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”)”

Defendant Co-Trustees, Anita Brunsting and Amy Brunsting, and the “Attorney in Fact” for Plaintiff Carl Brunsting, have neglected to identify any authority for the requested severance and have wholly failed to explain what they are talking about. Although they use the label “judicial economy” they make no effort to demonstrate their entitlement to a severance and fail to provide the court with any specificity or factual basis upon which any form of severance should be granted.

While the court has discretion in granting a severance, *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 “412,249-401” case that Carl Brunsting 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.

# QUI BONO?

Breach of fiduciary is a civil claim where a defendant has no right to remain silent but, to the contrary, a fiduciary has a duty to speak. At the same time, the same facts create 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 much more serious 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 of? What new and unique facts will distinguish the amputated portion from what is left behind? What claims and personas will be left behind? Will severance help clarify the issues and aid the Court in resolving the existing controversy?

## The -401 Case Style

The -401 case is styled as above, and not styled as the fiduciaries severance motion is styled. There is no decedents estate and if there is a Carl et al., it would be Carl individually and Carl the Independent Executor.

## 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[[2]](#footnote-2)]

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

## 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[[4]](#footnote-4)] 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[[5]](#footnote-5)]. The Court issued the preliminary injunction in open court and published a memorandum of the injunction on April 19, 2013 [6[[6]](#footnote-6)]. 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[[7]](#footnote-7)]. The Report of Special Master was filed August 8, 2013 [8[[8]](#footnote-8)] and hearing was had September 3, 2013 [9[[9]](#footnote-9)]. 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[[10]](#footnote-10)].

In essence, the federal plaintiff’s case was improperly smuggled into this court [11[[11]](#footnote-11)] 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[[12]](#footnote-12)].

Carl resigned as independent executor February 19, 2015, [13[[13]](#footnote-13)] substituting his wife Drina as attorney in fact. An agreed docket control order was signed [14[[14]](#footnote-14)]. An agreed order to “consolidate cases” [15[[15]](#footnote-15)] 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[[16]](#footnote-16)].

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[[17]](#footnote-17)] [18[[18]](#footnote-18)] 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[[19]](#footnote-19)].

The summary judgement hearing for August 3rd 2015 was suddenly converted into a hearing on an “emergency motion” [20[[20]](#footnote-20)] 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[[21]](#footnote-21)] 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[[22]](#footnote-22)] 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[[23]](#footnote-23)] 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[[24]](#footnote-24)] and Co-trustee defendant’s counter offer [25[[25]](#footnote-25)] 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 first items at issue 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 and this substitution raises another obvious issue. If Carl resigned due to want of capacity how and when did Drina become Carl’s attorney in fact?

To help distinguish the various plaintiffs, personas, and their respective claims, one has added sub cause divisions to the -401 case beginning with Carl individually (-401.1) and Carl the independent executor (-401.2).

# The Notion of Severing

Plaintiff Carl Brunsting and the Defendant Co-Trustees (the fiduciaries), are seeking to sever their respective claims against each other and create a separate lawsuit.

The fiduciaries want to separate from:

1. The preliminary federal injunction restraining the co-trustee defendants from “wasting” the trust assets.
   1. The co-trustee defendants refuse to perform the injunctions affirmative command to deposit income into an appropriate account for the beneficiary to avoid excess taxes while, at the same time, using its prohibitions against wasting the assets as an excuse for not performing a court ordered distribution to beneficiary Carole Brunsting, within the allotted time frame.

The fiduciaries want to separate from:

1. Breach of fiduciary claims Candace filed against the Defendant Co-Trustees
2. Carl’s individual claims against the Defendant Co-Trustees and Carole
3. The Independent Executor’s claims against the Defendant Co-Trustees and Carole
4. Trust beneficiary Carole’s claims against Carl, the former Independent Executor
5. The Defendant Co-Trustee/beneficiaries counter claims against beneficiary Candace
6. The Defendant Co-Trustee/beneficiaries counter claims against beneficiary Carl

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-Trustees occupy the office 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. However, 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. The QBD requires the Co-Trustees to divide the assets and distribute those assets into five separate “personal asset trusts” [PAT]. Did they?

According to the QBD’s terms Amy, Anita and Carole would be the sole trustee for each of their PAT’s but Amy and Anita would be Co-Trustees for Carl and Candace PAT’s.

A trust is a relationship and for a trust relationship to exist the separation of legal and equitable title must be maintained, Texas Property Code § 112.034. When legal and equitable titles are held by the same person merger occurs, the trust collapses because no trust relationship exists and the assets are held by the beneficiary in the beneficiary’s individual capacity where they are not protected.

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 and, 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 own their own shares outright and, claim to hold Carl and Candace share in trust. If this is the case the Defendant Co-Trustees failure to separate the trust assets from their own shares is misapplication and co-mingling.

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