Candace Louise Curtis	§	
	§	412249-401
v.	§	Feb 27, 2012
	§	
Anita Brunsting et al.,	§	
IN RE: THE ESTATE OF	§	PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS
	§	412,249 April 2, 2012
Carl Henry Brunsting	§	
Individually	§	
	§	412,249-401
v.	§	April 9, 2013
	§	
Anita Brunsting et al.,	§	

Memorandum on Appointing an Administrator

Appointment of a Third Party

On July 23, 2015, the Court appointed attorney Gregory Lester temporary administrator for the Estate of Nelva Brunsting, with limited powers to evaluate all claims filed by executor Carl Henry Brunsting. The report of Temporary Administrator for the Estate of Nelva Brunsting was filed on January 14, 2016. The report failed to provide a chronology of the various lawsuits filed or a history of the various trust and estate instruments. Moreover, the report fails to even mention the Will of Nelva Brunsting, focusing instead on the no contest clause in the alleged August 25, 2010 *Qualified beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement* (QBD/TPA). It should be noted that if a no-contest clause was applicable, which it is not, it would be a compulsory counter claim waived under Texas Rule of Civil Procedure 97(a) and Federal Rule §13 when it was not raised in the Defendants' answers.

The Will of Nelva Brunsting is a pour over will that devises solely to the Brunsting family inter vivos trust and limits the authority of the executor as follows:

> *"I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law."*

Executor Carl Brunsting filed the inventory, appraisement and list of claims March 27, 2013, and the order approving the inventory, appraisement and list of claims was signed April 4, 2013. A drop order was signed by the Probate Court on April 5, 2013.

The claims Carl filed in the probate court, individually and as executor, on April 9, 2013, were not included in the inventory and list of claims approved by the Court April 4, 2013. Individually Carl is a beneficiary of the trust and a co-trustee under the private law of the trust and not a devisee of the estate. The family trust is the sole devisee of the estate.

Estates Code §101 states that if a person dies leaving a lawful will, all of the person's estate that is devised by the will vests immediately in the devisees. Once the inventory, appraisement and list of claims was submitted and approved, the authority delegated to the executor by the Will was complete. It would also follow that the right of claims would vest immediately in the devisee. However, none of this was mentioned in the Administrator's Report.

Trusts - Standing[1]

In re XTO Energy, Inc., 471 S.W.3d 126 (Tex. App.—Dallas 2015, no pet.).

> *Trustee failed to pursue litigation on behalf of the trust under the terms of the trust which granted Trustee the discretion to carry out the trustee's powers and perform the trustee's duties. Beneficiary, unhappy with Trustee's inaction, brought action against Defendant on behalf of the trust. Trustee and Defendant seek a writ of mandamus to force the trial court to dismiss Beneficiary's suit for lack of subject matter jurisdiction.*

[1] http://www.professorbeyer.com/Case_Summaries/2015/XTO.html

> *The appellate court began its analysis by recognizing that a trust beneficiary may sue a third party on behalf of the trust if the trustee cannot or will not bring the action. However, a beneficiary cannot bring an action merely because the trustee has refused to do so because "[t]o allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory." Id. at *3.*
>
> *The court concluded that a beneficiary may not bring the suit unless "the beneficiary pleads and proves that the trustee's refusal to pursue litigation constitutes fraud, misconduct, or a clear abuse of discretion." Id. The court then engaged in a detailed analysis of the underlying dispute and determined that there were no facts that would support a finding that Trustee's decision not to bring suit was the result of fraud, misconduct, or a clear abuse of discretion. Accordingly, the court conditionally granted mandamus relief. (The court, however, allowed Beneficiary's claims against Trustee for breach of duty to continue.)*
>
> *Moral: This case appears to be the first time a Texas court has ruled on "the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue." The rule announced by the court is that the action may proceed if the trustee's failure to bring the action is the result of fraud, misconduct, or a clear abuse of discretion.*

Fraud, misconduct and clear abuse of discretion is a description of the underlying theme in the matter before this Court, which involves administration of an inter vivos trust and estate planning attorney malpractice.

Executor Carl Brunsting's complaint in the District Court alleges collusion between the estate plan attorneys and trust beneficiaries Anita and Amy Brunsting, to disrupt the settlors' estate plan. Carl's complaint in the probate court alleges Defendants Anita and Amy Brunsting entered into collusion with the estate plan attorney Defendants to improperly alter their parents' trust. It would follow that this conflict of interest would bar the alleged trustee defendants from serving on behalf of the trust as plaintiffs against their alleged collaborators.

The Trust

Because the sole devisee in this case is an inter vivos trust, the first step necessary to an orderly resolution of the matter is a determination regarding the question of what are the valid

instruments creating the trust the estate poured over into. From there we can determine other less primitive matters.

The trust chronology is simple. The original 1996 trust was replaced and superseded in its entirety by the 2005 restatement that removed Defendant Anita Brunsting from the list of successor trustees. The 2005 restatement was amended in 2007 replacing Article IV in its entirety and removing Defendant Amy Brunsting from the list of successor trustees. That left Carl and Candace as successor co-trustees and Frost Bank was added as the alternate. These are the only instruments signed by both settlors and these are the instruments creating the trust the estate poured over into when the inventory and list of claims was approved.

- Original 1996 Family Trust [V&F 000391-451]
- 2005 Restatement [V&F 000941-001027] [V&F000262-348]
- 2007 Amendment [V&F 000928-929] V&F 252-253

Under Article III, changes to the trust required a writing signed by both settlors, but was to become irrevocable and only subject to amendment by a court of competent jurisdiction upon the passing of either settlor. Elmer was officially declared NCM on or about June 9, 2008 and the only option for amending the family trust at that juncture was a court of competent jurisdiction.

The series of illicit instruments begins July 1, 2008, a mere two weeks later, and none of the instruments that followed the 2007 Amendment even mention the 2005 Restatement, as amended, a.k.a. "the trust". None of the instruments dated after the 2007 Amendment were signed by both settlors and none were approved by a court of competent jurisdiction.

The Statute of frauds, Property Code §112.004, requires all trust changes and any revocation to be in writing. At this juncture, Defendants need to certify the wet signed original of the August 25, 2010 *Qualified beneficiary Designation and Testamentary Power of Appointment*

under Living Trust Agreement, on personal knowledge of the chain of custody, with their argument as to how changes made after June 2008 were valid.

Courts of Competent Jurisdiction

The requirement that alterations or amendments to the family trust agreement would require the approval of a court of competent jurisdiction serves the same public policy purposes as the formalities that accompany the execution of testamentary instruments. Here, changes were made after the trust became irrevocable by its own terms. The Defendants had the option of bringing their just causes for making changes before a court of competent jurisdiction at the time, but chose to make changes in secret. If Defendants thought they had legitimate reasons for making changes, they should have petitioned a court of competent jurisdiction for leave to amend before the fact. Rationalizations and excuses at this juncture are not merely irrelevant, but what we have heard thus far constitutes slanderous and libelous gossip, defamation of character and intentional infliction of emotional distress.

The Farraginous Blend of Incompatible Powers

Defendants have claimed that the exercise of incompatible powers, combined together in one instrument, without distinctions, produced a result greater than the sum total of its parts and somehow rendered Article III's very clear and unambiguous language nugatory. The powers referenced are the "*Qualified Beneficiary Designation*" (QBD) mentioned in Articles III, V, X and XIII, and the "Testamentary Power of Appointment" (TPA) inserted into Article IX.

How a potpourri of non-differentiated incompatibilities and contradictions somehow produces a result inapposite to the extremely clear language expressed in Article III raises curious questions.

Unfortunately, this August 25, 2010 "*Qualified Beneficiary Designation And Testamentary Power Of Appointment Under Living Trust Agreement"* is not in evidence and multiple copies have proven unreliable for a variety of reasons, not all of which were addressed in Plaintiff's July 13, 2015 Answer to Defendants June 26, 2015 "*No-Evidence Motion for Partial Summary and Declaratory Judgment*". If and when the Defendants produce the original wet signed instrument with personal knowledge of the chain of custody, Plaintiff will be more than happy to address the multitude of anomalies, inconsistencies and contradictions associated therewith.

In the interim, Carl and Candace are the de jure co-trustees under the private law of the trust and if at least one trustee remains, that trustee will continue to serve alone and the Court will not fill a vacancy (§113.083).

A docket control order needs to be put in place and this case needs to be put on the fast track. The law of the trust is controlling. The settlors' intentions are the first consideration and that consideration demands a judicial declaration on the validity of ***trust*** instruments. Neither the Trust nor the closed estate requires another administrator.

Respectfully Submitted,

//s//
Candace Louise Curtis

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 8th day of July 2019.

//s//
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