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NO. 412,249-401

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

PLAINTIFF CANDACE LOUISE CURTIS' ANSWER TO DEFENDANT AMY BRUNSTING'S AND DEFENDANT ANITA BRUNSTINGS ORIGINAL COUNTERCLAIM

On November 4, 2019, after having been Defendants since February 27, 2012, Anita and Amy Brunsting filed "Amy Brunsting's & Anita Brunsting's Original Counterclaim". In their Original Counter Claim Defendants Anita Brunsting and Amy Brunsting bring the following list of claims:

Anita Brunsting & Amy Brunsting's List of Counter Claims

1) *One or more of the causes of action asserted and/or declarations sought by Carl trigger the forfeiture provisions;*
2) *One or more of the causes of action asserted and/or declarations sought by Curtis trigger the forfeiture provisions;*
3) *One or more of the motions, responses, and/or replies filed by Carl trigger the forfeiture provisions;*
4) *One or more of the motions, responses, and/or replies filed by Curtis trigger the Forfeiture provisions;*
5) *Carl did not have just cause to bring the action, and it was not brought in good faith;*
6) *Curtis did not have just cause to bring the action, and it was not brought in good faith;*
7) *Carl has forfeited his interest, and thus his interest passes as if he has predeceased the Founders;*
8) *Curtis has forfeited her interest, and thus her interest passes as if she has predeceased the Founders;*

9) *If Carl has not forfeited his interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and Anita's expenses in defending against Carl's claims are to be charged against his interest dollar for-dollar;*

10) *If Curtis has not forfeited her interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and Anita's expenses in defending against Curtis' claims are to be charged against her interest dollar-for-dollar;*

11) *All expenses incurred by Amy and Anita to legally defend against or otherwise resist the contest or attack by Carl and/or Curtis are to be paid from the Trust as expenses of administration.*

I. Summary of Defendants' Counter Claims:

Defendants' counter claims are of three types (1) In Terrorem (2) Bad Faith and (3) entitlement to fees and costs.

Defendants Anita and Amy Brunsting claim to be "*co-Trustees of the Restatement*", allege that Carl and Candace brought legal action without probable cause and in bad faith, (5 & 6) and allege that claims brought by Carl and Candace in the probate court triggered the no-contest clause provisions in the August 25, 2010 QBD/TPA, causing forfeiture of their beneficial interests (1, 2, 3, 4, 7, & 8), allege that Carl and Candace are responsible for the Defendants' attorney fees and other associated expenses "in *defending the attack* of Carl and Candace" (9, 10, 11) and claim the right to satisfy their personal legal debt obligations from Carl and Candace's trust property or from Carl and Candace's estate inheritance expectancy.

II. Summary of Plaintiff Answers

Defendants are not "co-Trustees of the Restatement".

Candace has already established probable cause and good faith.[1] Defendants Anita Brunsting and Amy Brunsting have manifested their own bad faith and malicious intent:

- by their refusal to perform fiduciary obligations of the office according to the "*Settlors Intentions*"
- by breaching the fiduciary duty of undivided loyalty owed to the beneficiary and threatening the beneficiary's property interests rather than protecting those interests,
- by breaching the fiduciary duty of candor,
- by breaching the fiduciary duty to avoid self-dealing
- by breaching the fiduciary duty to act with integrity of the strictest kind
- by breaching the fiduciary duty of fair and honest dealing
- by breaching the fiduciary duty of full disclosure of all actions affecting the Trust
- by breaching the fiduciary duty to provide full, true and complete accountings to the beneficiaries at least semi-annually
- by breaching the fiduciary duty to administer the trust solely for the benefit of the beneficiaries as required by the strict terms of the trust agreement and the property code.

Carl and Candace have forfeited nothing.

Defendant Anita Brunsting violated the in Terrorem clause in the 2005 Restatement[2] (1) by participating in making unauthorized changes to the Settlors' trust agreement, (2) by occupying the office of trustee and refusing to perform the obligations of the office according to the requirements established by the Settlors and (3) by making her malicious intentions abundantly obvious while failing to provide required accounting and disclosures knowing the beneficiary had no other means of protecting property interests than to seek judicial remedy.

[1] Preliminary Injunction issued April 9, 2013 and published April 19, 2013 that remains in full force and effect under the terms of the Order remanding the case to the probate court.
[2] Article 11 Section C page 11-1

Defendants triggered the in Terrorem clause in the Restatement by causing litigation to be brought for the purpose of advancing a theory that, if true, would enlarge the claimant's share. That theory is that Carl and Candace violated the in Terrorem clause in the August 25, 2010 QBD/TPA, containing corruption of blood provisions, a scheme which they have now formally admitted in their counter claims.

Plaintiffs are not liable for Defendants' personal liabilities or the costs of their defense. Breach of fiduciary is a personal liability of the trustee and not a liability of the cestui que trust[3]. Defendants continue to refuse to honor the affirmative obligations of the office, are responsible for causing litigation to be brought and maintained and responsible for all costs, expenses, losses and other injuries suffered as a direct and proximate result of Defendants' actions and inactions while occupying the office of trustee.

III. Co-Trustees of the Restatement

Amy and Anita Brunsting are not co-trustees of the Restatement.

In 1996 Elmer and Nelva Brunsting created a family trust in which they made each of their five children[4] a remainder beneficiary with equal property interests, with the intention of transferring their assets to their five children in equal proportions. Elmer and Nelva were the Original Trustees with three successor trustees in individual succession as follows: Anita, Carl, Amy. [5]

[3] Plaintiff is the cestui que. The cestui que is the real property owner. The trustee merely holds bare legal title for the benefit of the cestui que. If the trustee owes no affirmative duties to the cestui que, there is no trust relationship. A.k.a. "no trust"

[4] Candace Curtis, Carole Brunsting, Carl Brunsting, Amy Brunsting and Anita Brunsting

[5] Exhibit 6 Plaintiff's January 25, 2016 Motion for Partial Summary and Declaratory Judgment

When Elmer and Nelva restated their trust in 2005[6] they removed Anita's name from the list of successor trustees, designating Carl and Amy as "successor co-trustees" with Candace Curtis as the alternate.

When Elmer and Nelva amended the Restatement[7] in 2007 they replaced Article IV in its entirety removing Amy's name from the list of successor trustees designating Carl and Candace as the successor co-trustees and naming Frost Bank as the alternate.

The 2007 Amendment was the last instrument signed by both Settlors and it was the last instrument to comport with the Article III requirements for altering or amending the family trust agreement.

Carl and Candace are the co-trustees of the Restatement.

Elmer was declared NCM in June of 2008 and was no longer able to agree to make changes to the family trust agreement. All of the instruments that followed the 2007 Amendment were signed by Nelva alone, were not approved by a court of competent jurisdiction and are thus invalid.

IV. Probable Cause and Good Faith

Section XII (E) of the 2005 Restatement (p. 12-10) requires the trustee to account to the beneficiary at least semi-annually. Anita claims to have become trustee on December 21, 2010. Nelva passed November 11, 2011. By the time Nelva passed Anita would have been required to submit at least one accounting and given that it would be her first accounting, it would necessarily be a full, true and complete accounting.

It would also follow that, by the time Nelva passed Anita would have assembled the books and records of accounts and would be prepared to deliver her

[6] Exhibit 7 Plaintiff's January 25, 2016 Motion for Partial Summary and Declaratory Judgment
[7] Exhibit 8 Plaintiff's January 25, 2016 Motion for Partial Summary and Declaratory Judgment

second scheduled accounting. That accounting became due to the remaindermen within 90 days of the passing of Nelva Brunsting when they became income beneficiaries.

It was Anita's failure to submit the required accounting that compelled the beneficiary to pursue the only option available for protecting beneficial interests in trust property. Anita's plan to steal the trust res and her method (threats of disinheritance for "challenging the trust") were well known topics on the family grapevine when Curtis asked for accounting and disclosures.

FROM INCEPTION Plaintiff Curtis spent nineteen total months as a pro se in the federal courts[8]. In that time Curtis (1) perfected a successful Fifth Circuit Appeal[9], surviving sua sponte dismissal under the probate exception, (2) had two full evidentiary hearings, (3) obtained the appointment of a Special Master, (4) obtained an accounting and disclosures (5) established the existence of a fiduciary relationship, in that Anita and Amy Brunsting as trustees owe fiduciary duties to Plaintiff, (6) Findings of Fact, Conclusions of Law, and Order after Hearing (7) obtained a preliminary injunction. The Preliminary Injunction established that Anita Brunsting, after occupying the office of trustee for more than two years, had:

(a) Failed to establish books and records of accounts,

(b) Failed to provide Plaintiff with a required accounting

(c) Paid her personal credit card obligations directly from a trust account

(d) Distributed substantial assets unequally to herself, Amy and Carole Brunsting without notice to Plaintiff

(e) Failed to disclose non-protected trust instruments to Plaintiff and,

(f) Failed to act in accordance with the duties required by the Trust.

[8] Southern District of Texas Case No 4:12-cv-592

[9] Appellate No 12-20164, published Curtis v Brunsting 704 F.3d 406. The Wills of Elmer and Nelva Brunsting were filed after the sua sponte dismissal but before Appellants opening brief was due.

The prerequisites for the granting of a preliminary injunction require a plaintiff to establish that: (a) a substantial likelihood exists that the plaintiff will prevail on the merits; (b) a substantial threat exists that the plaintiff will suffer irreparable injury if the injunction is not granted; (c) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may do to the defendants; and, (d) granting the injunction will not disserve the public interest. *See Calloway*, 489 F.2d at 572-73.

This pretty much puts the allegations of the absence of just cause or lack of good faith to rest, but what does complete and total absence of specific performance say about Anita and Amy's intentions as those intentions relate to the intentions of the Settlors in creating a trust?

During disclosures Anita failed to reveal the emails she received from Nelva explaining that "everything gets divided equally". During Anita's tenure as sole trustee Anita distributed trust assets unequally to herself, Amy, Carole and Candace but there were no distributions to Carl even though Carl was the most needful of all.

In Terrorem

Anita Brunsting and Amy Brunsting have stated their intention to enlarge their share by claiming that Carl and Candace violated the no-contest clause in the August 25, 2010 QBD/TPA[10].

The in Terrorem clause in the August 25, 2010 QBD/TPA contains a corruption of blood provision that would reduce the number of shares, thus enlarging those of the remaining beneficiaries. However, Defendants fail to distinguish challenging their actions and inactions as trustees from challenging the intentions of the settlors, fail to distinguish sole and absolute discretion from sole

[10] "Qualified Beneficiary Designation and Testamentary Power Of Appointment under Living Trust Agreement" allegedly signed by Nelva Brunsting alone on August 25, 2010

and absolute power, fail to distinguish trustee powers and obligations from their own selfish interests, fail to distinguish between revocable and irrevocable, fail to distinguish the family trust from Nelva Brunsting's estate, fail to distinguish Elmer's share from Nelva's share, fail to distinguish between the exercise of the inter vivos "Qualified Beneficiary Designation" (Art. III), from the "Testamentary Power of Appointment" (Art IX) and fail to recognize any obligations associated with or boundaries applicable to their control of the assets, equivalent of arguing that there is no trust relationship at all.

V. Challenging the Settlors' Intentions

A trust is a mechanism used to transfer property. Bradley v. Shaffer, 535 S.W.3d 242, 247 (Tex. App.—Eastland 2017, no pet.); Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 589 (Tex. App.—Corpus Christi 1995, no writ).

Elmer Brunsting passed April 1, 2009 and Nelva Brunsting passed November 11, 2011. Remainder rights in entrusted property vested in the beneficiary at the passing of the second Settlor, both under the private law of the trust[11] and under the public law of Texas.[12]

These rights in property vested eight years ago and none of the other property owners have seen one dime of their beneficial interest in the trust nor has any "personal asset trust" been created for any beneficiary as Defendant Amy Brunsting's March 9, 2012 affidavit claims. Instead, the trust has been held hostage in the -401 action that has been malingering in Harris County Probate Court for six and one half years, without a single "Findings of Fact, Conclusion of Law, or Order after Hearing.

[11] 2005 Restatement as amended in 2007
[12] Tex. Est. Code § 101.001

During six and one half years in substantive stasis, trust beneficiaries Carl and Candace have been vilified, threatened, demeaned, robbed, defrauded and obstructed. The identity of Candace Curtis' lawsuit was converted to serve someone else's purposes and Candace Curtis has been sanctioned for filing good faith pleadings.

During that same six and one half years trust beneficiary Curtis has incurred substantial expense in her efforts to obtain possession and enjoyment of the property to which she has been vested for more than eight years, while that property has taken a substantial economic beating.

Carl and Candace have never held the capacity to perform the duties of the office of trustee and neither Carl nor Candace has the capacity to perform those duties while the office remains in the hostile possession of the Defendants.

Defendants have failed to perform any obligations under any alleged trust instruments, have ignored the specific performance commanded by the preliminary injunction and have moved the court to sanction a beneficiary to whom they owe fiduciary duties they refuse to honor.

VI. Settling the Trust

A trust is a mechanism used to transfer property.

The first step in transferring the trust property to the five beneficiaries in equal proportions requires a full true and complete accounting of the assets to be divided. Rather than prepare the necessary data Anita simply did nothing, thinking that under the 8/25/2010 QBD/TPA she had sole and absolute power and would spring the no-contest clause trap when her disenfranchised beneficiary victims complained. While the sua sponte dismissal of Plaintiff Curtis' Breach of fiduciary was on appeal to the Fifth Circuit Anita continued to do nothing to settle the trust.

Eight years without performing a single affirmative fiduciary duty, including failing to distribute the income to the income beneficiaries as Ordered by a federal judge, have shown Anita's intention. Those intentions have been further confessed by the recent counter claims disloyally seeking to disenfranchise beneficiaries Carl and Candace for bringing claims to protect beneficial interest and for asking the questions and raising the claims flowing from discovery of what Anita kept silent when she had a duty to speak.

VII. Mr. Toads Wild Ride

After retaining Houston attorney Jason Ostrom, Plaintiff Curtis' non-probate related federal lawsuit finds its way to Harris County Probate Court No. 4, where it vanished by way of conversion[13]. Sixty-six months later not one substantive issue relating to Plaintiff's breach of fiduciary lawsuit has even seen a hearing and not one substantive question has been resolved beginning with:

1. What are the valid and controlling trust instruments?
2. Who are the trustees?
3. What court should hear and decide these questions?"

VIII. Fiduciary Disloyalty

The Vacek and Freed attorneys betrayed the fiduciary duty of undivided loyalty they owed their clients, Elmer and Nelva Brunsting, and entered into a conflicting confidential relationship with Anita and later Amy Brunsting. When Candace filed suit, the Vacek and Freed Attorneys represented Defendants Anita Brunsting and Amy Brunsting against the beneficiary's demand for accounting and disclosures.

[13] According to what rule, policy, practice, statute, doctrine or other authority did the federal lawsuit become the estate of Nelva Brunsting?

Under Article III of the 2005 Restatement, changes to the trust could only be in a writing signed by both Settlors or by a court of competent jurisdiction. Thus, when Elmer was certified incompetent the trust could not be altered or amended except by a court of competent jurisdiction.

Notwithstanding Elmer having been declared non compos mentis, the Vacek and Freed attorneys began generating instruments that undermined and completely reversed the Settlors' intentions. The nearly decade old controversy that has followed can be traced directly to the creation of these instruments.

What did Vacek and Freed promise Elmer and Nelva in the way of Peace of Mind and Asset Protection, if not the avoidance of everything that has followed in the wake of these "modification instruments"?

Anita Brunsting wanted to steal the entire trust from her siblings and Vacek & Freed attorneys Candace Kunz-Freed and Bernard Lisle Mathews III seeded Anita's desire with the drafting of a slew of illicit instruments giving the appearance that Anita was trustee and causing the assets to come under Anita's control. The complete known trust chronology is twenty-one instruments totaling 432 pages. Two thirds of the instruments were created after the trust became irrevocable.

Not only did the Vacek & Freed attorneys betray the fiduciary duty of undivided loyalty they owed to Elmer and Nelva Brunsting, they negligently misrepresented to Anita Brunsting that as trustee she would have "sole and absolute discretion" over whether or not to make distributions to the other beneficiaries and, if the other beneficiaries complained they would be disinherited along with their children.

Plaintiff Curtis' original federal complaint mentioned stalking, illegal wiretapping, the drafting of illicit instruments and the no-contest clause

disinheritance scheme, all of which reared their ugly heads after Plaintiff's case left the federal court and arrived in probate court No. 4.

IX. The Scheme to Enlarge her Share

Curtis v Brunsting No. 4:12-cv-592 filed February 27, 2012 [Doc 1 p.20 para 4]

> *"I saw Carl and Drina for the first time since our Father's death, at our Mother's funeral. I did not know what to expect. Carl was talking to someone when Drina and I saw each other. In the blink of an eye we were hugging each other and crying. The deep wounds created by what had transpired over the last 16 months immediately began to heal. The bond between Carl, Drina and I was rekindled over the next few days. The difficulty for all of us was coming to grips with the notion that, apparently, behind our backs, Anita had made a concentrated effort to take control of the entire trust, and our individual inheritances, in such a manner that if Carl and I complain about it, she gets to keep it, all the while asserting to others that our Mother made this decision ON HER OWN. I know she did not, because she said so to me on the phone. She took my concern to heart and subsequently sent me a handwritten note saying, again, that it was not true.(P-16, 2 pgs.)"*

X. Irrevocable AND "Pour Over"

The Brunsting Trust became irrevocable before any modification documents were created and both Settlors had pour over wills created concurrent with the trust.

The settlor cannot change a trust that becomes irrevocable under its own terms and a pour over will avoids probate because no decedent's estate is formed. Everything is resolved according to the instruments creating the trust. You cannot maneuver around that by using labels to cloth the nakedness of illicit changes to a trust that cannot be altered or amended except by a court of competent jurisdiction.

XI. Qualified Beneficiary Designation vs. Testamentary Power of Appointment

The "Quali*fied Beneficiary Designation* ***and*** *Testamentary Power of Appointment under Living Trust Agreement*" allegedly signed by Nelva Brunsting on August 25, 2010 created five personal asset trusts at the death of Nelva Brunsting. However, inter vivos and testamentary dispositions are mutually exclusive and this instrument not only fails to distinguish one from the other, it fails to conform to the formalities of a testamentary instrument.[14]

> *If the death of the Trustor is a condition precedent to the creation of a trust, the requirements for the execution of a will must be met.*
>
> *There is a difference between the situation where the death of the settlor is a condition precedent to the creation of a trust, and the situation where the trust is created during the lifetime of the settlor, although he reserves power to revoke it. In the former case no trust is created unless the requirements for the execution of a will are complied with. In the latter case the trust is not testamentary and may be created without compliance with the requirements for the execution of a will.*[15]

The fact that the Brunsting family trust was irrevocable and that the provisions for the decedent's trust share were those prescribed by the irrevocable trust instrument is controlling. Nelva had no power to alter or amend either and the "Testamentary Power of Appointment under Living Trust Agreement" is nothing but a contradiction that creates another paradox.

Elmer and Nelva had arranged for an inter vivos disposition of their assets and both had wills devising only to the trust. Nelva did not express in the 8/25/2010 QBD/TPA that she intended to create a will or revoke her exiting will, which is a formality required of a testamentary instrument.

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[14] *Land v. Marshall*, 426 S.W.2d 841, 844 (Tex. 1968)
[15] Estate of Canales, in re, 837 S.W.2d 662, 665 (Tex. App. 1992)

The August 25, 2010 QBD/TPA

The August 25, 2010 QBD/TPA is not a valid trust instrument, however, Plaintiff Curtis bears no burden of proof an this juncture:

- The August 25, 2010 QBD/TPA is not in evidence.
- The August 25, 2010 QBD/TPA Claims to alter/amend/change irrevocable trusts.
- Was preceded by a June 2015 QBD that was not revoked but affirmed in the August 25, 2010 QBD/TPA.
- The August 25, 2010 QBD/TPA was allegedly Signed by Nelva alone but Nelva said "it's not true" in her own hand writing
    - 3 different signature page versions appear in the record
    - None are photo copies of a wet signed original but contain digital stamp images of Nelva's signature
    - Each signature page version was filed by a different party[16]
    - Amy, Anita and Carole have all denied personal knowledge of its creation and chain of custody
    - Only one Notary Log Entry for 8/25/2010 QBD, 3 for COT's and 1 DPOA
    - No-contest clause contains corruption of blood provisions
    - Allegedly authorizes the trustees to ignore fiduciary duties owed to and for the benefit of the beneficiary, which is the equivalent of arguing that there is no trust relationship.
    - The Article III QBD has never been distinguished from the Article IX TPA
        i. Art III - QBD applies to share of Settlor who exercises it (Nelva) Nelva's share was subject to revocation and Amendment
        ii. Art IX - TPA located in section titled "Administration of the Decedents Trust". The Decedents Trust share was created irrevocable and came into existence in the instant there was a decedent.
    - The alleged testamentary power of appointment presents a paradox. Irrevocable means Nelva didn't have a property interest in the decedent's trusts except for what was expressly stated[17]

[16] See Plaintiff Curtis July 13, 2015 Answer to Defendant Anita Brunsting and Defendant Amy Brunstings June 26, 2015 "No Evidence Motion for Partial Summary Judgment" (both remain pending)

- This "Testamentary Power of Appointment" came into existence in the same instant there was a decedent's trust, which is the same instant the trust became irrevocable, and, being testamentary, it would go into effect in the instant of Nelva's death which is the instant in which Nelva's limited property interest in the Decedent's irrevocable trust share terminated.
- Claims to create 5 testamentary trusts (personal asset trusts) but does not comport with the formalities required of a testamentary instrument.

Whether or not it presents itself for examination, the 8/25/2010 QBD/TPA is not a valid instrument by any measure. The in Terrorem clause contains corruption of blood and that too unenforceable.

XII. CONCLUSION

Only Defendants Anita Brunsting and Amy Brunsting have been in a position to honor and execute the Settlors' intentions and only Defendants Anita Brunsting and Amy Brunsting have refused to honor the Settlors' intentions.

Defendant Amy Brunsting, rather than taking exception to Anita's conduct, joined Defendant Anita Brunsting and has assumed the lead position in attempting to vilify the intended victims of Defendants' own disloyalty.

Eight years after the passing of the last Settlor, and after having failed to perform even one affirmative fiduciary act for the benefit of the cestui que, both co-defendant co-trustees have now formally advanced a theory that, if true, would enlarge their share of the trust res, just as Plaintiff Candace Curtis stated in her original affidavit February 27, 2012. In so doing, Defendants Anita Brunsting and Amy Brunsting have clearly violated the in Terrorem clause in "the 2005 restatement".

[17] $5000 annually plus whatever portion of the principal was needed for her health maintenance and welfare after the survivors share was exhausted.

Under the Restatement, Anita's former trust share should now be the property of her children, Luke and Katie, and Amy's former trust share should now be the property of her children, Ann and Jack.

Plaintiff Curtis wants possession and control of her property just as the Settlors intended. Unlike Anita and Amy Brunsting, Plaintiff Curtis has not and does not seek to enlarge her share at the expense of the other beneficiaries. Further, Plaintiff sayeth naught.

Respectfully submitted

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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 day, Thursday, January 16, 2020.

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