

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION NO. 4:12-cv-00592
	§	Jury
ANITA KAY BRUNSTING, et al.	§	
Defendants.	§	

**RENEWED APPLICATION FOR EX PARTE TEMPORARY
RESTRAINING ORDER, AND ASSET FREEZE,
TEMPORARY AND PERMANENT INJUNCTION**

PARTIES

1. Plaintiff, Candace Louise Curtis, is a citizen of the State of California.
2. Defendant Anita Brunsting resides in the county of Victoria; Defendant Amy Brunsting resides in the county of Comal.

NATURE OF ACTION

3. Plaintiff, is a beneficiary within the meaning of Texas Trust Code §111.004. Plaintiff brought this action under diversity jurisdiction, alleging breach of fiduciary duty, extrinsic and constructive fraud, and intentional infliction of emotional distress, against two of Plaintiff's sisters who claim to be trustees of the family trust.

JURISDICTION

4. This matter was originally brought in equity as breach of fiduciary and

related equitable claims and included a common law tort claim under diversity jurisdiction pursuant to 28 USC §1332 (a) (1) - 28 USC §1332 (b) and 28 USC §1332 (C) (2).

BRIEF HISTORY OF THE CASE

5. On February 27, 2012, Curtis filed a pro se complaint in the United States District Court for the Southern District of Texas, alleging the civil torts of breach of fiduciary, extrinsic and constructive fraud and intentional infliction of emotional distress, alleging that Defendants, Anita and Amy, acting as trustees for their parents trust, failed to notice her of actions affecting her beneficial interests, refused to provide copies of non-protected trust instruments and refused to account for trust assets, or to report on any other acts of administration. On March 8, 2012, Plaintiff's complaint was dismissed under the probate exception to federal diversity jurisdiction. Plaintiff promptly filed notice of appeal. On January 30, 2013, this Court received a Mandate from the Fifth Circuit Court of Appeals for further proceedings.

WASTING THE TRUST ESTATE

OFFER OF PROOF

6. On or about April 5, 2012, Plaintiff Curtis received a number of documents by email from Defendants' counsel Bernard Mathews. These documents were addressed to Bobbie Bayless, Candace Curtis and Carole Brunsting, apparently in

response to a state court petition brought in the name of Carl Brunsting as executor for the Elmer and Nelva Brunsting estate. On January 4, 2013, Plaintiff received four Excel spreadsheets purported to show “the assets in the trust as of year end”, sent by Defendant Anita Brunsting. Plaintiff herein offers the accounting schedules and related correspondence received from Defendants into evidence, as an offer of proof of the existence of self-dealing, co-mingling and misapplication of fiduciary. None of the spreadsheets were certified as true and correct, and are, in fact, incomplete and inaccurate. These schedules list a multitude of funds transfers of securities traded under the laws of the United States, primarily via electronic means. Other than these spreadsheets and schedules, Defendants have provided no other information, documents, notices, records, or any information of any kind regarding alleged administration of the trust.

SCHEDULES A THROUGH J AND JANUARY 2013 SPREADSHEETS

	Decedent		Survivor	
	Dec '10	Dec '12	Dec '10	Dec '12
Chevron Texaco	128,932.01	136,338.85	75,396.16	4,198.01
Exxon Mobil	157,848.84	51,722.62	173,895.85	60,337.71
Edward Jones	267,302.58	257,683.30	191,205.00	1.05
IRA			54,367.51	
Total	554,083.43	445,744.77	494,864.52	64,536.77
Decrease in Assets	108,338.66		430,327.75	
Total Decrease in Assets	538,666.41			

(Table 1)

7. Based upon the spreadsheets, Table 1 represents a rough estimate of the decrease in value of trust owned securities between December 2010, when Defendant Anita Brunsting proclaims herself to have become trustee, and December 2012, the date of the most recent spreadsheets, totaling **\$538,666.41**. Other questionable and/or unexplained transactions, apparent self-dealing, co-mingling, and/or misappropriation of trust assets include, but are not limited to, the following: Nelva Brunsting's social security payments were apparently diverted to an unknown location after January 3, 2011. Tax liabilities were created in direct violation of the terms of the trust and we have no evidence that those tax liabilities have been satisfied, or from what funds. Roughly \$108,000.00 in principal was removed from the Decedent's trust when the terms of the trust specifically state that no more than \$5,000.00 per year is allowed.¹ Almost \$100,000.00 was transferred, apparently to a Rights of Survivorship styled checking account jointly held by Plaintiff's sister Carole Brunsting and their Mother Nelva Brunsting. No other information about that account has ever been provided to Plaintiff. More than \$41,000.00 was paid from the trust account directly to credit cards assumed to be in the name of Anita Brunsting, and/or college funds for Defendant's children, and was excused as trustee compensation² at an exorbitant rate of 2% of the annual value of the trust per month, allegedly under an agreement with Nelva Brunsting.

¹ Article IX section A(2)(a) and (b) USCA5 p. 225.

² Trustee compensation is governed by article IV section G USCA5 p. 195.

On November 7, 2011, four days before Nelva Brunsting passed away, two wire transfers were made for \$10,000.00 to each of the Defendants, with a memo “for future trust exp”, categorized as “legal fees”, with a tag of “redeposited into new Surv Trust acct”. There is no evidence that these funds were ever redeposited into any account and, not including this \$20,000.00, legal fees paid with trust account funds since the passing of Nelva Brunsting exceed \$37,500.00. Transfers from Edward Jones into the Survivor’s Trust checking, between 12/23/2010 and 3/9/2012, exceed \$273,000.00. The balance of the Nelva Brunsting Survivor’s Trust Edward Jones Asset as of December 2010, as shown on Schedule B, is \$191,205.00. It is unclear where the difference of approximately \$81,795.00 came from.

8. After more than one year since Plaintiff’s first demand for an accounting, there are known assets of the trust that remain unaccounted for.

FAILURE TO HONOR TRUSTEE DUTIES

9. There are numerous anomalies and inconsistencies within these alleged accountings that are cumulative, but disconcerting none-the-less. Plaintiff could write *War and Peace* in an effort to itemize the obligations Defendants have failed to honor, but it is more economical to list the obligations that Defendants have honored.

10. The position of a trustee is voluntary. There are three substantive sources of duty that burden a trustee upon acceptance of that office. These are the common law; the law of the trust instrument; and statutes created by the legislature for the convenience of our courts in the settling of disputes.

11. Plaintiff can identify no common law duties that have been complied with by the alleged trustee Defendants. Plaintiff can identify no duties prescribed by the trust instrument that have been complied with by the alleged trustee Defendants, nor can Plaintiff identify duties prescribed by statute that have been fully complied with by the alleged trustee Defendants.

12. Amongst the duties prescribed by the trust,

Article XII Section E. Records, Books of Account and Reports p.12-10, states³:

“The Trustee shall promptly set up and thereafter maintain, or cause to be set up and maintained, proper books of account which shall accurately reflect the true financial condition of the trust estate.”

Defendants have failed to maintain complete and accurate books and records.

13. Defendants continue to conceal information and refuse to provide true, complete, and accurate accountings. Further, Defendants continue to communicate nothing regarding trust administration, or any other information regarding the trusts at all.

14. Affirmative Duty Of Trustee To Disclose Information To Beneficiaries:

³ USCA5 p.258

Texas Trust 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.

A trustee has the fiduciary duty, without any demand, to disclose to the beneficiaries all material facts known to the trustee that might affect the beneficiaries' rights. *Kinzbach v. The Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942); *Shannon v. Frost National Bank of San Antonio*, 533 S.W.2d 389 (Tex. Civ. App. – San Antonio 1975); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984); *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996); *Restatement of the Law, Trusts 2d*, §170; *Scott on Trusts*, §170; *Bogert, Trusts and Trustees*, §961.

The breach of the duty of full disclosure by a fiduciary is tantamount to fraudulent concealment. *Willis v. Maverick*, 760 S.W.2de 642 (Tex. 1988). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 309 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex.App.—Ft. Worth 1967, writ ref'd n.r.e.), and need not even prove that he relied on the fiduciary to disclose the information. *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938); *Miller v. Miller*, 700 S.W.2d 941 (Tex.App.—Dallas 1985, writ ref'd n.r.e.).

The trustee's duty of full disclosure extends to all material facts affecting the beneficiaries' rights. This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and the beneficiaries. *Huie v. Deshazo*, 922 S.W.2d 920 (Tex. 1996).

TRUSTEE DUTY TO PROVIDE BIENNIAL ACCOUNTING

15. Section E of Article XII of the trust⁴ requires trustees to setup and maintain, or cause to be set up and maintained, proper books of account which shall accurately reflect the true financial condition of the trust estate. Section E in the next paragraph requires trustees to provide biannual accountings to each beneficiary in writing.

16. It should not be necessary to resort to the Texas Trust Code to compel the accounting required by the trust, or to define the content of a proper accounting, none-the-less those sections are §113.151 and 113.152.

DEFENDANTS' PERSONAL LIABILITIES

17. The most recent spreadsheets show Defendants are paying their legal fees for their breach of fiduciary defense out of property belonging to the trust, but the trust is not a defendant and is not liable for the Defendants' breach of fiduciary.

Texas Property Code Section 101.002 - Liability Of Trust Property

§ 101.002. LIABILITY OF TRUST PROPERTY. Although trust property is held by the trustee without identifying the trust or its beneficiaries, the trust property is not liable to satisfy the personal obligations of the trustee.

⁴ USCA5 p. 258

BURDEN OF PROOF

18. In equity actions where breach of fiduciary allegations are coupled with misapplication of fiduciary, the burden of proof is upon the fiduciary to show that the transactions were proper. Further, in a fiduciary case, the usual burden of establishing a “probable right to recover”, before the court will grant a temporary injunction, does not apply if the gist of the complaint is “self-dealing”.

In a fiduciary self-dealing action, the “presumption of unfairness” attaches to the transactions of the fiduciary shifting the burden to the defendant to prove that the plaintiff will not recover. If the presumption cannot be rebutted as a matter of law at the temporary injunction stage, then the injunction should be granted since the plaintiff, by simply presenting a prima facie case of the existence of a fiduciary relationship and a probable breach of that duty has adduced sufficient facts tending to support his right to recover on the merits. *Cf. Camp v. Shannon, 348 S.W.2d 517, 519 (Tex. 1961); and, Jenkins v. Transdel Corp., 2004 WL 1404364(Tex.App. – Austin 2004, no pet.)*(exculpatory provision would not defeat showing of “probable right to recover” where some evidence that agreement including the clause was induced by fraud).

DEMAND FOR SHOW OF PROOF

19. At paragraph 46 of Defendants’ answer, Defendants affirmatively plead conformance with "applicable provisions of the Trust and sub-trust instruments" and at paragraph 50 Defendants affirmatively claim:

"Defendants’ alleged actions and omissions were undertaken in good faith, with the absence of malicious intent to injure Plaintiff, and constitute lawful, proper and justified means to further the purposes of the Trust and sub-trusts."

Plaintiff Exhibit 29 at USCA5 p.179-278 shows the provisions of the Brunsting trust. Defendants are invited to answer this application for injunction and to show that their actions, as confessed by their accountings, are consistent with their affirmative defense claims in items 46 and 50 of Defendants' answer.

REQUEST FOR RELIEF

20. Due to the lack of proper inventory, proper accounting, and full and complete disclosure, it is imperative that this Court act quickly to protect the Brunsting family of trusts from being further wasted by the present acting trustee Defendants. Injunction is the only way to protect the beneficiaries and the trust estate assets from further damage in the event the Defendants will not be able to adequately respond to the trusts' injuries. There is no other remedy at law that will prevent the irreparable injury that will result if the requested relief is not granted.

21. Wherefore, Plaintiff prays the Court issue the attached proposed order, or issue its own orders upon such terms as the Court deems most beneficial in protecting the trust assets and the rights of the beneficiaries.

March 11, 2013

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