W.3d at 599. A violation of the in terrorem clause will be found only when the acts of the parties clearly fall within its express terms. In re Estate of Hamill, 866 S.W.2d 339, 342-13 (Tex.App.-Amarillo 1993, no writ). Thus, we narrowly construe in terrorem clauses to avoid forfeiture while also fulfilling the settlor's intent. McLendon v. McLendon, 862 S.W.2d 662, 678 (Tex.App.-Dallas 1993, writ denied). Lesikar v. Moon 237 S.W.3d 361 (Tex. App. 2007) Cited 62 times

*By statute, a forfeiture clause does not prevent a beneficiary from seeking redress against a fiduciary for breach of the fiduciary's duties. EST. § 254.005(b); see Lesikar v. Moon , 237 S.W.3d 361, 370–71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (A beneficiary has an inherent right to challenge the actions of a fiduciary, and he does not trigger a forfeiture clause by doing so.); McLendon v. McLendon , 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied) ("The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship.").* [Jurgens v. Martin](https://casetext.com/case/jurgens-v-martin?jxs=tx&p=1&q=suing%20trustee%20does%20not%20trigger%20in%20Terrorem&sort=relevance&type=case&ssr=false&scrollTo=true&find=&resultsNav=false#p399) 631 S.W.3d 385 (Tex. App. 2021) [Cited 8 times](https://casetext.com/case/jurgens-v-martin/how-cited?jxs=tx&p=1&q=suing%20trustee%20does%20not%20trigger%20in%20Terrorem&sort=relevance&type=case&ssr=false&scrollTo=true&find=&resultsNav=false)

ATTORNEY PARTICIPANTS

# Attorney Candace Kunz-Freed, Texas State Bar No. 24041282

(Vacek & Freed P.L.L.C.) Estate planning attorney’s Candace Kunz-Freed and Bernard Lyle Matthews III are the disloyal estate planning attorneys. Candace Kunz-Freed (Freed) worked very closely with Anita Brunsting [using each family crisis event to implement changes](http://www.rikmunson.com/wp-content/uploads/2022/06/2021-10-15-addendum.pdf) not authorized by the trust instrument after the trust had already became irrevocable by its own terms ([Article III](http://www.rikmunson.com/wp-content/uploads/2022/06/2005-01-06-P230-316-2005-Restatement-of-Trust.pdf)). Disciplinary Rules 1.06(a), (b)(2), (d), (e), (f) and comments 1, 2, 3, 4, 6, & 9

Attorney Candace Kunz-Freed testified at a deposition that she couldn’t pass the state board certification exam if she tried and yet, she still advertises “estate planning services” and “The Pursuit of Excellence”. (<http://www.freedlawyer.com>)

# Attorney Bernard Lyle Matthews III, Texas State Bar No. 13187450

When trust beneficiary and de jure trustee Candace Curtis filed breach of fiduciary claims in the [SDTX](http://www.rikmunson.com/wp-content/uploads/2022/06/Tabs-1-10.zip) Bernard Lyle Matthews III (Mathews) appeared on behalf of their new clients arguing the case fell within the probate exception. Mathews appeared using a Green and Mathew’s law firm label to conceal his conflict of interests. Disciplinary Rule 1.06 et seq.

# [Attorney Bobbie G. Bayless](https://www.baylessstokes.com/) Texas State Bar No. 01940600

### Divide and Conquer

After the federal 5th Circuit determined the Brunsting Trust Controversy to be outside the probate exception, Bayless filed professional Negligence Claims against V&F (1&2) in the Harris County District Court and then filed non-probate tort claims, involving all of the trust beneficiaries, in the probate court.

Attorney Bobbie G. Bayless (Bayless) representing Carl Brunsting (or his wife Drina) was the attorney that engaged in state court activities while Candace Curtis federal appeal was pending. That series begins with a petition to take depositions before suit, Harris County 80th Judicial District Court No. 2012-14538. After the 5th Circuit revered and remanded for further proceedings (Curtis v Brunsting 704 F.3d 406) and while the federal case was in transition between courts, Bayless filed malpractice claims against the estate planning law firm in Harris County 164th Judicial District Court No.2013-05455. The Vacek & Freed Defendants are represented by Thompson Coe attorneys Attorney Zandra E. Foley, State Bar No. 24032085 and Cory S Reed, Texas State Bar No. 24076640. Affiant will address their undisclosed conflict of interest in due course.

Upon return to the Southern District of Texas Candace Curtis obtained a preliminary injunction and, on that same day, Bayless filed non-probate related tort claims [[Tab 25](http://www.probatemafia.com/Brunsting/Tab%2025%20Carl's%20Original%20April%209,%202013%20Petition%20412249-401%20PBT-2013-115617_Certified.pdf)] in the probate court, (No. 412249-401) as ancillary to a closed estate, in an independent administration of a pour-over estate, after the inventory had been approved and the estate administration closed, in violation of Disciplinary Rules 3.01, 3.02, 3.03.

In short Bayless intentionally segregated the estate planning bait and switch grifters from their victims; the intended beneficiaries of the settlor’s estate planning law firms’ products and services.

With the estate planning attorneys sequestered in the district court and the trust held hostage in the probate court Bayless resigns her incapacitated independent executor [[Tab 27](http://www.probatemafia.com/Brunsting/Tab%2027%202015-02-19%20Case%20412248%20PBT-2015-57597%20Carl%20Resignation_Certified.pdf)] and began signing agreements [Tab [28](http://www.probatemafia.com/Brunsting/Tab%2028%202015-02-20%20Case%20412249-401%20Agreed%20Docket%20Control%20Order_Certified.pdf) & [29](http://www.probatemafia.com/Brunsting/Tab%2029%20%202015-03-05%20Agreed%20Order%20to%20Consolidate%20412249-402%20into%20412249-401_Certified.pdf)] with the other participating attorneys.

## HANNAH v. HATCHER

Bayless filed Carl Brunstings non-probate tort suit in Harris County Probate Court April 9, 2013. Bayless filed Hannah v Hatcher in August 2013. Bayless wrote a [plea to the jurisdiction](http://www.probatemafia.com/Brunsting/Tab%2080c1%202013-11-1%20Hannah%20-%20Bayless%20Plea%20to%20the%20Jurisdiction.pdf) and [petition for writ of mandamus](http://www.probatemafia.com/Brunsting/Tab%2080c1%202013-11-1%20Hannah%20-%20Bayless%20Plea%20to%20the%20Jurisdiction.pdf) No. 14-14-00126-CV, In Re Julie Hannah, effectively arguing that the tort claims she filed in the district court were not probate claims. [see *In re Hannah* , [431 S.W.3d 801](http://www.probatemafia.com/Brunsting/Tab%2080c3%202014-05-13%20IN%20RE%20%20Julie%20HANNAH.pdf)] The ringer is [Mortensen v Villegas](http://www.probatemafia.com/Brunsting/2021-02-01%20Hannah%20-%20Mortensen%20v.%20Villegas.pdf) 630 S.W.3d 355! Mortensen is a judicial analysis of In re Hannah *In re Hannah*, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014. In essence, [Bayless petition](http://www.probatemafia.com/Brunsting/Tab%2080c2%202014-02-11%20Hannah%20Petition%20for%20writ%20of%20mandamus%20filed.pdf) and the opiniuon of the Court of appeal both show that Bayless knew Carl’s probate court claims were not probate realted claims and that the Statutory Probate Court had no subject matter jurisdiction.

## We did not appeal the order denying our plea to the jurisdiction

We did not appeal the order denying our plea to the jurisdiction because an interlocutory appeal from a nonfinal order or judgment is permitted only when authorized by statute[[28]](#footnote-28). Interlocutory appeal from an order denying a plea to the jurisdiction is available by statute only to governmental agencies.[[29]](#footnote-29)

At a deposition July 3, 2015, [[Tab 74](http://www.probatemafia.com/Brunsting/Tab%2074%202015-02-03%20Case%202013-05455%20BRUNSTING,%20CARL%20H.-1%20Deposition%20of%20Carl%20H.%20Brunsting.pdf), [p.77](http://www.probatemafia.com/Brunsting/Tab%2074%20Pages%2077-78%20from%202015-02-03%20Case%202013-05455%20BRUNSTING,%20CARL%20H.-1%20Deposition%20of%20Carl%20H.%20Brunsting.pdf) ln 16-25] Carl testified that he had already paid attorney Bayless a quarter of a million dollars. That was more than eight years ago and none of Carl’s claims have been resolved.

# Attorney Zandra E. Foley, [*State Bar No. 24032085*](https://www.texasbar.com)

# Attorney Cory S Reed, Texas [State Bar No. 24076640](https://www.texasbar.com)

### Milking the Malpractice Insurance Money Cow

Representing the Associate Judge in the probate court while also representing the estate planning bait and switch grifters in the District Court.

## [Attorney Jason B. Ostrom [Texas State Bar No. 24027710](https://www.texasbar.com)](http://www.probatemafia.com/Brunsting/Tab%2062e%20Article%20XII%20B_Certified.pdf)

# Attorney Jason B. Ostrom Texas State Bar No. 24027710, Fed. Id. No. 33680

There is no rule this attorney did not break. His conduct in this case was absolutely reprehensible but the late Jason Bradley Ostrom (Ostrom) is no longer of concern to the Bar and no longer a threat to public justice. It should be noted that Ostrom appeared as a pro se defendant in the honest services fraud case (SDTX 4:16-cv-1969) and also represented co-defendant Attorney Gregory Lester, Texas State Bar No. 12235700, against the client he betrayed.

Attorney Gregory Lester, Texas State Bar No. 12235700 was appointed Temporary Administrator for the sole purpose of evaluating the pending “claims” (Tex. Est. Code § 22.005). We will get to the fraudulent temporary administrator and his report in due course but Ostrom representing RICO co-conspirator, co-defendant, Gregory Lester against his former client was a violation of Disciplinary Rule 1.06 et seq. Ostrom also lied to the federal tribunal, claiming the honest services fraud case arose from a “probate case” [SDTX NO. 4:16-cd-1969 Doc 78 p.1] (Disciplinary Rule 3.03 et seq.)

“It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. See **duPont v** **. S. Nat'l Bank** , [575 F.Supp. 849, 864](https://casetext.com/case/dupont-v-southern-nat-bank-of-houston-texas#p864) (S.D. Tex. 1983), modified, [771 F.2d 874](https://casetext.com/case/dupont-v-southern-nat-bank-of-houston-tex) (5th Cir. 1985). ” Goughnour v. Patterson, No. 12-17-00234-CV, at \*25-26 (Tex. App. Mar. 5, 2019)

Nelva passed 11/11/2011. Anita was unable to produce a competent accounting and had already made her plans to steal the family trust well known. Candace filed a breach of fiduciary suit 109 days after Nelva passed (2/27/2012). The case was dismissed under the probate exception then reversed by the 5th Circuit [[Tab 2](http://www.probatemafia.com/Brunsting/Tab%202%202013-01-09%20%20Curtis%20v.%20Brunsting%20704%20F.3d%20406%205th%20Circuit%20Jan%202013.pdf)]. Upon returning to the Southern District of Texas with no accounting having been produced, Candace applied for a preliminary injunction.

Anita claims to have become sole trustee on 12/21/2010. The injunction hearing was had April 9 2013.

## Breach of fiduciary has three elements.

1. The existence of a fiduciary relationship.

2. The fiduciary’s failure to perform the obligations owed to the beneficiary

3. Benefit to the fiduciary (trustee) or injury to the beneficiary as a result of the trustees failure to perform.

The memorandum of preliminary injunction [[Tab 4](http://www.probatemafia.com/Brunsting/Tab%204%202013-04-19%20Doc%2045%20Memorandum%20of%20Preliminary%20Injunction%20Certified.pdf)] established the existence of a fiduciary relationship (1). Anita Brunsting and Amy Brunsting owe fiduciary obligations to Candace Curtis. (2) that Anita’s had failed to perform the obligations required by the trust - based upon the instruments Anita submitted to the Court; that Anita had failed to establish books and records of accounts after more than two years as trustee and failed to disclose unprotected trust instruments. (3) A May 9, 2013 Order appointing a Special Master [[Tab 5](http://www.probatemafia.com/Brunsting/Tab%205%202013-05-09%20Case%204-12-cv-592%20%5bDoc%2055%5d%20Order%20Appointing%20West%20-%20Special%20Master.pdf)] verified how Anita caused the litigation to be brought by her failure to account and the Report of the Special Master [[Tab 6](http://www.probatemafia.com/Brunsting/Tab%206%20%202013-08-08%20Case%20%204-12-cv-592%20Doc%2062%20Report%20of%20Special%20Master.pdf)] filed August 8, 2013 revealed self-dealing and other undisclosed transactions Anita had performed that benefitted only her or her, Amy and Carole. One example is $40,000 in personal credit card debt paid directly out of a trust checking account. Anita labeled that as “trustee compensation” but failed to perform her trustee duties and made no record of any fiduciary acts that would justify “compensation”.

On January 6, 2014 Houston attorney Jason Bradley Ostrom (Ostrom) filed Notice of Appearance in the SDTX as counsel of record for Candace Curtis [[Tab 8](http://www.probatemafia.com/Brunsting/TAB%208%20%202014-01-06%20Ostrom%20Appearance%20in%204-12-cv-592.pdf)]. At this juncture an accounting had been produced and all that was necessary was for previous distributions to be equalized among the beneficiary’s and the remaining assets divided by 5. However, there is no indication that Anita had any intentions of performing those obligations but fully intended on causing litigation to be brought so she could play the In Terrorem card, as was stated in Curtis original complaint [[Tab 1](http://www.probatemafia.com/Brunsting/Tab%201%202012-02-27%20Doc%201%20Case%20412-cv-592%20Curtis%20Original%20Federal%20Complaint_verified%20not%20Certified.pdf)]. That complaint also mentioned hearsay of Anita wiretapping Nelva’s phone and stalking her emails. All of this gets verified in due course.

Rather than resolve the fiduciary issue and settle the trust, Ostrom perpetrated fraud in order to obtain an order for Remand.

May 9, 2014 Ostrom filed a 1st amended complaint to pollute diversity [[Tab 9](http://www.probatemafia.com/Brunsting/Tab%209%202014-05-09%20Ostrom%E2%80%99s%20Motion%20to%20Amend%20federal%20Complaint_certified.pdf)], and on May 9, 2014 Ostrom filed an unopposed Motion to “**Remand**” the non-probate case to Harris County Probate Court No. 4 [[Tab 10](http://www.probatemafia.com/Brunsting/Tab%2010%202014-05-09%20federal%20motion%20for%20remand.pdf)], from which the case had never been removed. Ostrom never even filed notice of appearance in the state probate court but simply started filing documents and signing agreements. May 28, 2014 Ostrom filed a Motion to Enter a Transfer Order. The order approving the federal remand as a transfer was entered June 5, 2014 [[Tab 26](http://www.probatemafia.com/Brunsting/Tab%2026%20%202014-06-05%20412249-401%20Motion%20to%20Enter%20Remand%20as%20a%20Transfer%20and%20Order%20Accepting%20Transfer%20Certified.pdf)] February 9, 2015 Estate of Nelva Brunsting No. 412249-402 was opened, and was allegedly the federal case remanded/transferred to the probate court.

February 17, 2015, incapacitated independent executor Carl Henry Brunsting tendered his resignation and substituted his wife Drina as his attorney in fact. [[Tab 27](http://www.probatemafia.com/Brunsting/Tab%2027%202015-02-19%20Case%20412248%20PBT-2015-57597%20Carl%20Resignation_Certified.pdf)]. Three days later, February 20, 2015, Ostrom and the participating attorneys all signed an Agreed Docket Control Order [[Tab 28](http://www.probatemafia.com/Brunsting/Tab%2028%202015-02-20%20Case%20412249-401%20Agreed%20Docket%20Control%20Order_Certified.pdf)] and March 5, 2015 the participating attorneys all signed an Agreed Order to Consolidate “estate of Nelva Brunsting 412,249-402” with “estate of Nelva Brunsting 412,249-401” [[Tab 29](http://www.probatemafia.com/Brunsting/Tab%2029%20%202015-03-05%20Agreed%20Order%20to%20Consolidate%20412249-402%20into%20412249-401_Certified.pdf)].

## The question at this juncture is where is the federal plaintiff’s lawsuit?

The probate court docket [ROA.20-20566.2869] shows that Ostrom did not even bother to file an appearance in Harris County Probate Court No. 4, but simply filed a motion to enter a transfer order [ROA.20-20566.2684-2690] and then entered into agreements culminating in a merger so complete [ROA.20-20566.2693-2696] that it deprived Appellant of her separate legal identity and substantial rights. In this manner Appellant’s own counsel, in concert with other attorney’s, robbed Candace Curtis of her right to due process, her right to equal protection of the law, her legal work product and access to the benefit of the unanimous opinion of the 5th circuit court in the very cause in which it was obtained. (Curtis v Brunsting 704 F.3d 406)

## [Attorney [Stephen A Mendel](http://www.mendellawfirm.com/), Texas State Bar No. 13930650](http://www.probatemafia.com/Brunsting/Tab%2062f%20%20Art%20X%20Section%20A_Certified.pdf)

## [Attorney [Neal Spielman](https://grifmatlaw.com/), Texas State Bar No. 00794678](http://www.probatemafia.com/Brunsting/2014-11-17%20Mendel%20Notice%20of%20Appearance%20for%20Anita%20Kay%20Brunsting.pdf)

## Attorney Gregory Lester Texas State Bar No. 12235700

## Attorney Jill Willard Young Texas State Bar No. 00797670

# Plaintiff Calls Anita Brunsting

Defendant co-trustees have the burden of bringing forth evidence to show they have performed the obligations of the office they claim to occupy. They can’t do that unless they can articulate the obligations and therein lies the tar pit.

1. To date, Anita Brunsting has refused to honor any of the obligations of the office she claims to occupy.
2. while malevolently refusing to honor the prohibitive and affirmative commands therein.
3. , Anita had assumed sole control over the assets before the passing of the last Settlor and
4. Affidavit of Trust
5. Case 4:12-cv-00592 Document 1-5 Filed in TXSD on 02/27/12 Page 5 of 30
6. Action for Contempt of Court,
7. Breach of Fiduciary Duties,
8. Fraud,
9. Conversion,
10. Verified Accounting and Enforcement of Trust

# THE TRUST

Article I[[30]](#footnote-30) identifies the beneficiaries and successor beneficiaries

Article III[[31]](#footnote-31) contains the provisions for altering or amending the family trust

Article IV[[32]](#footnote-32) identified the initial and successor trustees

Article VII[[33]](#footnote-33) dictates division of the assets into two separate shares at the passing of the first Settlor, a Decedents irrevocable share and a Survivors amendable and revocable share.

Article VIII[[34]](#footnote-34) controls administration of the Survivors trust share.

Article IX[[35]](#footnote-35) controls administration of the Decedent’s trust share.

Article X[[36]](#footnote-36) governs distribution of the trust assets in to five separate but equal shares at the passing of the last Settlor.

Article XI[[37]](#footnote-37) governs protection of beneficial interests

Article XII[[38]](#footnote-38) Defines the powers of the trustees and the limits placed upon the exercise of the powers granted.

Article XIII[[39]](#footnote-39) is the Article governing definitions and Article XIV[[40]](#footnote-40) governs miscellaneous matters.

1. Upon the April 2009 death of ELMER BRUNSTING, two trusts were created: with the property being divided into two shares: The Survivor’s and Decedent’s trusts, Restatement Article VII, Section B.
2. Article VIII Section D provides that the Survivor’s trust SHALL terminate at the Surviving Founder’s death and
3. Article IX Section D provides that the Decedent’s trust SHALL terminate at the Surviving Founder’s death.
4. Upon the surviving founder’s death, November 11, 2011, both trusts terminated and were required to be distributed in accordance with Article X, dividing all trust property by five and distributing 1/5 of the total assets to each beneficiary: CANDACE LOUISE CURTIS, CAROL ANN BRUNSTING, CARL HENRY BRUNSTING, AMY RUTH TSCHIRHART N/K/A AMY RUTH BRUNSTING, ANITA KAY RILEY N/K/A ANITA K. BRUNSTING.
5. Article X Section B governs the distribution of CANDACE LOUISE CURTIS’ share and states that it shall be held in trust with the trustee distributing as much of the net income and principal of CURTIS’ personal asset trust which the trustee deems necessary for her health, education, maintenance and support—for her lifetime. CANDACE CURTIS’ right to the net income and principal of the trust is not alienable, voluntarily or involuntarily other than the execution of a testamentary power of appointment, valid living trust, or last will and testament—which is not at issue in this case.
6. Clearly the settlors made the BRUNSTING FAMILY LIVING TRUST and specifically, CANDACE CURTIS’ share—unalienable and not subject to creditors, including judgment creditors.

# MEMORANDUM OF POINTS AND AUTHORITIES

[*Texas Commerce Bank—Rio Grande Valley v. Correa*](http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0f554233-fad7-46af-b93d-ff9d8f48a0fd&coa=coa13&DT=Opinion&MediaID=ff566119-b543-4670-b0ea-48f0c57e9706), 28 S.W.3d 723 (Tex. App.—Corpus Christi 2000, pet. denied).

Testator’s will was admitted to probate in county court and an independent administration was opened. Seven years later, the county court entered an order approving the final account and the resignation of Administrator. Creditor subsequently filed a petition in district court seeking to foreclose on real property Administrator used as collateral for a loan. The district court approved the foreclosure and Creditor purchased the property at a sheriff’s sale. Two years later, Creditor sued Administrator seeking damages and indemnification for environmental contamination. Administrator claimed Creditor never acquired ownership of the property because the foreclosure suit was a matter incident to the estate and thus the county court had exclusive subject matter jurisdiction. Accordingly, Administrator asserted that the foreclosure and sheriff’s sale were void. The trial court agreed with Administrator.

The appellate court reversed. The administration of Testator’s estate was closed at the time Creditor brought the foreclosure action. The county court has jurisdiction over matters incident to the estate only when a probate matter proceeding related to the incident matter is already pending. Because no probate proceeding was ongoing or pending when Creditor brought the foreclosure action, the district court had jurisdiction.

Moral: Once an estate is closed, the district court may have jurisdiction over matters that otherwise would have been the province of the probate court as matters incident to the estate.

# Closing Independent Administration

Independent administration does not require formal closing procedures

[Texas Commerce Bank—Rio Grande Valley v. Correa](http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=0f554233-fad7-46af-b93d-ff9d8f48a0fd&coa=coa13&DT=Opinion&MediaID=ff566119-b543-4670-b0ea-48f0c57e9706), 28 S.W.3d 723 (Tex. App.—Corpus Christi 2000, pet. denied).

*Administrator filed a “Final Account and Exhibit.” The document was verified and included a list of undistributed estate assets. Administrator also requested approval of the account and exhibit as well as Administrator’s resignation. The court approved the requests.*

*The appellate court rejected the argument that the estate nonetheless remained open. The court held that the documents were sufficient to qualify as a closing report under Prob. Code § 151. The court did, however, recognize that the probate court actually has no power to approve or disapprove a final account. The court also explained that the estate was actually closed even without the closing report because an independent administration is considered closed after the debts have been paid, the property distributed, and there is no more need for administration.*

Moral: The independent personal representative should seriously consider seeking a judicial discharge rather than relying on a closing report or a “natural” closing.

<http://www.professorbeyer.com/Case_Summaries/2000/TexasCommerce.html>

The 1999 Legislature added Probate Code §§ 149D, 149E, 149F, and 149G to establish a procedure for the independent executor to obtain a discharge from liability for matters relating to the past administration of the estate that have been fully and fairly disclosed.

Restatement of the Law of Trusts 2nd

# Duty of Full Disclosure

"A duty to disclose may arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; and (4) when one makes a partial disclosure and conveys a false impression." Id. (quoting Hoggett v. Brown, [971 S.W.2d 472, 487](https://casetext.com/case/hoggett-v-brown#p487) (Tex.App.-Houston [14th Dist.] 1997, pet. denied)). Brown Brown v. Omni Metals, 317 S.W.3d 361, 384 (Tex. App. 2010)

### Silence where there is a duty to speak is fraud

"Where there is a duty to speak, silence may be as misleading as a positive misrepresentation of existing facts." Omni Metals, 2002 WL 2331720, at \*3 (quoting Smith v. Nat'l Resort Cmty., Inc., [585 S.W.2d 655, 658](https://casetext.com/case/smith-v-national-resort-communities-inc#p658) (Tex. 1979)). "Whether a duty to disclose exists is a question of law." Id. (citing Bradford v. Vento, [48 S.W.3d 749, 755](https://casetext.com/case/bradford-v-vento#p755) (Tex. 2001)). It further opined, "The mere silence on the part of one does not alone constitute fraud, but where the circumstances impose on a person the duty to speak and he deliberately remains silent, such failure to speak constitutes fraud. Where the law imposes a duty on one party to disclose all material facts known to him and not known to the other, silence and concealment in violation of this duty with intent to deceive amounts to fraud and is the equivalent to the assertion of a false-hood. See Peist v. Roesler, Tex.Civ.App., [86 S.W.2d 787](https://casetext.com/case/feist-v-roesler), and cases cited therein. Also, 37 C.J.S., Fraud, § 16, page 245. Playland Stad. v. J. H. Spector, 253 S.W.2d 466, 469-70 (Tex. Civ. App. 1952)

## 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.

## AN OVERVIEW OF THE TRUSTEE’S DUTY TO DISCLOSE

### The Commentators

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

“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):

“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.”

* George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees,* § 961(Revised Second Edition):

“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.”

### 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).”

* 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.

§ 113.152. CONTENTS OF ACCOUNTING. A written statement

of accounts shall show:

(1) all trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;

(2) a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;

(3) a listing of all property being administered, with an adequate description of each asset;

(4) the cash balance on hand and the name and location of the depository where the balance is kept; and

(5) all known liabilities owed by the trust.

Added by Acts 1983, 68th Leg., p. 3332, ch. 567, art. 2, § 2, eff.

Jan. 1, 1984.

The Texas Trust Code provides specific remedies for breach of trust and gives the court broad discretion in its power to provide equitable relief.

§ 114.008. REMEDIES FOR BREACH OF TRUST.

a) To remedy a breach of trust that has occurred or might occur, the court may:

(1) compel the trustee to perform the trustee's duty or duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust, including compelling the trustee to pay money or to restore property;

(4) order a trustee to account;

(5) appoint a receiver to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided under Section 113.082;

(8) reduce or deny compensation to the trustee;

(9) subject to Subsection (b), void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property of which the trustee wrongfully disposed and recover the property or the proceeds from the property; or

(10) order any other appropriate relief.

(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.

[*The unsworn statements of an attorney are not evidence unless the attorney has first-hand knowledge of the facts asserted.* SeeState v. Guerrero , 400 S.W.3d 576, 585–86 (Tex. Crim. App. 2013).](https://casetext.com/case/ex-parte-holliday-7?jxs=tx&p=1&q=Unsworn+testimony+of+an+attorney+is+not+evidence&sort=relevance&type=case&ssr=false&scrollTo=true&find=#pa33)

With few exceptions not relevant here, unsworn statements by an attorney are not "evidence." See, e.g., Lott v. Fort Worth, [840 S.W.2d 146, 150](https://casetext.com/case/lott-v-city-of-fort-worth#p150) (Tex.App. — Fort Worth 1992, no writ) (holding that generally an unsworn statement by counsel is not evidence in the context of a Batson hearing). However, no party objected at any time during the hearing that the discussions were evidentially unsound. "[I]f 'non-evidence' is 'introduced' and considered by the court without objection, it then becomes 'evidence.'" Id.; Jones v. State, [795 S.W.2d 32, 34](https://casetext.com/case/jones-v-state-688#p34) (Tex.App. — Houston [1st Dist.] 1990, no pet.). Therefore, defendant did "present" evidence concerning the taped conversation.

Generally, unsworn statements by an attorney are not evidence. Peterson v. State, [961 S.W.2d 308, 311](https://casetext.com/case/peterson-v-state-17#p311) (Tex.App.-Houston [1st Dist.] 1997, pet. ref'd). However, if such "non-evidence" is introduced and considered by the court without objection, it then becomes evidence. Id. To preserve error under Texas law, a party must object each time inadmissible evidence is offered unless that party has requested a running objection or has objected out of the presence of the jury to the testimony he deems objectionable on a given subject. Love v. State, [199 S.W.3d 447, 456](https://casetext.com/case/love-v-state-10#p456) (Tex.App.-Houston [1st Dist.] 2006, pet. ref'd) (citing Martinez v. State, [98 S.W.3d 189, 193](https://casetext.com/case/martinez-v-state-192#p193) (Tex.Crim.App. 2003))

An attorney's unsworn statements are not evidence. See Banda v. Garcia,[955 S.W.2d 270, 272](https://casetext.com/case/banda-v-garcia#p272) (Tex. 1997) (holding unsworn statements of attorneys are not normally evidence); Ardmore, Inc. v. Rex Grp., Inc., [377](https://casetext.com/case/ardmore-inc-v-rex-grp#p62) S.W.3d 45, 62 (Tex. App.-Houston [1st Dist] 2012, pet. denied); see also In re J.T.G.,[No. 14-10-00972-CV](https://casetext.com/case/in-re-jtg), [2012 WL 171012, at \*15](https://casetext.com/case/in-re-jtg#p15) (Tex. App.-Houston [14th Dist] Jan. 19, 2012, pet. denied) (mem. op.) (comment by attorney in response to trial court's question "was not sworn testimony by a witness"); In re J.N.F.,[116 S.W.3d 426, 436](https://casetext.com/case/in-the-interest-of-jnf#p436) (Tex. App.-Houston [14th Dist.] 2003, no pet.) In re Brown, No. 01-19-00953-CV, at \*19-20 (Tex. App. Dec. 20, 2022)

1. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 3 of 30 [↑](#footnote-ref-1)
2. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 9 of 30 [↑](#footnote-ref-2)
3. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 11 of 30 [↑](#footnote-ref-3)
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11. Case 4:12-cv-00592 Document 1-8 Filed in TXSD on 02/27/12 Page 29 of 30 [↑](#footnote-ref-11)
12. Breach of Fiduciary Obligations [ROA 222] Extrinsic Fraud [ROA 223] Constructive Fraud [ROA 224] Intentional Infliction of Emotional Distress [ROA 226] [↑](#footnote-ref-12)
13. (1) Demand for trust accounting, (2) Breach of fiduciary duties against trustees (3) Conversion of trust property (4) Negligence (5) Tortious Interference with Trust Inheritance (6) Constructive Trust (7) Civil Conspiracy (8) Fraudulent Concealment and (9) injunctive relief to preserve trust assets, [↑](#footnote-ref-13)
14. The 2005 Restatement of the trust ROA 86-173 [↑](#footnote-ref-14)
15. (citing Montgomery v. Kennedy, 669 S.W.2d 309, 312–14 (Tex. 1984); Kinzbach Tool

    Co., Inc. v. Corbett-Wallace Corp., 160 S.W.2d 509, 513–14 (Tex. 1942)) [↑](#footnote-ref-15)
16. ROA 42 fn. 11, Exhibit J1 apparently omitted in error but is a matter of public record “Candace Curtis v. Anita Brunsting et al. SDTX Case 4-12-cv-592” [Doc 62]. [↑](#footnote-ref-16)
17. Breach of Fiduciary Obligations [ROA 222] [↑](#footnote-ref-17)
18. Fraud [ROA 223-224] [↑](#footnote-ref-18)
19. Added by Acts 2009, 81st Leg., R.S., Ch. 1351 (S.B. 408), Sec. 13(a), eff. January 1, 2014.

    Amended by: Acts 2013, 83rd Leg., R.S., Ch. 161 (S.B. 1093), Sec. 6.007, eff. January 1, 2014. [↑](#footnote-ref-19)
20. Added by Acts 2009, 81st Leg., R.S., Ch. 1351 (S.B. 408), Sec. 13(a),

    Amended by: Acts 2013, 83rd Leg., R.S., Ch. 1136 (H.B. 2912), Sec. 3, eff. January 1, 2014. [↑](#footnote-ref-20)
21. Added by Acts 2009, 81st Leg., R.S., Ch. 1351 (S.B. 408), Sec. 13(a), eff. January 1, 2014.

    Amended by: Acts 2011, 82nd Leg., R.S., Ch. 1338 (S.B. 1198), Sec. 2.03, eff. January 1, 2014. [↑](#footnote-ref-21)
22. Attorney Bobbie G. Bayless for Realtor Julie Hannah, 14th COURT OF APPEALS HOUSTON, TEXAS, No 14-14-00126-CV. Attorney Bobbie G. Bayless for Plaintiff/Appellee Carl Henry Brunsting Harris County Probate Court No. 4 No. 412249-401. [↑](#footnote-ref-22)
23. The Duty to Account alone is not sufficient. Without a distribution standard the trust becomes passive. [Statute of uses of 1535] see Texas Property Code Sec. 112.032. What are the distribution standards? [↑](#footnote-ref-23)
24. 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 nothing, and the court is without jurisdiction. Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930 (Tex. App. 1997) [↑](#footnote-ref-24)
25. [FDCA No. 10-22-00513-CV- Tab 13] Statement of Death and other facts by Drina Brunsting [↑](#footnote-ref-25)
26. Case 4:22-cv-01129 Document 2-12 Filed on 04/08/22 in TXSD Page 1 of 56 showing Carl’s 412,249-401 action in the probate court as having been filed by Candace Curtis and, [↑](#footnote-ref-26)
27. Case 4:22-cv-01129 Document 2-15 Filed on 04/08/22 in TXSD Page 17 of 52 showing a 30 minute phone conference regarding Anita’s intention of filing for Guardianship of Carl on 5/15/2015 with a 5/29/2015 entry regarding possible agreement with Carl’s counsel to avoid IME Motion and Hearing. [↑](#footnote-ref-27)
28. *Cherokee Water Co. v. Ross,* 698 S.W.2d 363, 365 (Tex. 1985) (orig. proceeding). [↑](#footnote-ref-28)
29. Tex. Civ. Prac. Rem. Code Ann. § 51.014(a)(8) (Vernon Supp. 2004); *see Shell Cortez Pipeline Co.,* No. 02-01-00006-CV, 2004 WL 41411. [↑](#footnote-ref-29)
30. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 3 of 30 [↑](#footnote-ref-30)
31. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 9 of 30 [↑](#footnote-ref-31)
32. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 11 of 30 [↑](#footnote-ref-32)
33. Case 4:12-cv-00592 Document 1-6 Filed in TXSD on 02/27/12 Page 29 of 30 [↑](#footnote-ref-33)
34. Case 4:12-cv-00592 Document 1-7 Filed in TXSD on 02/27/12 Page 5 of 30 [↑](#footnote-ref-34)
35. Case 4:12-cv-00592 Document 1-7 Filed in TXSD on 02/27/12 Page 13 of 30 [↑](#footnote-ref-35)
36. Case 4:12-cv-00592 Document 1-7 Filed in TXSD on 02/27/12 Page 17 of 30 [↑](#footnote-ref-36)
37. Case 4:12-cv-00592 Document 1-8 Filed in TXSD on 02/27/12 Page 3 of 30 [↑](#footnote-ref-37)
38. Case 4:12-cv-00592 Document 1-8 Filed in TXSD on 02/27/12 Page 7 of 30 [↑](#footnote-ref-38)
39. Case 4:12-cv-00592 Document 1-8 Filed in TXSD on 02/27/12 Page 25 of 30 [↑](#footnote-ref-39)
40. Case 4:12-cv-00592 Document 1-8 Filed in TXSD on 02/27/12 Page 29 of 30 [↑](#footnote-ref-40)