

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S RECORD

VOLUME 1 OF 1

COURT CAUSE NO. 412.249-401

APPELLATE NO. _____

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

* * * * *

MOTION FOR PARTIAL DISTRIBUTION

MOTION FOR CONTINUANCE

* * * * *

On the 18th day of February, 2015, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable Christine Butts Judge of Probate Court No. 4, held in Houston, Harris County, Texas:

Proceedings reported by Machine Shorthand

A-P-P-E-A-R-A-N-C-E-S:

1
2 Mr. Neal E. Spielman
3 Griffin & Matthews
4 Attorney at Law
5 SBN 00794678
6 1155 Dairy Ashford
7 Suite 300
8 Houston, Texas 77079
9 281.870.1124
10 ATTORNEY FOR:
11 AMY BRUNSTING

Mr. Jason B. Ostrom
Attorney at Law
SBN 24027710
5020 Montrose Blvd.
Suite 310.
Houston, Texas 77006
713.863.8891
ATTORNEY FOR:
CANDACE CURTIS

8 Ms. Bobbie G. Bayless
9 Bayless & Stokes
10 Attorney at Law
11 SBN 01940600
12 2931 Ferndale
13 Houston, Texas 77098
14 713.522.2224

Ms. Darlene Payne Smith
Crain, Caton & James
Attorney at Law
SBN 18643525
Five Houston Center
1400 McKinney St.
Suite 1700
Houston, Texas 77010
713.658.2323
ATTORNEY FOR:
CAROLE ANN BRUNSTING

12 ATTORNEY FOR:
13 CARL H. BRUNSTING

14 Mr. Brad Featherston
15 The Mendel Law Firm, L.P.
16 Attorney at Law
17 SBN 24038892
18 1155 Dairy Ashford
19 Suite 104
20 Houston, Texas 77079
21 281.759.3213

19 ATTORNEY FOR:
20 ANITA K. BRUNSTING

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

VOLUME 1
(MOTION FOR PARTIAL DISTRIBUTION/MOTION FOR CONTINUANCE)

February 18, 2015	Page	Vol.
PROCEEDINGS.....	4	1
MOTION FOR CONTINUANCE:		
ARGUMENT BY MR. OSTROM.....	4	1
COURT'S RULING.....	12	1
MOTION FOR PARTIAL DISTRIBUTION:		
ARGUMENT BY MR. OSTROM.....	34	1
COURT'S RULING.....	51	1
COURT REPORTER'S CERTIFICATE.....	56	1

1 February 18, 2015

2 PROCEEDINGS

3 THE COURT: We're here on Cause Number
4 412.249, The Estate of Nelva Brunsting. And we're here
5 on, I guess, the 402 as well.

6 We've got a motion for distribution that
7 was filed by Candace that will be heard today and also a
8 motion for continuance.

9 So, let's start with Mr. Ostrom.

10 MR. OSTROM: Yes, Your Honor. Which
11 one -- I want to bring up the motion for continuance
12 first. I think this is probably the easier one for us
13 to discuss.

14 MOTION FOR CONTINUANCE

15 ARGUMENT BY MR. OSTROM:

16 MR. OSTROM: We have filed our motion for
17 continuance seeking to move our trial date. Our trial
18 date is currently in March, and I have a variety of
19 reasons why.

20 First, we had delays in trying to get the
21 case transferred from federal court to this court.
22 You'll notice that only recently we were able to get
23 documents to file within the 402. The 402 has now been
24 created.

25 When we entered into that docket control

1 order, unbeknownst to me but was brought up to my
2 attention by Mr. Featherston, we're not technically in
3 the 401. So, even though I signed on that docket
4 control order, my client is not a party to the 401. And
5 Brad and I have exchanged some voicemails and discussed
6 how to fix that. I think we have this now fixed and now
7 we have the 402, but we don't have a docket control
8 order as it relates to the 402. Instead of leaving that
9 out there and not being part of the 401, my initial
10 suggestion is we move the current trial setting and
11 amend it so that we can try, both, the 401/402 together.
12 They have a lot of the same claims. Now, they're not
13 the same clients. Candace's lawsuit can stand on its
14 own un-impacted by the lawsuit that Ms. Bayless brought
15 against Anita and Amy, but it's going to involve a lot
16 of the same witnesses, the same discovery; so, it makes
17 more sense to combine them.

18 The second reason we were talking about a
19 continuance is Ms. Anita and Amy did not have counsel
20 for a period of time when Ms. McCutchen withdrew, and a
21 lot of stuff didn't get done. When -- and that was
22 after we had already agreed to that March trial date.

23 When Mr. Featherston appeared in the case
24 and we started discussing the current docket control
25 order, I think early on, we acknowledged - and I don't

1 know if he had discussions with Darlene or Bobbie - but
2 as between he and I, in December, we acknowledged that
3 we needed to rework the current deadlines because they
4 weren't, they weren't workable. We submitted and asked
5 for permission from the parties to enter into a new
6 docket control order that was objected to; and so, we
7 moved forward with our continuance.

8 The -- mainly, I think what we're going to
9 have to address in this litigation is a level of legal
10 inquiry this Court has to make as to the validity of
11 these documents and then a decision regarding whether
12 there were any factual breaches of fiduciary duty that
13 we'd ultimately try to a fact finder.

14 Given the current status of both the
15 pleadings and the fact that no summary judgments have
16 been filed, I think trying this case to a fact finder
17 right now in March would be premature because we have
18 to -- there has to be a legal determination as to the
19 validity of some of the documents executed by Ms.
20 Brunsting.

21 And then lastly, and I don't -- we've not
22 raised this in our motion for continuance, but it's been
23 raised by Ms. Smith and in correspondence I received
24 this week is there's some concern that the current
25 executor of the estate whose party is -- has

1 experiencing diminished capacity. And Ms. Bayless and I
2 have spoken. We will be moving forward with an
3 application to appoint a successor. The line of
4 successors under the will are Ms. Bayless' client, Amy,
5 who we believe is disqualified because of the gifts she
6 received out of the trust and then my client. And so
7 we're going to be seeking the appointment of my client
8 as the successor executor to step in the shoes of that
9 litigation.

10 So, we don't really have a party we can
11 go to trial with right now as it relates to the estate.

12 So, for all those reasons, we'd ask that
13 the Court grant our continuance, allow the parties to
14 enter into a docket control order that allows us to deal
15 with, both, the legal issues and then ultimately, a
16 trial on the merit.

17 THE COURT: Does anyone oppose the motion
18 for continuance?

19 MS. SMITH: Originally, Your Honor, I did
20 until I spoke with my client.

21 My main reason for the opposition is that
22 this case is not getting better with age - it is getting
23 worse, and the fees are mounting, and that makes no
24 sense to me. And my client was not originally sued by
25 Candy and now has been. And my thought is if we were

1 ready to go, having been added, then everybody should be
2 able to -- it doesn't look like the case is doing
3 anything or going anywhere except incurring attorneys
4 fees. And that just makes no sense to me, that Carole
5 has now been sucked in by Candy, sued by her on the same
6 issues that she was sued before and yet no one's doing
7 any discovery; nobody's doing anything; but then here we
8 are saying give us some more time to do nothing and
9 incur some more attorneys fees. And so -- but I talked
10 to Carole, and she did not want to oppose it, but at the
11 same time, at some point, she has to get some relief in
12 this. And Carole is present today.

13 THE COURT: Thank you.

14 Ms. Bayless?

15 MS. BAYLESS: Yes, Your Honor?

16 THE COURT: Do you have an objection to
17 the motion for continuance?

18 MS. BAYLESS: Do I have a what?

19 THE COURT: Do you have an objection to
20 the motion?

21 MS. BAYLESS: No. No, I don't. And, in
22 fact, my client will be resigning as executor. So, that
23 does raise the issues that Mr. Ostrom brought up in
24 addition to what's in his motion.

25 THE COURT: Mr. Featherston?

1 MR. FEATHERSTON: No objection, Your
2 Honor.

3 THE COURT: And Mr. Spielman?

4 MR. SPIELMAN: I feel a lot of pressure
5 now to give no objection. No objection to the
6 continuance, Judge.

7 THE COURT: Okay.

8 MS. BAYLESS: I do have one question,
9 though, Your Honor.

10 I guess I've been completely unaware of
11 this 402/401 issue because I haven't seen the 402
12 numbers on anything that's been -- being filed. So, I
13 didn't know we were really dealing with two different
14 cases. I'm not sure my client is party in Mr. Ostrom's
15 case, and I don't know how we can deal with these issues
16 without all the beneficiaries involved. So, I don't --
17 we may need to think some about how we're dealing with
18 that. I mean, I'd hate for everyone to have to do
19 double filings in the 401 and the 402 - that doesn't
20 make any sense.

21 MS. SMITH: As I understand it, it was a
22 random filing - a random filing in the sense it was a
23 new case in the same cause. And it seems to me that if
24 we did an agreed motion for consolidation -- an agreed
25 order, maybe we wouldn't even require a motion that we

1 could all get in the same case.

2 I totally disagree with Jason that his
3 case could stand alone. That's ridiculous. He should
4 know that's ridiculous. It's almost like a
5 cut-and-paste of the same lawsuit as it relates to
6 Carole. So, I mean, literally almost the same words.
7 And so I can't imagine how he thinks it's only partially
8 related.

9 My understanding is that causes of action
10 alleged by both of these parties, one of whom, in my
11 opinion, has always been incapacitated and not able to
12 raise the issues - have always been the same.

13 MR. OSTROM: Your Honor, and just by way
14 of background, 'cause I don't think this Court is aware.

15 We attempted -- when you signed the order
16 accepting this litigation into this court, that it was
17 signed so that it could go into the 401. They, the
18 Clerk's Office, is the one that required the 402. They
19 rejected our filings as we moved them in and just kicked
20 them, and we had to refile.

21 So, as we move these things back in, the
22 Clerk's Office said, "File it in 402."

23 I agree that I don't think Candace is a
24 party in the 401, but we wouldn't oppose a
25 consolidation. I think we need to consolidate them for

1 that very reason because, like Mr. Featherston pointed
2 out, I wasn't a party, and we're going to have the same
3 witnesses and send real discovery for purposes of
4 litigation.

5 THE COURT: Okay. Well, if you guys can
6 get us an agreed order to consolidate the 401 and the
7 402, we will sign it happily because, you know, it's
8 really confusing for us to have the three files sitting
9 up here and --

10 MR. OSTROM: We will get that done.

11 THE COURT: Okay.

12 MS. SMITH: Is the "we" you?

13 MR. OSTROM: Yeah, the "we" is me.

14 THE COURT: By "we" you mean?

15 MR. OSTROM: I will.

16 THE COURT: Okay.

17 MR. SPIELMAN: Judge, I'm sorry, this
18 seems like the appropriate time to bring it up before we
19 transition, formally, into the application for the
20 partial distribution.

21 I just, for the record, wanted to make
22 note of the fact that I don't know if it has to do with
23 the 402/401 issue, but somehow or another, I/my office
24 never got the official notice of today's hearing. And
25 I've read Mr. Featherston's response on behalf of Anita,

1 and I've read Ms. Payne Smith's response on behalf of
2 Carole. I think they can, more than appropriately,
3 provide the Court the reasons to deny the motion. But I
4 just wanted the Court to understand that there is a
5 reason that I haven't formally responded and that's
6 because I didn't know about it before I had this
7 conversation with Mr. Featherston yesterday, I wouldn't
8 even be here.

9 THE COURT: Well, hopefully with that
10 consolidation you will get notice.

11 MR. SPIELMAN: And I'm not saying it's
12 anybody's fault - it could have just even been --
13 because I've been getting -- it seems like I've been
14 getting everything else. So, it could be something that
15 just got hung up in terms of our internal server.
16 However it happened, I didn't know about this until a
17 phone call yesterday so.

18 COURT'S RULING ON MOTION FOR CONTINUANCE:

19 THE COURT: Okay. Well, so it sounds like
20 the continuance will be an agreed continuance. And
21 along with that, I'd like, I'd like if you guys could
22 remain here for a little while and fill out a new docket
23 control order, and that docket control order will apply
24 to both cases as I'm, you know -- we're anticipating
25 that they'll be combined.

1 MR. OSTROM: Yes, Your Honor. And I think
2 that's very helpful because we've discussed that there's
3 some time tables we'll need to meet. I think Mr.
4 Featherston has some other legal issues he wants to
5 raise.

6 THE COURT: And have you guys been to
7 mediation yet? I forget.

8 MR. OSTROM: We have -- well, counsel
9 for -- current counsel for Anita and Amy have not.

10 THE COURT: Oh, okay.

11 MR. OSTROM: We all went to mediation.
12 Amy and Anita went under their former counsel. So, with
13 present counsel, there's been no mediation.

14 THE COURT: Okay. And just to be clear, I
15 know you were supposed to by September of last year, but
16 I just want to make sure that, you know, it actually
17 happened.

18 MS. SMITH: Oh, it happened.

19 MR. OSTROM: And, Your Honor, I'll be
20 submitting, then, an order on the continuance, agreed
21 order on the continuance.

22 THE COURT: Okay. And just to save, like
23 just as a matter of efficiency, if you want to go ahead
24 and submit the order on the continuance, you don't have
25 to circulate it necessarily and get everyone's signature

1 unless you guys want to sign. And you don't have to
2 call it an "agreed order" - we'll just see from the
3 record that there was no opposition.

4 MR. OSTROM: Well, I have an order on the
5 continuance today, it's just not an agreed. I mean,
6 I'll be happy to circulate this order so we can --

7 MS. SMITH: It just says it's granted.

8 MR. OSTROM: -- it just says "Granted" and
9 it has a date for a trial.

10 THE COURT: Well, we've got it on the
11 record that there is no opposition, and so I don't mind
12 just signing that.

13 MS. SMITH: Yeah, I think it was attached.
14 Don't you have it, Judge? I thought --

15 MR. OSTROM: It was. It was attached.

16 THE COURT: Okay.

17 MR. OSTROM: The other motion we're here
18 down on, I think is a little bit more complicated, Your
19 Honor. When you're ready, I'll begin.

20 THE COURT: Okay. I'll go ahead and sign
21 this order now, and then we'll make copies for everyone.
22 Now it asks me to set a date.

23 MS. SMITH: And we desperately need to do
24 that because we'll never agree. I promise you.

25 MR. OSTROM: I think after the hearing, if

1 we're all going to stay and work on the agreed order,
2 agreed docket control order, I think we can pick the
3 date. But if you want to give us a date right now,
4 that's fine too.

5 MS. SMITH: That would be awesome.

6 MR. OSTROM: Let's talk about -- and, Your
7 Honor, if you don't mind, I'd like to talk and get some
8 weigh-in from counsel on what I see is what we're going
9 to need to do to move forward.

10 I believe that we're going to -- parties
11 have designated some experts. Mr. Featherston has not
12 been able to designate, really, an accounting expert
13 because there's been no accounting, before, prepared by
14 Mr. Bayless -- Ms. Bayless' expert, and I haven't
15 designated an expert. So, at some point, there will be
16 a accounting tracing report and exercise done with
17 competing experts. That - we can almost guarantee.

18 We anticipate that there is going to be
19 summary judgments as to the legal effect of certain
20 gifts and then summary judgment as to a legal effect of
21 certain amendments as it relates to the trust. So, we
22 needed a briefing schedule that would allow the parties
23 to adequately brief those and set those and have those
24 heard. I don't anticipate there's anymore discovery
25 relating to those briefs; but, again, since Mr.

1 Featherston and Mr. Spielman weren't present, they may
2 have some additional discovery they want answered before
3 we get to those summary judgments.

4 I also anticipate that there is going to
5 be a legal challenge to the temporary injunction that's
6 presently in place as to whether it can stay in place in
7 this court. And we're going to need some time and
8 briefing on that, on that injunction and maybe a
9 separate hearing on getting a new injunction in place.

10 Additionally, depositions, for the most
11 part, I don't think depositions have been taken. I
12 think -- and Bobbie is going to correct me if I'm wrong
13 on this, but I've not participated in any depositions of
14 any parties in this litigation. There may have been
15 some depositions taken as related to the other
16 litigation in district court, but in this proceeding, I
17 don't think we've taken any party depositions, expert
18 depositions, fact-witness depositions at all. So, you
19 know, I think we have, still, we've exchanged written
20 discovery, but I think we have a lot of work still to
21 do. And, frankly, I think June is probably aggressive.
22 And I welcome any response --

23 MS. BAYLESS: Well, and I can make it
24 easier because I have three trial settings already the
25 first week in June. So, that's no reason to set one

1 then that could conceivably add to that.

2 MR. OSTROM: I guess I'd like some
3 feedback - what y'all think you're going to need.

4 MR. SPIELMAN: So, my feedback at this
5 point is basically two points:

6 One is, my client is out of town and a
7 school teacher. And so I sort of like the idea of a
8 summer setting because hopefully that makes her a little
9 bit more accessible and available for a trial. It can
10 be June and maybe one of the other summer months.

11 The other thing -- I don't want to speak
12 out of turn because I don't know a whole lot about the
13 other district court lawsuit that Ms. Bayless is working
14 on; but as I understand it, in quotes, that lawsuit is a
15 case against the law firm that drafted the trust
16 documents that are at issue in this case. And I think
17 the allegation is that that law firm committed
18 malpractice in drafting those documents which, in one
19 form or fashion, seems sort of similar to what's being
20 dealt with in this case as to whether or not those
21 documents are invalid and enforceable.

22 In my little, tiny, lawyer brain, it seems
23 to me that if that malpractice case is successful then
24 the damage model that would be built as to those lawyers
25 probably encompasses a good portion of what Carl and

1 Candy may be suing Amy and Anita and possibly Carole
2 for. So, I think maybe we need to figure out what the
3 time line is for that other district case, the district
4 court case, so that we don't find out, butting heads
5 with it, and winding up with two different judges making
6 determinations on the enforceability of some documents
7 that credit as one case or the other.

8 I don't know enough to know if that's
9 going to, you know, be like the plane dropping the hand
10 grenade in the middle of the room, but it seems like
11 those are some issues that somebody needs to think
12 about.

13 MS. SMITH: Well, first of all, that
14 lawsuit has lost its plaintiff because I never thought
15 Carl had the capacity to bring it in the first place.
16 But now that he's stepping down, it's lost its only
17 possible plaintiff and the only person who could
18 possibly sue Mr. Baseck (sic) for anything. And so it
19 doesn't have a plaintiff. So, it's not going anywhere
20 without a plaintiff.

21 And the other thing is I don't know why
22 it's not in this court in the first place. I have no
23 idea why it wouldn't have been in this court in the
24 first place, and I think it needs to be brought in.

25 MS. BAYLESS: Well, this has been the

1 matter of some discussion with counsel in the other
2 case. Their position is that this case needs to run its
3 course because that will determine their damages if, in
4 fact, there are any damages, and they can be recovered
5 in this case - it obviously has an impact on their
6 damages. So, they think just the opposite of what Mr.
7 Spielman says - that this case needs to go forward first
8 before that case is really ripe for trial. And that is
9 pretty typical of malpractice cases if there are still
10 issues that might affect the damage model. It really
11 doesn't make no sense to proceed --

12 THE COURT: But isn't it the
13 chicken-and-the-egg-sort-of-deal where we have to
14 determine the validity of the document?

15 MS. BAYLESS: And that part is the same
16 and --

17 THE COURT: Well then, I mean, that's the
18 perfect case to be tried here because all of that can
19 be -- if we -- each of those issues is co-dependent upon
20 the other; so, it really does seem like that case would
21 belong here.

22 MS. BAYLESS: Well, frankly, my client
23 will not be driving the bus in that case. There will
24 be -- I mean, there is a request that will be made when
25 the resignation is actually filed for a successor, and

1 that successor will have to deal with that. But there
2 is also a whole set of counsel that's not in this room
3 that would have something to say about that. I don't
4 know whether they would have a positive response or a
5 negative response --

6 MS. SMITH: I'd just pick up the phone and
7 call her and ask her.

8 THE COURT: Well, why don't we -- I mean,
9 it's -- you know, we'll be happy to hear that if someone
10 wants to do a motion to transfer, we'll be happy to hear
11 the motion. And it sounds like the exact type of case
12 that we would pull over here. So --

13 MS. BAYLESS: I'm happy to broach that
14 subject. And I'm not saying, you know, one way or the
15 other, that it would be a contentious matter or it would
16 be an agreement. I don't know.

17 THE COURT: Right. It's just something to
18 do which is impacting on the date in which we go to
19 trial.

20 So, it sounds to me -- what if we do this.
21 What if we plan for an August date, and then we, just
22 with the understanding that we're kind of penciling it
23 so it's on our calendar, and we can go if we're ready,
24 but with the understanding that we know there's a lot to
25 do before we get to trial, and we may not get it all

1 done before that August trial date.

2 So, but honestly, I think it's good. It's
3 better to set it earlier than later 'cause sometimes --
4 well, things get done if you have, if you have a date
5 certain, and it's sooner on the calendar.

6 How does that sound? Anybody object to
7 that?

8 MR. OSTROM: Your Honor, I have no
9 objections to that. I've never dealt with the counsel
10 there on the personal injury or the malpractice
11 proceeding, and I would suggest that what we would need
12 to do is do a -- try to organize a conference call with
13 them, with all counsel together. Their interest will
14 likely be on the participation or briefing of any
15 summary judgments that are filed. That's what I'm --
16 I'm guessing, to the extent we're going to do something
17 jointly with those attorneys as opposed to trying the
18 case, they're going to want to weigh in on whatever
19 deadlines we set for purposes of briefing and responding
20 to MS Chase (sic).

21 MS. SMITH: No, they won't because it is
22 the chicken and the egg. We probably won't be trying
23 them together. It's the chicken and the egg. I mean, I
24 don't know how you can try a malpractice case in the
25 middle of a trust breach of fiduciary duty case. I

1 don't think the two are the same. The only reason I
2 think they need to be here is because I think that it is
3 a probate attorney that did all these documents, and
4 district courts don't typically deal with them. And the
5 other reason is, is because if that Court rules one way
6 and you rule another, you're guaranteeing - you, not
7 you - but the proverbial courts are guaranteeing us
8 years of appeal with still nobody getting their
9 inheritance. That's crazy.

10 THE COURT: Yeah.

11 MS. SMITH: I mean, it's crazy to think
12 there'll be a ruling in another court that might totally
13 conflict with your reading of the trust documents or a
14 jury's reading of the trust documents and then have two
15 exactly opposite rulings which guarantees a reversal in
16 one way or the other on appeal. But I don't think you
17 can try them together. I think that the reality is
18 there would be a 401 and a 402, and the malpractice case
19 will go to the 402. I think it will be up to this Court
20 as to which one got tried first.

21 MS. BAYLESS: If I could just make a
22 suggestion, Your Honor, before we spend a lot of time
23 arguing about trial dates.

24 If maybe what we did is determined whether
25 the Toxico (sic) people have any problem with moving the

1 case here. And I don't know the answer to that one way
2 or the other. But if they don't, then I don't even care
3 if Ms. Smith calls Zanders Foley and asks her, but if we
4 know the answer --

5 MS. SMITH: We're not buddies. We have a
6 case against each other. She can't stand me --

7 MS. BAYLESS: I can vouch for that.

8 MS. SMITH: -- but she will, in fact,
9 answer the phone.

10 MS. BAYLESS: But the point I was going to
11 make is that I do think that everybody's right about
12 this. There are very common issues. It would also make
13 no sense to try the cases together, but it might make
14 sense to make the legal determinations of both at the
15 same time and then you know what will be tried, and you
16 can determine when those should be tried.

17 And so maybe what we need to be doing is
18 establishing a date to deal with those legal issues. I
19 mean, you may not even need nearly as much trial time.
20 Once you deal with the legal issues, you may not have a
21 trial; you may have a long trial; you may have two
22 trials, and you may want to do them back to back. But
23 right now we're sort of -- we don't know what we're
24 dealing with. But I do think that the legal issues are
25 going to be preliminary matters to both and make huge

1 differences in what's left and what's dealt with -- the
2 way it's dealt with. So, if they're okay with moving it
3 over here --

4 MS. SMITH: She doesn't really hate me, I
5 was just kidding. I just took her policy limits on a
6 malpractice case. She's just a little pissed off but
7 not a lot.

8 But I'm just saying that I never talked to
9 her about this case other than she told me that Carl was
10 incapacitated. So, I've never had another discussion
11 with her about the merits or anything else, but I'm
12 happy to walk outside and say, do you have the
13 authority? She probably doesn't. She probably has to
14 go to the carrier. I don't think they ever make
15 decisions. I think the carrier does. I think they
16 don't let their lawyers make very many decisions. And
17 so, at least I can call her or you could. It doesn't
18 have to be me and say, we're considering this. If I
19 rule, the district court won't have any choice, but it
20 be nice to do it by agreement and get her moving because
21 my understanding is these malpractice insurance
22 companies do everything by committee. And I'm not being
23 facetious. On our case, I could never get her -- she
24 was very responsive; her client was never responsive.
25 And so it would take two and a half weeks to get the

1 answer to a simple, "yes" or "no."

2 MS. BAYLESS: Which is probably why it
3 doesn't make any sense to just call her and think we can
4 get the answer, but --

5 MS. SMITH: We can get it moving.

6 MS. BAYLESS: Yeah. Or maybe what we
7 could do, we all recognize that we've agreed to move the
8 case that is now set. Maybe we set a status conference
9 in two weeks or a week or something and we find out,
10 give her an opportunity, find out how long it's going to
11 be for her to let us know that, and then she can
12 participate in scheduling what needs to happen in terms
13 of determining these legal issues. I think she's going
14 to feel the same way. Why not see if that resolves her
15 case or balloons her case or leaves it the same. I
16 don't think that's going to be a controversy, but I can
17 certainly see why she might not like somebody else
18 scheduling the briefing on something like that. And she
19 might -- maybe she doesn't care. I mean, I don't care.
20 So, maybe that's -- and I don't mind contacting her and
21 letting her know this is going on. I don't mind if
22 Darlene does it. I don't care who does it. But I think
23 we need the input, and it seems like a lot of
24 unnecessary effort to move beyond that issue until we
25 know the answer to that issue.

1 Now, you know, if you're going to move it
2 over here anyway, I guess that's one thing she needs to
3 be told - whether you agree to it or not - I mean, I'm
4 not saying that's what you're --

5 THE COURT: Well that would be an advance,
6 you know, ruling, and I can't do that. But, I mean --

7 MS. BAYLESS: No. No. I understand. But
8 I think Zanders is a very reasonable person, and I agree
9 with Darlene - she's responsive. I don't think this
10 will be anything that will be hard, but I do think she
11 can't just, when you call her, off the top of her head,
12 say, yes, let's do this drastic thing.

13 MS. SMITH: The only reason that I was
14 thinking you call her, and we're so belaboring a point,
15 is that she's not a probate lawyer. She's very bright.
16 I'm not taking away from it at all. But a lot of people
17 don't realize -- I'm not saying that you're making a
18 predetermination of your ruling. I didn't mean to
19 insinuate that. What I meant is a lot of people don't
20 realize you have the power. They don't realize that
21 they don't have to consent if you make a determination
22 that it is appertaining an incident to and belongs in
23 here and we're not forum shopping. I don't think that
24 this has never come up in our other case, and it was
25 probate-related. And so, she may have the Estates Code

1 right in front of her and realize that you have the
2 power to do that - I'm betting that.

3 So, I'm not saying that the reason you
4 should speak to her is to say what your advance ruling
5 is - I just think that one of us needs to tell her you
6 have the power to do it - not that you told us that you
7 would because a lot of people would just say, no. No,
8 we're happy where we are. We don't want to start over
9 with another judge, and they don't realize all the
10 pleadings moved too. So, they see it as this giant
11 morass when it doesn't really have to be. So, that's
12 it. I'm not saying you've already ruled.

13 THE COURT: No. No. I know.

14 My thought is, what if I give you guys
15 just time to sort this out, visit with the other counsel
16 and, you know, file a motion to transfer if that's what
17 you want to do or just file an agreed order. We don't
18 even need a motion necessarily. But what if we have a
19 scheduling conference in a month and just reconvene and
20 talk about this issue and see where it's headed. And
21 then we've still got our trial date in place, but if the
22 other attorneys are participating need to make changes
23 to our docket control order, then, you know, we'll do
24 that at the status conference which will be in a month.
25 But at least we'll have something in our file.

1 MS. SMITH: In place.

2 THE COURT: Right.

3 MS. BAYLESS: Whatever the Court wants to
4 do.

5 THE COURT: Well, it was your suggestion,
6 right --

7 MS. BAYLESS: Well --

8 THE COURT: -- to have a conference in a
9 month?

10 MS. BAYLESS: That was my suggestion. My
11 suggestion was to have a status conference in a month
12 about dealing with the preliminary legal issues before
13 establishing a trial date, but --

14 THE COURT: Well that's, I mean, that's
15 sort of what it would be except we would have penciled
16 in a trial date just so we don't get, we don't get -- we
17 don't lose those dates to someone else.

18 MS. BAYLESS: Right. Right. Well, maybe
19 what would make sense is to pencil in the trial date,
20 have -- set the status conference for three weeks or a
21 month or whatever the Court wants to do and get the
22 other people here and then have the more formal docket
23 control order happen and that status conference; is that
24 what you were saying? Maybe you said that and --

25 THE COURT: Well, I want a formal docket

1 control order today. I just want -- I want -- but we'll
2 be open to changing it if the other attorneys -- I mean,
3 if the other attorneys need to make changes, we'll be
4 open to that. I just want something on paper.

5 MS. BAYLESS: Okay. Well, yeah, I'm sure
6 they would want input. That's the main reason I brought
7 it up but that's fine.

8 THE COURT: Okay. So, in a month.
9 Today's the 18th. So, March 18, we've got spring break
10 in there so y'all want to say the end of March? Will
11 that work for you guys?

12 MR. OSTROM: Your Honor, I can't do it
13 between the 5th and 15th of March. I'll be out of the
14 country.

15 THE COURT: Okay.

16 MS. SMITH: Your kids cannot have a spring
17 break that is that long. That is physically impossible.

18 THE COURT: So, do we have any dates for
19 the end of March and late March?

20 MS. SMITH: Some of us don't work our
21 phones, Judge, quite as quickly.

22 MS. BAYLESS: Some of us have a flip
23 phone.

24 MR. SPIELMAN: It's easy for me. I'm not
25 allowed to leave for spring break anyway.

1 MS. SMITH: The 23rd is fine. I just
2 couldn't read all the little print.

3 MS. BAYLESS: What time are you talking
4 about?

5 THE COURT: Say, 1:30?

6 MS. SMITH: What are we calling this? I
7 got lost in the what we're calling this.

8 MR. SPIELMAN: Status conference.

9 MS. SMITH: I just want to know what's
10 expected of me on that day. That's all I want to know.
11 You can call it a "pig". I don't care. I just need to
12 know what I need to bring and what I need to be ready to
13 address.

14 MS. BAYLESS: Well and I guess -- okay. I
15 mean, I will let -- I guess part of the issue is what
16 has been worked out by agreement, what hasn't, what's
17 still being pushed. So, it's -- I don't know what to
18 call it other than a status conference assuming that we
19 can add things as needed if there's some, you know, a
20 hearing that is raised by the discussions in the
21 meantime, just have that block set aside.

22 THE COURT: Well, I mean, so if you're
23 talking about developing an agenda, which is what I'm
24 hearing, then, I mean, the first item on the agenda is
25 the status of the case in the district court.

1 MS. BAYLESS: Right.

2 THE COURT: Whether that's transfer,
3 whether -- you know, it's already transferred, whether a
4 motion has been filed. Just getting those attorneys
5 involved would be the first item of the agenda. And
6 then the second would be if those attorneys have any
7 objections to the docket control order that's in place,
8 that would be in place today. And then I guess you guys
9 will add items as you wish.

10 MS. BAYLESS: On this one, I do need to go
11 call my office, Your Honor, because I'm supposed to be
12 out of town in August. I don't remember when.

13 THE COURT: Okay.

14 MS. BAYLESS: It will take a second.

15 THE COURT: Sure. Take the time you need.

16 (Off the record)

17 MS. BAYLESS: Okay. The difficulty is
18 that I have to be out of town right up until that point
19 which makes it very hard to be ready for an August 17.

20 THE COURT: And what about the next week?

21 MS. SMITH: That's when I leave for New
22 Jersey.

23 THE COURT: Okay. So, let's look into
24 September.

25 MS. SMITH: What is this a trial sitting?

1 THE COURT: Yes.

2 MS. SMITH: I got lost in the scheduling.

3 THE COURT: So, how about the first week
4 in September?

5 MR. OSTROM: Which is Labor Day.

6 MS. SMITH: No, it's not. The second one
7 is --

8 MR. OSTROM: Yeah, that's right. The
9 first full week of September is Labor Day beginning on
10 the 7th. I didn't know if that was the Monday you want
11 us to start.

12 MR. SPIELMAN: My birthday is on the 2nd
13 of September and it's usually -- Labor Day is usually
14 right before it.

15 MS. SMITH: It doesn't ever change, Honey.
16 Maybe your birthday does, but Labor Day doesn't really
17 ever change.

18 MS. BAYLESS: I thought you said September
19 20th.

20 THE COURT: No, that was July.

21 MS. BAYLESS: What date in September?

22 JUDGE COMSTOCK: September, any week in
23 September.

24 MS. SMITH: Can we do the 14th?

25 MR. OSTROM: That's fine with me.

1 MS. BAYLESS: Yes.

2 MR. SPIELMAN: It's just the issue that
3 I'm going to have with my client's availability but, you
4 know, you're in a lawsuit. Eventually, you'll have to
5 find a way to make yourself available. So, if we're
6 just penciling it in so we can make some progress being
7 made, then let's get it penciled in. I think I
8 understand what the Court's saying on that. And if it
9 becomes a problem as we get closer, we'll figure it out.

10 THE COURT: Okay. So, September 14th?
11 The whole week and then we can pare it back if we want.

12 MS. BAYLESS: So, what time on that day?

13 JUDGE COMSTOCK: It's a Friday. So, early
14 afternoon? 1:30.

15 MS. SMITH: Is the morning, like, not an
16 option?

17 JUDGE COMSTOCK: Morning is a possibility.
18 Do you prefer morning?

19 MS. BAYLESS: 10:00.

20 THE COURT: We have no preference.

21 JUDGE COMSTOCK: 10:00 a.m.

22 MS. BAYLESS: That's fine.

23 THE COURT: I need to take just like two
24 minutes because I told someone I would call them at 3,
25 and I need to email them, and I need to let them know

1 I'm busy. Be right back.

2 (Off the record)

3 THE COURT: Are we ready to take up the
4 application for partial distribution?

5 MR. OSTROM: I am, Your Honor.

6 MS. SMITH: Judge Comstock handed me the
7 DCO and said, later before we leave, we should finish
8 it.

9 THE COURT: Okay. Terrific.

10 MOTION FOR PARTIAL DISTRIBUTION

11 ARGUMENT BY MR. OSTROM:

12 MR. OSTROM: Your Honor, you may recall
13 that we originally came down here on an application as
14 an award for attorneys fees or application to release
15 funds.

16 At that hearing, as opposed to asking for
17 attorneys fees, what we got permission from our client
18 to do was to allow for her to seek a distribution from
19 this trust - the trust that her parents had established
20 for her under the restatement of the Brunsting Family
21 Living Trust. This restatement was done in 2005, and it
22 calls for after both the grantors/founders passed away,
23 the division of the assets into a trust for the
24 children. It's undisputed that my clients were
25 beneficiaries of this trust. There is a question as to

1 who is trustee under this instrument. And I may give
2 this Court a little bit of background before I explain
3 why I think it's appropriate.

4 The restatement of the trust was done in
5 January 2005. Elmer, one of the grantors passes away in
6 April of 2009. After Elmer's death, the trustee of this
7 trust is Nelva, of the 2005 trust.

8 In June of 2010, which you don't have in
9 front of you, but I have a copy here if this Court would
10 like to see - Nelva does a Qualified Beneficiary
11 Designation. She doesn't change any provisions on the
12 trust other than to say, "I want there to be
13 advancements." So, to the extent the beneficiaries got
14 property during their life, I want those to be treated
15 as advancements. That's the first Qualified Beneficiary
16 Designation. And she, she purports to use, both, her
17 general power of appointment under this 2005 instrument
18 and her limited power of appointment.

19 She then does, in August of 2010, a new
20 Qualified Beneficiary Designation that was attached as
21 an exhibit to a response. In this -- it's our
22 contention, as a wholesale amendment of the trust. It's
23 not a three-page exercise.

24 The August has no revocation language. It
25 doesn't revoke prior designations; it doesn't undo prior

1 designations. We believe one of the legal issues you'll
2 face, going forward, is that the exercise in June
3 prohibits the exercise in August because it wasn't
4 revoked/undone; it was a testamentary division, and we
5 know that the only way you can undo a testamentary
6 division is you have to revoke it in writing, execute
7 with live formalities.

8 So, but Counsel is right - the QBD of
9 August of 2010 removes or appoints Anita and Amy as
10 trustees of Candace's trust. It also severely limits
11 Candace's right to receive funds out of that trust, but
12 it still has language in there to suggest that the
13 beneficiary should be given a liberal use of these
14 assets. And, you know, even in this document that we've
15 objected to, it says, "The terms, 'support' and
16 'maintenance' may include but are not limited to
17 investment, a family business, purchase, primary
18 residence, entry into a business, vocation, profession
19 commensurate with Beneficiaries' abilities, interest,
20 recreational or educational travel, expenses incident to
21 marriage or child birth and for the reasonable comfort
22 but not luxurious support of the beneficiaries."

23 Very broad.

24 There is no dispute that she's not
25 received a single distribution out of this trust. In

1 fact, the federal court, in granting the injunction
2 indicated that one of the reasons why they granted the
3 injunction was that Anita and Amy never funded these
4 trusts.

5 The Decedent passed away in November 11,
6 2011. The Court signs its injunction order in April of
7 2013, April 19, 2013; and Judge Hoyt, relying on the
8 fact that, one, they haven't provided county records
9 plan like they were supposed to; and two, they didn't
10 fund this trust within -- once the judge signed this
11 order, it still hadn't been funded.

12 So, there's no dispute my client hasn't
13 received any distributions even though she's allowed to.

14 It's our position that as soon as the
15 Court entered this injunction, the discretion ability of
16 Anita and Amy stopped as it relates to -- as it relates
17 to making distributions out of that trust. The Court
18 specifically says that you're not supposed to do
19 anything, and I'm going to weigh in, and you coming to
20 me if you want to make a distribution. We believe that
21 removes that discretionary ability and puts it squarely
22 on the shoulders of the judge who is enforcing that
23 injunction.

24 It's our position that, Your Honor, you're
25 the judge enforcing that injunction. This injunction is

1 now down in front of you under the 402. We have filed a
2 notice of filing of the injunction, and we filed the
3 various lawsuits that the injunction arose out of in the
4 402.

5 What we're asking for today is a
6 disbursement of \$40,000 to our client. It's to give her
7 some use and benefit of this trust. She was being
8 supported by Mom, and there is no dispute that Mom would
9 routinely support her during her life. That was the
10 reason why one of the QBDS was done - was to treat as a
11 advancement to monies paid. That has now stopped.
12 There's been no support, and she should be entitled to
13 that - some modicum of income and support from these
14 trusts for that period of time. I mean, it's been well
15 over four years that we're, now, in this talking about
16 having not gotten any benefit from the trusts that the
17 parents clearly intended for her to receive the benefit
18 from.

19 So, we're asking you to authorize a
20 disbursement of \$40,000 from the trust to my client.
21 What she does with that funds is up to her, and we're
22 not asking you to authorize to pay as our fees. We're
23 not asking you have it paid directly to our firm. It's
24 a disbursement that will go to our client for her, for
25 her benefit and support. She does owe us monies. And

1 if, you know, just like any client which you hand cash
2 out to them, if she chooses to pay my fee then I'll be
3 grateful. But I don't want any ties to bind or require
4 her to make that payment because I agree with Counsel -
5 I don't think that a creditor can compel a beneficiary
6 to make payments.

7 The -- an important place to note is that
8 all the objections seem to stem from this idea that
9 she's going to use these funds to pursue this
10 litigation. We are in this litigation, and we're going
11 to pursue this litigation whether the funds get paid or
12 not. But I don't believe that it's equitable for any of
13 the beneficiaries in this trust not to get use of
14 that -- of those funds for their other maintenance or
15 needs during the course of this litigation. I think the
16 beneficiary should have the ability to come ask for what
17 the purpose of that trust was there to deal with.

18 We're asking that the 40 come out her
19 share. We're not asking that it be taxed against any
20 other beneficiary's share of the trust.

21 There is an argument that suggests that,
22 while you can't do this because the actions of Candace
23 violate the no-contest clauses within the instrument,
24 the lawsuit that Candace has alleged against Amy and
25 Anita relate to -- or against Anita, relate to transfers

1 that she made as trustee of the Brunsting Family Living
2 Trust at that time. This is while Momma was still
3 alive. These are trusts that aren't authorized by the
4 trust instrum -- or distributions not authorized by the
5 trust instrument that she has complained of. It doesn't
6 impact a challenge to the trust instrument - just the
7 trustee's performance under this instrument. So, I
8 don't believe that we are walking on thin ice as to the
9 enforceability of the no-contest language that's found
10 in Exhibit 1, the 2005 restated trust.

11 With regard to Exhibit 2, this is the QBD
12 that was done last in time, the August 2010 QBD. It
13 does have varying expansive, no-contest language. We
14 are challenging this document, not for a breach on the
15 part of Amy and Anita under this document, just as to
16 its judicial effectiveness. It's a dec action. And
17 this Court is well aware that a declaratory judgment
18 action as to rights and the enforcement of documents is
19 typically cut out and removed from contest provisions.

20 So, I think it's important to understand
21 the litigation if they're going to rely on that to say
22 that somehow we're going to forfeit our request.

23 The challenges against Anita relate to
24 transfers made prior to this QBD ever being done in
25 relation as to 2005 as her conduct as a fiduciary.

1 Obviously, holding a fiduciary accountable is something
2 this Court is well aware of.

3 The challenges to this QBD that was done
4 in 2010 are declaratory in nature. The respective
5 rights of Candace under this document that was, one,
6 that never terminates an earlier QBD; two, is done after
7 the death of the other grantor and the actions are the
8 trust had become irrevocable at that time.

9 So, I believe we're well within safe
10 footing as it relates to the other contest and the
11 forfeiture; but again, we're only asking for the \$40,000
12 to be taxed against her side. I believe this Court,
13 relying on the injunction, can exercise that discretion.

14 THE COURT: Is your client disabled?

15 MR. OSTROM: She's, Your Honor, she's not
16 disabled. She -- no, she's not disabled.

17 THE COURT: Well, to say that she receives
18 support from her aging parents before they passed away
19 is not compelling at all to support the argument that
20 she should receive a portion of her inheritance at this
21 point prior to litigation being settled. So, that's the
22 first -- my first thought on it.

23 MR. OSTROM: Your Honor, I don't know why
24 Mom was sending her checks. That was a --

25 THE COURT: Well, I mean, that's between

1 them, but it's not compelling to me. I'm not going to
2 continue to enable Candace for whatever -- you know, I'm
3 not saying enable in the context of, you know, that's
4 necessarily bad; but it's just -- I'm not going to
5 continue that pattern because that would violate the
6 trust terms because this money is supposed to be -- it's
7 got to have some sort of standard for distribution.

8 MR. OSTROM: Well --

9 MS. SMITH: It does.

10 MR. OSTROM: -- it has a standard for
11 distribution, but there has to be a deans testing of
12 that standard. It's not just, you know -- and again,
13 that's, I think, that's where we're getting into -- when
14 we talk about support and maintenance under the trust
15 instrument - it's very broad. And --

16 THE COURT: Is it HEMS? I mean, Health
17 Education, Support, Maintenance?

18 MS. SMITH: No, ma'am. It's a very, very
19 very, modified HEMS. It's not broad at all. It is so
20 narrow that it almost chokes you. It even discusses the
21 character of the person at issue.

22 THE COURT: Okay.

23 MR. OSTROM: Your Honor, I read the
24 support language right off the trust. I mean, it was --
25 she can take trips if she wanted to, you know. If

1 what --

2 THE COURT: Just as long as it wasn't
3 luxurious, right?

4 MR. OSTROM: Well, no, she couldn't do a
5 luxurious lifestyle. Yeah, she's supposed to be
6 supported up to the level she's accustomed to and not
7 this luxurious lifestyle.

8 THE COURT: But, I mean, the point for me,
9 though, is if she's not disabled, the first point she
10 made was she received these checks from Mom. We would
11 imagine they'd be support checks. And that that --
12 she's been without those checks for four years, and we
13 need to make those up in the form of a distribution, and
14 I'd be open to that idea if all of the other
15 beneficiaries were open to that -- to receiving a like
16 distribution.

17 So, that's the first issue.

18 The second is that the other beneficiaries
19 are making sacrifices, I would imagine. I know that
20 Carole has. The last time we were here, she talked
21 about how it was brought up that she had to sell a horse
22 in order to pay her attorney. And the -- I'm really
23 nervous about making any kind of distribution at this
24 point unless it's for the benefit of all of the
25 beneficiaries. Like, we allow distributions for the

1 payment of taxes, I think, at some point, didn't we? Or
2 is that this case?

3 MR. OSTROM: We did but that was violated.
4 You know, we allowed -- we were here -- and to these,
5 both these points, I think these are critical issues in
6 the case.

7 Candace and Carl didn't receive the assets
8 the other beneficiaries did. We're talking about
9 hundreds of shares of stock that came out in 2011, both,
10 Exxon and Chevron stock, that have gone to these
11 respective beneficiaries and their kids. We're talking
12 about cash that came out of bank accounts of the trust
13 while Momma was alive that have gone to people who
14 weren't Carl and Candy. So, I think it's --

15 THE COURT: But Candace received an
16 on-going stream of payments from her mother, right?

17 MR. OSTROM: Right. But what the -- and
18 you'll look at the master's report. It details how much
19 people received.

20 Candace and Carl are clearly on the
21 back-end of that. Carl for sure; he receives zero.
22 Candace is the next least. Then Anita, Amy and Carole
23 because the master went through, identified payments
24 that were taken out of the trust, identified stock they
25 received, identified --

1 THE COURT: Were any of these after Mom
2 passed away?

3 MR. OSTROM: No, these were all during
4 Mom's lifetime while Anita was trustee.

5 So, I think it's -- it's not that they are
6 just sacrificing. I mean, we're apparently here in this
7 litigation because my client didn't get benefit of the
8 trust, Carl didn't get benefit of the trust, and these
9 other clients, the other beneficiaries did, to a
10 disproportionate amount.

11 Moreover, I think it's, it's one thing to
12 say we need to find some balance amongst the
13 beneficiaries, and you're uncomfortable to make this
14 distribution. But there is no evidence that any income
15 has been paid under these trusts to any beneficiaries.
16 It's not that, okay, maybe we have a stringent HEMS
17 standard. The evidence is, and you won't hear anybody
18 object otherwise, that there have been zero
19 distributions other than a request for attorneys fees
20 that I made in the federal proceeding that have come out
21 of this trust for the benefit of Candace. Even though
22 she's entitled to this income, we're offering a zero
23 amount. So, it's not, well, maybe 2000 is appropriate,
24 maybe 1000 is appropriate. There's not even a
25 reasonable amount that's allocated to her right now.

1 So, whatever that reasonable amount should
2 be, it should be something. It can't be zero in
3 relation to, in relation to her right to receive the
4 benefit of this trust that was set up to help her.

5 And to the last point.

6 Yes, Your Honor, we've come here and asked
7 for distributions out of the trust, and Maureen did that
8 for the taxes. And I objected to it saying I didn't
9 think we should do this because it required other
10 things.

11 Your Honor, you signed an order that
12 allowed for the payment of taxes.

13 We have since found out that pursuant to
14 that order, Anita also paid the releasing fees or
15 commission to the brokers, to the CPA there in Iowa,
16 even though, at the hearing, I specifically objected to
17 that.

18 Now what I've been told by Mr. Featherston
19 is -- sorry, I wasn't the lawyer at the hearing. I just
20 read the order. It wasn't clear in the order. Maybe
21 that was something -- and I didn't make clear in this
22 order; nonetheless, her client, Anita, has spent money
23 that wasn't authorized by the Court.

24 THE COURT: After the injunction was in
25 place --

1 MR. OSTROM: That was after the
2 injunction.

3 THE COURT: She made distributions that
4 were not --

5 MR. OSTROM: It was a payment; it wasn't a
6 distribution. It was a payment to -- it was a leasing,
7 a reletting payment. The lease on the land had expired.
8 The trustee wasn't supposed to do anything in relation
9 to the property.

10 The CPS who also does the accounting and
11 the tax filings, the broker for these leases, okay.
12 When they sought application -- when Maureen sought
13 application to this court regarding that lease, we
14 objected. One of our reasons for objecting is that we
15 didn't want to relet by that broker at some discounted
16 price. The Court overruled our objections, said, "I'm
17 going to let them pay the CPA's fees. I'm not letting
18 them pay the brokerage fee even though it's the same
19 company, the same person." And actually, those fees did
20 get paid.

21 MS. BAYLESS: If I can interrupt just one
22 second.

23 I just looked at this order today. The
24 Court or somebody interlineated that accounting fees
25 could be paid so long as they related to the preparation

1 of tax returns. That's interlineated in the order.
2 It's very clear. It's not ambiguous at all. And fees
3 have been paid to this accounting firm that do not
4 relate to the preparation of tax returns.

5 MR. OSTROM: My point being that people
6 seem to still be using the trust not directed by any
7 restrictions of this injunction, but my client doesn't
8 have that ability and is the one who is in the
9 litigation trying to get access to her trust.

10 THE COURT: But that's a reason -- I mean,
11 it's a reasonable mistake; it's not something that was
12 done on purpose and it probably did -- it was paid in
13 violation of the order, or the injunction, because it
14 wasn't specifically mentioned in the order. And I think
15 I remember that. I think I'm the one who interlineated
16 that language, and it was based on your objection, you
17 know, that we want to make sure that, you know, that, I
18 guess, the payments were tax-related but...

19 Is it well-settled that gifts, prior to
20 Nelva's death, would be factored in and accounted for
21 and go to reduce the ultimate inheritance passing to the
22 beneficiaries?

23 MR. OSTROM: Is it well-settled? I don't
24 think it is. The, the Qualified Beneficiary Designation
25 that allowed for that issue that my client acknowledges,

1 allowed for this offset, requires it to be done in a
2 certain way. It requires it to be a writing sent to the
3 trustee saying here's what you need to withhold.

4 In all our discovery thus far, I haven't
5 seen a single writing. I don't know if that ever
6 really --

7 THE COURT: So, we don't know if this is
8 going to be divided up into five equal shares or if it's
9 going to go in a manner such that all gifts prior to
10 death and after death are -- all gifts prior to death
11 and all bequests after death ultimately place each child
12 in the same position. We don't know which way it's
13 going to go, right?

14 MR. OSTROM: Well, I guess we do because
15 there were no more -- the gifts that we're talking about
16 were gifts that Mom was making out of her personal
17 funds, okay, that she had access to a bank account where
18 she'd write a check for a thousand dollars here or two
19 thousand dollars here, whatever it may be. So, they
20 weren't really gifts out of the trust.

21 The trust, the estate itself, doesn't
22 contemplate that gifting other than for tax benefits or
23 purposes. So, the trust itself divides up five ways.
24 Most of all the assets we're talking about divide up
25 equally five ways.

1 The -- when we talk about a reallocation,
2 it's limited by a time period so it doesn't go all the
3 way back. And that may be helpful for this Court to
4 understand that there were two older children and two
5 younger children. And so it picked up gifts to the
6 younger children, but it doesn't go all the way back to
7 gifts that would have occurred decades before.

8 So, to the extent it makes an advancement,
9 it's advanced during her lifetime after June 1st, 2010.
10 So, it cuts off what our lot of advancements that took
11 place prior to that point in time, if that helps answer
12 your question, Your Honor.

13 THE COURT: But is it -- I mean, so the
14 advancements made after June 1st, 2010, is it
15 well-settled that those advancements go against the
16 future inheritance?

17 MS. SMITH: No.

18 MR. OSTROM: I don't know if it's
19 well-settled. My client's position has been, and she's
20 never deviated from this, is that to the extent she
21 receives money, she's willing to take that as an
22 advancement. The numbers that she -- that we've
23 discussed and I've discussed with her, we've discussed
24 at mediation, those numbers that we're talking about are
25 relatively small compared to the overall value of the

1 estate. So, even if you were to go from 2010-onward,
2 we're talking about a thousand dollars a month for a
3 year as opposed to several hundred thousands of dollars.
4 And so her position is, no, she wants that applied
5 across the board. She thinks everybody got something -
6 she better be putting it back.

7 THE COURT: Well, she got the second least
8 amount, so of course that's going to be her position,
9 right?

10 MR. OSTROM: She's been consistent,
11 though. She's not saying, no, that doesn't apply to me.

12 COURT'S RULING ON MOTION FOR PARTIAL DISTRIBUTION:

13 THE COURT: Okay. Well, unless it's
14 well-settled, I mean, I'm not willing to make a
15 distribution to bring her up to an amount or put all
16 beneficiaries on the level of having as if they had
17 received the exact same as of the date of death. I
18 mean, I think we look at the date of death, and you have
19 to assume -- well, I don't know. I don't know. I think
20 I'm going to -- I don't think I'm making sense here at
21 this -- with this line of thought.

22 But I will say that I just don't feel
23 comfortable allowing a distribution to be made unless
24 we're making a distribution to all five children. I'd
25 be fine if everyone wanted to receive a distribution; I

1 just don't see making a distribution to Candace and no
2 one else because...

3 MR. OSTROM: Your Honor, I know I'm the
4 only one asking and maybe that's --

5 MS. SMITH: And I object. And I believe
6 that, at the end of the day, your client won't be
7 entitled to anything.

8 MR. OSTROM: And maybe that's the
9 problem - is that I'm the only one asking. And if
10 that's the case, that's the case, Your Honor; and, you
11 know, I do want it clear, though, that no one should be
12 using this trust. I mean, it's one thing my client
13 doesn't get the benefit of it, but no one should at all.
14 And I think, you know, if that's what's going on, then
15 if that's the way this Court is expressing her concern
16 to me, then I think that -- then I understand. We won't
17 be asking for anymore distributions.

18 THE COURT: Well, and you can, of course,
19 you can bring a motion to show cause and show cause the
20 trustees to answer why they made payments outside of the
21 order if you wanted to do that. You know, I mean, there
22 are fixes and ways to address payments made, you know,
23 that were not court-ordered. So, I'm not concerned
24 about that because I know we have a room full of
25 attorneys watching out, making sure that something is

1 brought to the Court's attention. But, I mean, this
2 isn't to say I wouldn't consider, later on, a
3 distribution. If everybody needs a distribution, I'm
4 open to that. But, at this point, I feel very
5 uncomfortable making a distribution or allowing a
6 distribution to be made to only one of the
7 beneficiaries.

8 MS. SMITH: I attached an order to my
9 opposition.

10 THE COURT: I'll have to find it.

11 MS. SMITH: I have an extra copy here.
12 I'm sorry, I didn't want to do something that isn't
13 stamped.

14 THE COURT: Do you want me just to sign
15 this?

16 MS. SMITH: It just says, "denied." Did
17 you all get it?

18 MR. OSTROM: I'm sure I did.

19 THE COURT: Anything else we need to talk
20 about before you guys start working on the docket
21 control order?

22 MR. OSTROM: I don't believe so, Your
23 Honor.

24 MS. BAYLESS: Your Honor, I do have one
25 request of Mr. Featherston.

1 I don't believe, part of that order that
2 we've been talking about, was that we were supposed to
3 receive the tax filings as in a relatively short period
4 of time after they've been done. I don't believe I have
5 received, and it may be because of the gap in
6 representation, but I haven't received any of the 2013
7 tax filings.

8 THE COURT: Okay. I think it's important
9 to look at those, and I don't know what kind of income
10 this trust is generating, but I will say this:

11 I think distributions actually may be
12 necessary to avoid a higher income tax rate because if
13 no distributions to the beneficiaries are being made,
14 that income is being taxed at the highest possible rate
15 to the trust where as if distributions were made to the
16 beneficiaries of that income, then they would be taxed
17 the beneficiary's rate. So, I just want to bring that
18 issue up - that I think distributions, to the extent
19 there's income, would be more favorable as far as income
20 taxes go and would be -- and the trustees would be
21 abiding closely to their fiduciary duty by making such
22 distributions.

23 MS. SMITH: Your Honor, the last tax
24 return that I remember seeing, there wasn't that much
25 income at all. I don't think that taxes were a big

1 issue.

2 THE COURT: Okay. Well good. Well
3 then --

4 MS. BAYLESS: I'm not sure if that's the
5 case, but if we got a tax return --

6 MS. SMITH: Look at 2011.

7 THE COURT: If the amount is over \$8,000
8 then that's the threshold when it becomes an issue, so
9 FYI. And I know you know that already - I just, you
10 know, have to state it for my own peace of mind.

11 Okay. Anything else?

12 MR. OSTROM: I don't believe so, Your
13 Honor.

14 THE COURT: All right. It's nice to see
15 everyone.

16 MR. OSTROM: Thank you.

17 MR. SPIELMAN: Thank you, Judge.

18

19 * * * * *

20

21

22

23

24

25

1 The State of Texas)

2 County of Harris)

3

4 I, Hipolita Lopez, Official Court Reporter in and
5 for the Probate Court Number Four of Harris County,
6 State of Texas, do hereby certify that the above and
7 foregoing contains a true and correct transcription of
8 all portions of evidence and other proceedings requested
9 in writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record
14 truly and correctly reflects the exhibits, if any,
15 admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$346.00
18 and was paid by Ms. Candace Curtis.

19 WITNESS MY OFFICIAL HAND this the 30th day of
20 June, 2016.

21

22 /s/ Hipolita G. Lopez
23 HIPOLITA G. LOPEZ, Texas CSR #6298
24 Expiration Date: 12-31-16
25 Official Court Reporter
Probate Court Number Four
Harris County, Texas
201 Caroline, 7th Fl.
Houston, Texas 77002