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FILED
10/8/2018 5:43 PM
Stan Stanart
County Clerk
Harris County
Harris County - County Probate Court No. 4

CANDACE LOUISE CURTIS Plaintiff, v Anita Kay Brunsting, Amy Ruth Brunsting, Does 1-100 Defendants.	§ § § § § § §	CIVIL ACTION NO. 4:12-cv-00592 Harris County Probate No. 4 No 412,249-402 Breach of Fiduciary
CARL HENRY BRUNSTING Individually ~~and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting~~ vs ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust; AMY RUTH BRUNSTING f/k/a AMY RUTH TSCHIRHART, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust; CAROLE ANN BRUNSTING, individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a Nominal Defendant Only: Candace Louise Curtis	§ § § § § § §

NOMINAL DEFENDANT'S VERIFIED FIRST AMENDED PLEA IN ABATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

1. Comes now Candace Louise Curtis, Nominal Defendant in the above titled and numbered cause and files this Motion to Dismiss, herein respectfully moving this Honorable Court for an Order of Abatement, dismissing the above-titled and numbered action on jurisdictional ground.

2. Relator, would respectfully notice this Honorable Court that 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**.

3. 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. Therefore, Nominal Defendant Curtis herein moves the Court to abate this third suit, that the matter may proceed in the Court of Dominant Jurisdiction.

STATEMENT OF CASE

4. In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust ("the Trust") for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively "the Brunstings' Wills") include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust.

5. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust. The beneficiaries, Candace Curtis, Carole Brunsting, Carl Brunsting, Anita Brunsting, and Amy Brunsting, are siblings.

The First Brunsting Trust Related Lawsuit

6. On February 27, 2012, Candace Curtis ("Curtis") filed a breach of fiduciary suit into the United States District Court for the Southern District of Texas under diversity jurisdiction.[1]

7. That complaint alleged that Anita and Amy Brunsting, while acting as co-trustees of the Trust, had breached their fiduciary duties to Curtis, a beneficiary of the Trust. Specifically, she alleged that Anita and Amy had failed to provide her with documents related to administration of the Trust and had failed to provide accurate and timely accounting. The complaint alleged claims for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. Curtis sought compensatory damages, punitive damages, a temporary restraining order against "wasting the estate," and an injunction compelling both an accounting of Trust property and non-probate assets, as well as production of documents and accounting records.

8. On March 1, 2012, the District Court denied Curtis' application for a temporary restraining order and injunction because the Defendants had not been served with process. In the order the District Court noted that it "*appears that the court lacks subject matter jurisdiction over the claim(s) asserted.*" On March 6, 2012, in response to the lis pendens Curtis had filed related to property in Texas and Iowa, Anita and Amy, represented by Vacek & Freed staff attorney Bernard Mathews, filed an emergency motion to remove the lis pendens.

9. The motion noted that it was subject to the Defendants' contention that the federal district court lacked subject matter jurisdiction under the probate exception to federal court jurisdiction, an issue that the Defendants said would be raised in a separate Rule 12(b) motion to dismiss.

10. On March 8, 2012, following a telephone conference with the parties, the District Court Judge entered a sua sponte order dismissing the case for lack of subject matter jurisdiction. In

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[1] *Candace Louise Curtis vs. Anita and Amy Brunsting and Does 1-100 No. 4:12-cv-592 filed 2/27/2012*

doing so, he concluded that the case falls within the probate exception to federal diversity jurisdiction. Plaintiff Curtis filed timely Notice of Appeal[2].

11. On March 9, 2012 Attorney Bobbie G. Bayless (Bayless) representing Carl Brunsting (Carl) filed "*Carl Henry Brunsting's Verified Petition to Take Depositions Before Suit*" No. 2012-15538 in the 80th Judicial District Court of Harris County. Thus, while Plaintiff Curtis' breach of fiduciary lawsuit was on appeal, Bayless was moving forward with deposition and discovery.

12. On January 9, 2013 the Fifth Circuit Court of Appeals announced their unanimous opinion in No. 12-20164, published *Curtis v Brunsting 704 F.3d 406* (Jan 9, 2013), in which the Justices determined Curtis' claims for breach of fiduciary duty against the co-trustees of an inter vivos trust did not implicate the probate exception.

> *HN5 As a threshold matter, the probate exception only applies if the dispute concerns property within the custody of a state court. The federal court cannot exercise in rem jurisdiction over a res in the custody of another court. Both of the Brunstings' Wills were admitted to probate after the district court dismissed the case, and probate proceedings are ongoing.11 However, nothing suggests that the Texas probate court currently has custody or in rem jurisdiction over the Trust. It likely does not. HN6 Assets placed in an inter vivos trust generally avoid probate, since [*410] such assets are owned by the trust, not the decedent, and therefore are not part of the decedent's estate.12 In other words, because the assets in a living or inter vivos trust are not property of the estate at the time of the decedent's death, having been transferred to the trust years before, the trust is not in the [**8] custody of the probate court and as such the probate exception is inapplicable to disputes concerning administration of the trust. The record also indicates that there would be no probate of this Trust's assets upon the death of the surviving spouse.13 Finding no evidence that this Trust is subject to the ongoing probate proceedings, we conclude that the case falls outside the scope of the probate exception. The district court below erred in dismissing the case for lack of subject-matter jurisdiction.*
> *IV.*
> *For the reasons set forth above, we REVERSE the district court's dismissal of the case and REMAND for further proceedings.* ***REVERSED AND REMANDED.***

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[2] Fifth Circuit Appeal No. 12-20164

The Second Brunsting Trust Related Lawsuit

13. On January 29, 2013 Bayless filed a malpractice suit against Brunsting trust and estate plan attorneys Vacek & Freed in the Harris County District Court styled:[3] *Carl Brunsting Executor for the Estate of Nelva Brunsting*[4].

Back in the United States District Court for the Southern District of Texas

14. On April 9, 2013 there was a hearing in the Southern District of Texas on Curtis' renewed application for a preliminary injunction. Judge Hoyt issued the injunctive order at the conclusion of the hearing which he published on April 19, 2013. In the Order Judge Hoyt summarized Plaintiff Curtis complaint as follows:

> *"She asserts that, as co-trustees, the defendants owe a fiduciary duty to her to "provide [her] with information concerning trust administration, copies of trust documents and [a] semi-annual accounting." According to the plaintiff, the defendants have failed to meet their obligation and have wrongfully rebuffed her efforts to obtain the information requested and that she is entitled."*
>
> *"The record also reflects that the defendants have failed to provide the records requested by the plaintiff as required by Article IX-(E) of the Trust. Nor is there evidence that the Trustee has established separate trusts for each beneficiary, as required under the Trust, even though more than two years has expired since her appointment."*

15. In essence the Court found all of the elements necessary to issue the injunction which just happen to also be all the elements necessary to establish Curtis' claim that Anita Brunsting, while occupying the office of trustee, had breached the fiduciary duties owed to her as a beneficiary of the Brunsting Trusts.

The Third Brunsting Trust Related Lawsuit

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[3] No. 2013-05455 164th Judicial District Court of Harris County Texas

[4] Made a part of the probate court record in Case 412,249 [03032016: 1510: P0065]

16. April 9, 2013, Bayless knew the Harris County District Court was the second court to entertain the Brunsting trust controversy when she filed a third action exclusively related to the Brunsting inter vivos trusts in Harris County Probate Court Four (4) No. 412,249-401 styled:

> *CARL HENRY BRUNSTING, individually and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting*
> *vs.*
> *ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust; AMY RUTH BRUNSTING f/k/a AMY RUTH TSCHIRHART, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust; CAROLE ANN BRUNSTING, individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, CANDACE LOUISE CURTIS*

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

In the United States District Court for the Southern District of Texas

18. On May 9, 2013 United States District Court Judge Kenneth Hoyt issued an Order appointing a Special Master to perform an accounting of the Brunsting Trusts. The trustees were ordered to cooperate with the Special Master in the Performance of his duties. It was this inquiry that produced evidence of misapplication of fiduciary and self-dealing.

DOMINANT COURT JURISDICTION

The Multiplication Factor

19. "Courts are erected to settle controversies, not to multiply them." *Cleveland v. Ward*, 285 S.W. 1063, 1071 (1926).

> *"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."*[5]

20. On August 17, 2018, Relator filed a Plea in Abatement raising the dominant jurisdiction question. In Item 2 of Bayless' "*Response to Plea in Abatement*" she states:

> *"2. An abatement based on dominant jurisdiction must be alleged and proved by Curtis. That burden requires Curtis to prove that a suit is still pending in another court which involves the same parties and the same dispute. Wyatt v. Shaw Plumbing Company, 760 S.W.2d 245 (Tex. 1988)."*

21. The dominant jurisdiction analysis proceeds in three distinct parts and begins by asking whether we must reach the dominant-jurisdiction question at all.

22. *Wyatt v. Shaw Plumbing Co. supra.*, explains that this question only arises "[w]hen an inherent interrelation of the subject matter exists in two pending lawsuits." Thus, we first ask whether there is an inherent interrelation between the subject matter of the two pending lawsuits that triggers the dominant-jurisdiction question here.

23. Bayless filed a Petition for Partial Summary Judgment in this Court on July 9, 2015. At page 2 Bayless states:

> *Summary Judgment Issues*

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

This is a case involving, ***among other things, a dispute about changes[6] purportedly made to a trust of which all of the parties are beneficiaries****, as well as the administration of that trust and disbursements made from that trust after the parties' mother resigned as trustee and Defendant, Anita Kay Brunsting ("Anita"), took over the trustee duties. This Motion for Partial Summary Judgment seeks relief on two specific points at issue in this case.*
1. Carl seeks a determination, as a matter of law, that the August 25, 2010 Qualified Beneficiary Designation is null and void because it violates the terms of the Brunsting Family Living Trust as restated on January 12, 2005 (the "Family Trust") which prohibits amendments after the death of the first founder. Elmer, the first founder to die, died in 2009. (Exhibit 4, p. P4347).

24. Five days later, on July 14, 2015, Bayless filed a Motion to Transfer the District Court case to Probate Court Four (4)[7] in which **Bayless herself said** the actions were related:

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

25. In Bayless "Response to Plea in Abatement" she claims (*emphasis added*):

"4. The assertion is also made by Curtis that the existence of the legal malpractice action filed in Harris County District Court against Vasek & Freed, who prepared the trust instruments at issue, can be asserted to support some type of dominant jurisdiction in a court other than this one. Curtis is not even a party to that proceeding. ***The proceeding involves legal malpractice issues, and does not involve the same parties or really even the same dispute."***

26. That is exactly the opposite of what Bayless' said in her District Court Complaint. In Bayless District Court Complaint against Vacek & Freed at page 2 she claims:

"5. Other parties and entities involved in the facts relevant to this petition but who are not named as defendants herein include the following:"

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[6] This is essentially what Plaintiff Curtis said in **her** First Amended Federal Complaint
[7] 2015-07-14 Motion to Transfer the District Court case to Probate Court Four (4) [Case 412249-401 PBT-2015-228888]

27. Bayless then lists the family trust and all the trust beneficiaries, except Carl, and on page 3 she describes exactly what the District Court case is about.

> *"This is a case involving Defendants' negligence, breach of fiduciary duty and other acts or omissions in their representation of Elmer and Nelva, both individually and in their capacities as trustees of the Family Trust. Defendants' actions constitute negligent misrepresentation, negligence per se, deceptive trade practices, conversion, fraud, commercial bribery, breaches of their fiduciary duties, as well as aiding and abetting, assisting and encouraging repeated breaches of*
> *-3-*
> *fiduciary duty. Alternatively, a conspiracy existed between Defendants, and the Current Trustees for that unlawful purpose.*
> *The Defendants assisted the Current Trustees in implementing a scheme to change the terms of the Family Trust, to ultimately remove Nelva from her position as trustee of the Family Trust, and to improperly remove assets from Elmer and Nelva's estates and from the Family Trust.*
> *Because of the actions of the Defendants, the Current Trustees were able to alter Elmer and Nelva's wishes, resulting in the improper transfer of assets to Anita, Amy, and Carole, all to Plaintiffs detriment."*

28. Bayless says, "*a conspiracy existed between Defendants, and the Current Trustees*". When Bayless says "Defendants" she is talking about the defendants in the District Court. When she says "Current Trustees" she is talking about the (de facto Trustee) defendants in the Probate Court.

29. In Bayless' *Memorandum in Support of Motion to Transfer*[8] she argues:

> *"Transfer to the 164th Judicial District Court of Harris County, Texas, the Honorable Smoots-Hogan presiding, would be perfectly acceptable to Plaintiff, but because the Harris County Probate Court is a statutory Probate Court a transfer of the probate proceedings to the District Court is not authorized under Estates Code Chapter 32."*

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[8] 2016-03-02 Case 412249-401 PBT-2016-71625 Bayless Memorandum in Support of Motion to transfer

30. Bayless filed her Brunsting Trust related claims in the District Court in the name of the Estate of Nelva Brunsting knowing that the controversy over the administration of the Brunsting inter vivos trusts was not a probate matter.

31. Now Bayless argues that because she filed a related lawsuit against "*current trustee co-conspirators*" in a Probate Court, that it is suddenly a probate matter governed under the Estates Code.

32. The fact that Harris County Probate Court is a statutory Probate Court does not convert the in personam breach of fiduciary trust administration matter into an in rem probate proceeding, nor does it convert the non-probate assets of the Brunsting trusts into assets belonging to the decedent's estate subject to probate.

33. On page three of her *Memorandum in support of Motion to Transfer* **Bayless states**:

> *"The Consideration of Relatedness*
> *The legal theories are irrelevant, as the standard for determining relatedness for consolidation purposes is measured by the facts and whether the actions are so related that the evidence presented will be material, relevant, and admissible in each case.*
> *Once we have established that the cases are related the questions become whether or not consolidation would 1) promote judicial economy and the efficient administration of Justice, 2) reduce the burden of duplicate hearings on the witnesses and the Court, 3) Reduce the risk of conflicting findings of fact or conclusions of law 4) or, in the negative, whether consolidation would be productive of prejudice to the Defendants or confusion for the jury.*
> *Under examination it becomes inarguable that the summary judgment motions and petitions for declaratory judgment in the two pending suits turn on but one set of facts, and that the cases are so factually related that the evidence presented will be material, relevant, and admissible in each case."*

34. Bayless' final argument in her opposition to the Plea in Abatement is focused on Curtis' March 2, 2016 Motion in Support of Transfer. On page 1 of Bayless' Memorandum in Support of her Motion to Transfer, Bayless states:

"A previous transfer motion was filed by Carl Brunsting, February 9,2015, in estate case 412249 (PBT-2016-44972). The motion was discussed at a hearing in July 2015, but no hearing on the motion was ever set. Opposition to the transfer motion was filed July 17, 2015 by V & F (PBT -2015-234080) in which they:

> *"adamantly oppose transfer and believes the 164th Judicial District Court of Harris County, Texas, the Honorable Smoots-Hogan presiding should decide the dispute between Brunsting and V & F"*

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Transfer to the 164th Judicial District Court of Harris County, Texas, the Honorable Smoots-Hogan presiding, would be perfectly acceptable to Plaintiff, but because the Harris County Probate Court is a statutory Probate Court a transfer of the probate proceedings to the District Court is not authorized under Estates Code Chapter 32."

35. While this may be true for "probate proceedings", the Brunsting inter vivos trusts contain only non-probate assets that do not come within the definition of a "probate matter".[9]

36. This fundamental distinction was the focus of the Texas Court of Appeals in Mayfield v Peek[10], a case decided February 28, 2017, where there was a guardianship, a probate, and a trust lawsuit. At its core the Mayfield case involved two siblings fighting over an inheritance from their parents. The two principal issues before the Court were not so much the merits of the dispute, but whether one sibling had standing to complain of the other's actions, and in what court the fight should take place.

37. Mayfield filed claims in the District Court of Dallas claiming in part that her brother, Appellee Gary Bruce Peek, (Bruce) prevailed upon their mother to remove assets from a revocable trust at a time when their mother allegedly lacked the mental capacity to do so. Bruce convinced the district court that Mayfield lacked standing to make that claim. He also claimed that another

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[9] See Texas Estates Code §§ 22.029 and 22.012 infra.

[10] 2018-08-07 Plea in Abatement - Exhibit 3 LINDA MAYFIELD, Appellant, v. GARY BRUCE PEEK, EXECUTOR OF THE ESTATE OF DOROTHY PEEK, Appellee. No. 08-15-00018-CV

court should hear that sort of claim, because by the time of the trust suit his mother had passed away and her will was in probate.

Impeachment by Self-Contradiction

38. Bayless' argument that these cases could be seen as something other than integrally related after arguing their relatedness herself is preposterous. Once it has been established that an inherent interrelation of the subject matter exists, as in these two pending lawsuits, dominant jurisdiction must be assessed. However, if no inherent interrelation of the subject matter exists, dominant jurisdiction is not an issue and both suits may proceed.

39. 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. Thus, if the suits are inherently interrelated, the first filed Court is presumed to be the Court of dominant jurisdiction and the burden shifts to the later filed Plaintiff to show why an exception should apply.

40. Since Bayless is the author of the integrally related lawsuits filed in both state courts, the burden to show why an exception should apply falls squarely on her shoulders.

DOMINANT JURISDICTION EXCEPTIONS

41. There are three exceptions to application of the dominant jurisdiction rule delineated in Cleveland v. Ward, *supra*, that the court where suit is first filed acquires dominant jurisdiction: (1) conduct by a party that estops him from asserting prior active jurisdiction; (2) lack of persons to be joined if feasible, or the power to bring them before the court; and (3) lack of intent to prosecute the first lawsuit. Young, 128 Tex. at 636-37, 101 S.W.2d at 800-01; see also Curtis, 511 S.W.2d at 267.

42. While all three factors are present throughout, and there is a great deal of overlap in the application of the same facts to all three categories, none of the facts operate as exceptions to the dominant jurisdiction rule but, because of the peculiar dynamics, each works to taint both state court filings inasmuch as comity, dominant jurisdiction and complete remedy are concerned.

The Inequitable Conduct Exception

43. It has been held that the plaintiff in the first suit may be guilty of such inequitable conduct as will estop him from relying on that suit to abate a subsequent proceeding brought by his adversary. V. D. Anderson Co. v. Young, 128 Tex. 631, 101 S.W.2d 798 (1937); Russell v. Taylor, 121 Tex. 450, 49 S.W.2d 733 (1932); Johnson v. Avery, 414 S.W.2d 441 (Tex.1966).

44. Bayless, who has clearly argued that these two cases are related **and** clearly argued that these two cases are unrelated, filed claims in the Harris County District Court knowing there was an integrally related action arising from the same nucleus of operative facts already pending in the federal court. Bayless filed her claims in the Harris County District Court in the name of Carl Brunsting, only as Executor for the Estate of Nelva Brunsting, knowing that Carl was not competent to receive letters testamentary and that he was not competent to perform the duties of that office.

45. Bayless then filed claims in the Harris County Probate Court in the name of "*Carl Brunsting Individually and as Executor for the Estate of Nelva Brunsting*" knowing inherently interrelated claims arising from the same nucleus of operative facts were already pending in two other courts, that Carl lacked the capacity to perform the duties of the executor's office and that the trust administration controversy had already been held not to be a probate matter[11].

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[11] Curtis v Brunsting 704 F.3d 406.

46. Carl resigned due to his lack of capacity and not only has the probate court refused or otherwise failed to fill that office, Bayless has refused or otherwise failed to distinguish claims belonging to Carl Brunsting individually from those alleged to belong to the estate.

47. The reality of this case is that both state court actions appear to have been filed by Bayless with the manifest intention of interfering with the due process rights of the trusts' living beneficiaries to obtain remedy. Bayless refused to file a proper joinder to the active federal court suit and instead filed the action in Harris County District Court in which she failed to include all necessary parties.

48. Not only did the filing of both state court actions run afoul of the inequitable conduct exception but due to Bayless actions, the litigation was multiplied while the prospects for resolution diminished proportionally.

The Second Exception – The Due Diligence Exception

49. The second exception is satisfied when the first-filer filed suit merely to obtain priority, without a bona fide intention to prosecute the suit. Texas Appeals Courts have said that "the mere physical filing of the petition is not sufficient" to establish the requisite intent. Instead, the first-filer must exhibit "actual diligence thereafter in getting out citation <u>and otherwise prosecuting his suit</u>."

50. Had Bayless intended to seek resolution for her client she would have filed a proper joinder to pollute diversity. Instead Bayless multiplied the controversy by filing an action inherently interrelated with Curtis' federal suit in Harris County District Court, in which she failed to include all necessary parties. Bayless followed her District Court claims by filing related claims in Harris County Probate Court in which she again failed to include all necessary parties.

51. Had Bayless intended to seek resolution for her client she would not have filed an inherently interrelated action in Harris County Probate Court in which she again failed to include all necessary parties, nor would she have argued in favor of transferring the second filed case (Harris County District Court) to the third court (Harris County Probate Court No. 4), nor would she have opposed abating the third court suit (Probate Court) so the inherently interrelated non-probate actions could proceed in the court of dominant jurisdiction.

52. Had Bayless intended to seek resolution for her Estate of Nelva Brunsting claims she would have insisted the office be filled before agreeing to move forward in her probate court action without someone to prosecute the claims she claimed belonged to the estate.

53. Bayless has not demonstrated a bonafide interest in prosecuting these suits. Quite the contrary, Bayless appears to have done everything in her power to prevent resolution by filing multiple state court suits for that sole purpose.

54. The plea in abatement must be raised in a timely manner, or it is waived. Cleveland, 116 Tex. at 21, 285 S.W.2d at 1071-72. However, there can be no such thing as untimely in this case, as no findings of fact or conclusions of law have ever been entered after hearing in the Probate Court. That would be because there have been no evidentiary hearings, with one exception: The August 3, 2015 hearing on the "Emergency Motion for Protective Order" involving illegally obtained and illegally disseminated telephone wiretap recordings.

55. In that evidentiary hearing there were no fact witnesses called to testify and no evidence was offered or even asked for by the Court. No findings of fact, conclusions of law or orders after hearing ever followed.

The Third Exception – Necessary Parties Exception

56. It is not required that the exact issues and all the parties be included in the first action before the second is filed, provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues. 760 S.W.2d at 247.

57. The District Court suit could not have been amended to bring in all necessary and proper parties at the time it was filed, as the Brunsting Trust Controversy was already pending in the federal court and Curtis is a California resident over which the state District Court has no personal jurisdiction.

58. Bayless could have filed a proper joinder in the federal court to pollute diversity, but refused or otherwise failed to bring in all necessary and proper parties. Bayless chose instead to file integrally related claims in two different state courts, with no intention of obtaining resolution in either. This goes to the second and third exceptions which also operate as an estopple.

59. The only inherently interrelated actions to exhibit evidence of effort to include all necessary parties was filed by Plaintiff Curtis. First, her original federal action styled "Candace Louise Curtis v Anita and Amy Brunsting and Does 1-100". Second was Curtis' May 1, 2013 First Amended Complaint in the federal court specifically adding Candace Kunz-Freed and the law firm of Vacek and Freed P.L.L.C. Curtis' First Amended Complaint in the federal court was dismissed sua sponte because it was filed without leave of the Court and did not contain a certificate of conference.

WHO OWNS THE CLAIMS AND WHAT COURT PROPERLY HAS POSSESSION OF THIS CONTROVERSY?

60. While a trustee owes their duties to the settlor so long as the trust is revocable, and as a general rule, the trustee cannot be held to account by other successor beneficiaries for its administration of a revocable trust during the settlor's lifetime. The same rule does not apply to

irrevocable trusts. The successor beneficiaries of irrevocable trusts are vested and have standing to address the administration of the trust and hold a trustee accountable for past wrongs affecting their beneficial interests as soon as they become income beneficiaries. This is especially true where, as here, the trustees are beneficiaries with equitable interests equal to those to whom they owe fiduciary duties and where there are claims of conspiracy, undue influence, forgery, self-dealing and other frauds.

61. The Brunsting Trust administration controversy was already pending in the federal court when Bayless filed integrally related claims arising from a common nucleus of operative facts in the Harris County District Court in the name of the Estate of Nelva Brunsting and both of these suits were pending when Bayless filed integrally related claims arising from the same nucleus of operative facts in the Harris County Probate Court in the Name of Carl Brunsting both Individually and as Executor for the Estate of Nelva Brunsting.

62. Carl resigned as executor in February 2015 and the exact nature of the claims in the Probate Court alleged to belonging to the Estate of Nelva Brunsting remains a mystery.

63. The question of whether the living or the dead own the claims, looms large here where privity with the founder was abandoned and where the abandoner entered into a conspiracy with members of the beneficiary class resulting in injury to the other beneficiaries.

The Estate of Nelva Brunsting

64. The "Estate of Nelva Brunsting" in the present context is nothing but a gateway artifice Bayless used to interfere with remedy belonging to the living beneficiaries of an inter vivos trust. There is no probate matter. The claims filed in all three courts are integrally related to administration of the Brunsting trusts and belong to the trust and to the injured trust beneficiaries respectively and not to any decedent's "estate".

65. Texas Estates Code §22.012 defines "Estate" to mean a **decedent's property.** While the matter before the Court is labeled "Estate of Nelva Brunsting", the subject matter is entirely focused on the Brunsting inter vivos trusts, created and funded in 1996, which have nothing to do with property belonging to the decedent at the time of her death.[12]

66. The action filed in this Court was brought in the name of Carl Brunsting individually and as executor for the Estate of Nelva Brunsting. Carl Brunsting resigned the office of Executor on February 19, 2015 and his individual claims have never been bifurcated from the claims brought in the name of the estate ("decedent's property").

67. On July 24, 2015 Gregory Lester was appointed Temporary Administrator and charged with a duty to evaluate the estates claims[13]. In writing his report, Mr. Lester never mentions the Pour-over Will, never identifies a devisee, never mentions heirs[14], never mentions or identifies the nature of any interested persons,[15] never mentions the inventory and approved list of claims and never identifies a single claim belonging to the Estate pending in the Probate court.

68. Mr. Lester's report also fails to even mention the problem of multiple suits, involving the same persons, parties, events, and instruments having been filed in separate courts or even approach the question of dominant jurisdiction.

69. While the Lester Report refers to the original federal lawsuit as "that previous federal case" when pointing to the Report of Special Master from the case, Lester ignores the Fifth Circuit Court of Appeals Opinion and the injunction issued prior to Bayless' filing in this Court and never

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[12] Candace Louise Curtis v Anita and Amy Brunsting 704 F.3d 406 (Jan 2013)

[13] 07242015: 1343: P0046

[14] Sec. 22.015. HEIR. "Heir" means a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies **intestate**. The term includes the decedent's surviving spouse.

[15] Sec. 22.018. INTERESTED PERSON; PERSON INTERESTED. "Interested person" or "person interested" means:
(1) an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered;

mentions that all orders and rulings entered in the federal court case are binding upon this Court by the express terms of the federal Remand Order that this Court accepted without reservation.

70. The controversy here is not whether the cases are related but who owns the inter vivos trust related claims and which court should hear the matter. The distinction between administration of an inter vivos trust and the probate of an estate is well addressed by the court in Mayfield where the claims are broken down into three categories expressed and discussed as (the 'Trust Claim'), (the 'Guardianship Claim') and (the 'Will Claim'). The analysis proceeds as follows:

> *As to the Trust Claim, the Property Code authorized the 271st District Court to hear the issues raised. Subject to exceptions we discuss below, a district court has original and exclusive jurisdiction over all proceedings against a trustee and all proceedings concerning a trust. TEX.PROP.CODE ANN. § 115.001(a)(West 2014). A non-exclusive list of those matter specifically include: "determinations of fact affecting the administration, distribution, or duration of a trust"; relieving a trustee of duties; and requiring an accounting. Id. at § 115.001(a)(6), (7), (8), and (9). Mayfield sued Bruce for breach of his duties as trustee of the Peek Family Revocable Trust (2000). She sought an accounting, complained of his actions with respect to administering the assets of Peek Family Revocable Trust (2000), and sought his removal as trustee of the PK Revocable Living Trust (the trust allegedly set up to hold the improperly transferred assets).*
>
> *But while the district court had jurisdiction of those claims, its jurisdiction was not exclusive. Section 115.001 declares that the district court's jurisdiction is exclusive "except for jurisdiction conferred by law on . a county court at law." Id. at § 115.001(d)(6). This exception, added in 2011, would create concurrent jurisdiction with a county court at law if it were also authorized to hear trust disputes. See Act of June 17, 2011, 82nd Leg., ch. 657, 2011 TEX.GEN.LAWS 1605, 1606 (adding county courts at law to exceptions). That authorization is found in the last major revision to the Probate Code before it was incorporated into the Estates Code.*
>
> *A court exercising original probate jurisdiction also has jurisdiction over "matters related to the probate proceeding" as specified in former Section 4B of the Probate Code. Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 4A, 2009 TEX.GEN.LAWS 4273, 4275 (formally codified at TEX.PROB.CODE ANN. § 4A, now repealed and replaced with TEX.EST.CODE ANN. § 32.001(a)(West 2014)). Section 4B in turn provided that in a county with no statutory probate court, but a county court at law exercising original probate jurisdiction, one of the matters that can be "related" to a probate proceeding is the "interpretation and administration of an inter vivos trust created by the decedent whose will has been admitted to probate in the court."*

Id. at § 4B(3)(now codified at TEX.EST.CODE ANN. 31.002(b)(3)). Though the textual grant of jurisdiction is not as broad as that given to a district court, it might fairly encompass Mayfield's claim because the transfer of property is an aspect of administration of a trust.

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

71. Just as in Mayfield, the District Court would have automatically declined to hear a probate matter and, just as in Mayfield, the Probate Court could also have heard the trust dispute but because the jurisdiction between the two courts is concurrent as to trusts the issue is not one of exclusive jurisdiction but rather dominant jurisdiction. Because the trust dispute was first filed in the District Court, a Plea in Abatement filed in this Court *must be granted.*

DEMAND FOR EVIDENTIARY HEARING

Demand for Hearing on Plea in Abatement

72. The purpose of abatement is to save the time and expense of a trial when the plaintiff's suit cannot be maintained in the form originally presented. The Jurisdictional defects generated by this sequence of events are much too serious to be ignored unless you want your lawsuits to drag on for sixteen years or more without resolution[16].

73. The pending plea in abatement, the addendum and this First Amended Verified Plea in Abatement provide the Court with sufficient **notice** of its want of jurisdiction over the Brunsting trust controversy.

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[16] The Lesikar Alpert Method Syndrome

74. Critical issues remain unresolved or not addressed and this course of action is not going to lead to any form of dispositive resolution for the parties, because it cannot. The notion of setting trial in this Court is extremely problematic for a multitude of reasons. In fact, setting trial in any court without first resolving these foundational issues is pointless:

a. All of the Necessary Parties are not in one Court;

b. Harris County Probate is not the Court of Dominant Jurisdiction;

c. Carl Brunsting resigned the office of executor, the office remains vacant and,

d. in order to move forward with the question of appointing an administrator one would need to distinguish the claims filed in the probate court that belong to the estate, if any, from the claims filed in the probate court that belong to Carl Brunsting individually.

75. This should be a simple matter of clarification for Ms. Bayless since she drafted the claims but to date, Bayless has refused or otherwise failed to do so and the Temporary Administrator was apparently incompetent to distinguish the Brunsting inter vivos trust administration controversy (beneficiary claims against trustees in personam - a.k.a the trust matter) from claims belonging to the decedent's estate (in rem administration of a decedents property – a.k.a. the probate matter).

The Standard of Review

76. A relator need only establish a trial court's abuse of discretion to demonstrate entitlement to mandamus relief with regard to a plea in abatement in a dominant-jurisdiction case.[17]

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[17] IN RE: J.B. Hunt Transport, Inc., Relator, NO. 15-0631 Supreme Court of Texas, Decided: May 27, 2016

77. An Order denying a plea in abatement regarding dominant-jurisdiction is reviewed under the deferential abuse-of-discretion standard.[18] A trial court abuses its discretion when it acts "arbitrarily, unreasonably, or without regard to guiding legal principles."[19] With regard to factual questions, the abuse-of-discretion standard is more akin to a clear-error standard.[20] But with regard to questions of law, "[a] trial court has no 'discretion' in determining what the law is or in applying the law to the facts."[21] This principle applies "even when the law is unsettled."[22] We must thus carefully establish the controlling legal principles at issue in this case.

78. "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."[23] The dominant jurisdiction issue has been raised before this court in two previous pleadings without a ruling.[24]

79. The first-filed rule flows from "principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues."[25] 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 filed rule is settled, the issue, if any, comes down to the exceptions to that general rule if any can be shown and none have.

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[18] *See, e.g., Street v. Honorable Second Ct. of Appeals*, 756 S.W.2d 299, 300 (Tex. 1988).

[19] *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)

[20] *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997).

[21] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

[22] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

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

[24] 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)

[25] *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.").

Conclusion

80. Despite appearances, this Court never properly acquired jurisdiction over the Brunsting trust controversy and because it could not compose itself a court of competent jurisdiction. There was no Court to receive a remand of Curtis' improperly polluted federal diversity case, which now sits in limbo with no immediate hope for substantive resolution.

81. There is no lawful choice but to abate the interrelated non-probate action filed in the Probate Court and if it is necessary to have a hearing on the Plea in Abatement in order to get Bayless to clarify which of her diametrically opposed positions she is willing to verify under oath, and to determine what claims belonging to the Estate, if any, are pending in this Court, then a hearing should be set and Bayless should be ordered to file her affidavit clarifying the distinctions between Carl's individual claims and the claims filed in the probate court, belonging to the Estate of Nelva Brunsting, no less than ten days before the Plea in Abatement hearing.

82. Realtor herein further moves the Court to take judicial notice of the law and the facts and to bifurcate the Brunsting inter vivos trust action from the probate matter pending in this Court.

Respectfully submitted,

_____

Candace Louise Curtis

VERIFICATION

Before me the undersigned Notary Public, personally appeared Candace Louise Curtis and after having been properly identified and duly sworn, did declare and state under penalty of perjury as follows:

My name is Candace Louise Curtis. I am of the age of majority and competent to testify. I have personal knowledge of the facts stated in the Plea in Abatement I filed August 17, 2018 in the Harris County Probate Court and the Addendum of Memorandum in Support of the Plea in Abatement that I filed September 4, 2018; Those instruments are incorporated by this reference as if fully set forth herein and;

I have personal knowledge of the facts stated in this First Amended Plea in Abatement and I declare under penalty of perjury pursuant to the laws of the United States of America and the State of Texas, that the facts stated in all three pleadings are true and correct.

Respectfully submitted,

Candace Louise Curtis

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California, County of Napa
Subscribed and sworn to (or affirmed) before me on this 8th day of October, 2018 by Candace Louise Curtis proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature _____ (seal)

SHYLEE C. MAGSANO
Commission No. 2102913
NOTARY PUBLIC-CALIFORNIA
NAPA COUNTY
My Comm. Expires MARCH 13, 2019

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 Monday, October 08, 2018 to the following attorneys and unrepresented parties.

//s//
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