NO. 412,249-401

CARL HENRY BRUNSTING, § IN PROBATE COURT

INDIVIDUALLY AND AS §

INDEPENDENT EXECUTOR OF THE §

ESTATES OF ELMER H. BRUNSTING §

AND NELVA E. BRUNSTING § NUMBER FOUR (4)

§

vs. §

§

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 §

# Answer to Defendant Co-Trustees Untimely Motion for Severance

On January 6, 2022, almost nine years after case initiation, Defendant Co-Trustees Anita Brunsting and Amy Brunsting and Independent Executor Carl Brunsting (the fiduciaries) filed an extremely vague and untimely motion; apparently seeking refuge is some form of case dissection.

“Plaintiff, Carl Brunsting, and Defendant/Co-Trustees, Anita Brunsting and Amy Brunsting (collectively the “Severing Parties”), file this motion to sever their respective claims against each other from the above-entitled and numbered cause (the “401 Case”)”

To reveal the ludicrous nature of this notion one should probably begin with verifiable facts regarding the litigation chronology and move from there to distinguishing the parties and their respective claims. The “412,249-401” case that Carl and the Defendant Co-Trustees want to run away from was filed in the probate court by Carl Brunsting on April 9, 2013 [1[[1]](#footnote-1)] and the fiduciaries seem to have a problem with the matter proceeding to trial.

## The -401 Case Style

The -401 case is styled as above, and not styled as the fiduciaries severance motion is styled. There is no decedent’s estate and if there is a Carl et al., it would be Carl individually and Carl the Independent Executor. The “412,249-401” case was filed in the probate court by Carl Brunsting individually and as executor on April 9, 2013[[2]](#footnote-2), four days after the probate of the pour-over will had closed.

Eight years, eight months, and twenty-eight days later, Plaintiff Carl Brunsting and Defendant/Co-Trustees Anita Brunsting and Amy Brunsting want to break away from the action Carl filed and start a new and independent action with an all new cause number. In sum total the motion to sever asks that:

The Severing Parties request that the Court sever the claims of Plaintiff, Carl Brunsting, against Defendant/Co-Trustees, Anita Brunsting and Amy Brunsting, and those of the Defendant/Co-Trustees against Plaintiff, Carl Brunsting, into a separate cause number, and grant the Severing Parties such other and further relief to which they may be entitled.

Defendant Co-Trustees and the attorney in fact for Plaintiff Carl Brunsting neglected to identify an authority for their requested severance and, although they use the label “judicial economy” for their excuse, they make no effort to demonstrate an entitlement to severance with any facts upon which their request for severance should be granted.

While the court has discretion in granting a severance motion, *see Liberty Nat'l Fire Ins. Co. v. Akin,* 927 S.W.2d 627, 629 (Tex. 1996), severance is only proper were the following Conditions are met: (1) the controversy involves more than one cause of action (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. See *Guaranty Fed. Savs. Bank v. Horseshoe Op. Co.,* 793 S.W.2d 652, 658 (Tex. 1990); *see also* Tex. R. Civ. P. 41. The core fact relevant in regard to any dissection of claims is that there is only one nucleus of operative facts common to all.

## The Parties

The Brunsting trusts were drafted by the law firm of Albert Vacek Jr. which later became Vacek & Freed P.L.L.C. (the “-403 case”). The federal breach of fiduciary action (the “-402 case”) was filed against the Co-trustee Defendants by trust beneficiary Candace Curtis under diversity jurisdiction on February 27, 2012. Defendant Co-Trustees appeared represented by Vacek & Freed staff attorney Bernard Lilse Mathews, III, State Bar # 13187450, who used a Green and Mathews firm name in effort to conceal his conflicts of interest. [2[[3]](#footnote-3)]

The federal case was dismissed under the probate exception March 8, 2012, but reversed and remanded by the Circuit Court January 9, 2013 [3[[4]](#footnote-4)].

## The -403 Case

Independent Executor Carl Henry Brunsting filed professional negligence claims against the Vacek & Freed estate planning attorneys in Harris County District Court 164 [4[[5]](#footnote-5)] On January 29, 2013 alleging [P3]:

8. This is a case involving Defendants' negligence, breach of fiduciary duty and other acts or omissions in their representation of Elmer and N elva, 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 fiduciary duty. Alternatively, a conspiracy existed between Defendants, and the Current Trustees for that unlawful purpose.

9. 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 N elva' 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.

10. Despite the Law Firm's representations to Elmer and Nelva that the Family Trust would preserve their plans for their estate, Defendants took direction from the Current Trustees, while representing Nelva, with the result being just the opposite. It is believed that Defendants not only failed to inform Nelva that they had established a relationship with the Current Trustees which put them in a conflict of interest with regard to their representation of Nelva's interests but that Defendants actually ignored that conflict of interest and their obligations to Nelva and assisted the Current Trustees in changing the terms of the Family Trust in ways which it is believed that Nelva did not have capacity to change and/or did not understand or want. Defendants also took steps to undermine and even remove Nelva's control of her own assets, of the assets of Elmer's estate, and of the Family Trust assets, thereby placing those assets at risk of loss to Anita, Amy, and Carole and facilitating the loss which actually occurred.

11. Moreover, it is believed that Defendants assisted the Current Trustees in various ways intended to prevent Nelva from even understanding that documents were being prepared by Defendants at the Current Trustee's request, why those documents were being prepared, and what the impact of the documents would be. It is believed that in assisting the Current Trustees in obtaining their improper objectives, Defendants, among other things:…

After filing civil conspiracy claims against the disloyal estate planning attorneys in District Court, Carl’s counsel filed the -401 case in Probate Court 4 on April 9, 2013, four days after the independent administration was closed and in direct violation of Section 6.04 and other provisions in the Will prohibiting further action in the probate court.

## Preliminary Injunction

On the very same day Carl filed his -401 claims in the Probate Court, there was a hearing held in the Southern District of Texas on Plaintiff Curtis pro se motion for preliminary injunction [5[[6]](#footnote-6)]. The Court issued the preliminary injunction in open court and published a memorandum of the injunction on April 19, 2013 [6[[7]](#footnote-7)]. Due to trustee Anita Brunsting’s failure to produce a proper trust accounting after more than two and one half years as trustee, the Federal District Court felt compelled to appoint a Special Master in order to get a handle on the assets [7[[8]](#footnote-8)]. The Report of Special Master was filed August 8, 2013 [8[[9]](#footnote-9)] and hearing was had September 3, 2013 [9[[10]](#footnote-10)]. At this Juncture “NOMINAL DEFENDANT CANDACE CURTIS” will incorporate the Statutory Bill of Review (“Case 412249-404”) by reference as if fully set forth herein [10[[11]](#footnote-11)].

In essence, the federal plaintiff’s case was improperly smuggled into this court [11[[12]](#footnote-12)] by attorney Jason Ostrom. Mediation was had and the only topic was the amount of attorney’s fees. No offer was received by beneficiary Candace Curtis and shortly thereafter the Mills Shirley Attorneys filed a motion for leave to withdraw [12[[13]](#footnote-13)].

Carl resigned as independent executor February 19, 2015, [13[[14]](#footnote-14)] substituting his wife Drina as attorney in fact. An agreed docket control order was signed [14[[15]](#footnote-15)]. An agreed order to “consolidate cases” [15[[16]](#footnote-16)] was signed, the -402 docket was closed and the federal plaintiff vanished into Carl’s -401 case where she is a Nominal Defendant only. When data mining revealed these events Candace Curtis discharged Ostrom and on June 26, 2015 Defendant Co-Trustees filed a No-evidence Motion for Summary Judgment [16[[17]](#footnote-17)].

Illicit wiretap recordings were disseminated by the Mendel law Firm via certified U.S. Mail over the July 4th holiday and on July 13, 2015 the “Severing Parties” both filed notice of hearing on their respective summary judgment motions [17[[18]](#footnote-18)] [18[[19]](#footnote-19)] followed by beneficiary Candace Curtis filing her answer to Defendant co-Trustees no-evidence motion with a demand to produce the evidence to be rebutted [19[[20]](#footnote-20)].

The summary judgement hearing for August 3rd 2015 was suddenly converted into a hearing on an “emergency motion” [20[[21]](#footnote-21)] for a protective order regarding the immaterial and otherwise irrelevant portion of the wiretap recordings that had been disseminated. There was no pleading as to jurisdiction or venue and hearing [21[[22]](#footnote-22)] was had on the emergency motion rather than on dispositive motions. There was no testimony or mention of relevance and no protective order after hearing was ever issued. After suffering through the “Temporary Administrator” charade [22[[23]](#footnote-23)] trust beneficiary Candace Curtis attempted to put summary judgement hearings back on the docket but was met with an evasion performance that one could see from the eye contact, the body language and the script, that the performance was obviously staged [23[[24]](#footnote-24)] in effort to intimidate the pro se into capitulating to the threats and extraction demands, demands that never appeared on paper until the March 2021 pre settlement negotiation accounting [24[[25]](#footnote-25)] and Co-trustee defendant’s counter offer [25[[26]](#footnote-26)] were received via email.

According to the June 2021 Docket Control Order all amendments and supplements were to be filed no later than 10/15/2021. Beneficiary Candace Curtis filed her addendum on October 15, 2021. On November 5, 2021 Defendant Co-Trustees rushed to clutter the record with an untimely summary judgment motion arguing in Terrorem and entitlement to fees from the trust. Their in Terrorem claims are not only vague but patently ludicrous. A beneficiary seeking to compel a fiduciary to perform the fiduciary’s duties; seeking redress against a fiduciary for a breach of the fiduciary’s duties; or seeking a judicial construction of a will or trust (§ 112.038), cannot be construed to trigger a forfeiture provision; Texas Trust Code § 111.0035(b)(6) and as will be shown, these are the very things Defendant Co-Trustees claim trigger forfeiture with no specificity as to the particulars.

The core fact relevant in regard to any dissection of claims is that there is only one nucleus of operative facts. What is true for any one question of fact is true for the Co-Trustees, true for the executor, true for all of the beneficiaries and equally true for the estate planning attorneys. In sum total the motion to sever asks that:

The Severing Parties request that the Court sever the claims of Plaintiff, Carl Brunsting, against Defendant/Co-Trustees, Anita Brunsting and Amy Brunsting, and those of the Defendant/Co-Trustees against Plaintiff, Carl Brunsting, into a separate cause number, and grant the Severing Parties such other and further relief to which they may be entitled.

## Standing and the Division of claims

The next items to examine regarding severance are standing and division of claims. Carl filed tort claims in the probate court in two separate persona, Carl individually and Carl as “independent executor”. When Carl resigned the office of “independent executor” he simultaneously substituted his wife Drina as his attorney in fact. However, Carl’s individual claims have never been bifurcated from the independent executor’s claims.

To help clarify the logistical complexities proposed by the notion of severing, it would be necessary to distinguish the various Plaintiff’s personas and respective claims. Counsel has thus added sub-cause divisions to the -401 case beginning with Carl individually (-401.1) and Carl the independent executor (-401.2).

# 412,249-401.1

## Carl Henry Brunsting individually vs

1. ANITA KAY BRUNSTING f/k/a 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;
2. 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;
3. CAROLE ANN BRUNSTING, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust;
4. And, as a nominal defendant only, CANDACE LOUISE CURTIS
5. Breach of Fiduciary Duties,
   1. there is fiduciary relationship between the plaintiff and defendant;
   2. the defendant breached his fiduciary duty to the plaintiff; and
   3. the defendant's breach proximately caused injury to the plaintiff or benefit to the defendant.
6. Conversion,
   1. Plaintiff owned, had legal possession of, or was entitled to possession of the property;
   2. Defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights;
   3. Plaintiff made a demand for the property;
   4. Defendant refused to return the property.
7. Negligence,
   1. Duty owed by defendant to plaintiff;
   2. Breach of that duty;
   3. Proximate cause of the plaintiff's damages by defendant's breach; and
   4. Damages.
8. Civil Conspiracy,
   1. a combination of two or more persons;
   2. the persons seek to accomplish an object or course of action;
   3. the persons reach a meeting of the minds on the object or course of action;
   4. one or more unlawful, overt acts are taken in pursuance of the object or course of action; and
   5. Damages occur as a proximate result.
9. Fraudulent Concealment
   1. Generally a theory applied to statutes of limitations in fraud cases. Given limitations are not at issue here, this cause would simply mean breach of the fiduciary duty of full disclosure in conjunction with the object or course of action in the civil conspiracy.

### THE OTHER CLAIMS ARE REMEDIAL

1. ~~Tortuous Interference with Inheritance~~,
   1. Texas does not recognize this cause Archer v. Anderson, 556 S.W.3d 228, 239 (Tex. 2018)
2. Constructive Trust,
3. Construction of Trust and Suit for Declaratory Judgement,
4. Demand for Trust Accounting,
5. Prejudgment Interest
6. Attorney’s Fees pursuant to Chapters 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code.

#### Breach of Fiduciary Duties

Anita (-401.1(a)) as a co-trustee is a fiduciary owing obligations to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Amy (-401.1(b)) as a co-trustee is a fiduciary owing obligations to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Independent Executor Carl owes fiduciary obligations to the Decedent and the Decedent’s devisee, the family trust, and by necessary implication to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Carole is not a fiduciary and owes no fiduciary obligations to Carl.

#### Conversion,

Candace and Carole have never been in possession, assumed control or exercised dominion over any property belonging to Carl.

#### Negligence

Candace and Carole owe no duties to Carl and carl has identified no duties owed by Candace or Carole in relation to any of his claims.

#### Civil Conspiracy

Civil conspiracy is not an independent tort, but rather, a theory of vicarious liability which requires some underlying wrong.

#### Fraudulent Concealment

Carl only plead this in regard to statutes of limitations

# 412,249-401.2

## Independent Executor Carl Brunsting vs

1. ANITA KAY BRUNSTING f/k/a 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;
2. 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;
3. CAROLE ANN BRUNSTING, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust;
4. And, as a nominal defendant only, CANDACE LOUISE CURTIS
5. Breach of Fiduciary Duties,
   1. there is fiduciary relationship between the plaintiff and defendant;
   2. the defendant breached his fiduciary duty to the plaintiff; and
   3. the defendant's breach proximately caused injury to the plaintiff or benefit to the defendant.
6. Conversion,
   1. Plaintiff owned, had legal possession of, or was entitled to possession of the property;
   2. Defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights;
   3. Plaintiff made a demand for the property;
   4. Defendant refused to return the property.
7. Negligence,
   1. Duty owed by defendant to plaintiff;
   2. Breach of that duty;
   3. Proximate cause of the plaintiff's damages by defendant's breach; and
   4. Damages.
8. Civil Conspiracy,
   1. a combination of two or more persons;
   2. the persons seek to accomplish an object or course of action;
   3. the persons reach a meeting of the minds on the object or course of action;
   4. one or more unlawful, overt acts are taken in pursuance of the object or course of action; and
   5. Damages occur as a proximate result.
9. Fraudulent Concealment
   1. Generally a theory applied to statutes of limitations in fraud cases. Given limitations are not at issue here is would simply mean breach of the fiduciary duty of full disclosure combined with the object or course of action in the civil conspiracy.

### THE OTHER CLAIMS ARE REMEDIAL

1. Tortuous Interference with Inheritance,
   1. Texas does not recognize this cause Archer v. Anderson, 556 S.W.3d 228, 239 (Tex. 2018)
   2. Constructive Trust,
   3. Construction of Trust and Suit for Declaratory Judgement,
   4. Demand for Trust Accounting,
   5. Prejudgment Interest
   6. Attorney’s Fees pursuant to Chapters 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code.

Defendant Co-Trustees filed their original answers on May 13, 2013: 412249-401 Amy’s Answer PBT-2013-154977; and Anita’s answer PBT-2013-154981. If Defendant Co-Trustees had counter claims those claims would be compulsory and were waived under Texas Rules of Civil Procedure 97(a) when they failed to raise their compulsory counter claims with their original answer.

#### Breach of Fiduciary Duties

Anita (-401.1(a)) as a co-trustee is a fiduciary owing obligations to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Amy (-401.1(b)) as a co-trustee is a fiduciary owing obligations to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Independent Executor Carl owes fiduciary obligations to the Decedent and the Decedent’s devisee, the family trust, and by necessary implication to trust beneficiaries Amy, Anita, Carl, Carole and Candace.

Carole is not a fiduciary and owes no fiduciary obligations to Carl.

#### Conversion,

Candace and Carole have never been in possession, assumed control or exercised dominion over any property belonging to Carl.

#### Negligence

Candace and Carole owe no duties to Carl and carl has identified no duties owed by Candace or Carole in relation to any of his claims.

#### Civil Conspiracy

Civil conspiracy is not an independent tort, but rather, a theory of vicarious liability which requires some underlying wrong.

#### Fraudulent Concealment

Carl only plead this in regard to statutes of limitations

# 412,249-401.3

## Defendant Carole Brunsting’s Original Counter Claims vs Independent Executor Carl Brunsting

(Filed May 5, 2013)

1. Breach of Fiduciary,
   1. ~~Tortious Interference with Inheritance Rights~~
   2. Actual Damages
   3. Punitive Damages
   4. Attorneys' fees, costs, and expenses
   5. declaratory judgment

While the estate (412249) was removed from the active docket with the approval of the inventory (4/5/2013) prior to any claims having been filed in the probate court on 4/9/2013, Independent Executor Carl Brunsting resigned the office leaving it vacant but has not been relieved of fiduciary liability nor has he distinguished his individual claims from those of the independent executor.

By filing civil tort claims in the probate court; in an independent administration; after the inventory had been approved and the probate dropped from the active docket, Carl converted the “independent administration” of a pour-over estate into a dependent administration of a living trust in violation of Section 6.04 of the wills and other specific provisions contained therein.

Carole Brunsting’s breach of fiduciary claims against independent executor Carl Brunsting cannot be severed from independent executor Carl Brunsting’s claims against non-fiduciary beneficiary Carole Brunsting.

# 412,249-401.4

## Defendant Co-trustee Anita and Amy Brunsting’s Original Counter Claims vs Carl

Defendant Co-Trustees filed their original answers on May 13, 2013 with no counter claims. On November 4, 2019, 6 years, 5 months, 23 days later, the Defendant Co-Trustees filed their “original counter claims” against beneficiaries Carl and Candace, without reference to jurisdiction, venue or forum statutes. Those claims are as follows:

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

It is an odd theory that defending beneficial interests in trust property equals forfeiture of those same beneficial interests, the equivalent of saying the beneficiary and the Co-Trustees are merely nominal. If the Defendant Co-Trustees have no obligations that can be enforced by the beneficiary, legal and equitable titles merge in the beneficiary, Trust Code § 112.032.

Texas Property Code § 111.0035(b)(6) The terms of a trust will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary’s duties; from seeking redress against a fiduciary for a breach of the fiduciary’s duties; or seeking a judicial construction of a will or trust. (§ 112.038)

"The right to challenge a fiduciary's actions is inherent in the fiduciary / beneficiary relationship." McLendon, [862 S.W.2d at 678](https://casetext.com/case/mclendon-v-mclendon-1#p678).” Lesikar v. Moon, 237 S.W.3d 361, 370 (Tex. App. 2007)

# 412,249-401.5

## Defendants Anita and Amy Brunsting’s Original Counter Claims vs Candace

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

If Defendant’s did not have counter claims available when they filed their original answers, they did not develop counter claims in the course of ignoring the fiduciary obligations of the office of trustee for more than eight years. Defendants do not have any claims against Carl and do not have any claims against Candace but have only demonstrated the disloyal intention they had from the onset.

# 412,249-402

## Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100 filed U.S. District Court No. 4:12-cv-592 on 2/27/2012

1. Breach of Fiduciary Duties,
   1. there is fiduciary relationship between the plaintiff and defendant;
   2. the defendant breached his fiduciary duty to the plaintiff; and
   3. the defendant's breach proximately caused injury to the plaintiff or benefit to the defendant.
2. Constructive Fraud, (Subset of breach and not a separate cause of action)
   1. Constructive fraud is a breach of a legal or equitable duty that the law declares fraudulent, irrespective of moral guilt, because it tends to deceive others, violate confidences, or injure public interests. Constructive fraud, by its very definition, does not include an overt act.
3. Extrinsic Fraud, (Subset of breach and not a separate cause of action)
   1. Fraudulent acts which keep a person from obtaining information about his/her rights to enforce a contract or getting evidence to defend against a lawsuit. This could include destroying evidence or misleading an ignorant person about the right to sue. Extrinsic fraud is distinguished from intrinsic fraud, which is the fraud that is the subject of a lawsuit
4. Intentional Infliction of Emotional Distress, a byproduct of breach and not a separate cause of action
   1. the defendant acted intentionally or recklessly;
   2. the defendant's conduct was extreme and outrageous;
   3. the conduct caused the plaintiff emotional distress; and
   4. the emotional distress was severe

Intentional infliction of emotional distress is a "gap-filler" tort applicable only when "a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.

Defendant Co-Trustees Anita Kay Brunsting and Amy Ruth Brunsting filed their original answers in 4:12-cv-00592 [Dkt 29] jointly on March 1, 2013. Their original answers did not raise any counter claims.

Plaintiff Candace Curtis October 15, 2021 Addendum adds:

1. Money Had and Received
   1. Money had and received is an equitable doctrine used to prevent unjust enrichment.
2. Conversion – Theft
   1. Plaintiff owned, had legal possession of, or was entitled to possession of the property;
   2. Defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with plaintiff's rights;
   3. Plaintiff made a demand for the property;
   4. Defendant refused to return the property.
3. ~~Tortious interference with inheritance rights~~
4. Declaratory Judgement
5. In Terrorem allegations against the co-trustee defendants

# 412,249-403

## Independent Executor Carl Brunsting vs Vacek & Freed P.L.L.C.

Carl filed professional negligence claims in the District Court in his fiduciary capacity as independent executor for the estates of Elmer and Nelva Brunsting on January 29, 2013, three months before related claims were filed against all of the trust beneficiaries in the probate court. The professional negligence claims in the District Court were ordered transferred to the probate court April 4, 2019 without a pending probate administration. The -403 case has **remained without a plaintiff** since Carl’s resignation on February 19, 2015 and so has the -401.2.

1. Professional negligence,
2. Negligence Per Se- Violation of Texas Penal Code§ 32.43; Commercial Bribery
3. Negligence *Per Se-* Violation of Texas Penal Code §7.02(a)(2) & (3); Criminal Responsibility for Conduct of Another
4. Breach of Fiduciary Duty
5. Negligent Misrepresentation
6. Aiding & Abetting Current Trustees' Breaches of Fiduciary Duty
7. Assisting & Encouraging
8. Assisting & Participating
9. Concert of Action
10. Fraud
11. Conversion
12. Conspiracy
13. Deceptive Trade Practices
14. Fraudulent Concealment
15. Actual Damages
16. Forfeiture of Fees
17. Treble Damages
18. Punitive Damages
19. Attorney's Fees
20. Prejudgment Interest

These claims explain the bait and switch front end but fail to explain the back end of the grift.

# 412,249-404

## Plaintiff Curtis Statutory Bill of Review re Statutory Probate Court Jurisdiction

District courts and statutory probate courts are the only courts with jurisdiction over trust proceedings. See Texas Property Code Ann. § 115.001 (West Supp. 2005); Schuele, 119 S.W.3d at 825. The jurisdiction of the District Court over trust proceedings is exclusive except for the authority granted to a probate court by Subsection (d):

§ 115.001 (a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts…

The exception to the exclusive jurisdiction of the District Court provided by subsection § 115.001 (d) is limited to matters “*incident to an estate*” and apply only when a probate proceeding relating to such estate is actually “*pending*” in the probate court. See: *Baker v. Baker NO. 02-18-00051-CV (Tex. App. Sep. 6, 2018)(emphasis added)* There was no probate administration actually pending in the probate court when Carl filed the 412249-401 case on 4/09/2013. Further filing in the probate court after the recording of the will and the return of an inventory, appraisement and list of claims was a violation of very specific directives in the Wills thus converting an independent administration of a closed probate into a dependent administration of a living trust. Carl’s counsel filed conspiracy and professional negligence claims against the disloyal estate planning attorneys in the District Court and then filed conspiracy and other claims against the “suckers”, including the greedy beneficiaries the disloyal estate planning attorneys baited in order to disrupt the estate plan, thus opening the door that facilitated the generational asset transfer intercepting litigation.

# Relevant Trust History

1. 1996 Family Trust – Settlors Co-Trustees - Anita sole successor trustee [Divide by 5 at the passing of the last settlor]
2. 1999 Irrevocable Life Insurance Trust - Anita sole trustee [Divide by 5 at the passing of the last settlor]
3. 2005 Restatement – Settlors Co-Trustees – Anita removed from Article IV – Carl and Amy successor Co-Trustees with Candace as the alternate - [Divide by 5 at the passing of the last settlor]
4. 2007 Amendment – Settlors Co-Trustees – Amy removed from Article IV – Carl and Candace successor Co-Trustees with Frost Bank as the alternate - [Divide by 5 at the passing of the last settlor]
5. June 9, 2008 Elmer N.C.M. - Family Trust becomes irrevocable and all changes require approval from Court of Competent Jurisdiction.
6. July 1, 2008 Amendment to Article IV – Anita and Carl successor Co-Trustees with Candace as the alternate. This Instrument does not meet the Article III criterion for alterations and is invalid in its entirety.
7. April 1, 2009 Elmer Brunsting passes and the passing of a Settlor was a qualifying event that triggered the separation of assets into two resulting trusts. The Decedents Irrevocable Trust [DIT] and the Survivors Revocable Trust [SRT].
8. August 25, 2010 Amendment to Article IV - changed to Anita and Amy successor Co-Trustees with Frost Bank as the alternate – Carl Removed
9. August 25, 2010 Qualified Beneficiary Designation - - [Divide by 5 at the passing of the last settlor] Anita, Amy & Carole trustees of their own 1/5 share – Anita & Amy Co-Trustees for Carl and Candace Shares. If valid, this QBD could only apply to Nelva’s share.
10. November 11, 2011 was the passing of Nelva Brunsting, a qualifying event that triggered the separation of assets into five shares and that’s a focal point.

The incapacity of Elmer Brunsting was a qualifying event because changes to the trust agreement required the signatures of both Settlors. The passing of Elmer Brunsting was a qualifying event because it triggered the provisions requiring the division of assets into two separate shares. The passing of Nelva Brunsting was a qualifying event because it triggered the provisions requiring the division of assets into five separate shares whether you look at the 1996 trust, the 2005 restatement or the 8/25/2010 QBD.

Any argument over whether the Co-Trustee Defendants occupy the office of trustee de jure or de facto is irrelevant to the obligation to perform the duties of the office they occupy. Among the obligations of the office was to divide the trust estate by five and distribute each share at the passing of the second Settlor. How the shares were to be managed after Nelva’s passing is irrelevant to the obligation to perform the divisions required. The question of whether or not those divisions were performed is core to any question of subsequent management.

Without addressing any issue of validity of transactions or instruments and without addressing the question of whether the QBD applies to Elmer’s share, Nelva’s share, neither or both shares, let’s look at what the QBD claims to do and ask whether or not it has been done.

## The August 25, 2010 QBD

According to the QBD’s terms the trust assets were to be divided into five shares that would be called “Personal Asset Trusts” (PAT). Amy, Anita and Carole were to be the sole trustee for their respective shares with Amy and Anita to be Co-Trustees for Carl and Candace PAT’s. To begin with, a trust is a relationship. For a trust relationship to exist the separation of legal and equitable title to trust property must be maintained, Texas Property Code § 112.034, because when legal and equitable titles are held by the same person, merger occurs and the trust collapses because no trust relationship exists. It this case the assets are held by the beneficiary in the beneficiary’s individual capacity where they are not protected from personal injury actions brought by third parties.

# Conversion/Theft vs. Misapplication

The current Co-Trustees have not divided the assets and according to their own argument Carole’s share vested entirely in Carole at the passing of Nelva Brunsting November 11, 2011. Thus, the Defendant Co-Trustees have been in wrongful possession of Carole Brunsting’s share of the trust property for more than ten years. According to Defendants QBD the Defendant Co-Trustees, as trustees for their own Personal Asset Trusts, own their shares outright and, while claiming to hold Carl and Candace share in trust, the Defendant Co-Trustees have failed to separate Carl and Candace trust assets from their own personal assets and this wrongful possession and co-mingling is misapplication.

## Silence where there is a Duty to Speak is Fraud

Breach of fiduciary is a civil claim where a defendant has no right to remain silent. Quite to the contrary, in an action against a fiduciary, a fiduciary has a duty to speak. As will be shown, the fact’s upon which a civil breach of fiduciary cause relies in this case, also establishes cause for public prosecution under the Texas Penal Code. Texas has several criminal statutes that define when fiduciary actions become criminal acts and Texas law treats the misapplication of assets held in a fiduciary capacity as a much more serious offense than a generic theft. Under Texas Penal Code § 32.45(a)(1), the term “fiduciary” is described as:

(A) a trustee, guardian, administrator, executor, conservator, and receiver;

(B) an attorney in fact or agent appointed under a durable power of attorney as provided by Subtitle P, Title 2, Estates Code;

(C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and

(D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

What specific claims, subtracted from what ancillary cause(s) or ancillary sub-causes will this separate lawsuit be composed? What new and unique facts will distinguish the rights and obligations in the amputated portion from those of the claims and claimants left behind? Will severance help clarify the issues and aid the Court in resolving the existing controversy?

1. 2013-04-09 PBT-2013-115617 Original Petition 412249-401 [↑](#footnote-ref-1)
2. 2013-04-09 PBT-2013-115617 Original Petition 412249-401 [↑](#footnote-ref-2)
3. Emergency motion for removal of lis pendens filed with Affidavit of Amy Brunsting [↑](#footnote-ref-3)
4. 2013-01-09 Curtis v Brunsting 704 F.3d 406 [↑](#footnote-ref-4)
5. 2013-01-29 District Court Complaint [↑](#footnote-ref-5)
6. Transcript of April 9, 2013 injunction hearing [↑](#footnote-ref-6)
7. 2013-04-19 Case 4-12-cv-592 Doc 45 Preliminary Federal Injunction [↑](#footnote-ref-7)
8. 2013-05-09 Case 4-12-cv-592 [Doc 55] Order Appointing West - Special Master [↑](#footnote-ref-8)
9. 2013-08-08 Case 4-12-cv-592 Doc 62 Report of Special Master [↑](#footnote-ref-9)
10. Hearing Transcript - Report of Special Master [↑](#footnote-ref-10)
11. [10] 2019-11-19 Statutory Bill of Review 412249-404 [↑](#footnote-ref-11)
12. 2014-06-05 Case 412249-402 Ostrom Motion to Enter Transfer Order PBT-2014-184792 [↑](#footnote-ref-12)
13. [13] 2014-09-09 PBT-2014-294428 Maurene Mccutcheon application to withdraw [↑](#footnote-ref-13)
14. 2015-02-19 Case 412249-401 PBT-2015-57597 Carl Resignation [↑](#footnote-ref-14)
15. [14] 2015-02-20 Case 412249-401 Agreed Docket Control Order [↑](#footnote-ref-15)
16. 2015-03-09 Agreed Order to Consolidate cases [↑](#footnote-ref-16)
17. 2015-06-26 Case 412249-401 Anita & Amy's No Evidence MSJ re 8-25-2010 QBD-PBT-2015-208305 [↑](#footnote-ref-17)
18. 2015-07-13 Case 412249-401 PBT-2015-226432 Notice of hearing on No Evidence Motion 2015-07-13 [↑](#footnote-ref-18)
19. 2015-07-13 Case 412249-401 PBT-2015-227302 Bayless Notice of hearing august 3 2015 [↑](#footnote-ref-19)
20. 2015-07-13 Case 412249-401 Plaintiff Curtis Response to No-evidence motion PBT-2015-227757 [↑](#footnote-ref-20)
21. 2015-07-22 Emergency Motion for Protective Order [↑](#footnote-ref-21)
22. 2015-08-03 Estate of Nelva E Brunsting August 3, 2015 Wiretap Transcript [↑](#footnote-ref-22)
23. 2016-01-14 Case 412249 PBT-2016-14856 Greg Lester Report [↑](#footnote-ref-23)
24. 2016-03-09 Case 412249-401 March 9, 2016 Staged Ambush Hearing Transcript [↑](#footnote-ref-24)
25. 2021-03-05 Settlement accounting [↑](#footnote-ref-25)
26. [25] 2021-03-29 Brunsting - Trustee Counter-Offer [↑](#footnote-ref-26)