

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

PLEA IN ABATEMENT

1. Comes now Nominal Defendant Candace Louise Curtis, herein respectfully moving this honorable Court for an Order of Abatement, dismissing the above-titled and cause numbered action on jurisdictional ground and would respectfully notice this Honorable Court of the following:

Lawsuits involving the same inherently interrelated subject matter, persons, transactions, events, substantive rights, questions of law and fact, and requiring construction of the same instruments, have been filed in three separate courts. This can only lead to the gross and unnecessary waste of economic and judicial resources, as a case tried in the wrong court will automatically be reversed on appeal after judgment.

Relevant Facts

2. The contested matters before this court (**3rd Court**), irrespective of the theories or labels used, are exclusively related to administration of the Brunsting family of inter vivos trusts. **Assets in the inter vivos trusts are not property belonging to a decedent's estate and, generally, are not subject to probate administration.**

3. **The First Lawsuit** relating to the administration of the Brunsting Trusts was filed in the United States District Court for the Southern District of Texas on February 27, 2012. The action was dismissed sua sponte under the probate exception to federal diversity jurisdiction, but was reversed and remanded by the Fifth Circuit Court of Appeals as outside that exception.¹

4. Notice of that Petition was filed into this Court's record on remand from the federal Court and assigned ancillary number 412,249-402 on February 9, 2015.²

5. Attorney Jason Ostrom also filed notice of that petition in 412,249 on February 9, 2015³ and while Ostrom disingenuously disguises his client's case under an Estate of Nelva Brunsting cover, the legitimate style is shown on page one of that complaint (page 6 of Ostrom's filing), and it reads *Candace Louise Curtis v Anita Kay Brunsting and Amy Ruth Brunsting and Does 1-100*:
"Case 4:12-cv-00592 Document 1 Filed in TXSD on 02/27/12 Page 1 of 28".

¹ *Curtis v Brunsting* 704 F.3d 406

² PBT-2015-47608

³ PBT-2015-45555 (stamped 02102015:1527:P0027)

6. **The Second Lawsuit** relating to the Brunsting Trust administration controversy was filed by Bobbie G. Bayless January 29, 2013, in the Harris County District Court and, while it is styled:

“CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E. BRUNSTING vs. CANDACE L. KUNZ-FREED AND VACEK & FREED, PLLC f/klā THE VACEK LAW FIRM, PLLC”,

a review of the substance of the complaint (Exhibit 1) reveals claims related exclusively to the administration of the Brunsting inter vivos trusts, involve the same persons, transactions, events, substantive rights, questions of law and fact, requiring construction of the same trust instruments⁴ as those described in the claims filed into this Court on April 9, 2013.

7. In this Court, the Report of Gregory Lester, *“Temporary Administrator for the Estate of Nelva Brunsting pending contest”*,⁵ focused entirely upon the Brunsting Trust administration controversy.

8. Mr. Lester’s report gave particular emphasis to the no-contest clause in the alleged August 25, 2010 “Qualified Beneficiary Designation and Testamentary Power of Appointment Under Living Trust Agreement” (8/25/2010 QBD/TPA).

9. This would be the very same 8/25/2010 QBD/TPA discussed in the federal court (1st Court) at the April 9, 2013 injunction hearing (Exhibit 2 p.6 and *inra*); the very same 8/25/2010 QBD/TPA drafted and notarized by Defendants in the 164th District Court suit (2nd court); the same 8/25/2010 QBD/TPA that was the topic of Amy and Anita Brunsting’s June 26, 2015 “No-Evidence Motion” and Curtis’ “Answer and Demand to Produce Evidence” in this court; and, the

⁴ The Brunsting trusts were marketed to Elmer and Nelva Brunsting as a product and a service provided by District Court Defendants Vacek & Freed.

⁵ Filed in 412,249 on January 14, 2016

same 8/25/2010 QBD/TPA that is the intended topic of the summary judgment motion Bobbie G. Bayless scheduled for hearing in this Court for September 5, 2018.

Which Court Should Hear the Trust Matter?

10. Generally, all probate proceedings must be heard in a court exercising original probate jurisdiction.⁶ Subject to certain exceptions, a district court has original and exclusive jurisdiction over all proceedings against a trustee and all proceedings concerning a trust.⁷

11. While a court exercising original probate jurisdiction also has jurisdiction over “matters related to the probate proceeding”, as specified in former Section 4B of the Probate Code,⁸ the textual grant of jurisdiction is not as broad as that given to the district court, and while the statutory probate court could also hear the Brunsting Trust Controversy, the issue here is not one of exclusive jurisdiction, but rather dominant jurisdiction.⁹

Dominant Jurisdiction

12. “The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.” As a result, when two suits are inherently interrelated, “a plea in abatement in the second action *must* be granted.”¹⁰ The dominant jurisdiction issue has been raised before this court in two previous pleadings without a ruling.¹¹

⁶ Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 4A, 2009 TEX.GEN.LAWS 4273, 4275 (formally codified at TEX.PROB.CODE ANN. § 4A, now repealed and replaced with TEX.EST.CODE ANN. § 32.001(a)(West 2014)

⁷ TEX.PROB.CODE ANN. § 115.001(a)(West 2014) which specifically includes “determinations of fact affecting the administration, distribution, or duration of a trust”.

⁸ Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 4A, 2009 TEX.GEN.LAWS 4273, 4275 (formally codified at TEX.PROB.CODE ANN. § 4A, now repealed and replaced with TEX.EST.CODE ANN. § 32.001(a)(West 2014)).

⁹ In re Puig, 351 S.W.3d 301, 305 (Tex. 2011) (“When the jurisdiction of a county court sitting in probate and a district court are concurrent, the issue is one of dominant jurisdiction.”) see also *Mayfield v Peek* No. 08-15-00018-CV - Mandamus to the Eighth District Court of Appeals of Texas (Feb. 2017) (Exhibit 3)

¹⁰ *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974).

¹¹ On 07/17/2015 in Case No. 412249-401, PBT-2015-234080, Vacek and Freed Response to Bayless Motion (Art II p.3), and, 03/08/2016 in Case No. 412249, PBT-2016-77014, Vacek and Freed Response to Curtis Motion (Art III p.5)

13. This first-filed rule flows from “principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues.”¹² The default rule thus tilts the playing field in favor of according dominant jurisdiction to the court in which suit is first filed. Once the first file rule is settled, the issue, if any, comes down to the exceptions to that general rule.

14. The analysis begins by asking whether or not the court must reach the dominant-jurisdiction question. In *Wyatt v. Shaw Plumbing Co.* the Texas Court of Appeals explains that this question only arises “[w]hen an inherent interrelation of the subject matter exists in two pending lawsuits.” If such an inherent interrelationship exists, we then assess dominant jurisdiction. However, if not, then dominant jurisdiction is not an issue, and both suits may proceed.

15. The only question before this court is whether another proceeding raising claims related to administration of the Brunsting trusts had been previously filed in another court. Specifically brought to the Court’s attention with this Plea in Abatement, are the records of pleadings in two other actions showing when those actions were filed and what issues were raised.

16. Probate matters are actions in rem as against property.¹³

“(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.”

17. Actions relating to the administration of inter vivos trusts are personam actions against the trustee or other responsible persons and not claims against the property itself.

¹² *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988) (emphasis added). See also *Curtis*, 511 S.W.2d at 267 (“Any subsequent suit involving the same parties and the same controversy must be dismissed if a party to that suit calls the second court’s attention to the pendency of the prior suit by a plea in abatement.”).

¹³ Estates Code 32.001(d)

18. The claims filed in this Court, specific to Carl Brunsting individually, are against the trustees and relate exclusively to the administration of the Brunsting inter vivos trusts. The claims alleged to belong to the estate are not so clear. Carl resigned from the office of executor on February 19, 2015 and yet Ms. Bayless continues to file pleadings, without changing the style, and without distinguishing Carl's individual claims from those alleged to belong to the estate.

CONCLUSION

19. Public policy does not favor the wasting of judicial or private resources. Permitting a case to proceed in the wrong court necessarily "costs private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings."¹⁴

20. This Court must dismiss all trust administration related claims so that the trust controversy can proceed in the court of dominant jurisdiction, unburdened by the threat of collateral estoppel, conflicting rulings, the mixture of incompatible plaintiffs, and the vaguer of claims such as those knowingly and belatedly placed before this Honorable Court on April 9, 2013.

WHEREFORE, PREMISES CONSIDERED, first filed Plaintiff, Candace Louise Curtis, prays this court abate the current trust administration suit and for any other relief, whether in law or in equity, whether pled or unpled to which Petitioner, Candace Louise Curtis, may show herself to be justly entitled.

Respectfully submitted,

//s//

Candace Louise Curtis

¹⁴ *Prudential*, 148 S.W.3d at 136.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to all known counsel of record and unrepresented parties in the manner required by the Rules on this 17th day of August 2018.

//s//

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CARL HENRY BRUNSTING	§	No. 412,249-401
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executor of the estates of Elmer H.	§	
Brunsting and Nelva E. Brunsting	§	IN PROBATE COURT
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Defendant only,		
CANDACE LOUISE CURTIS		

ORDER ON PLEA IN ABATEMENT

Before the Court is Nominal Defendant Candace Louise Curtis' Plea in Abatement raising the dominant jurisdiction question. The Court has read the pleadings and examined the record and finds that the ancillary matter before this court, No. 412,249-401, involves the same inherently interrelated subject matter, persons, transactions, events, substantive rights, questions of law and fact, and require construction of the same instruments, as the action filed into the 164th Judicial

District Court of Harris County on January 29, 2013, three months prior to the claims filed into this Court.

The Court further finds that ancillary matter No. 412,249-401, was filed into this Court more than 11 months after a case involving the same inherently interrelated subject matter, persons, transactions, events, substantive rights, questions of law and fact, and requiring construction of the same instruments was filed into the United States District Court for the Southern District of Texas.

The Court will not attempt to answer the question of which court should hear the trust administration controversy but has concluded as a matter of law, that this Court should not.

IT IS THEREFORE ORDERED:

Ancillary matter No. 412,249-401, relating to the Brunsting trust administration controversy is DISMISSED, and all Orders entered by this Court relating to the administration of the Brunsting inter vivos trusts are vacated, set aside and held for naught.

Further, the Order accepting the remand of *Candace Louise Curtis vs. Anita Kay Brunsting, Amy Ruth Brunsting and does 1-100, No. 4:12-cv-592*, from the United States District Court for the Southern District of Texas, is VOID ab initio and is therefore vacated and the matter is hereby Ordered to be returned to the Court of Origin.

SIGNED THIS ____ DAY OF _____, 2018

Presiding Judge