No. _____

IN THE COURT OF APPEALS

FOR THE FIRST OR FOURTEENTH DISTRICT OF TEXAS

HOUSTON, TEXAS

==========

In Re Candace Louise Curtis

Relator

==========

Original Proceeding from the Harris County Probate Court No. 4

Cause No. 412,249-401 et seq.

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RECORD INDEX V3

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FOR RELATOR CANDACE CURTIS

TAB 35

PROBATE COURT 4

No. 412,249-401

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

ORDER DENYING PLEAS AND MOTIONS FILED BY CANDACE CURTIS

On this day, the Court considers the following pleadings filed by Candace Louise Curtis:

8/17/2018 "Plea in Abatement"

9/4/2018 "Addendum to Pleas in Abatement in Reply to Stephen Mendel"

10/8/2018 "Nominal Defendant's Verified First Amended Plea in Abatement"

10/19/2018 "Plea to the Jurisdiction"

2/5/2019 "Plaintiff Curtis' Response to Notice of Hearing, Motion for Clarification and to Dismiss; Special Exceptions, Motion in Limine and Memorandum of Points and Authorities in Support"

The Court, after considering the pleadings on file related to:

1) Civil Action No. 4:12-cv-00592 pending in the U.S. District Court for the Southern District of Texas, which was remanded to Harris County Probate Court No. 4 at the request of Candace Curtis, resulting in the U.S. District Court case being closed, remanded and terminated;
2) Cause No. 412,249-402, pending in Harris County Probate Court No. 4, into which the above-referenced U.S. District Court case was transferred on February 9, 2015, and in which Candace Curtis, by and through her counsel, signed an Agreed Docket Control Order and the March 16, 2015 Agreed Order to Consolidate Cases;
3) Cause No. 412,249-401, pending in Harris County Probate Court No. 4, initiated on April 10, 2013, and through which claims have been asserted by Carl Henry Brunsting,

individually and as Independent Executor of the Estate of Elmer H. Brunsting and Nelva E. Brunsting, naming all beneficiaries of the Estate, and counterclaims asserted by Carole Brunsting against Carl Brunsting, as Executor; and

4) Cause No. 2013-05455, filed by Carl Brunsting, as Executor of the Estate of Nelva Brunsting, in the 164th Judicial District Court of Harris County, Texas on January 29, 2013 against Candace Kuntz-Freed and Vacek & Freed as the only defendants (the "District Court Case"), which claims are the subject of a separate Order on Motion to Transfer District Court Proceedings to Probate Court No. 4 signed on even date herewith,

finds that subject matter jurisdiction is proper in Harris County Probate Court No. 4 with regard to the Estates of Nelva and Elmer Brunsting as well as the assets contributed to Trusts related to those Estates. The Court also finds that no other court has dominant jurisdiction regarding claims related to these Estates. Therefore, the Pleas in Abatement, the Plea to the Jurisdiction and all other relief requested by the pleadings first enumerated in this Order, filed by Candace Curtis, lack merit and should be, in all things, DENIED.

Signed on the 14 day of February, 2019.

HONORABLE JAMES HORWITZ
PRESIDING JUDGE

FILED
2019 FEB 14 PM 2:05
COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURT 4

No. 412,249-401

IN RE: THE ESTATE OF	§	PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
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HONORABLE JAMES HORWITZ
PRESIDING JUDGE

FILED
2019 FEB 14 PM 2:05
COUNTY CLERK
HARRIS COUNTY, TEXAS

TAB 36

NO. 412,249-**401**

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS
	§	
	§	
CARL HENRY BRUNSTING, et al	§	
	§	
v.	§	
	§	
ANITA KAY BRUNSTING, et al	§	

AMY BRUNSTING'S & ANITA BRUNSTING'S ORIGINAL COUNTERCLAIM

TO THE HONORABLE JUDGES HORWITZ AND COMSTOCK:

AMY BRUNSTING ("Amy") and ANITA BRUNSTING ("Anita") (collectively "Co-Trustees") have been sued individually and in various capacities by their sister, Candace Louise Curtis ("Curtis") and their brother, Carl Henry Brunsting ("Carl"), each of whom has amended and/or supplemented their petitions on numerous prior occasions.

In light of the numerous amended and/or supplemental petitions filed by Curtis and Carl, Co-Trustees file these Original Counterclaims, individually and in various identified capacities, including without limitation, as Co-Trustees of The Restatement of The Brunsting Family Living Trust (the "Brunsting Family Living Trust").

Each allegation, assertion, claim or cause of action made by Amy and/or Anita in this Original Counterclaim is in addition to and/or in the alternative to any other allegation, assertion, claim or cause of action made by them in this Original Counterclaim.

I. BACKGROUND FACTS

The Brunsting Family Living Trust was created by Elmer Henry Brunsting and Nelva Erleen Brunsting (together, "Founders" or "Trustors" and each a "Founder" or "Trustor"), on or about October 10, 1996. Over time, additional documents pertaining to The Brunsting Family Living Trust were executed by one or both of the Founders, including without limitation, a Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed by Nelva E. Brunsting on or about June 15, 2010 (the "June 2010 QBD"), and another Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed by Nelva E. Brunsting on or about on August 25, 2010 (the "August 2010 QBD"). Elmer Henry Brunsting was not a party to either document, as he died on April 1, 2009.

Through the Brunsting Family Living Trust and the August 2010 QBD, the Founders set out a number of different terms, conditions and instructions to be implemented and followed by the trustees and beneficiaries. Included among these terms, conditions and instructions were rules intended for the "protection of beneficial interests", including without limitation rules dictating that the Founders' instructions were not to be contested.

This "no-contest" language appears in both the Brunsting Family Living Trust **and** the August 2010 QBD, and was included because the Founders did not want to burden the trust with the costs of a litigated proceeding to resolve questions of law or fact, unless originated by a trustee or with a trustee's written permission. The penalty for those who violated the no-contest provision was the forfeiture of any amounts the violator is or may have been entitled to receive. In such an event, a violator's interest would pass as if the violator(s) had predeceased the Founders.

The Founders identified certain specific acts which, if taken, would trigger a forfeiture. Prohibited acts include but are not limited to originating (or causing to be instituted) a judicial proceeding:

- To construe or contest the trust(s);
- To resolve any claim or controversy in the nature of reimbursement;
- Seeking to impress a constructive or resulting trust;
- Alleging any theory, which if assumed as true, would enlarge (or originate) a claimant's interest in the trust or the Founder's Estates;
- Unsuccessfully challenging the appointment of any person named as a Trustee or unsuccessfully seeking the removal of any person acting as a Trustee;
- Objecting to any action taken or proposed to be taken in good faith by the Trustee, if such action is determined to have been taken in good faith;
- Objecting to any construction or interpretation of the trust, or any amendment to it, and such objection is later adjudicated to be an invalid objection; and/or
- In any other manner contesting the trust or any amendment to it, including its legality or the legality of any provision thereof, on the basis of incapacity, undue influence or otherwise, or in any other manner attacking or seeking to impair or invalidate the trust or any amendment, or any of their provisions.

The Founders further expressed their intentions regarding application and enforcement of these prohibited acts by including other instructions and conditions in the Brunsting Family Living Trust and/or the August 2010 QBD. These other instructions and conditions include but are not limited to:

- Application of the forfeiture penalty even if it is determined that the judicial proceeding was initiated in good faith, with probable cause;
- Application of the forfeiture penalty even if is determined that the judicial proceeding was initiated to do nothing more than construe the application of the no-contest provision;
- Cautioning a trustee against settling any contest, attack or attempt to interfere with the Founders' estate plan; and

- Requesting that the Court take into account the Trustor's firm belief that no person contesting or attacking the Trustor's estate plan should take or receive any benefit from the estate.

Against the backdrop of these forfeiture provisions, Curtis and Carl each elected to proceed with the origination of their respective judicial proceedings. By way of summary, but not limitation, Carl and Curtis' respective claims have included/currently include:

Carl's Claims	**Curtis's Claims**
(1) Construction of Trust and Suit for Declaratory Judgment; (2) Demand for Trust Accounting; (3) Breach of Fiduciary Duties; (4) Conversion; (5) Negligence; (6) Tortious Interference with Inheritance; (7) Constructive Trust; (8) Civil Conspiracy; (9) Fraudulent Concealment; (10) Liability of Beneficiaries; (11) Removal of Trustees; (12) Receivership Over Trust; (13) Self-Dealing; (14) Criminal Wiretap Claim; (15) Civil Wiretap Act; (16) Invasion of Privacy and Intrusion on Seclusion; and (17) Request for Injunctive Relief.	(1) Breach of Fiduciary Obligation; (2) Extrinsic Fraud; (3) Constructive Fraud; (4) Intentional Infliction of Emotional Distress; (5) Breach of Fiduciary Duty; (6) Fraud; (7) Money Had and Received; (8) Conversion; (9) Tortious Interference with Inheritance Rights; (10) Declaratory Judgment Action; (11) Demand for Accounting; (12) Unjust Enrichment; and (13) Conspiracy.
<u>Declarations Sought by Carl</u>: • 8/25/10 QBD *in terrorem* clause void. • Construe validity, terms, responsibilities and obligations of documents signed by Elmer and Nelva. • That Carl's actions do not violate *in terrorem* clause (if valid). • That Carl's actions are done in good faith, so *in terrorem* not triggered.	<u>Declarations Sought by Curtis</u>: • "Modification Documents" (June 2010 QBD, August 2010 QBD and Exercise of Testamentary Power of Appointment) are not valid. • *In terrorem* clause not capable of enforcement.

II. CLAIMS AND CAUSES OF ACTION

Beginning with the filing of their respective original petitions/complaints, both Curtis and Carl have asserted (and/or continue to assert) claims and causes of action, or otherwise taken action through the filing of various motions, objections and/or responses/replies which violate the Founders' restrictions and trigger the forfeiture provisions. Once triggered, a prior or subsequent amendment of their pleadings does not and cannot "untrigger" the forfeiture. Consistent with the Founders' wishes and cautions, the Co-Trustees assert that:

- one or more of the causes of action asserted and/or declarations sought by Carl trigger the forfeiture provisions;
- one or more of the causes of action asserted and/or declarations sought by Curtis trigger the forfeiture provisions;
- one or more of the motions, responses, and/or replies filed by Carl trigger the forfeiture provisions;
- one or more of the motions, responses, and/or replies filed by Curtis trigger the forfeiture provisions;
- Carl did not have just cause to bring the action, and it was not brought in good faith;
- Curtis did not have just cause to bring the action, and it was not brought in good faith;
- Carl has forfeited his interest, and thus his interest passes as if he has predeceased the Founders;
- Curtis has forfeited her interest, and thus her interest passes as if she has predeceased the Founders;
- 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;
- 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;

and/or

- 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.

As a more specific example, but not by way of limitation, in his First Amended Petition for Declaratory Judgment, Carl "*seeks declaratory relief construing the...terms...[of the] Family Trust.*" The Brunsting Family Living Trust specifically prohibits an action to construe or contest the trust. Carl also seeks to impose a constructive trust, another claim that is specifically prohibited by Brunsting Family Living Trust.

Likewise, as a non-exclusive/non-limiting example, Curtis also seeks a declaration by the Court construing the terms of the Brunsting Family Living Trust, including, in particular, a finding that the QBDs affecting the terms of the Brunsting Family Living Trust are invalid. Curtis' requests violate the Brunsting Family Living Trust's terms.

Consistent with the Founders' wishes and cautions, the Co-Trustees request that the Court enter one or more declarations setting forth and confirming all or any of the Co-Trustees' assertions above. The Co-Trustees further seek a recovery/reimbursement of all attorney's fees, expenses and court costs associated with this matter, whether in accordance with the terms of the Brunsting Family Living Trust; in accordance with the Declaratory Judgment Act; as a sanctions/penalty for actions taken in bad faith, in equity, or otherwise.

III. PRAYER

Co-Trustees, Amy Brunsting and Anita Brunsting, pray that the Court declare:

A. Carl and Curtis have taken actions that trigger the forfeiture provisions;

B. Carl and Curtis' actions in triggering the forfeiture provisions were without just cause and were not in good faith;

C. The forfeiture provisions are enforceable and applicable in this case;

D. By their actions, Carl and Curtis have forfeited their interests in the trust as though they had predeceased the Founders;

E. All expenses, including attorney's fees, incurred 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.

F. Co-Trustees be reimbursed their reasonable attorneys' fees and court costs;

G. Co-Trustees recover prejudgment and post-judgment interest as allowed by law.

H. Co-Trustees receive such other and further relief, general and special, legal and equitable, to which they may be entitled.

Respectfully submitted,

GRIFFIN & MATTHEWS

BY: _____

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THE MENDEL LAW FIRM, L.P.

BY: Stephen A. Mendel /by permission @

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ATTORNEYS FOR ANITA BRUNSTING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 4th day of November 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

Attorneys for Candace Kunz-Freed:

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NEAL E. SPIELMAN

12/05/2014	Response	TO CARL'S MOTION TO REMOVE TRUSTEES Film code number PBT-2014-393812	Responses	3	☐
12/05/2014	Electronic Filing Fee				☐
12/05/2014	Instrument Over 25 Pages				☐
12/05/2014	Response	TO CANDACE'S MOTION FOR DISTRIBUTION OF TRUST FUNDS & RESPONSE TO CARL'S MOTION FOR DISTRIBUTION OF TRUST FUNDS Film code number PBT-2014-393808	Responses	156	☐
12/02/2014	RECEIPT				☐
12/02/2014	RECEIPT				☐
12/02/2014	Attorney Assigned				☐
12/01/2014	Electronic Filing Fee				☐
12/01/2014	Witness List	PLAINTIFFS DESIGNATION OF EXPERT WITNESS Film code number PBT-2014-387901	Witness List	9	☐
12/01/2014	Electronic Filing Fee				☐
12/01/2014	Declination to Serve	CARL HENRY BRUNSTING'S EXPERT WITNESS DESIGNATION Film code number PBT-2014-387708	Declination to Serve	10	☐
12/01/2014	RECEIPT				☐
12/01/2014	Electronic Filing Fee				☐

TAB 37

FILED
10/15/2021 3:32 PM
Teneshia Hudspeth
County Clerk
Harris County - County Probate Court No. 4
Accepted By: CC

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.

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

[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

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]

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

[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
[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

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 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.

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;

[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.

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 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"

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

(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.

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.

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

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.

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.

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

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.

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.

[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)

- 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]
    - 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.

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

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".

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, Friday, October 15, 2021.

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TAB 38

Contents

Addendum to Plaintiff's Second Amended Complaint and Motion for Summary and Declaratory Judgment

I. Introduction

Elmer and Nelva Brunsting had a son and four daughters they wanted to benefit from their lifetime of inherited and acquired wealth. Their concerns were quite simply to transfer their assets to their five progeny in equal proportions at their passing, [1, 2, 3] minimizing taxes and avoiding the much publicized corruption in the state probate courts [4, 5, 6]. In order to accomplish this purpose they retained the assistance of estate planning attorney Albert Vacek Jr. who gave specific assurances that his products and services would accomplish these purposes.

Elmer Brunsting passed April 1, 2009 and Nelva Brunsting passed November 11, 2011. In theory, Elmer and Nelva did everything correctly as, under the law, all right, title and interest in their bounty vested equally in their five progeny, via the family trust, at the passing of Nelva Brunsting on November 11, 2011. Nevertheless, today is 10/10/2021 and in nearly ten years, not one dime from the Brunsting Trust has been transferred to any of the trust beneficiaries.

The pivotal question here is obvious.

If Elmer and Nelva did everything correctly, as advertised by their estate planning attorneys, why, after nearly ten years, have the income beneficiaries received nothing from the corpus or income of the family trust as the settlors intended?

One dispositive fact that should be noted from the onset is that family trust beneficiary Anita Brunsting claims to have become sole trustee on December 21, 2010. Anita is the only individual with the trust check book and exclusive control of the trust's assets. It should also be noted that Anita Brunsting's Attorney is Stephen A Mendel, *(mendellawfirm.com)* Texas State Bar No. 13930650.

Dispositive allegations should also be noted from the onset. Anita Brunsting is not now, nor has she ever been, a trustee for Elmer's share of the family trust, nor has she ever performed a fiduciary act for the benefit of the other beneficiaries, nor did she disclose her self-distributions to Plaintiff's Carl and Candace, nor did she equalize the distributions she failed to disclose. Quite the contrary, Anita Brunsting colluded with the settlor's disloyal estate planning attorneys to seize control of the trusts' assets [7] and has not divided the assets according to the settlors' intentions.

It doesn't appear that Anita ever intended to divide the assets according to the settlors' intentions as everything in the record suggests she gave preference to her own intentions.

II. Relevant History of the Brunsting Trust

The Original 1996 Family Trust

In 1996 Elmer Brunsting and his wife Nelva created the "Brunsting Family Living Trust" for their benefit and for the benefit of their five adult progeny. Elmer and Nelva were the original co-trustees and Anita Brunsting was named as the sole successor trustee.

Irrevocable Life Insurance Trust

In 1999 Elmer and Nelva also created an irrevocable Life Insurance Trust for the benefit of their five issues, naming Anita Brunsting as the sole trustee.[1]

January 12, 2005 – The 2005 Restatement

In 2005 Elmer and Nelva restated their trust, replacing the original 1996 trust agreement in its entirety. The 2005 Restatement [8] removed Anita from becoming a successor trustee and replaced her with Carl and Amy as successor co-trustees with Candace Curtis as the alternate.

September 6, 2007 – The 2007 Amendment

In 2007 Elmer and Nelva jointly amended Article IV of the 2005 Restatement. With the 2007 Amendment [9], Elmer and Nelva replaced Amy with Candace, leaving Carl and Candace as successor co-trustees and naming Frost Bank as the alternate.

The Power to Alter or Amend

Article III of the 2005 Restatement provides an "either/or" for making changes to the trust agreement. Either (1) the signature of both Settlors or (2) a court of competent jurisdiction, neither of which accompanied any instrument dated after June 9, 2008. It necessarily follows that the administration and disposition provisions for Elmer' trust share could not be changed after June 9,

[1] Anita Brunsting used this instrument April 9, 2013, at the preliminary injunction hearing, mixed with portions of the family trust, in attempt to fool federal judge Kenneth Hoyt into thinking that she had always been the only trustee for the family trust. Judge Hoyt's April 19, 2013 Memorandum of Preliminary Injunction [14] points out the pertinent anomalies with the instruments and lack of accounting and finds that Anita failed to act in accord with the trusts requirements.

2008 and that the September 6, 2007 Amendment was the last family trust instrument signed by both Settlors.

"Our Right to Amend or Revoke This Trust"

Section A. We May Revoke Our Trust

While we are both living, either of us may revoke our trust. However, this trust will become irrevocable upon the death of either of us. Any Trustee, who is serving in such capacity, may document the non-revocation of the trust with an affidavit setting forth that the trust remains in full force and effect. Tile affidavit may, at the Trustee's discretion, be filed in the deed records in each county in which real property held in trust is located or in the county in which the principal assets and records of the trust are located. The public and all persons interested in and dealing with the trust and the Trustee may rely upon a certified copy of the recorded affidavit as conclusive evidence that the trust remains in full force and effect.

Section B. We May Amend Our Trust

This trust declaration may be amended by us in whole or in part in a writing signed by both of us for so long as we both shall live. Except as to a change of trust situs, when one of us dies, this trust shall not be subject to amendment, except by a court of competent jurisdiction.

Each of us may provide for a different disposition of our· share in the trust by using a qualified beneficiary designation, as we define that term in this agreement, and the qualified beneficiary designation will be considered an amendment to this trust as to that Founder's share or interest alone."

III. The Family Trust became Irrevocable June 9, 2008

Elmer Brunsting was certified Non Compos Mentis by three doctors in June 2008 [10] and was no longer able to make legal or medical decisions, thus rendering the family trust irrevocable by its own terms,[2] and requiring the approval of a court of competent jurisdiction before any alterations or amendments could be made that would affect the distribution of Elmer's share, see Texas Property Code Section §112.051.[3]

Qualified Beneficiary Designation

Article III of the 2005 Restatement also contains a provision that allowed each settlor the option of altering the disposition for their individual share. The exercise of this power could only apply to the share of the Settlor who exercised the power. Elmer did not exercise the QBD power and thus, the provisions for administration and disposition of Elmer H. Brunsting's irrevocable

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[2] Texas Property Code Sec. 112.051. REVOCATION, MODIFICATION, OR AMENDMENT BY SETTLOR. (a) A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.

[3] Elmer Brunstings irrevocable trust share contains all of the remaining assets

trust "share" remains those contained in the 2005 Restatement as amended in 2007. Carl Henry Brunsting and Candace Louise Curtis are the lawful co-trustees and Elmer's share of the family trust was to be divided by five and distributed to the beneficiaries. That has not happened.

IV. The Rupture

Notwithstanding the fact that the trust had become irrevocable, estate planning attorney Candace Kunz-Freed, with the assistance of Vacek associate attorney Bernard Lisle Mathews III, began producing alterations to Elmer and Nelva's trust agreement, beginning with drafting instruments altering Article IV, installing their new client Anita Brunsting[4], as successor co-trustee with Carl and issuing new certificates of trust.[5] None of the instruments authored after June 9, 2008 were signed by both Settlor's or approved by a court of competent jurisdiction and none could affect the trustee designations in Article IV or the disposition provisions for Elmer's irrevocable trust share as expressed in Article X Section B; 1/5, 1/5, 1/5, 1/5, 1/5.

No instrument created after June 9, 2008 is valid as affecting the irrevocable family trust in regard to the administration or disposition of Elmer's share. It should also be noted here that Elmer's share is where the remaining assets are held, including the securities and the Iowa farm.

July 1, 2008 Appointment and Certificates of Trust

These instruments [11], and the series to follow, are alleged to have been signed by Nelva alone and even if they were signed by Nelva, they were not approved by a court of competent jurisdiction and could not apply to the disposition of Elmer Brunsting's irrevocable trust share in any event. Nelva's was entitled to the income from Elmer's trust share but had a yearly limit of $5000 on access to the corpus. (Article IX Section A (2)) with specific exceptions strictly limited to the Surviving founders "*health, education, maintenance and support*".

Elmer passed April 1, 2009

When Elmer passed on April 1, 2009 the successor co-trustees for the irrevocable Family and Decedent's trusts could only be those named in the 2007 Amendment [9]; Carl Brunsting and Candace Curtis.

An identical certificate to one not signed on July 1, 2008 appears to have been signed by Nelva alone on February 24, 2010 and thus, the steady encroachment continued as the Vacek & Freed Attorneys improper changes to Elmer and Nelva Brunsting's trust agreement are

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[4] Violating Rule 1.06(a), (d) and (e) of the Disciplinary Rules of Professional Conduct

[5] CONFLICT: It should be noted here that when litigation was brought in effort to obtain an accounting and fiduciary disclosures, Anita Brunsting, and her new co-trustee Amy Brunsting, were represented by Vacek & Freed Attorneys Candace Kunz-Freed and Bernard Lisle Mathews III, infra. These conflicts of interest are violations of Rule 1.06(a), (d), (e) and (f) of the Disciplinary Rules of Professional Conduct and is thus conduct ultra vires the office of attorney.

implemented one incremental alteration at a time, with Vacek & Freed's new client, "Anita Brunsting", now improperly embedded as a successor co-trustee with Carl.

Freed and Mathews second wave of incremental alterations came with the Certificates of Trust dated February 24, 2010.

a. New Family Trust [BRUNSTING005810-5813]
b. Elmer H. Brunsting Decedents Trust (disposition of this share was irrevocable as of June 9, 2008)
c. Nelva E Brunsting Survivors Trust (disposition of this share was amendable)

June 15, 2010 QBD

On June 15, 2010 [12], Nelva executed a Qualified Beneficiary Designation (Art III) combined with a Testamentary Power of Appointment (Art IX) in which she advanced Candace Curtis $20,000 to be offset against her future inheritance.

July 3, 2010 Carl falls ill with encephalitis and is in coma

When Carl fell weak the Vacek & Freed team went to work exploiting this family crisis as an opportunity to continue their alterations of Elmer and Nelva's trust agreement. When Carl was is in a coma, Anita took that opportunity to launch a character attack on Carl's wife Drina, thus distracting attention from the changes Anita and the Vacek crew were making to remove Carl as a successor co-trustee. Freed's notes say "*Anita called, Carl has encephalitis, amendment to trust, Anita and Amy to be co-trustees*". - [7] -. This is clearly where we see the collusion between Anita,

the Settlor's disloyal estate planning attorneys, and the irrevocable trust rupturing instruments that followed Elmer's incapacity.

V. OBJECTION TO ASSUMING FACTS

August 25, 2010 Qualified Beneficiary Designation and Testamentary Power of Appointment

After a number of disclosures the alleged August 25, 2010 QBD/TPA shows up in the record with three distinctly different signature page variations.

1. August 25, 2010 QBD/TPA Can before signature
    a. Disclosed in Anita's 156 page objections filed December 5, 2014. The QBD appears at pdf pages 96 through 132 with signature page 37 at p132 bearing Bates stamp [P229].
2. August 25, 2010 QBD/TPA Signature on the line
    a. Case 4:12-cv-00592 Document 1-12 (pgs. 1-30) and Doc. 1-13 (pgs. 1-7), Filed TXSD on 02/27/12 with signature at Doc. 1-13 Page 7 of 20
3. August 25, 2010 QBD/TPA [V&F 353-389 ABL] Signature above the line
    a. In Carole's 133 page objection filed Feb. 17, 2015. The QBD appears at pdf pages 97 through 133 with signature page 37 appearing at p133 and bearing Bates stamp [P192].
4. August 25, 2010 Appointment of Successor Trustees
5. August 25, 2010 Certificates of Trust [V&F 000207-251]

At page 3 of 13, in their June 26, 2015 "No-Evidence Motion for Summary Judgement", alleged co-trustees Anita and Amy Brunsting argue that Plaintiff can produce no evidence "*that Anita and/or Amy were present when Nelva signed the 8/25/2010 QBD*", and the first paragraph of the following page reads:

> *"There is also no evidence in the record that suggests Plaintiff Curtis or Plaintiff Brunsting were present when Nelva allegedly executed the 8/25/10 QBD. There is no evidence that Defendant Carole Brunsting was present when Nelva executed the 8/25/10 QBD."*

Thus, neither Anita, nor Amy, nor Carole claim to have been present when Nelva is alleged to have signed the instrument and yet each produced a different signature page version of the instrument. The Notary Public on all of the post June 2008 "change instruments" was estate planning attorney Candice Kunz-Freed, whose notes show that she received her instructions to "change the trust" from Anita [13] and we do have evidence of that. It should also be noted that Kunz-Freed's notary log fails to show that three separate copies of the 8/25/2010 QBD were notarized as required by Gov't Code § 406.014, if in fact three separate instruments had been signed on that date. As already stated, Texas Property Code Section §112.051 does not allow a

Settlor to amend a trust that has become irrevocable by its own terms so this 8/25/2010 QBD is necessarily invalid as to Elmer's share whether the instrument was signed by Nelva or not.

The August 25, 2010 QBD/TPA that Defendants point to as "the trust", is not in evidence. Until it has been introduced by eye witness testimony at an evidentiary hearing and qualified as evidence, beneficiary Candace Curtis objects to any reference to this instrument as assuming facts not in evidence. The same objection is hereby made to the instruments dated December 21, 2010. Instruments from both dates appear to be scanned analog instruments bearing the signature of estate planning attorney/notary Candace Kunz-Freed, to which digital images of Nelva's signature were added.

a. December 21, 2010 Resignation of Original Trustee [V&F906-915]
b. December 21, 2010 Appointment of Successor trustee [V&F240-245 & 906-915]
c. December 21, 2010 Certificates of Trust, [V&F906-915]

These instruments appear to have been digitally altered to give the appearance of having been signed by Nelva Brunsting and, as the best evidence rule requires, we need to see a show of proof along with witness testimony regarding the chain of custody and control for each of these instruments. In any event the answers will have no effect on the disposition of the Elmer H. Brunsting's irrevocable trust share, officially created by the passing of Elmer Brunsting April 01, 2009.

November 11, 2011 Nelva Brunsting Demise

After Nelva's passing, the procedural catalyst for commencing litigation was Anita Brunsting's failure to provide a full, true and complete accounting within 90 days of a request by current trust income beneficiary Candace Curtis.

VI. SUMMARY OF THE CLAIMS

BREACH OF FIDUCIARY

6. Defendant Anita Brunsting, while acting as sole trustee for the Brunsting family Living Trust, owed fiduciary duties to Beneficiary/Plaintiff Candace Curtis.
7. Defendant beneficiary Anita Brunsting, acting as trustee, has continuously and persistently breached the fiduciary duty of full disclosure owed to Beneficiary Plaintiff Candace Curtis; continuously and persistently breached the fiduciary duty to provide full, true and complete accountings to Beneficiary Plaintiff Candace Curtis; continuously and persistently breached the duty of undivided loyalty and utmost good faith owed to Beneficiary Plaintiff Candace Curtis; continuously and persistently breached the duty of candor owed to beneficiary Candace Curtis; breached the duty to refrain from self-dealing; continuously and persistently breached the duty to act with integrity of the

strictest kind; breached the duty of fair, honest dealing and has challenged the Settlor's intent, thereby violating in Terrorem provisions.

8. Plaintiff Candace Curtis has suffered damages as a direct or proximate result of Defendant Trustee Anita Brunsting's breach of fiduciary duties.

CONSTRUCTIVE FRAUD

Constructive fraud exists when a breach of a legal or equitable duty occurs that has a tendency to deceive others and violate their confidence. As a result of Defendants' fiduciary relationship with Plaintiff, Defendants owed Plaintiff legal duties of a fiduciary character imposing a level of obligation far above that of ordinary care. The breaches of the fiduciary duties discussed above, and incorporated herein by reference, constitute constructive fraud, which caused injury to Plaintiff. Plaintiff seeks actual damages, as well as, punitive damages from Defendant Anita Brunsting individually, on behalf of self and on behalf of those similarly situated.

MONEY HAD AND RECEIVED

Defendant, Anita Brunsting, has taken money that belongs in equity and good conscience to Plaintiff, and has done so with malice and through fraud. Plaintiff seeks her actual damages, exemplary damages, pre- and post-judgment interest and other costs.

CONVERSION THEFT

Defendants have converted assets that belong to the Brunsting Family Living Trust in which Plaintiff, as beneficiary, has the same beneficial interest as the other beneficiaries. Defendants have wrongfully, and with malice, exercised dominion and control over assets the plaintiff owned, possessed, or had the immediate right of possession and control of; the defendant wrongfully exercised dominion or control over the property to the exclusion of, or inconsistent with, the plaintiffs rights as an owner; the plaintiff demanded distribution, surrender and return of the property; and the defendant refused to return, surrender, or distribute the property; and the plaintiff has thereby suffered injury as has the Brunsting Family Living Trust and its other income beneficiaries. Plaintiff seeks actual damages, exemplary damages, pre- and post-judgment interest and court costs.

TORTIOUS INTERFERENCE WITH INHERITANCE RIGHTS

A cause of action for tortious interference with inheritance rights exists when a defendant by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received. Defendants herein breached their fiduciary duties and converted funds that would have passed to Plaintiff through the Brunsting Family Trust, and in doing so tortuously interfered with Plaintiffs inheritance rights. Plaintiff seeks actual damages as well as punitive damages.

DECLARATORY JUDGMENT

The only things necessary to fashion an appropriate remedy at this juncture is a judicial declaration of which instruments are valid and controlling. This is not a difficult question to answer but a very simple question of law. As has been shown, the Brunsting Family Living Trust was

created by Nelva and Elmer Brunsting in 1996, restated in 2005 and amended in 2007. The family trust became irrevocable upon the certified incapacity of Elmer Brunsting on or about June 9, 2008. None of the instruments dated after June 9, 2008 altered or amended the administration or distribution provisions for Elmer's share of the Brunsting Family Living Trust.

Plaintiff seeks judicial declarations that the valid trust instruments are the 2005 Restatement as amended in 2007; that the obligations of the acting trustee at the passing of Nelva Brunsting, on November 11, 2011, was to divide the assets by 5 and distribute the assets among the five beneficiaries in equal portions.

IN TERROREM

Plaintiff seeks a judicial declaration that Defendant Anita Brunsting, acting as sole trustee with exclusive control of the trust's assets since December 21, 2010, has breached fiduciary duties owed to the other beneficiaries; that Anita's failure to act in accord with the settlor's express intent has been willful and malicious; that by acts and omissions, Anita has challenged the Settlors intentions and violated in Terrorem, thus entitling her issue to receive what would have become Anita's share of the trust income and corpus had she not challenged her parents trust agreement.

Article XI Section C of the 2005 Restatement [8] contains the in Terrorem provisions. A beneficiary seeking judicial remedy for a trustee's failure to account, seeking disclosures and seeking declaratory judgement in regard to trust instruments and seeking declaratory judgement in regard to compliance with trustee obligations, do not trigger in Terrorem and cannot be converted into acts violative of in Terrorem prohibitions, the criterion for which is confined to challenging the Settlors intentions.

Anita Brunsting, by act and omission as evidenced by the record and established by the admissions therein, has violated the in Terrorem clause in Article XI Section C of the 2005 Restatement by participating in the generation of illicit instruments; BY causing litigation to be brought for the purpose of enlarging her share and, by refusing to divide and distribute trust income and assets according to Article X Section B of the 2005 Restatement.

Anita has unquestionably challenged the distribution provisions established by Elmer and Nelva Brunsting jointly and is thus viewed, under the law of the trust, to have pre-deceased the settlor's thus entitling her successors in interest, Luke and Katie Riley, to receive what Anita would have received had she not violated the settlor's in Terrorem, as hereinafter more fully appears.

VII. LIABILITY

Breach of trust is a tortious act contrary to public policy for which the trustee is liable in their individual capacity. There are three elements to a breach of trust cause of action. All three of those elements have been established. The first two elements were established at the injunction hearing, as evidenced by the April 19, 2013 Memorandum of Preliminary Injunction.[13]

The liability of defendant Anita Brunsting for breach of fiduciary obligations was established by the April 19, 2013 Memorandum of Preliminary Injunction's finding of facts and conclusions of law finding (1) the existence of a fiduciary relationship, (2) that Anita, acting as

trustee, owed fiduciary duties to beneficiary Candace Curtis (3) that there were inconsistencies with the instruments Anita presented as "the trust" (4) that Anita, after having been trustee for more than two and one half years, was unable to provide a proper accounting and (5) that Anita had failed to perform her obligations as required by the trust.

DAMAGES

Unfortunately injuries and damages suffered by the beneficiaries of this family trust, as a direct and proximate result of Anita's failure to act according to the Settlors directives, have continued to grow unabated. Using a prudent investor calculation of 13.8% interest compounded annually [14], **each beneficiaries 1/5th share of the three million dollar family trust should be worth more than 2.5 million dollars**. None-the-less, the trust corpus has remained stagnant while it is being held hostage in effort to extort the cost of Anita's failed attempt to steal the family trust from the other beneficiaries, under terms and conditions that would launder the extorted ransom by a settlement contract labeling the extorted ransom money's as legal fees.

The Defendants December 5, 2014 Objection to Plaintiff's Motion for Distributions [412249-401] argues at page 1:

1. Distributions to pay legal-fee creditors are not authorized by the trust and, therefore, the motions must be denied.
2. Distributions to pay legal-fee creditors are prohibited by the trust and, therefore, the motions must be denied.

However, on March 5, 2021 Defendants submit an accounting in preparation for settlement negotiations in which they list $537,000 as a "Legal Fee Allocation" [15] with each beneficiary bearing a share of those costs. These Legal Fee Allocations do not appear as outstanding obligations of the trust on any trust accountings and are either trust obligations the trustee failed to disclose and for which the trustee has failed to account or, they are an illicit attempt to extract valuable consideration from parties that do not owe any such thing. There has been no accounting for these fees at all. What are they for? There has been no disclosure of any retainer agreement between trustee and attorney that would explain the work to be performed and the purpose for the

trust being liable for such an amount. This is yet another breach of trust in bad faith with dishonest intentions.

The Beneficiaries have received no benefit from the family trust in the past ten years while several non-beneficiaries have enjoyed distributions from the family trust:

a. $5000.00 Attorney Jason Ostrom
b. $5000.00 Attorney George Vie III
c. $300,000.00+ in excess taxes due to trustee failure to distribute trust income to the beneficiaries.
d. $6500.00 Andrews Kurth L.L.P. mediation
e. $19,907.40 to attorney Gregory Lester, Temporary Administrator for the "Estate of Nelva Brunsting". How is the trust supposed to recover loans to an estate that does not have a representative or a corpus?
f. $10,620.73 to Jill Willard-Young, attorney for attorney Gregory Lester, Temporary Administrator for the "Estate of Nelva Brunsting". How is the trust supposed to recover loans to an estate that does not have a representative or a corpus?
g. Mediation with Judge Seymour - unknown
h. Mediation with Judge Davidson – unknown

None of this accounts for money spent on costs or fees already paid to attorneys by the beneficiaries. In the face of all this the alleged trustee defendants are demanding $537,000.00 in legal fee allocations without evidence of a retainer agreement describing the work to be performed or an accounting statement describing the work actually performed for which the beneficiaries of the trust would be liable. These figures also fail to include Anita's self-dealing or her non-disclosed and non-equalized distributions.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final trial in this matter, she will take judgment for her actual and exemplary damages, and that pre- and post-judgment interest and costs of court be assessed against the Defendants, and that Plaintiff be granted such further and additional relief to which she may show herself justly entitled.

Respectfully Submitted,

EXHIBIT LIST

1. Email Nelva to Candy "divided equally"
2. Nelva email to Amy "Candy to be co-trustee divided-equally"
3. Nelva email to Anita "divided equally"
4. Nelva email to Carl re corruption in the probate courts
5. Nelva email to Carl – news article attachment
6. Carl's reply – judge and attorneys should be horse whipped
7. Kunz-Freed's Notes: "Anita called, change the trust", make her and Amy co-trustees
8. 2005 Restatement
9. 2007 Amendment
10. 2008-06-09 email from Nelva to Anita and Kunz-Freed "Elmer Incompetent"

--- TRUST IS IRREVOCABLE ---

11. July 1, 2008 Appointment and Certificates of Trust
12. June 15, 2010 QBD
13. Preliminary Injunction
14. Compound Interest Calculator
15. Legal Fee Allocation in proposed Settlement Accounting

TAB 39

NO. 412,249-401

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

CARL HENRY BRUNSTING, Et Al	§	
	§	
V.	§	
	§	
ANITA KAY BRUNSTING, Et Al	§	

Rule 11 Agreement of Plaintiff Carl Brunsting, Defendant & Co-Trustee Anita Brunsting, & Defendant & Co-Trustee Amy Brunsting

The parties to this Rule 11 Agreement are:

A. Plaintiff Carl Brunsting.
B. Defendant & Co-Trustee Anita Brunsting.
C. Defendant & Co-Trustee Amy Brunsting.

The Parties, as identified above, appearing through their respective counsel, reached the following agreements:

1. Plaintiff Carl Brunsting requests that the Court ***not*** rule on the portion of his July 9, 2015 motion for partial summary judgment, which relates to the issue of:

> Carl also seeks a determination, as a matter of law, that disbursements in 2011 of Exxon Mobil stock and Chevron stock were improper distributions for which Anita, as the trustee making the disbursements is liable, and for which the beneficiaries who received benefits from those distributions are also liable pursuant to TEX. PROP. CODE §114.031, including through an offset of the applicable beneficiary's liability against that beneficiary's remaining interest in the trust estate.

2. Defendant & Co-Trustee Anita Brunsting and Defendant & Co-Trustee Amy Brunsting request that the Court ***not*** rule on any portion of the Co-Trustees Motion for Summary Judgment, filed on November 5, 2021, to the extent that the motion relates in whole or in part to

Plaintiff Carl Brunsting. Rather, the Court should construe the motion for summary judgment as filed solely against Candace Louise Curtis.

3. Notwithstanding any other provision of this Rule 11 Agreement to the contrary, this Rule 11 Agreement does not and shall not be construed as an intent to delay any ruling by the Court on the Co-Trustees Motion for Summary Judgment, filed on November 5, 2021, with regard to the Plaintiff Candace Louise Curtis.

4. More specifically, Co-Trustees continue to seek a summary judgment as to Candace Louise Curtis on the following issues:

A. By pursuing her claims, Candace Louise Curtis triggered the Trust's forfeiture provisions (or other similar provisions in other trust documents);

B. No unauthorized distributions were made by Anita Brunsting;

C. During their tenure, the Co-Trustees have not materially breached any duties; and

D. Attorneys' fees and expenses incurred by the Co-Trustees are the obligation of the Trust and/or Candace Louise Curtis.

5. Plaintiff Carl Brunsting, Defendant & Co-Trustee Anita Brunsting, and Defendant & Co-Trustee Amy Brunsting each reserve the right, in their sole and absolute discretion, to reset for oral hearing or written submission, the summary judgment issues set forth in sections 1 and 2 of the Rule 11 Agreement; provided that the resubmission or resetting of those issues meets the twenty-one (21) day notice requirements of a motion for summary judgment, or such other requirements as required by law or the Court.

Respectfully submitted,

// s // Bobbie G. Bayless

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Attorney for Drina Brunsting,
Attorney-in-Fact for Carl Brunsting

Respectfully submitted,

// s // Stephen A. Mendel

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Attorneys for Anita Brunsting

&

Respectfully submitted,

// s // Neal Spielman

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Attorney for Amy Brunsting

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following:

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Pro Se

via eService, email, telefax, or first class mail, on this December 5, 2021.

// s // Stephen A. Mendel

Stephen A. Mendel

TAB 40

NO. 412,249-401

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

CARL HENRY BRUNSTING, Et Al	§
	§
V.	§
	§
ANITA KAY BRUNSTING, Et Al	§

Plaintiff Carl Brunsting's & Defendant/Co-Trustees' Motion to Sever

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"), and would respectfully show the Court as follows:

1. Given the totality of the litigious nature of Candace Curtis, the Severing Parties see no prospect of settlement regarding their respective claims against each other without a severance from the 401 Case.

2. A severance would promote judicial economy. More specifically, this case is set for a two-week trial starting April 4, 2022. The Severing Parties believe the 401 Case could probably be tried in one week, especially given the fact that Curtis has no evidence to refute the Defendant/Co-Trustees pending motion for summary judgment against Curtis.

3. In the event the Severing Parties are unable to settle their respective claims against each other, then Severing Parties will seek an agreed docket control order for the severed case.

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.

Respectfully submitted,

// s // Stephen A. Mendel

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Attorneys for Anita Brunsting

&

Respectfully submitted,

// s // Neal Spielman

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Attorney for Amy Brunsting

Certificate of Conference

Notice of intent to file this motion was provided on December 21, 2021, to Candace L. Curtis and Carole Brunsting. Plaintiff Carl Brunsting agrees with the filing of this motion and the relief sought. Candace L. Curtis and Carole Brunsting are presumed to oppose the relief sought, since they did not join in the filing of this motion.

// s // Stephen A. Mendel

Stephen A. Mendel

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following:

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Pro Se

via eService, email, telefax, or first-class mail, on this January 6, 2022.

// s // Stephen A. Mendel

Stephen A. Mendel

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This April 18, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 41

REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. 412249-401

APPELLATE COURT NO. _____

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

* * * * * * * * * * * * * * * *

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ & MOTION TO EXECUTE EASEMENT AND SETTLEMENT

* * * * * * * * * * * * * * * *

On the 11th day of February, 2022, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable James Horwitz, Judge of Probate Court No. 4, held in Houston, Harris County, Texas:

Proceedings reported by Machine Shorthand

A-P-P-E-A-R-A-N-C-E-S:

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ALSO PRESENT:
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VOLUME 1

(Motion to Sever & Status Conference Regarding MSJ & Motion to Execute Easement and Settlement)

February 11, 2022

February 11, 2022

(WHEREUPON the following proceedings were conducted via Zoom and YouTube:)

PROCEEDINGS:

THE COURT: This is our case, it's the 412249 the 401, Brunsting estate.

My notes reflect that we have a motion to sever and a status conference regarding an MSJ and a motion to execute easement and settlement.

First, I want to make sure we're all in agreement that's what we're talking about today.

MR. MENDEL: Yes, sir, for Anita Brunsting.

THE COURT: I'm not hearing anybody disagree.

All right. Let's start by having each attorney make an appearance on the record, and tell the Court who you represent.

MS. BAYLESS: Bobbie Bayless on behalf of Carl Brunsting.

MR. MENDEL: Steve Mendel on behalf of Anita Brunsting.

MR. SPIELMAN: Neal Spielman on behalf of Amy Brunsting.

MS. CAROLE BRUNSTING: Carole Brunsting,

pro se.

MS. SCHWAGER: Candice Schwager on behalf of Candace Curtis, Your Honor

MR. REED: This is Cory Reed on behalf of Candace Kunz-Freed.

THE COURT: Okay, Mr. Spielman, I heard you barely; if you can turn your volume up and get a little closer.

MR. SPIELMAN: Is that better?

THE COURT: That's a lot better. All right. Who spoke after Mr. Spielman?

MS. CAROLE BRUNSTING: I think I did. Carole Brunsting, pro se.

THE COURT: Okay, Carole. Got it.

Ms. Schwager and Mr. Reed, I think are the only two remaining to speak.

MS. SCHWAGER: Oh. Candice Schwager for Candace Curtis, Your Honor.

THE COURT: Thank you.

MR. REED: And Cory Reed on behalf of Ms. Kunz Freed.

THE COURT: Okay. The first thing I want to take up is this motion to execute easement and settlement.

The Co-Trustees have filed their motion

for authority to execute an easement and Settlement Agreement. Would either Mr. Spielman or Mr. Mendel like to speak on this topic, briefly?

MOTION TO EXECUTE EASEMENT AND SETTLEMENT

ARGUMENT BY MR. MENDEL:

MR. MENDEL: Yes, Your Honor.

There's a -- part of the Trust asset is 145 acres, plus-or-minus, up in, I think, Sioux County, Iowa. The Local Water Authority wants an easement across a whole bunch of contiguous tracks. This is one of those.

I have emails from Ms. Bayless and from Carole Brunsting and from Candice Schwager that indicate no opposition; so, I'm pleased to say that we've resolved that particular issue. But the bottom line - for the Court's benefit - is that it's not a lot of money, but it's about $17,000-and-change that the Local Water Authority is going to be compensating the Trust.

THE COURT: All right. And if I understand it right - some portion of that is going to go to a tenant-farmer?

MR. MENDEL: Well, it might. That's a discussion to have with the tenant-farmer, but we've received money - as part of the negotiation - from the Local Water Authority to -- they're of the opinion

there's no material impact to farmers. Naturally, farmers would disagree, but we may need to share a little bit of that money with the farmer. That amount is to be negotiated, but we need to be resolved with the Local Water Authority.

THE COURT: All right. And if I understand it right as what Mr. Mendel has said - counsel for the other parties aren't in disagreement as to at least initially signing the Settlement Agreement with the Water Board; is that a correct statement, Ms. Bayless?

MS. BAYLESS: Yes, Your Honor.

THE COURT: Ms. Schwager?

MS. SCHWAGER: Yes, Your Honor.

THE COURT: And, Ms. Brunsting? Carole?

MS. CAROLE BRUNSTING: Sorry, I was on mute. Yes, that's correct.

THE COURT: Okay. So, the Court has a little bit of a concern, given that the proposed order...

(Judge's computer froze)

THE COURT REPORTER: Judge, you're frozen.

THE COURT: Gives the Trustees right to make --

JUDGE COMSTOCK: Judge, can you hear me?

THE COURT: Did I freeze up?

JUDGE COMSTOCK: You did. Can you sort of -- right as you started, I think it was a ruling. I'm not sure.

MOTION TO EXECUTE EASEMENT AND SETTLEMENT

THE COURT'S RULING:

THE COURT: All right. My concern is the language in the proposed order that gives the Trustees the right to unilaterally make a settlement with the tenant-farmer for some monies. Given the litigious nature of this whole situation with the family, I'm a little bit concerned that I would just be creating another problem with that. So, I'm willing to agree to the settlement for the Trust to receive the - I think you said - some $17,000.

MR. MENDEL: Yes, sir.

THE COURT: But I want to hear back from the parties.

And Mr. Mendel, if you're the one leading the charge - on what kind of money is going to satisfy the tenant-farmer for his crop damage.

MR. MENDEL: Well, it's our position - and we haven't negotiated this out - but based on the due diligence that we have performed, we think that number might be in the range of maybe 250 to maybe 500 dollars.

We do not see the farmer as having any rights whatsoever to a material significant portion of this money.

THE COURT: All right. Let me ask this question of Ms. Bayless, Ms. Schwager, Ms. Brunsting. If I was to delineate -- and Mr. Reed, sorry and Mr. Spielman.

If I was to delineate into this proposed order that the Trustees can tender a portion of the settlement of the proceeds not to exceed a thousand dollars; would that be acceptable to all of the parties?

MS. BAYLESS: Yes, Your Honor.

MS. SCHWAGER: Yes.

THE COURT: Okay. So, why don't I do that. And, Judge Comstock... Are you with me, Judge Comstock?

JUDGE COMSTOCK: I am; yes, Judge.

THE COURT: Can you delineate that phrase in there?

JUDGE COMSTOCK: Yes, sir.

THE COURT: To tender a portion of the settlement proceeds not to exceed a thousand dollars.

JUDGE COMSTOCK: Got it.

THE COURT: To the existing farming tenant. So, we put that issue to bed, okay.

MR. SPIELMAN: Judge, I have one comment.

THE COURT: Sure, go ahead, sir.

MR. SPIELMAN: To perhaps avoid anyone in the future misconstruing what you just said, like maybe not to exceed $1,000 without prior court, without prior court approval - that way nobody thinks that you've ruled that it can't be a thousand and one dollars; you're just giving the Trustees authority up to a thousand dollars.

THE COURT: That's fine. If that will make additional comfort, I'm okay with that. So, can you add that language, Judge Comstock?

JUDGE COMSTOCK: I will.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

THE COURT: All right. So, we're taking care of that.

All right. The next [technical interruption] we have after this before me right now is the -- a motion to sever. Now, let me make sure I'm reading this correctly.

And then this motion to sever is -- is it to be understood in conjunction with the Rule 11 Agreement that was filed on December the 6th?

MR. MENDEL: Yes, Your Honor.

THE COURT: Okay. Now, I've ruled on the July -- I think the July 9th, 2015 motion for partial

summary judgment has been ruled on, has it not?

MR. MENDEL: You ruled on part of it. I'm sorry, Ms. Bayless - that's your motion; I apologize.

MS. BAYLESS: That's all right. But, you said what I was going to say. You only ruled on part of it, Judge.

THE COURT: All right. Well, I just want to make sure that whatever decision is going to be made after this hearing, things don't change because of the fact that I've ruled on this, that part of that motion for summary judgment - after the Rule 11 Agreement - it doesn't affect the Rule 11 Agreement - the motion to sever; am I correct?

MS. BAYLESS: No, Your Honor. I'm sorry. We knew about your ruling when we did the Rule 11.

THE COURT: Okay. All right. I just wanted to make sure. Okay.

MR. SPIELMAN: I'm sorry. Just to be clear. I think I'm -- I think just to be clear. The status conference relative to the summary judgment, I believe, is with regard to the Co-Trustees' pending summary judgment against Ms. Curtis which has been set for a hearing but which the Court switched to its submission docket.

THE COURT: Okay. So, Ms. Bayless, would

you like to speak on... I'm not... Let me see about this. Yeah, I want [technical interruption] this motion to sever and the part of the Rule 11 Agreement that relates to that.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

ARGUMENT BY MS. BAYLESS:

MS. BAYLESS: Okay. Well, Judge, I don't have the Rule 11 Agreement in front of me, but I think I remember enough to answer your question. The severance --

THE COURT: I'll be glad to read to you the significant portion that relates to your client, okay?

MS. BAYLESS: Okay.

THE COURT: It says, "Plaintiff Carl Brunsting requests the Court not rule on the portion of his July 9th, 2015 Motion for Partial Summary Judgment" - and maybe you've already said this has been taken care of - "Carl sees the determination as a matter of law that disbursements in 2011 of Exxon Mobile stock and Cheveron stock were improper distributions for which Anita as the Trustee making the disbursements is liable."

Now that -- is that issue connected to this motion to sever?

MS. BAYLESS: Yes, Your Honor, in a sense that the Court made no ruling on that portion of my motion, and the parties have been attempting to work out a settlement of the remaining issues. And when I say "the parties," I mean my client and Anita and Amy, the Co-Trustees. I've also had discussions with Carole Brunsting about some issues, but I've been working on trying to get issues resolved, and I think progress has been made on some fronts.

But the question about the ruling on the motion for summary judgment was part of why we want to sever these issues. Those are different questions than what are presented by Candy Curtis. And, frankly, Judge, there are -- everybody in this Rule 11 has their own issues. I think the Co-Trustees are interested in getting in a posture where they could have a final judgment and some finality to issues with Candace Curtis, and we want to get in a position where we can try our issues separately from Candy Curtis. And, frankly, you know, the cleaner way to do that is a motion to sever which is what we had been discussing in our settlement discussions. But, if the Court doesn't grant the motion to sever, I'm going to file a motion for separate trials because my client would be prejudiced in trying to present a case that has two

plaintiffs that have different issues. I don't even know how the Court can do that very realistically and I certainly -- I think there's been enough hostility toward my -- me, mainly, by Candy Curtis that I'm not interested in the prejudice that could result from some type of a joint trial where we're supposed to be on the same side, and we don't even have the same issues.

So, the discussion was - and depending on what the Court does on the Co-Trustees' motion for summary judgment - severance may be the most efficient way to deal with it. If the Court disagrees with that for some reason, then we're still going to have to address the issue of trying these cases separately. And I think the Co-Trustees - I don't mean to speak for them; they can speak to this - but I think their position is they need to try the issues against Candy Curtis and get those finalized and know that they are put to bed so that they have some framework within which we can continue our settlement discussions.

My client, Your Honor, frankly, just as a little bit of background, it's very important for my client to get this matter resolved. Now, he suffered a rare and usually fatal form of encephalitis in 2011. And since Nelva Brunsting's death, he's not received any support or assistance, and his condition is physically

and mentally deteriorating, and he's going to need expensive care, and he's going to need some adjustments made because he's already fallen and broken a hip, had to have emergency surgery which, in a situation like his and his past medical history, is a very serious situation and, again, life-threatening. So, we are making every effort and exploring every possibility of getting the case resolved, and it's a big muddle; it doesn't seem to be going anywhere. I don't know if that answered your question, but that kind of gives you the background for that Rule 11.

THE COURT: So, just the idea -- and I'm not going to hold you to this, but I'm just trying to get my hands around this case. The idea is if this was severed you -- your client could make a settlement arrangement or an agreement with the Co-Trustees on some of the issues that are involved in this motion for summary judgment that's still pending, correct?

MS. BAYLESS: That's correct. That's correct.

THE COURT: For example, whether your client triggered the trust forfeiture provisions or similar provisions; is that right?

MS. BAYLESS: That's right.

THE COURT: Now, do you distinguish the

type of resistance that your client made against the Trustees different from Ms. Schwager's client in regard to their allegations of forfeiture provisions?

MS. BAYLESS: Yes, Your Honor. I mean -- yes. They have an entire claim that the -- as I understand part of what they're asserting, at least - is that the whole document is forged or it's some type of cut-and-paste document, that there is that type of situation ongoing. And I had Janet Masson look at the originals early on and eliminate those issues when I first heard them raised. We're not addressing any of those issues. Likewise, we haven't gone out and sued every party in the case including the judge and the court reporter and the clerk and everybody else who might have come near the courtroom when a hearing was going on. There are any number of differences between the two claims or the two cases. And frankly, the whole issue of whether they can be separated is sort of a non issue because they were separate lawsuits to begin with. So, there's no question that they can be separate. And the beauty of that situation is the inevitable appeal that will result from whatever Ms. Curtis -- the ruling on Ms. Curtis' claims are - or is - will be able to proceed through the appellate court and there be some finality.

Everything that Ms. Curtis has touched in this case has become 10 to 20 times more litigious than it needs to be, more contentious than it needs to be. And whether it's done in a clean way with the severance, whether it's done where everybody is still lumped together and there is separate trials -- I have had -- my client has been contacted by Ms. Curtis and Rik Munson who helps her with this case. And the most incredibly ridiculous and slanderous things have been said to my client about me in attempt to get my client to listen to them and not to listen to me. That's going to go on in a trial, Judge. That's going to be prejudicial to anything that I try to put on for my client assuming that I try to put anything on because I think we can get it resolved. I think rational people, reasonable people, can get these issues resolved, and I think progress has been made in that direction. We're not there. We're not presenting a settlement to the Court, but things have to be calmer in order to accomplish these things, and they're not calmer when Ms. Curtis is involved.

THE COURT: Okay. I'm certainly going to hear from her counsel.

THE COURT REPORTER: Judge? Judge Horwitz?

THE COURT: Hold on just a second.

This is for Mr. Mendel or Mr. Spielman:

If I should sever this out, what is your position on that as far as it affecting your client? does it -- it creates, potentially, two separate trials.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

ARGUMENT BY MR. MENDEL:

MR. MENDEL: Well, Your Honor, we recognize that there's, potentially, two separate trials. The -- but given the progress that has occurred between Ms. Bayless' client and the Co-Trustees, we believe that being carved out as a separate trial which would still ultimately need to result in a severance so that the appellate timetable as to Ms. Curtis will be separate from the rest of us. But we believe the severance is going to significantly increase the reasonable probability of a settlement which is good for our clients. Also, it reduces - which is great for the Court - is that it will significantly decrease, we believe, the time -- we're set on April 4th on a two-week trial docket; we believe it would reduce the time necessary to address the claims just to be asserted by Ms. Curtis. And so, we see value in increasing the probability of settlement with one party and decreasing the time that's going to be necessary for a trial. And

I would point out - we don't even think we need to get to a trial because there's no evidence, absolutely no evidence, against our summary judgment. But if we -- if we do need to go to trial, then we think it should just be a one-week period and let it be with the most litigious person in this entire case.

THE COURT: So, just --

MR. MENDEL: We're ready for trial. We want to go to trial. I want to be clear about that. If we can't have our summary judgment, we want to go to trial.

THE COURT: So, just so I understand clearly, and it may be obvious.

On the pending motion for summary judgment that was filed on or about November 5th - you wish the Court to consider this as solely a motion for summary judgment against Ms. Curtis.

MR. MENDEL: That's correct, Your Honor. We're reserving all our rights. In the severed action, we're reserving all our rights against Carl Brunsting just like Carl Brunsting's reserving his rights against the Co-Trustees. We want our MSJ to be dully considered as to Candace Curtis and no one else.

THE COURT: And -- but you're reserving the right for to reset an oral hearing or written

submission the same summary judgment issues against Ms. Bayless' client should that come to pass?

MR. MENDEL: Well, that's true, but if we're in a severed action, we've discussed - Ms. Bayless and myself and Mr. Spielman - that we would be -- we would, in reasonable probability, be tendering a -- an agreed docket control order or we would come back to the Court and ask for a docket control order to address -- as Ms. Bayless pointed out, there are issues between her client and our clients that are different from Ms. Curtis'. And, yes, we may be coming back and asking for that, and they may be considered in the future. But our issues with Mr. Brunsting and those of Curtis' are divergent in many ways.

THE COURT: Okay. Mr. Spielman, do you have anything to add to that before I talk to Ms. Schwager?

MR. SPIELMAN: Yes, Judge, I always have something to add to that. I would just --

THE COURT: I thought that might be the case.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

ARGUMENT BY MR. SPIELMAN:

MR. SPIELMAN: I would just say, Your Honor, that the motion for summary judgment specific to

Ms. Curtis is wholly briefed by the parties; it is ripe for judgment; it solves a ton of problems which Ms. Bayless has eloquently described and accurately fully described.

I'll add that on behalf of Mr. Mendel - my opinion - that Mr. Mendel has received similar hostile, inappropriate, slanderous contact. I haven't seen what's been written about Ms. Bayless, but I have seen some, at least of what's been written about Mr. Mendel; and frankly, frankly, it's not remotely consistent with Steve Mendel, the person who's on this Zoom call and just this pattern of aggressive rhetoric and spiraling out of control nonsense from Ms. Curtis is -- it is the single reason why these people have not received what they are supposed to receive years ago, you know. And it wasn't appropriate to talk about this during Carole's emergency motion. But it speaks to the reason why she hadn't gotten her money yet; it speaks to the reason why Carl hasn't gotten his money yet; it speaks to the reason why Amy and Anita, even as individuals, haven't gotten their money yet. This whole thing has been just ridiculously nonsensically. And there are Courts that have used those words as well, Judge; this is not just me pontificating. I'm using things that other judges in other courtrooms have said about Ms. Curtis and her

claims. And the time for this case to be resolved as to Ms. Curtis is now. Ideally, that's through the summary judgment, and if it has to be through the trial - so be it. And that's my thought on that.

THE COURT: Okay. Before Ms. Schwager speaks, I'll just make one little comment.

You know, it's a pleasure to work with veteran attorneys, and I appreciate it, but I always get a little bit of an ironic smile when I hear veteran attorneys say never before have they have heard such unfounded and ridiculous and, you know, statements. Each lawyer's charged with zealous advocacy on behalf of their client. And so, when lawyers, especially seasoned lawyers, come to me with - I've never heard such ridiculous and unfounded things, I -- if you're anything like me, and I'm sure you've practiced law a long time, you probably heard it all many times before. So, that doesn't necessarily invalidate the authenticity of your argument. But the Courts take such words with a grain of salt.

Now, Ms. Schwager, I'd like you to respond, if you could, to the argument about severing this so that you, alone, would be facing a summary judgment -- your client, alone, would be facing a summary judgment and how she could be penalized by such

severance.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

ARGUMENT BY MS. SCHWAGER:

MS. SCHWAGER: Your Honor, I -- this really doesn't surprise me. This case has gone on 10 years, and just when you think you're getting towards the finish line, they throw another wrench in it.

We started out in federal court. The first lawsuit ever filed between any of these parties was my client in federal court; that case was never invalidated. My client was never called weird names by the judges. That case - we won an injunction, and they've been trying to get away from it ever since. Maybe that's their thought in doing the severance, is somehow doubt in the effect of the injunction.

When you told us to go to mediation, they qualify -- the condition was that all claims had to be settled or none of them. Had they divided into the five accounts they were supposed to in 2013 when the Court ordered, it might -- I might not care so much, but I do have the obvious question of - who is going to pay their attorneys' fees for two trials when two trials aren't needed? It's not correct to say that we have different issues. And that's not the standard. The standard is not - do we have a different question or two from them

that -- than they have? I suppose the other parties in this case may not have an interest in the injunction that's protected the Trust all these years, but that's a common issue that has been there to help put all of the parties as against the Trustees' misused funds.

But, the law states not only that the case would be proper to be severed and that it involved more than one cause of action, but the severed claim is not so interwoven with the remaining action; they involve the same facts and issues.

What is very maddening to me is - as you know, we have challenged the jurisdiction of this court because of the action that we had in federal court. What happened was Jason Ostrom - Candace Curtis' counsel at the time - polluted diversity on purpose by making Candy a nominal defendant in a claim and managed to use that to her case over to probate court. So, we went through the appropriate channels. We challenged that. We're here -- we're here in their case. I'm actually -- we're in the case that Ms. Bayless filed for us to be drug over into this court pretty much against our will at the time. I mean, we are now litigating in good faith and got the docket control order. I feel like this is some scheme on the part of counsel to deprive Candace of her portion of the inheritance. Since it has

not been divided in a separate trust account for her, then I think I have reason to have concern for that about who's going to pay the fees? Who's going to pay the doubled [sic] fees? Are these going to be attorneys' fees that the Trust incurs twice or are they paying their own fees? We've asked for those fee bills for months, and we've not received any of that.

And the other issue that Mr. Spielman brought up about hostile emails. I don't know what family doesn't have hostile communications going on in the course of the 10 years of litigation; certainly that has gone on. I don't know about it all. Largely, it flies under the radar, and I see it later; but I can tell you that there have been talks behind closed doors trying to settle this case, not just trying to stir the pot. And I just think that severance is not the solution for whatever objectionable emails counsel is finding that my client wrote. As long as this is one nucleus of operative fact and one law of fiduciary duty, I don't see why it needs to be separate. I also don't see why it needs to be severed for them to settle. If they have reached a settlement, I just don't understand why they need to have a severance to accomplish that.

But to the extent that it doesn't prejudice my client's rights or her money, the

attorneys' fees as they would be charged against the parties, then I suppose we would have no objection, but our objection is based upon these ever-escalating attorneys' fees that are already admittedly over a half-a-million dollars for -- they keep blaming Candy for litigation, but most of the litigation was -- she was successful in. So, I don't see how her pursuing her legal rights and attempt to hold the Trustees accountable and obtaining release stating that they were breaching their duties, I don't see how that's worthy of so much contempt from the rest of the parties or the Trustees.

And Mr. Spielman admits that the single reason Candace hasn't received what she's entitled to is basically they don't like the way she emails or she doesn't, what, she hasn't just succumbed to the exorbitant settlement demands and say - I'll pay all the fees myself? I don't know what it is that she's doing besides litigating and winning that has been so prejudicial to any party in this case. And I don't know why fees haven't been sought from her before in federal court if that's what they contend was appropriate.

You know, but this fee issue is running this whole thing. All this is about fees because nobody really has a claim against anyone except my client. My

client made fiduciary duty claims. The claims asserted against my client are admittedly frivolous. She was sued as a nominal defendant to get her into your court. So, we -- you know, the ultimate result would be we'd be left in a case that we never filed in, we never appeared in, you know, as a nominal defendant rather than as a plaintiff which is what we filed in a federal court.

MOTION TO SEVER & STATUS CONFERENCE REGARDING MSJ

THE COURT'S RULING:

THE COURT: Thank you. Your words are well-taken by the Court. Normally, the Court is very - I don't know what the word is - supportive of judicial economy and not creating more work for the Court, also not incurring more attorneys' fees; but certainly the Co-Trustees would have the right - should they want to - a nonsuit against Carl Brunsting, Ms. Bayless' client, in their motion for summary judgment. And certainly the Court has the right, at a later time, to rule on attorneys' fees along the lines to what you pointed out.

And given all of this, I'm inclined to go ahead and sign the order severing this matter so long as -- we're not dealing with the attorneys' fees at this point, but it will come up. So, I'm going to go ahead and sign that order.

So, having dealt with the motion to sever

and the water rights or the water board, I'm trying to think if there's something else I need to bring up.

I owe you a ruling on the motion for summary judgment taking into account what we're doing today, and I will have that decision made by next week without belaboring the point.

Does anybody else have anything they wish to say? Ms. Bayless?

MS. BAYLESS: No, Judge, I'm done.

THE COURT: Ms. Schwager?

MS. SCHWAGER: No, that's all, Judge.

THE COURT: Mr. Mendel?

MR. MENDEL: No, sir.

THE COURT: Mr. Spielman?

MR. SPIELMAN: No, sir.

THE COURT: And Carole Brunsting, I know, nominally, you don't have a dog in this fight other than the attorneys' fees issue which is important to you. But before I even ask you that, how are you doing?

MS. CAROLE BRUNSTING: Well, I'm probably about a -- I'm doing probably about as well as I can with the situation right now.

THE COURT: Have you kind of psychologically assimilated your situation where it's not as -- let me put it this way: Are you able to sleep

at night?

MS. CAROLE BRUNSTING: When they ask you on a scale of 1 to 10, unfortunately that number is still going up. So, no, I'm not quite there yet.

THE COURT: Well, I pray that you will get there, and I hope you do better.

MS. CAROLE BRUNSTING: Well, there's still just some unknowns that I'm dealing with; and so, until all that gets resolved, it's just been a lot to deal with.

THE COURT: Well, your confusion and anxiety is entirely appropriate. So, given -- given your concerns, I wouldn't start beating on yourself for being confused and anxious and depressed in accompanying emotions. I hope we can resolve this and you can get some family care and comfort.

MS. CAROLE BRUNSTING: Well, I've been paired up with -- I've been paired up with -- M.D. Anderson pairs you up with people that have been through a similar situation as yourself; and so, I've been paired up with few women that have been very good with coaching me and providing a lot of support. So, that's been really, really helpful.

And then I guess that as far as this trust - and unfortunately, it is something that I've

been talking with my counsel and all that at M.D. Anderson - I guess the fear for me is because I am pro se, I guess I'm a bit concerned about what happens to me in this situation especially since I don't have legal counsel and because the money is really important to me now more so than ever because I didn't realize how expensive cancer can -- I didn't realize how this can get expensive rather quickly and ongoing care and things like that. So, there is...

THE COURT: Hopefully, we can get an end to this so you can get some more money.

All right. At this time, I'm going to excuse all the parties. I thank you very much. And we will sure visit again soon. Thank you. Bye-bye.

* * * * *

The State of Texas)
County of Harris)

I, Hipolita Lopez, Official Court Reporter in and for the Probate Court Number Four of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $224.00. and was paid by MS. CANDACE CURTIS.

WITNESS MY OFFICIAL HAND this the 20th day of February, 2021.

/s/ Hipolita G. Lopez
HIPOLITA G. LOPEZ, Texas CSR #6298
Expiration Date: 10-31-22
Official Court Reporter
Probate Court Number Four
Harris County, Texas
201 Caroline, 7th Fl.
Houston, Texas 77002

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This April 18, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 23, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 42

NO. 412,249-401

CARL HENRY BRUNSTING, et al	§	IN PROBATE COURT
	§	
v.	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, et al	§	HARRIS COUNTY, TEXAS

ORDER GRANTING
CO-TRUSTEES' MOTION FOR SUMMARY JUDGMENT
AS TO CANDACE LOUISE CURTIS ONLY

On the 25 day of February 2022, the Court, at its' discretion, considered, via submission, the Motion for Summary Judgment (the "Motion") filed by AMY RUTH BRUNSTING ("Amy") and ANITA KAY BRUNSTING ("Anita") (the "Co-Trustees"), in their individual capacities and as the co-trustees of The Brunsting Family Living Trust, a/k/a The Restatement of The Brunsting Family Living Trust (the "Trust") originally set for oral hearing on December 14, 2021.

The Court considered the Motion on no-evidence and traditional grounds. Via submission, the Court considered (1) the Motion and its summary judgment evidence, as well as the Co-Trustees' Reply to Candace Louise Curtis's Answer to Co-Trustee's Motion for Summary Judgment and Motion to Strike (the "Reply"); (2) any responses from counsel/pro se parties, including without limitation, the "*Answer to Co-Trustee's Motion for Summary Judgment and Motion to Strike*" filed by Candace Louise Curtis ("Curtis"); and (3) the pleadings on file in this cause.

As part of its consideration of this matter, the Court considered Curtis's position as set forth in her Motion to Strike. The Court **FINDS** that the Motion and the Reply were timely filed, procedurally proper and that the Motion is ripe for ruling. Accordingly, Curtis's Motion to Strike is **DENIED** in all respects.

As part of its consideration of this matter, the Court considered the Co-Trustees' objections to materials submitted by Curtis as summary judgment evidence. The Court **FINDS** that one or more of the submitted exhibits violate the Texas Rules of Evidence for one or more of the reasons described by the Co-Trustees in the Reply. Accordingly, the Court **ORDERS** as follows:

Exhibit	**Exhibit Description**	**Objection to Exhibit**	**Disposition**
Exhibit Pg. 1	Trust Flow Chart	Hearsay; not authenticated; not a testamentary instrument that would alter the 2005 Restated Trust or the 2010 QBDs.	X Sustained ____ Overruled
Exhibit Pgs. 2-3	2007 Amendment	Not authenticated; not a controlling instrument; not relevant to any issue raised by the co-trustees' motion for summary judgment.	X Sustained ____ Overruled
Exhibit Pgs. 4-5	Article III 2005 Restatement	Not authenticated; not relevant to any issue raised by the co-trustees' motion for summary judgment.	X Sustained ____ Overruled
Exhibit Pg. 6	Affidavit filed in federal court Feb. 27, 2012 describing Anita's plan.	Hearsay; not authenticated.	X Sustained ____ Overruled
Exhibit Pgs. 7-10	Nelva Brunstings' hand-written greeting card say-ing "That's Not true!"	Hearsay; not authenticated; the card does not negate the *in terrorem* provisions in the 2005 Restated Trust and/or QBD.	X Sustained ____ Overruled
Exhibit Pgs. 11-13	Estate Plan Purposes	Hearsay; not authenticated; not a testamentary instrument that would alter the 2005 Restated Trust or the 2010 QBDs.	X Sustained ____ Overruled

Exhibit Pg. 14	Estate Planning Attorney-Candace Kunz-Freed explaining the reason for subjecting Nelva to a competency evaluation.	Hearsay; not authenticated.	X Sustained ____ Overruled

Consistent with the above and foregoing, the Court **FINDS** that Curtis has failed to meet her summary judgment burden on the Motion's traditional and no-evidence points. The Court **FINDS** that Curtis has forfeited her interest as a beneficiary of the Trust, by taking one or more actions in violation of the Trust and/or the August 2010 QBD (as such terms are defined in the Motion). The Court **FINDS** that the Co-Trustees shall first recover attorneys' fees from Curtis (and/or from her forfeited interest in the Trust) via Article IV, Section G of the Trust; via Miscellaneous Provisions: Item A of the August 2010 QBD; and/or via the Declaratory Judgment Act.

Accordingly, the Court **GRANTS** the Motion as to Curtis only, **RENDERS** judgment for the Co-Trustees against Curtis only and **ORDERS**:

(1) That Co-Trustees' Motion for Summary Judgment is **GRANTED** as to Curtis in its totality;

(2) That Curtis **TAKE-NOTHING** by way of her claims against Amy, Anita, the Co-Trustees and/or the Trust;

(3) That the Co-Trustees are awarded attorneys' fees payable by Curtis (and/or from her forfeited interest in the Trust) in an amount to be subsequently determined; and

(4) That court costs are taxed against the party incurring same.

This Order disposes of all claims and causes of action asserted against Amy, Anita, the Co-Trustees and/or the Trust by Curtis, and no other claims or causes of action are pending against Amy, Anita, the Co-Trustees and/or the Trust from Curtis.

If and as necessary, the Court, upon motion properly filed, will enter an order of severance.

SIGNED AND ENTERED on this 25 day of February, 2022.

JUDGE PRESIDING

TAB 43

NO. 412249-401

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

CARL HENRY BRUNSTING, Et Al	§	
	§	
V.	§	
	§	
ANITA KAY BRUNSTING, Et Al	§	

Order Granting Motion to Sever

On February 11, 2022, the Court considered the motion to sever filed by Plaintiff, Carl Brunsting, and Defendant/Co-Trustees, Anita Brunsting and Amy Brunsting. After considering the motion, responses, and the arguments of counsel and/or the parties, if any, it is, therefore:

ORDERED that the Court severs 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 to be known as C.A. 412249-405; *Carl Henry Brunsting v. Anita Kay Brunsting, Et Al*; In Probate Court No. 4, Harris County, Texas.

It is further ORDERED that the Clerk's Office shall transfer copies of the following instruments from C.A. No. 412249-401 to the new cause number as referenced in the preceding paragraph:

04/09/2013 Carl Henry Brunsting's Petition for Declaratory Judgment, for an Accounting, for Damages, for Imposition of a Constructive Trust, & for Injunctive Relief, Together with a Request for Disclosures (20 Pages).

SC

05/13/2013	Defendant/Co-Trustee Anita K. Brunsting's Original Answer & Request for Disclosures (5 Pages).
05/31/2013	Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's 1ST Amended Answer (6 Pages).
06/07/2013	Plaintiff Carl Henry Brunsting's 1ST Amended Petition for Declaratory Judgment (18 Pages).
12/01/2014	Plaintiff Carl Henry Brunsting's Designation of Expert Witnesses (10 Pages)
12/05/2014	Defendant/Co-Trustee Anita K. Brunsting's Response to Plaintiff's Motion to Remove Trustee (3 Pages).
12/08/2014	Defendant/Co-Trustee Amy R. Brunsting's Response to Plaintiff Carl Henry Brunsting's Motion to Remove Trustee (4 Pages).
03/20/2015	Plaintiff Carl Henry Brunsting's 1ST Supplement to 1ST Amended Petition & Request for Injunctive Relief (4 Pages).
03/23/2015	Plaintiff Carl Henry Brunsting's Response to Anita Brunsting's Motion to Compel Carl Brunsting's Response to Anita Brunsting's Request for Disclosures with Exhibits 1-5 (43 Pages).
07/01/2015	Defendants/Co-Trustee Anita K. Brunsting's Expert Witness Designations (3 Pages)
07/10/2015	Plaintiff Carl Henry Brunsting's 2ND Supplement to Plaintiff Carl Henry Brunsting's 1ST Amended Petition & Request for Injunctive Relief / Film Code No. PBT-2015-225377 (3 Pages).
08/03/2015	Plaintiff Carl Henry Brunsting's 3RD Supplement to Plaintiff 1ST Amended Petition & Request for Injunctive Relief / Film Code No. PBT-2015-250703 (6 Pages).
08/29/2018	Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's Joint Response to Plaintiff's Motion for Partial Summary Judgment with Exhibit A (20 Pages).
11/04/2019	Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's 2ND Amended Answer (6 Pages).
11/04/2019	Defendants/Co-Trustees Amy R. Brunsting's & Anita K. Brunsting's Original Counterclaim (8 Pages).
07/30/2020	Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's Response to C. Brunsting's Partial MSJ with Exhibits A-E (225 Pages).

08/04/2020 Plaintiff Carl Henry Brunsting's Reply to Defendants' Response to Carl's Motion for Partial Summary Judgment (10 Pages)

08/13/2020 Order on Briefing as to Plaintiff Carl Henry Brunsting's Motion for Partial Summary Judgment (2 Pages).

09/10/2020 Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's Joint Amended Response to Carl Brunsting's Motion for Partial Summary Judgment with Stephen A. Mendel's Declaration Regarding Exhibits A-J & Exhibits A-J (456 Pages).

09/17/2020 Defendants/Co-Trustees Anita K. Brunsting & Amy R. Brunsting's 1ST Supplemental Answer (3 Pages).

09/25/2020 Plaintiff Carl Henry Brunsting's Reply to Defendants Amy R. Brunsting & Anita K. Brunsting's Amended Response to Carl's Motion for Partial Summary Judgment (14 Pages).

10/15/2021 Plaintiff Carl Henry Brunsting's Original Answer to Amy R. Brunsting's & Anita K. Brunsting's Original Counterclaim (4 Pages).

10/15/2021 Plaintiff Carl H. Brunsting's 4TH Supplement to First Amended Petition & Request for Injunctive Relief (3 Pages).

11/04/2021 Plaintiff Carl Henry Brunsting's 2ND Amended Expert Witness Designation & Further Supplement to Carl's Responses to All Requests for Disclosures (13 Pages).

11/05/2021 Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting Motion for Summary Judgment & Exhibits A-L (265 Pages).

11/12/2021 Order Denying Part of Plaintiff Carl Henry Brunsting's Motion for Partial Summary Judgment.

12/06/2021 2021-12-05 Rule 11 Agreement – Plaintiff Carl Henry Brunsting & Defendants/Co-Trustees Anita K. Brunsting & Amy R. Brunsting (4 Pages).

01/08/2022 Plaintiff Carl H. Brunsting & Defendants/Co-Trustees Amy R. Brunsting & Anita K. Brunsting's Agreed Motion to Sever (3 Pages).

SIGNED on this _____, 2022.

Signed on: 03/11/2022
3:50:08 PM

CC _____
Presiding Judge

APPROVED AS TO FORM:

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Counsel for Defendant/Co-Trustee
Amy R. Brunsting

TAB 44

NO. 412.249-401

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

CARL HENRY BRUNSTING, individually and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting	§	**IN PROBATE COURT**
vs.	§	
ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust; AMY RUTH BRUNSTING f/k/a AMY RUTH TSCHIRHART, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust; CAROLE ANN BRUNSTING, individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, CANDACE LOUISE CURTIS	§	**NUMBER FOUR (4) OF**
	§	**HARRIS COUNTY, TEXAS**

PLAINTIFF'S NOTICE OF NON-SUIT WITHOUT PREJUDICE

Plaintiff, Drina Brunsting, as attorney-in-fact for Carl Henry Brunsting, individually ("Carl"), notifies the Court and all parties that she hereby non-suits, without prejudice, Carl's action against Candace Louise Curtis, as a nominal defendant, to be effective immediately upon the filing of this Notice.

Dated this 18th day of March, 2022.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

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Attorneys for Drina Brunsting as attorney-in-fact for Carl Henry Brunsting, Individually

CERTIFICATE OF SERVICE

Pursuant to the Texas Rules of Civil Procedure, I hereby certify that on March 18, 2022, a true and correct copy of this document was delivered to all counsel of record, and all other interested parties, via certified mail, return receipt requested, e-mail, facsimile, e-file service, hand delivery, and/or by other accepted method.

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/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 45

CAUSE NO. 412249-401

CANDACE LOUISE CURTIS Plaintiff	§ § §	IN THE STATUTORY PROBATE COURT
VS	§ §	OF HARRIS COUNTY, TEXAS
ANITA K. BRUNSTING AND AMY RUTH BRUNSTING, et al. and Does 1-100, Defendants	§ § § §	PROBATE COURT NO.4

MOTION TO VACATE OR SET ASIDE FEBRUARY 25, 2022, ORDER

PLAINTIFF / COUNTER-DEFENDANT, CANDACE LOUISE CURTIS, files this MOTION TO VACATE OR SET ASIDE THE FEBRUARY 25, 2022, ORDER, granting summary judgment (1) disposing of all of CURTIS' claims for relief and (2) unlawfully subjecting CURTIS' **vested** 1/5 share of the Survivor's and Decedent's trusts and/or personal asset trust to forfeiture for the payment of DEFENDANTS' attorney's fees. The Order constitutes and abuse of discretion, for the following reasons:

A. *This Court lacks subject matter jurisdiction over the BRUNSTING FAMILY LIVING TRUST by Tex. Est. Code 32.005, 32.006, 32.007, lack of a probate estate or independent executor, Curtis vs. Brunsting, Registration of Foreign Judgment, Void Remand Order and Void Order of Transfer*

B. *Former Judge Kathleen Stone failed to render judgment and lacks authority to sign the Order*

C. *CO-TRUSTEES' Motion and the Court's order were untimely*

D. *CO-TRUSTEES' Motion fails to identify each element of PLAINTIFF'S claims upon which they allege there is no evidence*

E. *There was ample evidence in the record that CO-TRUSTEES violated their fiduciary duties, converted CURTIS' interest to their own use and benefit, and committed fraud.*

F. *The Court violated CURTIS' Constitutional right to due process in failing to declare the August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to living trust void and severable from the trust.*

G. *DEFENDANTS have not satisfied their burden of producing evidence to prove that CANDACE CURTIS violated the "no contest" provision of the Restatement*

H. *The Court erred in ruling that Co-trustees' attorneys' fees shall be taken out of CANDACE CURTIS' share, as CANDACE CURTIS' share is not alienable or subject to claims of judgment creditors*

I. *Attorneys' fees may not be granted in Texas absent a contract or statute authorizing attorneys' fees.*

J. *The Orders violated CANDACE CURTIS' Constitutional right to due process—notice and a meaningful opportunity to be heard.*

I. STANDARD OF REVIEW

1. A trial Court's review of an order granting summary judgment[1] is reviewed de novo. *Joe v. Two Thirty-Nine Joint Venture*, 145 S.W.3d 150, 156-57 (Tex. 2004). In reviewing a

[1] Rule 166a (traditional) and Rule 166a(i) states that summary judgment may be granted:

> **(a)For Claimant.** A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> **(c)Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) **the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records**, if any, **on file at the time of the hearing, or filed thereafter** and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the **issues expressly set out in the motion or in an**

traditional summary judgment, the appellate court considers whether the successful movant at the trial level carried the burden of showing that there is no genuine issue of material fact, and that judgment should be granted as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

2. No-evidence motions are reviewed under the same standard as a directed verdict. *King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750-51 (Tex. 2003).* The Appeals Court reviews the evidence in the light most favorable to the nonmovant and disregard all contrary evidence and inferences. Id. A trial court must grant a proper no evidence motion for summary judgment, unless the nonmovant produces more than a scintilla of probative evidence to raise a genuine issue of material fact on the challenged element of the claim. TEX.R. Civ. P. 166a(i). Notably,

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answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal…

(d)Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

more than a scintilla of evidence exists in the federal record DEFENDANTS have been trying to escape since 2013.

III. FACTS AND PROCEDURAL HISTORY

3. NELVA AND ELMER BRUNSTING established the BRUNSTING FAMILY LIVING TRUST October 10, 1996. The Trust was superseded and amended in its entirety by the Restatement of January 6, 2005. The 1st amendment to the trust occurred in 2007. No valid amendments exist after ELMER BRUNSTING'S June 9, 2008, incapacity, when the trust could no longer be amended or revoked—except by Qualified Beneficiary Designation applicable only to the disposition of the settlor's share of assets. The Controlling Instruments are the Restatement of 2005, 1st Amendment of 2007, and 6/15/10 Qualified Beneficiary Designation. The August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment is void and severable from the trust.[2] Certificates of Trust executed after June 9, 2008, are likewise, void.

4. While the trust allowed NELVA BRUNSTING to alter the disposition of her share via Qualified Beneficiary Designation, the record reveals that the only valid "QBD" was executed June 10, 2010. *Exhibits C and D, which are documents attached to CO-TRUSTEES' Motion that remain undisputed by the parties.* The August 25, 2010, QBD is disputed because it is void on its face for the lack of two attesting witnesses—aside from other objectionable defects.

5. The surviving settlor, NELVA BRUNSTING, passed away November 11, 2011, with Article X of the Restatement requiring distribution of the trust(s) within a reasonable time after payment of certain expenses listed in the trust.

6. PLAINTIFF CANDACE CURTIS sent two demand letters, requesting an accounting of the trusts in December of 2011 and January 2012. Because these letters were ignored,

[2] Exhibit A, January 6, 2005, Restatement, Exhibit B, 2007 1st Amendment to Restatement, Exhibit C, 6/15/10 QBD and Exhibit D, void 8/25/10 QBD and Testamentary Power of Appointment

CANDACE CURTIS sued AMY BRUNSTING AND ANITA BRUNSTING in federal court under diversity jurisdiction, 28 U.S.C. § 1332.[3]

7. PLAINTIFF'S 2012 federal lawsuit is the **first lawsuit** between the parties, in which California Plaintiff, CANDACE CURTIS' sued acting CO-TRUSTEES, ANITA AND AMY BRUNSTING ("CO-TRUSTEES") in the *Southern District of Texas, Houston Division, Cause No. 4:12-cv-00592.* The suit was brought to compel an accounting and disclosures and for breach of fiduciary duty, constructive trust, intentional infliction of emotional distress, and fraud concerning the BRUNSTING SURVIVOR AND DECEDENT'S FAMILY LIVING TRUSTS.

8. The federal case was properly filed in the Southern District of Texas based upon diversity jurisdiction, 28 U.S.C. §1332, but was[4] dismissed *sua sponte* on March 8, 2012, by the district judge on the basis of the probate exception to federal jurisdiction. The Court erred in dismissing the case under the probate exception, prompting an appeal to the 5th Circuit Court of Appeals by CANDACE CURTIS—which was successful when the panel ruled in CURTIS' favor in 2013. The 5th Circuit held that the probate exception did not apply, and this dispute was proper in the U.S. District Court based upon diversity jurisdiction. *See Curtis vs. Brunsting,* 710 F.3d 406 (5th Cir. 2013).[5]

9. On April 2, 2012, Vacek and Freed filed the will of ELMER BRUNSTING *(Estate of Elmer Brunsting, Cause No. 412248*) and the will of NELVA BRUNSTING *(Estate of Nelva Brunsting, Cause No. 412249*) with the Harris County Probate Court Clerk. Both wills were pour over wills and required only the filing and approval of an inventory to conclude probate. This was

[3] Exhibit E, Original Complaint of *Candace Louise Curtis vs. Anita K. Brunsting, et al. Cause No. 4:12-cv-00592 (S.D. Tex. 2012).*

[4] Aside from this case and subsequent appeal, the only other matter filed by CURTIS was an action for racketeering / organized crime which was dismissed under Federal Rule of Civil Procedure 12b(6), which is not at issue in this case because DEFENDANTS do not seek fees relative to this case.

[5] Exhibit F, Curtis vs. Brunsting 710 F.3d 406 (5th Cir. 2013)

accomplished April 5, 2013, when the Court approved the inventory and closed the case, issuing a drop order. *See Drop Order April 5, 2013.*[6]

10. On April 5, 2012, CO-TRUSTEES submitted a partial accounting prepared by estate planning attorneys, Vacek and Freed. This partial accounting revealed the misapplication of fiduciary assets, unauthorized and unnoticed to the remaining beneficiaries, CANDACE CURTIS, CARL BRUNSTING, AND CAROL BRUNSTING.[7] It remained insufficient to qualify as a proper trust accounting in breach of the trustees' duty to keep accurate books and records.

11. On April 15, 2012, while the federal case was on appeal, Attorney Bobbie Bayless filed an application in Harris County Probate Court No. 4 to probate the will of NELVA BRUNSTING and issue letters testamentary to independent administrator CARL BRUNSTING.

12. On April 25, 2012, the record for CURTIS' 5th Circuit appeal was complete and before the panel for consideration.

13. On April 28, 2012, the Harris County probate court issued letters testamentary, naming CARL BRUNSTING as independent executor of the Estate of Nelva Brunsting.

14. On January 9, 2013, the Fifth Circuit Court of appeals reversed and remanded the matter to the federal district court, holding that the probate exception did not apply to this lawsuit and the parties were completely diverse. Exhibit F, *Curtis vs. Brunsting*, 710 F.3d 406 (5th Cir. 2013).

15. The Fifth Circuit Opinion states as follows:[8]

> *"Plaintiff, the beneficiary of a trust, sued defendant co-trustees of the trust, for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas dismissed the case for lack of subject matter jurisdiction,*

[6] Exhibit G, Drop Order April 5, 2013.
[7] CO-TRUSTEES AMY AND ANITA BRUNSTING are also beneficiaries of the trusts.
[8] Exhibit F, *Curtis v Brunsting 704 F.3d 406, 412 (Jan 9, 2013)*

concluding that the case fell within the probate exception to federal diversity jurisdiction. The beneficiary appealed."
"The circuit court found that the case was outside the scope of the probate exception under the first step of the inquiry because the trust was not property within the custody of the probate court. Because the assets in a living or inter vivos trust were not property of the estate at the time of decedent's death, having been transferred to the trust years before, the trust was not in the custody of the probate court and as such the probate exception was inapplicable to disputes concerning administration of the trust..."
"...The record also indicated that there would be no probate of the trust's assets upon the death of the surviving spouse. Finding no evidence that the trust was subject to the ongoing probate proceedings, the case fell outside the scope of the probate exception. The district court below erred in dismissing the case for lack of subject-matter jurisdiction." Curtis v Brunsting 704 F.3d 406, 412 (Jan 9, 2013).

27. On January 29, 2013, while the federal suit was in transit back to the Southern District of Texas, Attorney Bobbie G. Bayless, filed legal malpractice claims against the Brunsting's estate planning attorneys, Vacek and Freed law firm, in *Harris County Texas Judicial District Court 164,_Cause No. 2013-05455*, representing Carl Brunsting as "Executor for the estates of Elmer and Nelva Brunsting".

28. On April 5, 2013, the probate matter, *the Estate of Nelva Brunsting, Cause No. 412429,* was closed by the Court's approval of the inventory and issuance of a drop order, closing the case. This prevented any subsequently transferred case from being deemed "ancillary", "incident to" or "related to" an estate matter in this conundrum of cases.

29. After returning to the Southern District of Texas, Candace Curtis reapplied for a preliminary injunction. Hearing was had April 9, 2013, and injunction issued with a Memorandum and Order of Preliminary Injunction issued April 19, 2013.[9]

30. Judge Kenneth Hoyt of the U.S. District Court for the Southern District of Texas found a substantial likelihood that CANDACE CURTIS would prevail on the merits of her claims against

[9] Exhibit H, *Memorandum of preliminary injunction published April 19, 2013.*

CO-TRUSTEES, recognizing numerous breaches of fiduciary duty to the beneficiaries. *Exhibit H.* His Order found evidence on the elements of CURTIS' claims and specifically noted that the only thing left to be accomplished by CO-TRUTEES was to distribute the trust assets. After 11+ years, the trusts have still not been distributed.

31. Also on April 9, 2013, Bobbie Bayless filed CARL BRUNSTING'S PETITION FOR DECLARATORY JUDGMENT, for Accounting, Damages, the Imposition of a constructive trust, injunctive relief and disclosures, naming AMY BRUNSTING, ANITA BRUNSTING, AND CAROL ANN BRUNSTING as defendants, with CANDACE CURTIS a nominal defendant only for purposes of declaratory judgment. This lawsuit essentially mirrored the relief CURTIS had already sought, pending in the *Southern District of Texas, Cause No. 4:12-cv00592.*

32. On April 10, 2013, Defendants' Counsel, George Vie III, in 4:12-cv-592 filed notice of a lawsuit brought in the state probate court.

33. Due to the continued failure of CO-TRUSTEES failure to provide a proper accounting for 2 ½ years, Judge Hoyt found that the appointment of a special master was necessary and in the best interests of all parties[10]. A Special Master was appointed May 9, 2013.

34. The Special Master's Report was filed August 8, 2013, finding that CO-TRUSTEES failed to maintain proper books and records and account to the beneficiaries, noting missing receipts for certain disbursements, and concluding that the Quicken files kept by CO-TRUTEES were "more for use as an electronic checkbook to keep bank balances as opposed to a more fully integrated bookkeeping system.[11]"

35. Due to Judge Hoyt's admonition that CANDACE CURTIS retain counsel to complete discovery, CURTIS retained JASON OSTROM OF OSTROM AND SAIN to complete

[10] Exhibit I, *See Order Appointing Special Master.*
[11] Exhibit J1, Special master's report, page 3.

discovery. JASON OSTROM appeared in federal court for CURTIS, but never filed a NOTICE OF APPEARANCE in probate court No. 4—to give him authority to act on CURTIS' behalf in probate court.

36. On May 9, 2014, JASON OSTROM filed a 1st Amended Complaint, naming CARL BRUNSTING as an involuntary plaintiff to pollute diversity, stating that a declaratory judgment action was necessary because relief could not be had without the addition of necessary, indispensable parties for complete adjudication. Naming CARL BRUNSTING as an involuntary PLAINTIFF was improper. CARL BRUNSTING should have been sued as a nominal DEFENDANT like CAROL BRUNSTING—the remaining beneficiary.

37. On May 9, 2014, OSTROM filed a Motion to Remand in the federal court and on May 28, 2014, OSTROM filed a Motion to Enter Transfer Order[12] in the probate court, when this case had never been removed from any State Court and it could not be "transferred" between federal and probate court. The basis of the "remand"[13] was the probate exception to federal jurisdiction, held inapplicable by the 5th Circuit Court of appeals, but subsequently deemed to apply by OSTROM'S wrongful pollution of diversity—all in an attempt to force CURTIS' federal lawsuit into probate court where the attorneys could raid the trusts free from Judge Hoyt's supervision.

38. On May 15, 2014, Judge Kenneth Hoyt signed the Order granting Plaintiff's motion to remand, admittedly issued in error by Judge Hoyt's September 30, 2020, Order denying Plaintiff Rule 60 Relief based on fraud on the court.[14] On June 3, 2014, probate judge Christine Butts signed the unlawful Order of Transfer of Federal Cause No. 4:12-cv-00592; Candace Louis Curtis vs. Anita Kay Brunsting et al., to probate court No. 4. The remand was signed May 15th,

[12] Exhibit J2, Motion to Enter Transfer Order
[13] Exhibit K1 Motion to Remand
[14] Exhibit X Order denying Plaintiff's Motion for Rule 60 Relief.

2014,[15] with Judge Hoyt unaware that the case was never removed to his court to merit remand. *See Order Granting Plaintiff's Motion to Remand and Court's Report denying CURTIS' Rule 60 Relief dated September 30, 2020, admitting that remand was an improper remedy*, but asserting that the federal court had lost jurisdiction of the case. Though JASON OSTROM never entered an appearance in probate court No. 4 to give him authority to act on CURTIS' behalf, he signed the Transfer Order granted June 3, 2014[16]. The transfer Order was signed to render CANDACE CURTIS' federal claims "ancillary to" or "incident to" an existing estate, when no estate was open since April 5, 2013.

39. CANDACE CURTIS' federal case was allegedly made part of the probate court record on February 9, 2015, designated *ancillary case 412249-402, the Estate of Nelva Brunsting* instead of the appropriate caption, Cause No. 4:12-cv-00592; *Candace Louise Curtis vs. Anita K. Brunsting et al.*

40. On March 16, 2015, an order was signed by Judge Christine Butts of Probate Court No.4, consolidating CARL BRUNSTING'S declaratory judgment action and CANDACE CURTIS' federal claims into *Cause No. 412429-401[17], the second Estate of Nelva Brunsting.* CURTIS' status as the PLAINTIFF suddenly changed to nominal defendant and the caption of the federal matter disappeared, bringing into question the very existence of CURTIS' federal claims, which appeared to vanish into thin air.

41. On or about February 17, 2015, and despite the closed probate and his incapacity, CARL BRUNSTING resigned as Independent Executor of the *Estate of Nelva Brunsting.* Two years after the estate was closed, CARL BRUNSTING attempted to unlawfully substitute his wife, DRINA BRUNSTING, as Independent Executor, when CANDACE CURTIS was named

[15] Exhibit K2, Order to remand
[16] Exhibit L1, Order of Transfer dated June 3, 2014
[17] Exhibit L2, Agreed Consolidation Order

successor Independent Administrator under the applicable will—and there was nothing left to administer in a closed estate. *See Will of Nelva Brunsting filed as Cause No. 412249 in Harris County Probate Court No. 4.*

42. CARL BRUNSTING'S lack of capacity deprived him of the ability to resign, as well as standing to serve, requiring a Court order to appoint a successor independent administrator—something that was not legally possible since the estate was closed on or about April 5, 2013. No independent administrator has been appointed for the closed estate since then.

43. Pursuant to Texas Estates Code Section 32.001[18] f/k/a Tex. Prob. Code Section 5A, the Vacek and Freed malpractice action was transferred to Probate Court No. 4 on April 4, 2019, as an ancillary case to the closed *Estate of Nelva Brunsting and designated* Cause No. 412249-403.

44. Though Cause Numbers 412249-401 (Estate of Nelva Brunsting)[19], 412249-402 (Curtis vs Brunsting designated Estate of Nelva Brunsting and later consolidated with 401), 412249-403 (Legal malpractice action against estate planning attorneys, Vacek and Freed filed by CARL BRUNSTING), 412249-404 (Statutory Bill of Review) and 412249-405 (severed claims of CARL BRUNSTING vs. AMY AND ANITA BRUNSTING from 401 on March 11, 2022) were all deemed ancillary matters to the *Estate of Nelva Brunsting* (originally filed as 412249), the Estate had been closed since April 5, 2013. This left no estate for any of these matters to be deemed ancillary to.

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[18] Sec. 32.001. GENERAL PROBATE COURT JURISDICTION; APPEALS. (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.(b) A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.

[19] Cause No. 412249-401 allegedly included claims and counterclaims between CARL BRUNSTING (incapacitated since 2015 when he resigned as independent administrator) and CAROL BRUNSTING, claims and counterclaims between CARL BRUNSTING and CO-TRUSTEES, AMY AND ANITA BRUNSTING (similar to the claims asserted against CO-TRUSTEES by CANDACE CURTIS), and the federal lawsuit filed by CANDACE CURTIS against ANITA AND AMY BRUNSTING (CO-TRUSTEES). See Cause No. 412249-401.

45. After consolidating CURTIS' federal claims with Cause No. 412249-401 in 2015, the Court recently severed CURTIS' claims against AMY AND ANITA BRUNSTING[20], along with CO-TRUSTEES' counterclaim for forfeiture of CANDACE CURTIS' vested share of a spendthrift trust, which is not alienable or subject to claims of creditors. *See Response to Candace's Motion for Distribution of Trust Funds and Response to Carl's Motion for Distribution of Trust funds[21], in which Defendants admit:*

1. Distributions to pay legal-fee creditors are not authorized by the trust and therefore, the motions must be denied

2. Distributions to pay legal-fee creditors are prohibited by the trust, and therefore, the motions must be denied.

3. The Court lacks jurisdiction to decide the distributions for legal-fee creditor issue because there are no allegations of fraud, misconduct, or clear abuse of discretion with respect to Candace's and Carl's request that the trust pay their attorneys' fees.

46. Despite the admissions above, CO-TRUSTEES' seek over $537,000 in attorneys' fees from CURTIS' personal asset spendthrift trust and/or share of the BRUNSTING FAMILY TRUST, which is immune from judgment creditors and not alienable, voluntarily or involuntarily by this Court's Order.

47. On June 12, 2020, CANDACE CURTIS registered the federal lawsuit was a foreign judgment in *Harris County District Court No. 151, Cause No. 2020-35401*[22], seeking enforcement of the memorandum and order granting Preliminary Injunction, issued by Judge Hoyt April 19, 2013. According to statute, the registration of foreign judgment immediately became an enforceable judgment in Texas, requiring the trustees to distribute the trust in

[20] Exhibit M, Order of Severance dated March 11, 2022.
[21] Exhibit N, *See Response to Candace's Motion for Distribution of Trust Funds and Response to Carl's Motion for Distribution of Trust funds*
[22] Exhibit O, Petition to register foreign judgment

accordance with Article X by creating 5 separate personal asset trusts. The Order is enforceable in Texas and may not be violated regardless of the probate court's attempts to evade it. CURTIS' interest vested on the date of the surviving settlor's death, November 11, 2011. It has at all times been part of spendthrift trusts and is not alienable or subject to judgment creditors' claims.

48. On or about March 11, 2022, the Court granted CO-TRUSTEES' motion for severance of CARL'S lawsuit against the CO-TRUSTEES, designating the severed matter Cause No. 412249-405. The severance was subsequent to the CO-TRUSTEES Rule 11 Agreement with CARL BRUNSTING (void for CARL'S incapacity to sign) to forego CO-TRUSTEES' claim for forfeiture against CARL BRUNSTING only but not CANDACE CURTIS, when CARL'S claims against them were nearly identical to CURTIS' claims. This breached CO-TRUSTEES' duty of loyalty and equal treatment of the beneficiaries to CURTIS.

49. On February 25, 2022, Kathleen Stone appeared in place of Probate Court No. 4 Judge James Horwitz for a pre-trial conference and hearing on COTRUSTEES' Motion for Sanctions and contempt and to exclude evidence against CURTIS. **Without first rendering summary judgment against CURTIS in open court, Stone simply announced that she had talked to Judge Horwitz and was granting CO-TRUSTEES' Motion for summary judgment against CURTIS.**[23] The order was based upon the void August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to Living Trust Agreement.

50. The Court failed to consider the multi-part response to summary judgment filed by CURTIS in 2015 and 2021, and failed to consider Judge Hoyt's Memorandum and order of Preliminary Injunction or the Special Master's Report, which proved CO-TRUSTEES breached their fiduciary duties and engaged in self-dealing, granting the untimely Motion against CURTIS. The February 25, 2022, Order purports to unlawfully dispose of all of her claims (including

[23] Exhibit P, Transcript of Oral Hearing February 25, 2022, Exhibit S, February 25, 2022, Order.

declaratory judgment, breach of fiduciary duty, conversion, fraud, intentional infliction of emotional distress) and subject her inalienable 1/5 interest in the spendthrift trusts to the claims of CO-TRUSTEES' attorneys for fees.

51. The August 25, 2010, QBD was not sworn to by CO-TRUSTEES as legitimate, not properly in evidence, and was void on its face by the lack of two witnesses—rendering it severable from the trust. This meant that the only "no contest" provision applicable was the clause in the 2005 Restatement.

52. KATHLEEN STONE abused her discretion in signing the void February 25, 2022, Order, which must be vacated and set aside for the reasons stated herein.

53. CURTIS has objected to KATHLEEN STONE as a former judge without a bond and oath on file, required by the Estates Code, Government Code and Texas Constitution. *See Objection to Former Judge Kathleen Stone for which Stone should have disqualified herself and voided the order.*[24]

IV. THE BRUNSTING FAMILY LIVING TRUST

54. On October 10, 1996, ELMER AND NELVA BRUNSTING established the BRUNSTING FAMILY LIVING TRUST, known as the:

ELMER H. BRUNSTING and NELVA E. BRUNSTING, Trustees, or the Successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended. ("BRUNSTING FAMILY LIVING TRUST")

And/or

[24] Exhibit R, *See Amended Objection to Former Judge Kathleen Stone.*

ELMER H. BRUNSTING and NELVA E. BRUNSTING, Trustees, or the successor trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

55. On January 12, 2005, the 1996 BRUNSTING FAMILY LIVING TRUST was amended and superseded in its entirety by the 2005 Restatement to the Brunsting Family Living Trust. ANITA KAY RILEY N/K/A ANITA BRUNSTING was removed as successor trustee by the 2005 Restatement and CARL BRUNSTING AND AMY BRUNSTING were designated successors, with CANDACE CURTIS sole alternate.

56. Article IC of the Restatement states that the trust was created for the use and benefit of ELMER H. BRUNSTING AND NELVA E. BRUNSTING, and to the extent provided by the trust, for other trust beneficiaries listed as:

CANDACE LOUIS CURTIS	Born March 12, 1953,
CAROL ANN BRUNSTING	Born October 16, 1954,
CARL HENRY BRUNSTING	Born July 31, 1957,
AMY RUTH TSCHIRHART	Born October 7, 1961,
ANITA KAY BRUNSTING	August 7, 1963,

57. Article IV was subsequently revoked and amended September 6, 2007, by the 1st Amendment, which superseded the Restatement's Article IV in its entirety.

58. Elmer was declared non compos mentis on June 9, 2008. No changes could be made to the Decedent's trust after that date, including appointment of successor trustees.

59. While a QBD properly executed by the surviving founder could alter the disposition of a Founder's share of trust assets, a QBD did not allow any amendment to change the designation of successor trustees after the death or incapacity of either SETTLOR, which occurred June 9, 2008—when ELMER was declared non compos mentos.

60. On July 1, 2008, an Appointment of Successor Trustee was allegedly executed by Nelva *based on and after Elmer's incompetence*, but this document is void for contradicting the trust as

a prohibited amendment after ELMER was no longer able to make legal decisions.[25] ELMER BRUNSTING did not sign the document. Since ANITA BRUNSTING was removed by the Article IV of the 2005 Restatement and AMY BRUNSTING was removed by the 1st Amendment (replacing Article IV in its entirety) this purported July 1, 2008, Appointment of Successor Trustee is void.

61. NELVA BRUNSTING executed a Qualified Beneficiary Designation on her share June 15, 2010[26], for the purpose of permitting CURTIS to receive an early distribution of her inheritance due to her son's medical needs. This was consistent with NELVA'S authority to alter the disposition of ***her share of the Survivor's trust***. It did not alter the designation of successor trustees in the trust document and could not alter the disposition of ELMER'S share. *Exhibit C, 6/15/10 Qualified Beneficiary Designation.*

62. Clearly recognizing the July 1, 2008, power of appointment to be void, Vacek and Freed drafted a Qualified Beneficiary Designation and Testamentary Power of Appointment, naming ANITA KAY BRUNSTING as Successor Trustee. DEFENDANTS allege that NELVA BRUNSTING signed the document on August 25, 2010 ("8/25/10 QBD"). *See 8/25/10 QBD and Testamentary Power of Appointment.* Given the fact that the 8/25/10 QBD was a testamentary instrument that only became effective, if at all, upon the death of NELVA BRUNSTING, it could only be enforced if it satisfied the statutory prerequisites of a testamentary instrument, as provided for in Article 251.051 of the Texas Estates Code. The 8/25/10 QBD is void on its face for the lack of signatures by two witnesses. Article 251.051 of the Texas Estates Code.

63. CARL BRUNSTING was in a coma July 3, 2010, leaving CANDACE CURTIS the sole

[25] Exhibit S, July 1, 2008, Appointment of Successor Trustee
[26] Exhibit C, 6/15/10 QBD and D, 8/25/10 QBD and Testamentary Power of Appointment.

successor trustee via the 2007 1st Amendment to the Trust. This is a fact the court was required to determine by virtue of CURTIS' declaratory judgment action.

64. ELMER BRUNSTING passed away April 1, 2009, at which time the trust was divided into a Decedent's and Survivor's Trust. The surviving founder, NELVA BRUNSTING passed away November 11, 2011, which is the date CANDACE CURTIS' share of the trusts vested and was required to be distributed to a spendthrift trust for CANDACE'S benefit for life. After payment of certain last expenses, the trusts were required to be distributed within a reasonable period of time, according to Article X of the Restatement.[10]

65. Article X required the TRUSTEE(S) to distribute the remaining trust(s) assets at the time of the SURVIVING SETTLOR'S death (or a reasonable time thereafter) in equal shares of 1/5 to CANDACE LOUISE CURTIS[27], CAROL ANN BRUNSTING, CARL HENRY BRUNSTING, AMY RUTH TSCHIRHART n/k/a AMY BRUNSTING, and ANITA KAY BRUNSTING, subject to any valid QBD altering a settlor's share and the payment of the following expenses: (a) expenses of last illness, funeral and burial expenses of the surviving founder, legally enforceable claims against the surviving founder, (c) expenses of administering the surviving founder's estate, (d) any inheritance, estate or other death taxes payable by reason of the surviving founder's death, together with interest and penalties thereon, and (e) statutory or court ordered allowances for qualifying family members. *Article VIII D, Restatement, Exhibit A.* The same expenses identified above were permitted to be paid from the DECEDENT'S share upon ELMER BRUNSTING'S death.

[27] While the entire trust was inalienable and not subject to claims of the beneficiaries' creditors (including judgment creditors as in this case), CANDACE CURTIS'1/5 share vested 11/11/11 and was to be held in a spendthrift trust, which was not alienable or subject to claims of creditors because she was not the trustee of her personal asset trust required to be created by the TRUSTEE(S), but admittedly not done in breach of their fiduciary duties.

66. Although the BRUNSTING FAMILY LIVING TRUST contains a "no contest clause", it does not prohibit beneficiaries from seeking to compel the trustees to account, distribute, or perform their fiduciary duties and does not prohibit any beneficiary from filing suit on any valid claims unless the beneficiary brought such claim to enlarge their share of the trust at the expense of another beneficiary. The "no contest" clause provides in Article XI C:

> ...Founders do not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact unless the proceeding is originated by the Trustee or with the Trustee's written permission.
>
> Any person, agency or organization who shall originate (or who shall cause to be instituted) a judicial proceeding to construe or contest this trust, or seeking to impress a constructive or resulting trust, or alleging any other theory which, if assumed as true, would enlarge (or originate) a claimant's interest in this trust...without the trustee's written permission, shall forfeit any amount to which that person, agency, or organization is or may be entitled and the interest of such litigant or contestant shall pass as if he or she had predeceased us, regardless of whether or not such contestant is a named beneficiary. Restatement XI.

66. CANDACE LOUIS CURTIS never filed any claim to enlarge her share of the trust at the expense of another beneficiary, but sought to enforce the trust in accordance with the settlor's intentions at all times. The 2013 federal lawsuit and preliminary injunction proves this. Id.[28]

67. Similarly, CANDACE CURTIS never challenged the "trust" but only the void 8/25/10 QBD which violated the express terms of the trust and is void on its face, rendering severable. CANDACE CURTIS did not assert any cause of action which would "enlarge" her interest in the trust. Based on Article XIV O and Article XII of the Restatement (imposing liability on the Trustees for bad faith, willful misconduct and/or gross negligence), CANDACE CURTIS'

[28] Nor did CURTIS need AMY OR ANITA'S permission to file suit because she is the de jure sole trustee of both trusts by the terms of the instrument itself.

lawsuit against the Co-trustees did not violate the "no contest" clause of the Restatement. The August 25, 2010, QBD is void and severed from this trust under the Article 251.051 of the Texas Estates Code and the terms of the Decedent's and Survivor's Trusts.

68. ANITA AND AMY BRUNSTING are the parties who asserted a theory which, if assumed true, would enlarge their share at CURTIS' expense. CO-TRUSTEES violated the no contest clause of the Restatement Article XI C. This necessarily means that their shares flow to their descendants, *See Exhibit A Restatement XI C and Exhibit D, August 25, 2010, QBD, respectively.*

69. AMY AND ANITA BRUNSTING challenged the trust by the very execution of the void, severable 8/25/10 QBD, contradicting Article XI Section C of the Restatement. According to the irrevocable trust and CURTIS' vested interest in her 1/5 share, even had she violated Article XI Section C, her interest would flow to her descendants per stirpes, not increase the share of any beneficiary or be subject to any judgment creditor, as prohibited by the "no contest" clause of Article XI Article C of the Restatement cited herein.

70. Restatement Article XIV Section O provides:

> If any provision of this agreement is declared by a court of competent jurisdiction to be invalid for any reason, such invalidity shall not affect the remaining provisions of this agreement. The remaining provisions shall be fully severable, and this agreement shall be construed and enforced as if the invalid provision had never been included in this agreement.

71. Restatement Article XI Section C, provides the standard for forfeiture to one's descendants:

> ...originating (or causing to be instituted) a judicial proceeding to construe or contest this trust instrument...or alleging any other theory which, ***if assumed as true, would enlarge (or originate) a claimant's interest in this trust...***

72. The unsworn Qualified Beneficiary Designation and Testamentary Power of Appointment dated August 25, 2010, is void ab initio because it violates the trust, does not specifically amend the prior unrevoked Qualified Beneficiary Designation, dated June 15, 2010, and fails for the lack of two witnesses as a testamentary instrument, notwithstanding the fact that it is not in evidence by the failure of DEFENDANTS to include an affidavit attesting to its validity and authenticity.[29]

73. Significantly, the 8/25/10 QBD does not have to be valid for ANITA and AMY BRUNSTING'S shares to be forfeited to their descendants. Article XI Section C assumes the theory to be true, looking at the intent of the beneficiaries in bringing the claim "to enlarge their share." By attempting to unlawfully take CANDACE'S share to pay their attorneys' fees incurred in defending themselves, ANITA AND AMY BRUNSTING attempted to enlarge their share at CURTIS' expense, thereby forfeiting their shares to their descendants.

74. This is without even considering whether the document is digitally forged—of which there is some evidence, but Plaintiff Curtis does not have the burden of bringing forth evidence. Federal Judge Hoyt granted CURTIS injunctive relief, recognizing irregularities in the alleged trust documents produced by Anita Brunsting, which were missing pages, among other problems. The 8/25/10 QBD was produced to CURTIS in three different versions as "duplicate originals".[30] The three QBD's are not reflected in CANDACE FREED'S notary logs or notes.[31] The Case History Notes provided in discovery by Candace Freed have an approximate 2-week gap both before and after August 25, 2010, in notary entries. NELVA BRUNSTING certified by handwritten note that she did not execute the 8/25/10 QBD, re-appointing ANITA BRUNSTING.

75. In a further effort to convert CURTIS' vested interest, ANITA and AMY BRUNSTING'S attorneys filed a traditional and no evidence motion for summary judgment against CANDACE

[29] Exhibits C and D.
[30] Exhibit V, 3 signature pages of 8/25/10 QBD & Testamentary Power of Appointment
[31] Exhibit T and U, Log and Notes of Candace Freed produced with oral deposition.

CURTIS in June of 2015 and November 5, 2021, alleging that she forfeited her share to them by violating the void 8/25/10 QBD—not in evidence. The 2015 Motion for Summary Judgment was answered by CURTIS in multiple parts as well as the November 5, 2021, untimely Motion for summary judgment, but the Court failed to timely rule upon the Motions prior to the expiration of the deadlines set forth in 2021 docket control order.[32]

76. ANITA AND AMY BRUNSTING'S traditional and no evidence motion for summary judgment was untimely filed on November 5, 2021, beyond the October 15, 2021, deadline set by the Court's June 2021 docket control order, without evidence of a valid 8/25/10 QBD and Testamentary Power of Appointment.

77. CURTIS nevertheless filed a further 5-page response to said motion and the court set the matter for consideration by submission on December 14, 2021—the deadline for hearing summary judgment motions. The Court's February 25, 2022, Order has not been rendered upon or signed by the presiding judge, but by a former judge without notice to the parties and admittedly without having reviewed the Motion for Summary Judgement—beyond the deadline for ruling on the Motion.

78. Furthermore, sufficient evidence exists in the record to support CURTIS' claims for conversion, breach of fiduciary duty, fraud, constructive trust, and other claims, via the Federal Court's 2013 Preliminary Injunction granted to CANDACE CURTIS, finding a substantial likelihood that she would prevail on her claims. Likewise, there is evidence of willful misconduct and bad faith on the part of ANITA BRUNSTING, who was found to have engaged in prohibited self-dealing and comingling, with irregularities in the trust documents presented to the federal judge.

[32] Exhibit Y, Docket Control Order June 2021

79. The special master's report proves that ANITA BRUNSTING engaged in fraud on the beneficiaries through the prohibited self-dealing and comingling of more than $150,000 after Nelva resigned as trustee and Anita took over. The Special Master's Report reveals that CO-TRUSTEES wasted $180,000 in taxes paid as a result of failing to distribute the income as the trust required.

80. CO-TRUSTEES' admit breaching their fiduciary duties by failing to account and distribute as required by Article X. *See Federal Preliminary Injunction, memorandum and order, Federal Master's Report, and discovery responses of AMY AND ANITA BRUNSTING, all revealing breaches of fiduciary duties, including but not limited to the duty to account, distribute, fully disclose all relevant information to the beneficiaries, treat all beneficiaries equally, refrain from self-dealing, avoid willful misconduct, bad faith and/or gross negligence.* AMY'S attorney, Neil Spielman, admitted on the record that the trust was not distributed for 11+ years due to CANDACE CURTIS' initiation of litigation to make them distribute the funds. *See Unsworn Declaration of Candice Schwager.*

81. Proof of self-dealing by ANITA is the fact that the trust did not authorize "mommy" to allow ANITA BRUNSTING the right to give monetary gifts to herself of $150,000+ while serving as trustee. While the trust allowed either Settlor to make gifts during their lifetimes via a valid QBD, Article VI A specifically states, **"Neither of us shall have the power to direct our Trustee to make gifts of any trust principal or income."** Restatement VIA. This necessarily dictates that ANITA BRUNSTING AND AMY BRUNSTING engaged in fraud on the beneficiaries and prohibited self-dealing of hundreds of thousands of dollars when neither SETTLOR had the power to authorize a TRUSTEE to make such gifts. This is a breach of fiduciary duty, which the Court should not have ignored.

82. CO-TRUSTEES admit breach of fiduciary duty by acknowledging that they have still not distributed the trust into 5 personal asset trusts and/or shares, as required reasonably soon after the death of NELVA BRUNSTING. They ADMIT that they have not distributed the assets TO ANY OF THE BENEFICIARIES, due to CURTIS' initiation of litigation This excuse is not permitted under the law or the trust.

83. CANDACE CURTIS' share vested on November 11, 2011, and was required to be distributed.[33] Notably, her share has not been distributed to her after 11+ years, which is evidence of breach of fiduciary duty via DEFENDANTS' own admissions.

84. A Pre-Trial Conference was set for February 24, 2022, at 10:00 a.m. At the last minute a hearing was noticed for February 25, 2021, at 3:00 p.m. (instead of 2022), to hear the Third Contempt Motion and the Motion to Exclude Testimony/Evidence, and the Pretrial Conference originally set for hearing on February 24, 2022, was rescheduled to February 25, 2022, at 3:00 p.m. with a defective notice stating that hearing would occur February 25, 2021.

85. Without notice that former judge Kathleen Stone would be appearing in place of Probate Court No. 4's Judge James Horwitz and the opportunity to object, and with no bond or oath on file in the Harris County clerk's office, Kathleen Stone appeared February 25, 2022. Without RENDERING judgment in open court on Defendants' motion for summary judgment, she announced she had spoken to Judge Horwitz and would be signing the Order[34]. See Transcript of *February 25, 2022, hearing, inaccurately referring to Stone as the Judge of Probate Court No. 4.*

86. On February 25, 2022, The Pre-Trial Conference did not occur and the two motions to be heard were never heard. Stone admits to not reading the motion and states on the record that she

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[33] Article X states that if CANDACE CURTIS shall predecease the settlors or die before the complete distribution of her share, the balance of her share shall be distributed to CANDACE'S then living descendants, per stirpes.

[34] Exhibit P, Transcript of Oral Hearing February 25, 2022

spoke with Judge Horwitz and was signing the Order, disinheriting CURTIS, and purporting to unlawfully distribute her share to CO-TRUSTEES' attorneys. The Order further unlawfully provided that attorneys' fees of CO-TRUSTEES would be paid from CURTIS' share when her share was not subject to claims of judgment creditors or alienable – whether voluntary or involuntary.

87. With evidence to support CURTIS' claims in the record since 2013, JUDGE KATHLEEN STONE signed by February 25, 2022, Order, disposing of CANDACE CURTIS' claims and purporting to subject her 1/5 interest and/or personal asset spendthrift trust to the opposing counsel's attorneys' fees. No statute or contract authorized attorneys' fees from CANDACE CURTIS to Neil Spielman or Stephen Mendel and her share vested November 11, 2011—making it inalienable and not subject to the claims of judgment creditors.

88. Furthermore, JUDGE KATHLEEN STONE abused her discretion in signing the February 25, 2022, Order[35], purporting to alienate her share of the trust for DEFENDANTS' attorneys' fees, when it was not subject to the claims of judgment creditors as a vested interest in a spendthrift trust and no contract or statute authorizes fees against CANDACE CURTIS by DEFENDANTS' attorneys. Stone subsequently signed an Order denying CURTIS' Bill of Review, challenging the court's jurisdiction—to which CURTIS objects.

89. On or about March 23, 2022, CURTIS filed a written objection for former judge serving in this case, based on her lack of oath and bond. This requires that STONE disqualify herself and void the February 25, 2022, Order granting summary Judgment and March 11, 2022, order denying CURTIS' bill of review, challenging the jurisdiction of this court.

[35] Exhibit Q, Order of February 25, 2022.

V. ARGUMENTS AND AUTHORITIES

A. This Court lacks subject matter jurisdiction over the BRUNSTING FAMILY LIVING TRUST by Tex. Est. Code 32.005, 32.006, 32.007, lack of a probate estate or independent executor, Curtis vs. Brunsting, Registration of Foreign Judgment, Void Remand Order and Void Order of Transfer

91. Section 115.001 of the Texas Property Code provides the district court with exclusive jurisdiction over trusts in Texas, except for the authority expressly provided to the statutory probate court. Tex. Prop. Code 115.001 provides:

> 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, including proceedings to:
> (1) construe a trust instrument.
> (2) determine the law applicable to a trust instrument.
> (3) appoint or remove a trustee.
> (4) determine the powers, responsibilities, duties and liability of a trustee.
> (5) ascertain beneficiaries
> (6) make a determination of fact affecting the administration, distribution, or duration of a trust.
> (7) determine a question arising in the administration or distribution of a trust
> (8) relieve a trustee from any or all of the duties, limitations and restrictions otherwise existing under the terms of the trust instrument or of this subtitle.
> (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and
> (10) surcharge a trustee.
>
> **(a-1)**
> The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).
> **(b)**
> The district court may exercise the powers of a court of equity in matters pertaining to trusts.
> **(c)**
> The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision.

(d)
The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on:
(1)
a statutory probate courts.

92. CANDACE CURTIS filed her suit for accounting, disclosure, breach of fiduciary duty, conversion, fraud, intentional infliction of emotional distress (and ultimately, declaratory judgment) in federal district court for the Southern District of Texas under diversity jurisdiction. The Fifth Circuit held that jurisdiction was proper in the U.S. District Court for the Southern District of Texas, Houston Division. *Curtis vs. Brunsting. Id.* The Fifth Circuit court of appeals held that the probate exception to federal jurisdiction did not apply, reversing and remanding to U.S. District Court Judge Kenneth Hoyt for further proceedings.

93. After oral hearing and consideration of the evidence, Judge Kenneth Hoyt issued a preliminary injunction over the trust in favor of CANDACE CURTIS against CO-TRUSTEES, ANITA K BRUNSTING AND AMY BRUNSTING. Judge Hoyt granted CURTIS' Application for Preliminary Injunction April 13, 2013, and issued a Memorandum and order on the 19th day of April 2013. Judge Hoyt detailed findings of irregularities in purported trust documents and held that CURTIS was substantially likely to prevail on her claims against ANITA AND AMY BRUNSTING. *See Memorandum and Order of Preliminary Injunction issued April 19, 2013.*

94. CURTIS was admonished to retain an attorney for discovery purposes, so she hired attorney JASON OSTROM. Almost immediately after being retained, JASON OSTROM committed attorney misconduct by amending her Complaint to pollute diversity, filing a motion to remand her case to probate court, when it had never been removed from probate court, and filing a motion to enter transfer order in the probate court, when he never officially appeared for CANDACE CURTIS in probate court and lacked authority to do so.

95. A claim for declaratory judgment was added and CARL BRUNSTING was included as an involuntary plaintiff when the proper procedure for declaratory judgment actions was to sue CARL BRUNSTING as a nominal defendant, as was done with CAROL BRUNSTING.

96. Though CURTIS' federal case, *Cause No. 4:12-cv-00592* had never been filed in or removed from Probate court No. 4 of Harris County, Texas, CURTIS' counsel caused the matter to be unlawfully "remanded" to Probate Court No. 4 and caused Judge Christine Butts to sign a void order accepting transfer. *See Order for Remand, Order accepting transfer signed by Judge Christine Butts, and Order denying Rule 60 Motion for Relief of Judge Kenneth Hoyt, in which Judge Hoyt acknowledges that remand was improper.* The only procedure to transfer a case between state and federal courts is removal or remand. Consequently, both orders are void—a fact acknowledged by Judge Hoyt in his order denying CURTIS' Rule 60 Motion to reopen the case.

97. The Transfer Order states that it is pursuant to Tex. Est. Code. 32.005, 32.006, and 32.007, but none of these statutes apply in this scenario because the case was never filed in probate court and original and exclusive jurisdiction is in the district court. Cases may not be transferred from federal to probate court other than removal and remand. No estate was pending for *Curtis vs. Brunsting* to be deemed ancillary to, and the case has already been registered in the district court, with original jurisdiction. The Petition to Register the Foreign Judgment is a final order, which has not been transferred.

98. Sections 32.005, 32.006 and 32.007 provides as follows:

> Sec. 32.005. EXCLUSIVE JURISDICTION OF PROBATE PROCEEDING IN COUNTY WITH STATUTORY PROBATE COURT. (a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is

concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court.

Sec. 32.006. JURISDICTION OF STATUTORY PROBATE COURT WITH RESPECT TO TRUSTS AND POWERS OF ATTORNEY. In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of:
(1) an action by or against a trustee.
(2) an action involving an inter vivos trust, testamentary trust, or charitable trust;
(3) an action by or against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
(4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Sec. 32.007. CONCURRENT JURISDICTION WITH DISTRICT COURT. A statutory probate court has concurrent jurisdiction with the district court in:
(2) an action by or against a trustee;
(3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code;
(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;

99. For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. In re Hannah, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101).

100. Finally, a probate court exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX. EST. CODE ANN. § 32.001(b). Yet for a probate court to have such authority to exercise jurisdiction over matters incident to an estate, it is axiomatic that there must necessarily be a probate proceeding then pending in such court. Frost Nat'l Bank, 315 S.W.3d at 506; Narvaez, 564 S.W.3d at 57." *Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021),*

Sabine Gas Transmission Co. v. Winnie Pipeline Co., 15 S.W.3d 199, 200 (Tex. App. 2000).

96. While Section 115.0001 provides a statutory probate court with concurrent jurisdiction with the district court, who have original and exclusive jurisdiction over living trust lawsuits, except for that provided to statutory probate courts, in order to transfer a case from even District Court to probate, an estate must be pending, rather than closed. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 932 n.1 (Tex. App. 1997).

97. The Estate of NELVA BRUNSTING was closed April 5, 2013, leaving no possibility for any subsequently transferred case to be deemed "ANCILLARY" OR "INCIDENT TO". Tex. Est. Code. 32.005, 32.006, 32.007.

98. CURTIS' federal lawsuit was never lawfully transferred to probate court no. 4 and subject matter jurisdiction cannot be waived or agreed to. CURTIS' lawsuit was assigned as ancillary *Cause No. 412249-402* and renamed *Estate of Nelva Brunsting* before being "consolidated" with *Cause No. 412249-401*, a declaratory judgment / breach of fiduciary duty lawsuit filed by CARL BRUNSTING against the CO-TRUSTEES which was wrongfully designated *Estate of Nelva Brunsting*.

99. Both "ancillary" matters involved solely the BRUNSTING FAMILY LIVING TRUST and were never ancillary to any pending estate because the ESTATE OF NELVA BRUNSTING, Cause No. 412249, was closed April 5, 2013. *See approval of inventory and drop order, signed April 5, 2013.* Without an estate, no lawsuit could lawfully be transferred to the probate court as an ancillary matter.

100. Even had the estate not been closed, the court would have lost jurisdiction over ancillary matters when the inventory was approved and the estate matter closed. In *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex.App.-Austin 1997, no pet.), the court held that a probate court abused its discretion in continuing to exercise ancillary jurisdiction over pendent claims

once the estate was dismissed from the probate proceeding. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex.App.-Austin 1997, no pet.) The court of appeals held that "the probate court had no discretion to continue to exercise ancillary jurisdiction after it dismissed the estate from the proceeding." *Id.* at 934. The court explained its holding by noting that a probate court's ancillary jurisdiction arises only over a claim that bears some relationship to the estate. *See id.* at 933. If the estate is dismissed from the probate proceeding, the claim loses its ancillary nature since there is no claim within the court's jurisdiction to which the ancillary or pendent claim relates. *See id.* Because it found the claims against the city to be ancillary or pendent to nothing, the court held the probate court lost jurisdiction.[36] Id. See also *Sabine Gas Transmission Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 200-01 (Tex. App. 2000).[14]

102. In Texas, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997). *See also Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581 (Tex. 1993).* This is because "[l]oss of jurisdiction is characteristic of specialized courts." Id. *See In re Estate of Hanau,* 806 S.W.2d 900, 904 (Tex.App. — Corpus Christi 1991, writ denied) (court lost jurisdiction to remove independent executrix after estate was closed). "

103. In *Bailey v. Cherokee County Appraisal District,* 862 S.W.2d 581 (Tex. 1993), the Texas Supreme Court stated that a trial court must have a probate case pending to exercise its jurisdiction over matters "incident to an estate." *See also In re Estate of Hanau,* 806 S.W.2d at

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[36] A court may exercise only the jurisdiction accorded it by the constitution or by statute. *City of Beaumont v. West,*484 S.W.2d 789, 791 (Tex.Civ.App. — Beaumont 1972, writ ref'd n.r.e.). Subject matter jurisdiction may not be enlarged by an agreement between the parties or by a request that the court exceed its powers. *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 445 (Tex. 1993); *Burke v. Satterfield,* 525 S.W.2d 950, 953 (Tex. 1975). A probate court is a specialized court that exists primarily for the limited purpose of administering decedents' estates. *See generally* Tex. Prob. Code §§ 5, 5A (West Supp. 1997). *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997)

904 (court lost jurisdiction to remove independent executrix after estate was closed). The Supreme Court held that the probate court may only exercise "ancillary " or "pendent" jurisdiction over a claim that bears some relationship to the estate. *Bailey v. Cherokee County Appraisal District,* 862 S.W.2d 581 (Tex. 1993)Once the estate settles, the claim is "ancillary " or "pendent" to nothing, and the court is without jurisdiction. Id. If it ever had jurisdiction, which is denied, jurisdiction was lost April 5, 2013. This made the Transfer Order void, even if it were possible to "transfer" a case from federal to state court –other than by removal or remand, which it is not.

104. An analogous situation occurs in cases in which a court loses jurisdiction over an indispensable party. The court in which the proceeding was pending loses subject matter jurisdiction over the cause when an indispensable party is nonsuited. *Travis Heights Improvement Ass'n v. Small,* 662 S.W.2d 406, 413 (Tex.App. — Austin 1983, no writ); *see also Royal Petroleum Corp. v. McCallum,* 135 S.W.2d 958 (1940). The Goodman Court held that the estate is an "indispensable party" to any proceeding in the probate court and the estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997). *Smith Inc. vs. Sheffield, No. 0302-00109-CV (Tex. App.—Austin, 2003).*

105. The estate has been closed and a drop order was issued since April 5, 2013. Furthermore, CARL BRUNSTING resigned due to incapacity on February 17, 2015. Therefore, neither the independent administrator nor the estate are parties to this litigation. Due to the fact that both are indispensable parties to any proceeding in the probate court and the fact that probate has been long since closed, there was no estate pending at the time CANDACE CURTIS' federal case was allegedly remanded and/or transferred to Probate Court No. 4. *Smith Inc. vs. Sheffield, No. 0302-*

00109-CV (Tex. App.—Austin, 2003). This deprives the court of jurisdiction over the alleged ancillary lawsuit of CANDACE CURTIS VS. ANITA K. BRUNSTING et al, Cause No. 4:12cv-00592, U.S. District Court for the Southern District of Texas (Houston Division, 2013).

B. ***Former Judge Kathleen Stone failed to render judgment and lacks authority to sign the Order***

C. CANDACE CURTIS filed an objection and amended objection to any former judge presiding over this case aside from the Honorable Judge James Horwitz on the basis that Judge Horwitz is the only judge with an oath and bond on file in Harris County probate court no. 4. This requires JUDGE KATHLEEN STONE to disqualify herself and void the order granting summary judgment and denying CURTIS' bill of review.

D. When a party files a timely objection to an assigned judge under section 74.053 of the Texas Government Code, the assigned judge's disqualification is mandatory. See TEX. GOV'T CODE § 74.053(a)-(c); *Starnes v. Chapman,* 793 S.W.2d 104, 107 (Tex.App. — Dallas 1990, orig.proceeding). *See Mercer v. Driver*, 923 S.W.2d 656, 658 (Tex.App. —Houston [1st Dist.] 1995, orig. proceeding); Starnes, 793 S.W.2d at 107.

E. Subsections 74.053(b) and (d) allow a party to make one objection to an assigned judge, and unlimited objections to an assigned former judge who was not a retired judge. See TEX. GOV'T CODE § 74.053(b) and (d); Garcia v. Employers Ins. of Wausau, 856 S.W.2d 507, 509 (Tex.App. —Houston [1st Dist.] 1993, writ denied). If the assigned judge overrules a timely section 74.053 objection, that judge's subsequent orders are void and the objecting party is entitled to mandamus relief. See Amateur Athletic Found. v. Hoffman, 893 S.W.2d 602, 603 (Tex.App. — Dallas 1994, orig. proceeding); Rubin v. Hoffman, 843 S.W.2d 658, 659 (Tex.App. — Dallas 1992, orig. proceeding).

F. Section 74.053 Subsection (b) provides:

> If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.

G. Subsection (d) provides:

> A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

H. Texas Government Code Sec. 25.0017 requires visiting judges to take the oath and provides:

> (a) A person who is a retired or former judge shall, before accepting an assignment as a visiting judge of a statutory county court, take the oath of office required by the constitution and file the oath with the regional presiding judge…
> (c) A retired or former judge may be assigned as a visiting judge of a statutory county court only if the judge has filed with the regional presiding judge an oath of office as required by this section.

I. KATHLEEN STONE does not have an oath or bond on file with the presiding judge of Harris County Probate Court. Due to the statutory mandate that any statutory probate judge presiding over this case have an oath of office and bond on file, PLAINTIFF objects to any former or visiting judge hearing this case that does not have both on file with the Harris County Probate Clerk and Harris County Commissioners, including but not limited to KATHLEEN STONE. PLAINTIFF has confirmed that only the HONORABLE JAMES HORWITZ has an oath of office and bond on file to preside over cases in probate court No. 4. Therefore, CURTIS objects to any other assigned judge other than the Honorable Judge James HORWITZ. Accordingly, JUDGE STONE must disqualify herself and void the orders signed.

J. Section 25.0017 (a) requires any visiting judge to take the oath of office required by the Texas Constitution before accepting an assignment as a visiting judge of a statutory probate court and file the oath with the regional. Presiding judge. Tex. Govt. Code. Sec. 25.0017. The Statute requires the regional presiding judge

(b) shall maintain a file containing the oaths of office filed with the judge under Subsection (a).

(c) A retired or former judge may be assigned as a visiting judge of a statutory county court only if the judge has filed with the regional presiding judge an oath of office as required by this section.

112. Section 25.0021 provides:

(b) A person who is a retired or former judge shall, before accepting an assignment as a visiting judge of a statutory probate court, take the oath of office required by the constitution and file the oath with the presiding judge of the statutory probate courts.

(c) The presiding judge shall maintain a file containing the oaths of office filed with the judge under Subsection (b).

(d) A retired or former judge may be assigned as a visiting judge of a statutory probate court only if the judge has filed with the presiding judge an oath of office as required by this section.

(e) When a retired or former judge is appointed as a visiting judge, the clerk shall enter in the administrative file as a part of the proceedings in the cause a record that gives the visiting judge's name and shows that:

(1) the judge of the court was disqualified, absent, or disabled to try the cause;

(2) the visiting judge was appointed; and

(3) the oath of office prescribed by law for a retired or former judge who is appointed as a visiting judge was duly administered to the visiting judge and filed with the presiding judge.

(f) "Administrative file" means a file kept by the court clerk for the court's administrative orders and assigned a cause number. Tex. Govt. Code. Sec. 25.00221.

113. Judge Stone has failed to satisfy the requirements of Section 25.0017 or Section 25.00221 of the Texas Government Code, violating the Texas Constitutional mandate that an oath be on file and statutory requirement for STONE to have a bond on file with the presiding judge of the Harris County probate court.

C. ***CO-TRUSTEES' Motion and the Court's order were untimely***

114. The Court issued a docket control order in June of 2021, setting the deadline for motions for summary judgment to be filed by October 15, 2021. The November 5, 2021, motion for summary judgment was untimely beyond the October 15, 2021, deadline set forth in the June 2021 court's docket control order. Additionally, the court's February 25, 2022, Order granting summary judgment was untimely, beyond the December 31, 2021, deadline for hearing dispositive motions or pleas subject to interlocutory appeal and February 7, 2022, deadline for hearing dispositive motions not subject to interlocutory appeal. Therefore, the February "unnoticed" hearing on Defendants' summary judgment motion was untimely as a matter of law, rendering the February 25, 2022, order voidable and/or void.

115. ANITA AND AMY BRUNSTING'S repeat traditional and no evidence motion for summary judgment was untimely field beyond the deadline set by the Court's June 2021 docket control order. CURTIS nevertheless filed a further 5-page response to said motion and the court set the matter for consideration by submission on December 14, 2021—the deadline for hearing summary judgment motions. The Court's February 25, 2022, Order has still not been rendered upon or signed by the presiding judge, but by a former judge with no authority to rule, render or sign the Order.

D. ***CO-TRUSTEES' Motion fails to identify each element of PLAINTIFF'S claims upon which they allege there is no evidence***

116. The Court unlawfully granted CO-TRUSTEES' "no evidence" motion for summary judgment on PLAINTIFFS' claims ***without pointing to any essential element of PLAINTIFFS' claims upon which they claim there was no evidence.*** PLAINTIFF asserted claims for breach of fiduciary duty, conversion, intentional infliction of emotional distress, fraud, declaratory judgment, constructive trust, as well as suing for an accounting and disclosures. *See Plaintiff's*

Complaint in Cause No. 4:12-cv-00592, U.S. District Court for the Southern District of Texas (Houston Division, 2012) and 2nd Amended Petition filed in this case.

117. Texas Rule of Civil Procedure 166a(i) permits a party to obtain a "no evidence" motion for summary judgment after adequate time for discovery, but **requires the movant to "state the elements as to which there is no evidence." Tex. R. Civ. P. 166a(i). Each element of PLAINTIFF'S claims, upon which DEFENDANTS allege there is no evidence, must be specifically identified. Defendants' Motion failed to do this.**

118. **Defendants pointed to no element of any cause of action upon which Defendants contend there is no evidence, but pointed merely to a list of allegations pled. Plaintiff objects to the failure of DEFENDANTS to identify each essential element of PLAINTIFF'S claims upon which they contend there is no evidence.**

119. Only once the movant satisfies this burden does the nonmovant bear the burden of "'raising a genuine issue of material fact'" for each challenged element . *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002) (quoting Tex. R. Civ. P. 166a(i)). A nonevidence challenge will be sustained when "'(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.'" *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

120. The record reveals substantial evidence to support PLAINTIFFS' claims for breach of fiduciary duty, conversion, fraud, constructive trust, intentional infliction of emotional distress, and declaratory judgment via the federal court's findings in its Memorandum and Order granting

PLAINTIFF extraordinary injunctive relief. *See April 19, 2013, Memorandum and Order and Preliminary Injunction, certified copies attached hereto and incorporated by reference, Special Master's Report.* Based upon PLAINTIFF'S allegations, upon which more than a scintilla of evidence exists in the record, summary judgment was an abuse of discretion.

121. Were this not so, the federal court would not have granted CURTIS a preliminary injunction against CO-TRUSTEES, finding a substantial likelihood that she would prevail on her claims. *See Certified Copies of Preliminary Injunction, Memorandum and Order, Special Master's report, Affidavit of Candace Curtis.* Likewise, there is evidence of willful misconduct and bad faith on the part of AMY AND ANITA BRUNSTING, who were found to have engaged in prohibited self-dealing with irregularities in the trust documents presented to the federal judge. Id.

122. The record already contains more than sufficient evidence that CO-TRUSTEES breached their fiduciary duties (to account, fully disclose, treat all beneficiaries impartially and equally, good faith and fair dealing, not commingle or self-deal), intentionally inflicted emotional distress upon PLAINTIFF (by setting out to disinherit her with a void testamentary Qualified Beneficiary Designation dated 8/25/10), converted her share of the BRUNSTING FAMILY Survivor's and Decedent's Trusts to their own use and benefit, and committed fraud via the use of a fraudulently procured document. PLAINTIFF was also entitled to declaratory judgment of the rights and liabilities of the parties, and she was denied the Constitutional right to due process via jury trial by the Court's February 25, 2022, Order, granting summary judgment on all of her claims.

4. Clearly, the Court also failed to consider CURTIS' multi-part response to DEFENDANTS' 2015 and amended 2021 motions for summary judgment, *July 13, 2015,*

Response to June 26, 2015, no evidence motion for partial summary judgment[37], *Response to Co-trustees' untimely November 5, 2022, Motion*[38], *Memorandum of Law on QBD*[39], *and Addendum to motion for summary judgment*[40], *attached hereto and incorporated by reference.*

5. The Court failed to consider the April 19th Memorandum and Order granting Preliminary Injunction of Judge Hoyt, finding a substantial likelihood that PLAINTIFF would prevail on her claims against CO-TRUSTEES, listing their numerous breaches of fiduciary duty and noting irregularities in the trust documents DEFENDANTS produced. *See Certified Memorandum and Order of Preliminary Injunction granted to CURTIS April 19th, 2013.* The Court failed to consider the Special Master's Report, which proves breach of fiduciary duty.

6. The record already contained more than sufficient evidence that CO-TRUSTEES breached their fiduciary duties (duty to account, fully disclose, duty of loyalty, duty to treat all beneficiaries impartially and equally, duty of good faith and fair dealing, duty not to commingle or self-deal), intentionally inflicted emotional distress upon PLAINTIFF, converted her share of the BRUNSTING FAMILY Survivor's and Decedent's Trusts to their own use and benefit—to pay their attorneys' fees, and committed fraud via the use of a Qualified Beneficiary Designation and Testamentary Power of Appointment that is void on its face, notwithstanding evidence of digital forgery.

13. PLAINTIFF had no burden to produce evidence where sufficient evidence was already in the record and the court could decide summary judgment as a matter of law in CANDACE CURTIS' favor. *See Defendant's exhibits listed above, Federal Affidavit of Candace Curtis*[41], *swearing that all evidence in this case was uniquely in the possession of the defendants,*

[37] Exhibit Z
[38] Exhibit AA
[39] Exhibit BB
[40] Exhibit CC
[41] Exhibit DD.

Preliminary Injunction, Memorandum and order of U.S. District for the Southern District of Texas, Judge Kenneth Hoyt, Special Master's Report, and Registration of Foreign Judgment, citing more than a preponderance of evidence justifying extraordinary injunctive relief and holding that CANDACE CURTIS was likely to win based on the evidence produced. These documents are all part of the record.

E. *The Court violated CURTIS' Constitutional right to due process in failing to declare the August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to living trust void and severable from the trust.*

123. The Court violated CANDACE CURTIS' Constitutional right to due process of law and a jury trial by granting summary judgment on all of her claims and not issuing a declaratory judgment as to the validity of the 8/25/10 QBD at issue in this case. PLAINTIFF pled for declaratory judgment and was entitled to findings of fact, as well as a declaration by the court as to which documents constituted "the BRUNSTING FAMILY LIVING TRUSTS", necessarily mandating that the Court find that the 8/25/10 QBD is void and severable by the terms of the trust and failure to comply with the statutory prerequisites for a testamentary power of appointment.

124. Without the Court declaring which documents constitute "the trust", it could not determine the rights and liabilities of the parties or grant summary judgment based upon a purported legitimate document that continues to be in dispute.

125. The only document produced by DEFENDANTS to satisfy their burden of proof on their forfeiture counterclaim was the 8/25/10 Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement, which is void on its face for the lack of attesting witnesses as required by the Code and because it contradicts the terms of the trust, rendering it severable. All testamentary instruments such as the 8/25/10 QBD which purported to take effect upon the death of NELVA BRUNSTING must be properly witnessed and notarized by

two disinterested witnesses. *See 8/25/10 QBD and* Article 251.051 of the Texas Estates Code. Since the document is void, it is severable from the trust.

126. Article XIII (3) states:

Power of Appointment or Qualified Beneficiary Designation. Whenever this trust declaration gives a trust beneficiary the power or authority to appoint a beneficiary of the trust, the designation must be in writing and be acknowledged **in the form required of acknowledgements by Texas law or exercised by a will executed with the formalities required by law of the trust beneficiary's residence**. Since the 8/25/10 QBD did not take effect until NELVA BRUNSTING' death, the document was testamentary. **Without satisfying Article 251.051 of the Texas Estates Code, the document is void and severable from the trust.**

127. Article 251.051 of the Texas Estates Code sets forth the requirements for testamentary instruments and requires that any such instrument be signed, notarized and witnessed by two witnesses. "Texas Estates Code section 251.051 requires, inter alia, a last will and testament be (1) in writing, (2) signed by the testator, and (3) attested to by two or more credible witnesses. *See* Tex. Est. Code Ann. § 251.051 (West 2014). " *Lemus v. Aguilar*, 491 S.W.3d 51, 56 (Tex. App. 2016)

128. The 8/25/10 was not witnessed and in fact, AMY, ANITA, and CAROL BRUNSTING admit that none of them witnessed NELVA BRUNSTING'S signature on this 8/25/10 QBD. Because the 8/25/10 QBD and testamentary power of appointment fails to satisfy *See* Tex. Est. Code Ann. § 251.051 (West 2014) and violates the trust, it is void and severable to the extent it was ever actually part of the trust.

129. Article VIV Section O states:

> If any provision of this agreement is declared by a court of competent jurisdiction to be invalid for any reason, such invalidity shall not affect the remaining

provisions of this agreement. The remaining provisions shall be fully severable, and this agreement shall be construed and enforced as if the invalid provision had never been included in this agreement.

130. Due process requires the Court to declare the rights and liabilities of the parties pursuant to CANDACE CURTIS' Application for Declaratory Judgment. CURTIS was denied this Constitutionally protected right. See U.S. Constit. Amend XIV, Texas Constit, Art. I Sec. 8

G. ***DEFENDANTS have not satisfied their burden of producing evidence to prove that CANDACE CURTIS violated the "no contest" provision of the Restatement***

131. In a traditional summary-judgment motion[42], the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See*

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[42] Rule 166a (traditional) and Rule 166a(i) states that summary judgment may be granted:

> **(a)For Claimant.** A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> **(c)Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) **the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records**, if any, **on file at the time of the hearing, or filed thereafter** and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the **issues expressly set out in the motion or in an answer or any other response.** Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal…
>
> **(d)Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment;

Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). We take as true evidence favorable to the nonmovant and resolve all doubts in its favor. *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995).

132. To be entitled to a traditional summary judgment under Tex. R. Civ. P. 166(a), a defendant must conclusively negate at least **one essential element of each of the plaintiffs causes of action or conclusively establish each element of an affirmative defense**. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). The movant is entitled to summary judgment if the evidence disproves, as a matter of law, **at least one element of each of the plaintiff's causes of action or conclusively establishes each element of an affirmative defense**. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *see Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). *Martin-De-Nicolas v. AAA Tex. Cnty. Mut. Ins. Co.*, No. 03-17-00054-CV, at *5-6 (Tex. App. Apr. 19, 2018). If the movant's motion and summary judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

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or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

133. Significantly, DEFENDANT CO-TRUSTEES obtained traditional summary judgment on a counterclaim, forfeiture, ***without satisfying their burden to produce evidence showing that no genuine issue of material fact occurred*** because the unsworn declaration that they attached to their motion for summary judgment did not authenticate any of the exhibits included.

134. AMY AND ANITA BRUNSTING'S lawyers filed a traditional motion for summary judgment against CANDACE CURTIS, alleging that she forfeited her share to them by violating the void 8/25/10 QBD on June 26, 2015, and November 5, 2021. CURTIS responded to their motions July 13, 2015, and November 17, 2021, including a Memorandum of Law on the August 25, 2010, Qualified Beneficiary Designation and Testamentary power of appointment dated September 28, 2020, (attaching three signature pages of the document-which appears to be digitally altered, notary logs and notes of CANDACE FREED showing no entries for 8/25/10 to reflect the three anomalous documents) and an Addendum dated October 15, 2021.

135. ANITA AND AMY BRUNSTING produced the following unsworn documents with their traditional and no evidence motion for summary judgment:

Exhibit A The Restatement of The Brunsting Family Living Trust.
Exhibit B Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about June 15, 2010.
Exhibit C Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about on August 25, 2010.
Exhibit D Excerpts from Deposition of Candace Kunz-Freed (March 29, 2019).
Exhibit E Excerpts from Deposition of Candace Kunz-Freed (June 27, 2019).
Exhibit F Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code §452.051 (signed July 23, 2015).
Exhibit G Report of Temporary Administrator Pending Contest.
Exhibit H Unsworn Declaration of Anita K. Brunsting.
Exhibit I Resignation of Original Trustee executed on or about December 21, 2010.
Exhibit J Memorandum and Order Preliminary Injunction (signed April 19, 2013).

Exhibit K Order (signed September 23, 2020).
Exhibit L Unsworn Declaration of Neal E. Spielman

136. It was DEFENDANTS' burden to produce sworn testimony concerning the authenticity of the purported 8/25/10 QBD, not Plaintiff's. Plaintiff demanded Defendants produce the original 8/25/10 QBD on July 13, 2015 and they have not because they cannot. No one witnessed the document as the law requires of testamentary evidence. Therefore, even if it were in evidence sworn by affidavit, whether it was digitally altered to add Nelva's signature or not, it is void on its face for failure to comport with statute. Notably, the Court could not decide DEFENDANTS' Rule 166a traditional motion for summary judgment without considering evidence. But this is precisely what it did in GRANTING DEFENDANTS' Motion for Summary judgment on their counterclaim of forfeiture. While the 8/25/10 QBD was attached as an exhibit to their motion, it was not sworn to and was not evidence. PLAINTIFF has disputed the validity of this document from the outset AS NOT PART OF THE TRUST and the document is void on its face for failing to have two disinterested witnesses attest to it. PLAINTIFF objects to the court granting summary judgment on DEFENDANTS' counterclaim with no evidence to justify it—DEFENDANTS' own the burden of burden of proof AND of bringing forth the evidence to be disputed.

137. ***Without attaching a sworn affidavit attesting to the authenticity and validity of the August 25, 2010, QBD and Testamentary Power of Appointment to Living Trust, witnessed by two disinterested persons, there is no evidence in the record from which the Court could rule that CANDACE CURTIS forfeited her share.***

138. DEFENDANTS' have produced no evidence to satisfy their burden of proof that CURTIS ***violated the "no contest" clause by asserting any claim which would enlarge her share of the trust,*** as set forth in the Article 11 Section C of the 2005 Restatement of the BRUNSTING FAMILY LIVING TRUST.

139. CANDACE LOUIS CURTIS never filed any claim **to enlarge her share of the trust** at the expense of another beneficiary, but sought to enforce the trust in accordance with the settlor's intentions at all times. The 2013 federal lawsuit and preliminary injunction proves this. Id.[43]

140. CANDACE CURTIS never challenged the "trust" but only the void 8/25/10 QBD which violated the express terms of the trust, rendering it void and severable. Based on Article XIV Section O and Article XII Section F of the Restatement (imposing liability on the Trustees for bad faith, willful misconduct and/or gross negligence), CANDACE CURTIS' lawsuit against the acting Co-Trustees did not violate the "no contest" clause of the Restatement and the August 25, 2010, QBD is void and severed from this trust under the terms of the trust and Texas Estates Code f/k/a Texas Probate Code.

128. The Trust Code expressly provides beneficiaries with the right 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), and the foregoing cannot be construed to trigger a forfeiture provision; Texas Trust Code § 111.0035(b)(6) which is exactly what the Court has done.

129. "The right to challenge a fiduciary's actions is inherent in the fiduciary / beneficiary relationship." *McLendon, 862 S.W.2d at 678." Lesikar v. Moon, 237 S.W.3d 361, 370 (Tex. App. 2007) 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)

[43] Nor did CURTIS need AMY OR ANITA'S permission to file suit because she is the de jure sole trustee of both trusts by the terms of the instrument itself.

H. *The Court erred in ruling that Co-trustees' attorneys' fees shall be taken out of CANDACE CURTIS' share, as CANDACE CURTIS' share is not alienable or subject to claims of judgment creditors*

130. Article XI Section A of the Restatement provides:

> No beneficiary will have the power to anticipate, encumber, or transfer any interest in the trust. No part of the trust will be liable for or charged with any debts, contracts, liabilities, or torts of a beneficiary or subject to seizure or other process by any creditor of a beneficiary.

131. The foregoing language indicates that the BRUNSTING FAMILY LIVING TRUST was created as a spendthrift trust, which is immune from creditors by its very terms. See Article XI Section A-C. Article XI Section C specifically states that the Founders "do not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact..." This necessarily voids the order granting Neil Spielman and Stephen Mendel attorneys' fees out of CANDACE CURTIS' share, which is held in a spendthrift trust.

132. Texas Probate Code Sec. 122.206 governs Spendthrift Trusts and provides:

> An assignment of property or interest that would defeat a spendthrift provision imposed in a trust may not be made under this subchapter.

133. Texas Property Code Sec. 112.035 governs spendthrift trusts and provides:

> (a) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.
>
> (b) A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by this subtitle.
>
> (c) A trust containing terms authorized under Subsection (a) or (b) of this section may be referred to as a spendthrift trust.
>
> (f) A beneficiary of the trust may not be considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have

the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity, holds or exercises:
(1) a presently exercisable power to:
(A) consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is:
(i) exercisable only on consent of another person holding an interest adverse to the beneficiary's interest; or
(ii) limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary; or
(B) appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;
(2) a testamentary power of appointment; or
(3) a presently exercisable right described by Subsection (e)(2).

Acts 2017, 85th Leg., R.S., Ch. 62 (S.B. 617), Sec. 2, eff. September 1, 2017.

134. Upon the April 2009 death of ELMER BRUNSTING, two trusts were created: with the property being divided into two shares: The Survivor's and Decedent's trusts, Restatement Article VII, Section B.

135. Article VIII Section D provides that the Survivor's trust SHALL terminate at the Surviving Founder's death and

136. Article IX governs administration of the Decedent's trust and permits the surviving founder to pay/apply for the survivor's benefit all of the net income and up to $5000 in principal per year. Article IX Section A. The surviving founder continued to have fiduciary duties to the remainder beneficiaries with respect to the Decedent's trust.

137. Article IX Section D provides that the Decedent's trust SHALL terminate at the Surviving Founder's death.

138. Upon the surviving founder's death, November 11, 2011, both trusts terminated and were required to be distributed in accordance with Article X, dividing all trust property by five and distributing 1/5 of the total assets to each beneficiary: CANDACE LOUISE CURTIS, CAROL

ANN BRUNSTING, CARL HENRY BRUNSTING, AMY RUTH TSCHIRHART N/K/A AMY RUTH BRUNSTING, ANITA KAY RILEY N/K/A ANITA K. BRUNSTING.

139. Article X Section B governs the distribution of CANDACE LOUISE CURTIS' share and states that it shall be held in trust with the trustee distributing as much of the net income and principal of CURTIS' personal asset trust which the trustee deems necessary for her health, education, maintenance and support—for her lifetime. CANDACE CURTIS' right to the net income and principal of the trust is not alienable, voluntarily or involuntarily other than the execution of a testamentary power of appointment, valid living trust, or last will and testament—which is not at issue in this case.

140. Clearly the settlors made the BRUNSTING FAMILY LIVING TRUST and specifically, CANDACE CURTIS' share—unalienable and not subject to creditors, including judgment creditors NEIL SPIELMAN AND/OR STEPHEN MENDEL,

I. Attorneys' fees may not be granted in Texas absent a contract or statute authorizing attorneys' fees.

130. "Texas follows "the American Rule" prohibiting recovery of attorney's fees unless provided by contract or statute." *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 663 (Tex. 2009). CO-TRUSTEES point to no legal authority which would permit them to recover their attorneys' fees incurred in defending themselves rendering the February 25, 2022, Order purporting to pay CO-TRUSTEES' legal fees out of CANDACE CURTIS' vested share of the BRUNSTING FAMILY LIVING TRUST.

131. CANDACE CURTIS has no contract for services with CO-TRUSTEES' attorneys, Neil Spielman and/or Stephen Mendel. CO-TRUSTEES point to no legal authority which would permit them to recover attorneys' fees from CURTIS, contractual or statutory. Furthermore, the BRUNSTING FAMILY LIVING TRUST makes clear that no portion of the spendthrift trust was

to be used for litigation costs. For this reason, the February 25, 2022, Order purporting to award NEIL SPIELMAN AND STEPHEN MENDEL attorneys' fees from CANDACE CURTIS' vested share of the spendthrift trust is void.

J. The Order violated CANDACE CURTIS' Constitutional right to due process—notice and a meaningful opportunity to be heard.

132. The Court had a duty to determine the validity of the documents attached and issue a declaratory judgment on the rights and liabilities of the parties and failed to do so. CANDACE CURTIS plead for and paid for a jury trial to determine the issues of fact in this case which remain unresolved and was deprived of this Constitutional right by the Court's February 25, 2022, Order, purporting to dispose of all of her claims and ruling against CURTIS on CO-TRUSTEES counterclaim of forfeiture without any evidence to justify this ruling. This was a complete deprivation of the Constitutional right to due process of law under the U.S. and Texas Constitutions. U.S. CONSTIT. AMEND. XIV, TEXAS CONSTIT. ART. I, SEC. 8. For this reason, the FEBRUARY 25, 2022, ORDER granting summary judgment against PLAINTIFF constitutes an abuse of discretion and must be vacated and/or set aside.[44]

133. A proper reading of the trust instrument 92005 restatement as amended in2007) reveals that the lawful trustees for the family trust are CARL BRUNGING and CANDACE CURTIS.

134. A list of the affirmative fiduciary duties performed by the DEFENDANT CO-TRUSTEES reads "*this page intentionally left blank*" and a passive trust results in merger and the trust collapses, *Property Code § 112.032.*

[44] DEFENDANTS attached the BRUNSTING FAMILY LIVING TRUST, 2005 RESTATEMENT, 1st Amendment, 6/15/10 Qualified Beneficiary Designation, and 8/25/20 Qualified Beneficiary Designation and Testamentary Power of Appointment to Living Trust, to their motion with unsworn declarations and the court had a duty to determine which documents constitute the trust, given PLAINTIFF'S allegations of fraud and the 8/25/10 QBD's invalidity on its face.

135. When merger occurs the trustee's only authority is to transfer the assets to or as directed by the beneficiary. It is true that "[a] spendthrift trust must be based on an active trust. If it is merely passive or inactive, there can be no spendthrift trust." Long v. Long , 252 S.W.2d 235, 247 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.). Likewise, "[a] trustee who has no duty except to make payments as they become due is the trustee of a 'passive' or 'dry' trust." Daniels v. Pecan Valley Ranch, Inc. , 831 S.W.2d 372, 379 (Tex. App.—San Antonio 1992, writ denied). Moreover, "[i]f a trustee is not given affirmative powers and duties, the trust is 'passive' or 'dry,' and legal title is vested in the beneficiaries , not the named trustee." Nolana Dev. Ass'n v. Corsi , 682 S.W.2d 246, 249 (Tex. 1984). Consequently, "[A] merely passive trust cannot constitute a valid spendthrift trust because the beneficiary is considered the real owner of the property." Daniels , 831 S.W.2d at 379. In re Estate of Lee, 551 S.W.3d 802, 814 (Tex. App. 2018)

VI. CONCLUSION AND PRAYER

136. For the reasons stated herein, PLAINTIFF respectfully prays that the Court vacate and set aside the February 25, 2022, Order, granting summary judgment against her and permit this matter to proceed to trial.

Respectfully Submitted,

Candice Schwager

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832.857.7173
candiceschwager@outlook.com
ATTORNEY FOR CANDACE CURTIS

CERTIFICATE OF SERVICE

I Candice Schwager hereby certify that the foregoing document was served on all counsel of record on the 27th day of March 2022.

Candice Schwager

Candice Schwager

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Stephen Mendel
Bar No. 13930650
info@mendellawfirm.com
Envelope ID: 62465912
Status as of 3/10/2022 12:33 PM CST

Associated Case Party: CAROLEANNBRUNSTING

Name	BarNumber	Email	TimestampSubmitted	Status
Carole AnnBrusnting		cbrunsting@sbcglobal.net	3/9/2022 4:45:20 PM	SENT

Associated Case Party: ANITAKAYBRUNSTING

Name	BarNumber	Email	TimestampSubmitted	Status
Stephen A.Mendel		info@mendellawfirm.com	3/9/2022 4:45:20 PM	SENT

Associated Case Party: CANDACE LOUISECURTIS

Name	BarNumber	Email	TimestampSubmitted	Status
Candice Schwager		candiceschwager@icloud.com	3/9/2022 4:45:20 PM	SENT

Associated Case Party: CANDACELKUNZ-FREED

Name	BarNumber	Email	TimestampSubmitted	Status
Cory SReed		creed@thompsoncoe.com	3/9/2022 4:45:20 PM	SENT

Associated Case Party: CARLHENRYBRUNSTIING

Name	BarNumber	Email	TimestampSubmitted	Status
Bobbie G.Bayless		bayless@baylessstokes.com	3/9/2022 4:45:20 PM	SENT

Associated Case Party: AMYRUTHBRUNSTING

Name	BarNumber	Email	TimestampSubmitted	Status
Neal Spielman		nspielman@grifmatlaw.com	3/9/2022 4:45:20 PM	SENT

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This March 27, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 46

Probate

Case Number: 412249

Court: All

Status: -All

File Date (From): MM/DD/YYYY

File Date (To): MM/DD/YYYY

SEARCH CLEAR

◉ Party ○ Attorney ○ Company

Last Name:

First Name:

File Date (From): MM/DD/YYYY

File Date (To): MM/DD/YYYY

SEARCH CLEAR

34 Record(s) Found.

Case	File Date	Type Desc	Subtype	Style	Status	Judge	Court	V A
412249-402	02/09/2015	ANCILLARY (LAWSUITS CASES) - CONVERSION			Open	JAMES HORWITZ	4	F

Event Date	Event Desc	Comments	Pgs ☐

07/29/2019	CC & Non-CC Order	Tag # 458969---MAILED 07/31/19			☐
10/08/2018	Plea in Abatement	Verified Plea in Abatement	2018-10-08 Verified Plea in Abatement.pdf	25	☐
03/16/2015	Order to Consolidate	ordered that all pleadings filed under or assigned to Cause Number 412249-402 be moved into Cause Number 412249-401 per order signed March 16, 2015.	Order to Consolidate	4	☐
02/18/2015	RECEIPT				☐
02/17/2015	Electronic Filing Fee				☐
02/17/2015	Misc. Notice	CHANGE OF NAME AND ADDRESS Film code number PBT-2015-56703	Misc. Notice	2	☐
02/13/2015	RECEIPT				☐
02/13/2015	Electronic Filing Fee				☐
02/13/2015	RECEIPT				☐
02/13/2015	RECEIPT				☐
02/13/2015	RECEIPT				☐
02/12/2015	Electronic Filing Fee				☐
02/12/2015	Application for Continuance		Application for Continuance	5	☐
02/12/2015	Instrument Over 25 Pages				☐
02/12/2015	Electronic Filing Fee				☐
02/12/2015	Misc. Notice	NOTICE OF FILING OF INJUNCTION AND REPORT OF MASTER Film code number PBT-2015-50259	Misc. Notice	51	☐

02/12/2015	Electronic Filing Fee				☐
02/12/2015	Demand for a Jury				☐
02/12/2015	Amended	PLAINTIFF'S SECOND AMENDED PETITION Film code number PBT-2015-49977	Amended	8	☐
02/12/2015	RECEIPT				☐
02/11/2015	Electronic Filing Fee				☐
02/11/2015	Notice of Hearing		Notice of Hearing	2	☐
02/11/2015	RECEIPT				☐
02/11/2015	Attorney Assigned				☐
02/10/2015	Electronic Filing Fee				☐
02/10/2015	Amended	NOTICE OF FILING OF PLAINTIFFS FIRST AMENDED PETITION Film code number PBT-2015-47716	Amended	12	☐
02/09/2015	Receipts	RECEIPT# 1166586 CHARGED $27.00 FOR ENVELOPE NUMBER 40506979 Film code number PBT-2015-47634	Receipts	1	☐
02/09/2015	Misc. Notice	NOTICE OF FILING OF INJUNCTION AND REPORT OF MASTER FILED PREVIOUSLY ON 2/6/15 Film code number PBT-2015-47630	Misc. Notice	51	☐
02/09/2015	Receipts	RECEIPT #1166892 CHARGE THE AMOUNT OF $4.00 FOR ENVELOPE NUMBER 4081121			☐

02/09/2015	Application for Continuance				☐
02/09/2015	Receipts	RECEIPT #1166739 CHARGED $182.00 FOR ENVELOPE #4075218 Film code number PBT-2015-47611	Receipts	1	☐
02/09/2015	Motion Pertaining to Lawsuits Only (Indep.)	NOTICE OF FILING OF PLAINTIFF'S ORIGINAL PETITION Film code number PBT-2015-47608	Motion Pertaining to Lawsuits Only (Indep.)	601	☐
02/09/2015	Folder Created				☐
02/09/2015	Case Initiated Application (OCA)				☐

TAB 47

Probate

Case Number: 412249

Court: All

Status: -All

File Date (From): MM/DD/YYYY

File Date (To): MM/DD/YYYY

SEARCH CLEAR

◉ Party ○ Attorney ○ Company

Last Name:

First Name:

File Date (From): MM/DD/YYYY

File Date (To): MM/DD/YYYY

SEARCH CLEAR

79 Record(s) Found.

Case	File Date	Type Desc	Subtype	Style	Status	Jud
412249-403	04/10/2019	ALL OTHER MATTERS (INDEPENDENT ADMINISTRATION)	MOTIONS PERTAINING TO LAWSUITS ONLY (INDEP.)	IN THE ESTATE OF: NELVA E BRUNSTING, DECEASED	Open	JAI HOF

Event Date	Event Desc	Comments		Pgs ☐
07/29/2019	CC & Non-CC Order	Tag # 458969---MAILED 07/31/19		☐
04/10/2019	Exhibit	A	Exhibit	3 ☐
04/10/2019	Misc. Notice	of Order on Motion to Transfer District Court Proceedings to Probate Court 4	Misc. Notice	3 ☐
04/10/2019	Notice of Hearing		Notice of Hearing	3 ☐
04/10/2019	Exhibit	A	Exhibit	2 ☐
04/10/2019	Application to Dismiss	for Want of Prosecution	Application to Dismiss	6 ☐
04/10/2019	Exhibit	G	Exhibit	11 ☐
04/10/2019	Exhibit	F	Exhibit	2 ☐
04/10/2019	Exhibit	E	Exhibit	9 ☐
04/10/2019	Exhibit	D	Exhibit	11 ☐
04/10/2019	Exhibit	C	Exhibit	19 ☐
04/10/2019	Exhibit	B	Exhibit	38 ☐
04/10/2019	Exhibit	A	Exhibit	142 ☐
04/10/2019	Application for Sanction		Application for Sanction	20 ☐
04/10/2019	Application for Continuance	Agreed	Application for Continuance	5 ☐
04/10/2019	APPEARANCE	Entry of Appearance of Greg Lester, Temporary Administrator Pending Contest of the Estate of Nelva E Brunsting	APPEARANCE	6 ☐

04/10/2019	Certificate	Reporter's Certification Oral and Videotaped Deposition of Carl H Brunsting	Certificate	13 ☐
04/10/2019	Notice of Hearing	Reset	Notice of Hearing	3 ☐
04/10/2019	Response	to Plaintiff's Notice of Vacancy of Party and Motion to Abate Proceeding, Defendants' Motion for Sanctions, and Request for Oral Hearing	Response	9 ☐
04/10/2019	Exhibit	1	Exhibit	8 ☐
04/10/2019	Application for Abate	Notice of Vacancy and Motion to Abate Proceedings	Application for Abate	4 ☐
04/10/2019	Misc. Notice	of Submission	Misc. Notice	3 ☐
04/10/2019	Application for Abate	Notice of Vacancy and Motion to Abate Proceedings	Application for Abate	4 ☐
04/10/2019	Exhibit	E	Exhibit	10 ☐
04/10/2019	Exhibit	D	Exhibit	6 ☐
04/10/2019	Exhibit	C	Exhibit	15 ☐
04/10/2019	Exhibit	B	Exhibit	10 ☐
04/10/2019	Exhibit	A	Exhibit	18 ☐
04/10/2019	Letter	Cory S Reed	Letter	2 ☐
04/10/2019	Application for Summary Judgment	Traditional and No-Evidence	Application for Summary Judgment	33 ☐
04/10/2019	Notice of Hearing		Notice of Hearing	3 ☐
04/10/2019	No Fee - Other	Resume	No Fee - Other	12 ☐
04/10/2019	Designation	Plaintiff's First Amended Expert Witness Designation	Designation	7 ☐

04/10/2019	Response	Defendant's First Amended Combined Responces to Plaintiff's Request for Disclosure and Designation of Expert Witness	Response	18 ☐
04/10/2019	Rule 11 Agreement		Rule 11 Agreement	2 ☐
04/10/2019	Rule 11 Agreement		Rule 11 Agreement	2 ☐
04/10/2019	Response	to Plaintiff's Motion to Compel Discovery Responses and Production of Documents	Response	15 ☐
04/10/2019	Application for Continuance	Joint	Application for Continuance	4 ☐
04/10/2019	Notice of Hearing	Amended	Notice of Hearing	3 ☐
04/10/2019	Notice of Hearing	Oral Hearing	Notice of Hearing	3 ☐
04/10/2019	Exhibit	3	Exhibit	12 ☐
04/10/2019	Exhibit	2	Exhibit	18 ☐
04/10/2019	Exhibit	1	Exhibit	12 ☐
04/10/2019	Application to Compel (Dep.)	Discovery Responses and Production of Documents	Application to Compel (Dep.)	14 ☐
04/10/2019	No Fee - Other	Resume	No Fee - Other	10 ☐
04/10/2019	Designation	Plaintiff's Expert Witness Designation	Designation	6 ☐
04/10/2019	Misc. Notice	of Filing Defendants' Privilege Log	Misc. Notice	13 ☐
04/10/2019	Rule 11 Agreement		Rule 11 Agreement	2 ☐
04/10/2019	Special Exceptions	Original Answer and Request for Disclosure	Special Exceptions	8 ☐
04/10/2019	Breach of Fiduciary Duty (Dep.)	Third Amended	Breach of Fiduciary Duty (Dep.)	17 ☐

04/10/2019	Misc. Notice	of Submission	Misc. Notice	3	☐
04/10/2019	Breach of Fiduciary Duty (Dep.)	Second Amended	Breach of Fiduciary Duty (Dep.)	16	☐
04/10/2019	Application for Abate		Application for Abate	7	☐
04/10/2019	Application to Transfer Docket (Dep.)		Application to Transfer Docket (Dep.)	4	☐
04/10/2019	Special Exceptions	Original Answer and Request for Disclosure	Special Exceptions	9	☐
04/10/2019	Breach of Fiduciary Duty (Dep.)	First Amended	Breach of Fiduciary Duty (Dep.)	19	☐
04/10/2019	Waiver	of Citation and Service of Process	Waiver	3	☐
04/10/2019	Breach of Fiduciary Duty (Dep.)		Breach of Fiduciary Duty (Dep.)	19	☐
04/10/2019	Records of Misc. Types	Resume			
04/10/2019	Designation	Plaintiff's Expert Witness			
04/10/2019	Misc. Notice	of Filing Defendants' Privilege Log			
04/10/2019	Letter	Cory S Reed			
04/10/2019	Special Exceptions	Defendant's Special Exceptions and Original Answer to Plaintiff's Third Amended Petition			
04/10/2019	Original Petition to Modify Trust (Dep.)	Third Amended			
04/10/2019	Misc. Notice	of Submission			
04/10/2019	Original Petition to Modify Trust (Dep.)	Second Amended			
04/10/2019	Application for Abate				
04/10/2019	Order to Transfer Docket	Unsigned			

04/10/2019	Application to Transfer Docket (Dep.)				
04/10/2019	Special Exceptions	Defendant's Special Exceptions, Original Answer, and Request for Disclosure			
04/10/2019	Original Petition to Modify Trust (Dep.)	First Amended			
04/10/2019	Waiver	of Citation and Service of Process			
04/10/2019	Original Petition to Modify Trust (Dep.)				
04/04/2019	Order to Transfer Docket	from Harris County 164th Judicial District to Harris County Probate Court 4	Order to Transfer Docket	2	☐
10/01/2015	Order for Continuance	Agreed	Order for Continuance	2	☐
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TAB 48

REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. 412249-401

APPELLATE COURT NO. _____

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

* * * * * * * * * * * * * * *

PRETRIAL HEARING

* * * * * * * * * * * * * * *

On the 31st day of March, 2022, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable James Horwitz, Judge of Probate Court No. 4, held in Houston, Harris County, Texas:

Proceedings reported by Machine Shorthand

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VOLUME 1
(Pretrial Hearing)

March 31, 2022 (WHEREUPON the following proceedings were conducted via Zoom and YouTube:)

PROCEEDINGS:

THE COURT: All right. This is our pretrial hearing. Good afternoon, lawyers.

This is Case Number 412249-401, in the Estate of Nelva E. Brunsting.

For the record, I need to have each attorney make an appearance and tell the Court who you represent.

MR. MENDEL: Steve Mendel, Your Honor, representing Anita Brunsting who is a Defendant and a Co-Trustee in this matter.

MS. SCHWAGER: Candice Schwager representing Candace Curtis in this matter who is the Plaintiff and Counter-Defendant.

MR. LOYD: Your Honor, Bruse Loyd, and I represent Carole Brunsting, one of the beneficiaries of the Trust.

THE COURT: Have you filed a notice of appearance?

MR. LOYD: Yes, Your Honor, I filed it. I got the electronic confirmation, but I'm -- and I'm receiving, just today, I started receiving filings; but I filed a notice a couple of weeks ago.

THE COURT: Okay.

MS. BAYLESS: Bobbie Bayless, Your Honor, on behalf of Carl Brunsting.

MR. SPIELMAN: Neal Spielman, Your Honor, on behalf of Amy Brunsting.

MR. REED: Cory Reed on behalf of Candace Kunz-Freed.

OFF-DOCKET MOTIONS:

THE COURT: Okay. So, there's some pending motions that are not set for today's pretrial, but I want to briefly discuss them for a few moments.

Ms. Schwager, I believe you filed a motion to vacate or set aside the February 25th, 2022, order citing Government Code 74.053(a); is that correct?

MS. SCHWAGER: There were 1, 2, 3, 4, 5, 6 7, 8, 9, 10 grounds, and that was just one of them.

THE COURT: Okay. Well, just so I can clear that up - when you take the position that there was a valid objection to Judge Stone under 74.053(a), I want to point you to Government Code 25.0022, Section R which specifically states that Chapter 74 does not apply to an assignment in a probate court.

Also, you have a issue you raised in regard to a bond. Section 25.00231(e) specifically states that this bond section does not apply to an

assigned judge sitting by assignment in a statutory probate court. So, as far as I'm concerned, those matters are moot, and we don't have to hear about that any further.

MS. SCHWAGER: When you say -- I'm sorry. Those matters, are you just speaking of is that ground?

THE COURT: Yeah, those two issues for sure. I hadn't really studied the full extent of your motion to exclude or vacate, but those were the technical -- seems like those were the technical matters.

MS. SCHWAGER: Okay.

PRETRIAL CONFERENCE:

THE COURT: So, what we need to do today is we have a trial setting that I believe is scheduled for April 5th. And correct me if I'm wrong, but I believe that we're seeking a 12-person jury; is that correct?

MR. MENDEL: Your Honor, I don't -- we're here today, and counsel for the -- with the exception of Ms. Schwager, we don't -- that trial is scheduled to be on fees. There are no other pending issues among the parties subject to these motions to vacate and things like that. But there's no pending issue for trial other than the issue of fees and Carl Brunsting, Carole

Brunsting, Amy Brunsting, and Anita Brunsting have an agreement in principal with regard to the fees which we think negates the necessity of a trial next week; specifically, the agreement in principal is not yet reduced to writing. There's still some issues being negotiated. But with regard to the fees - through today - the estimate is about $680,000 plus-or-minus for the group in the Matthews Law Firm that represents Amy Brunsting and the Mendel Law Firm that represents Anita Brunsting and I think Ms. Bayless on behalf of Carl Brunsting and Mr. Loyd on behalf of Carole Brunsting would confirm that those fees are reasonable and necessary, which from our perspective, therefore eliminates the necessity of a trial. I've asked Mr. Bayless -- Ms. Bayless and Mr. Loyd to please confirm that, if they would.

MS. BAYLESS: That's right, Your Honor.

MR. LOYD: That's correct, Your Honor.

THE COURT: All right. I neglected to ask Mr. Munson to speak. Can you unmute and tell me if you're an attorney, who you are, and who you represent?

(No audible response)

THE COURT: We have a person on the screen named Rik Munson; anybody identify that person?

MS. SCHWAGER: Yes, Your Honor, he's a

witness of mine and Candace Curtis' paralegal who is my paralegal.

MR. MENDEL: We also understand he's the boyfriend of Candace Curtis.

MR. SPIELMAN: I didn't follow that sentence at all. Mr. Munson is -- is Ms. Schwager saying that Mr. Munson is her paralegal or that Ms. Schwager is -- I mean, Ms. Curtis is her paralegal?

MS. SCHWAGER: No, Mr. Munson is.

MR. SPIELMAN: Okay. And is he actually the person that's on the line because in the past, it's been your client who's signed in under that name.

MS. SCHWAGER: I believe the invitation was sent out to Mr. Munson, so he joined us today as my paralegal to take notes.

MR. MENDEL: Well, is he going to come off video and answer the judge's question?

THE COURT: Mr. Munson, can you hear? Can you unmute, please, Mr. Munson and talk to me.

(No audible response)

MS. SCHWAGER: I'm going to text him.

THE COURT: Okay. Ms. Schwager, just so you know - if he doesn't respond to me, I'm going to remove him from this hearing, and he can watch on YouTube and take notes.

MS. SCHWAGER: Okay.

THE COURT: So, Mr. Munson, for whatever reason - technical or intentional - you're not responding to me; and therefore, I'm instructing my staff to remove you from this hearing. You can go on --

MS. SCHWAGER: I'm --

THE COURT: You can go on --

MS. SCHWAGER: I'm sorry.

THE COURT: Please don't interrupt. Please don't interrupt me.

You can, Mr. Munson, you can go on YouTube and watch this and take notes. So, Judge Comstock, if you're controlling this, can you remove Mr. Munson.

(Mr. Munson removed from Zoom)

THE COURT: Okay. So, what I'm hearing is that - from Mr. Loyd, Ms. Bayless, Mr. Mendel and Mr. Spielman - that there is an issue involving attorneys' fees but no need for a trial. And I want to make sure what I've said, as far as those lawyers are concerned, is correct. Is that correct, Mr. Spielman?

MR. SPIELMAN: I believe the correct way to say it is that there is no issue with attorneys' fees, and the non-forfeited Brunsting siblings represented by myself, Mr. Mendel, Ms. Bayless, and Mr. Loyd have agreed, in principal, to the amount of the

fees, and we will paper-up an agreement as to how they'll be funded within the context of the Court's order on the summary judgment.

THE COURT: All right. And then in regards to Ms. Schwager's client - I believe there's been a motion for summary judgment signed that, in essence, removes her from this -- her ability to collect inheritance; is that correct, Mr. Spielman?

MR. SPIELMAN: It is correct, Judge; that's the summary judgment order that Judge Stone signed after consulting with you when we were last before the Court on the pretrial conference of February the 25th, 2022.

THE COURT: And so, the Co-Trustees filed a motion to exclude testimony and evidence for sanctions and for third contempt as to Candace Louise Curtis. Do you want to just explain to me what you're trying to accomplish with that?

MR. SPIELMAN: I will try to do so briefly, Judge, because that is also - like you mentioned earlier - not technically on the hearing docket for today.

But, essentially, Judge, that was a motion that we had filed before learning of the summary judgment stemming from Ms. Curtis' various failures to

comply with the Court's orders and her conduct that we felt should preclude her from being able to present her case at trial because -- or allow our case against her or about her. Since it was opposed as a motion for sanctions and contempt, I think it survives the summary judgment and can still be considered as such in post-summary judgment. And then what probably has not made it to your screen, Judge, is that this morning, the supplement to it, that focuses more on the motion to exclude as a non - I'll call it, for purposes of right now - a non-sanction-based reason to exclude Ms. Curtis based off of the Court's summary judgment order in which she's, essentially, forfeited her interest in being disinherited.

So, long story - short, there's no, there's no standing, no capacity for her to appear or participate in the trial or any matter other than those limited things that, in part, would be connected with her effort to appeal the summary judgment order and --

THE COURT: So --

MR. SPIELMAN: -- everything is probably going up, we figured that it probably makes -- that it made sense to put it back on the docket whether phrased as the motion to exclude based on the summary judgment or and/or as the sanctions and the contempt so that the

record is clear and particularly since the contempt and the sanctions part, Judge, you know, it's pretty significant when you consider the totality of Ms. Curtis' behavior. And, again, we'll argue the details of that later if necessary, but we thought it important the record be clear about who Ms. Curtis is and how she's conducted herself throughout the course of the [inaudible].

THE COURT: So, the question before the Court today, if we're not going to have a trial is - to what degree the Court is willing to entertain Ms. Schwager's motion to vacate or set aside the summary judgment order?

MR. MENDEL: Well, Your Honor, it was indicated from Ms. Vaso that that would be rescheduled. And there are several matters that we think need to be set for a hearing; one would be Ms. Schwager's motion or her client's motion to vacate. It's important that the Co-Trustees, that there be a ruling on the motion to exclude. There's the possibility -- we want to put the Candace Curtis versus the Co-Trustee portion of the case into a position for a final judgment to be issued so that they can pursue whatever appellate remedies they want to pursue; that may involve a severance; it may not, but that's an issue that would need to be

addressed.

There are also some claims by the estate that were filed early on by Carl Brunsting, and we believe those claims are going to be resolved; but if not resolved in advance of a, of a final judgment that would deal with Curtis and the Co-Trustees and maybe that gets severed out, but the rest of the parties believe that those are going to be a moot issue.

So, we would respectfully suggest that a -- they be set out, say, a couple of weeks down the road, and all of these pending issues be scheduled for a hearing so they can all be resolved at one time; and it would also give the parties - that have reached this via agreement in principal - to finish a written settlement agreement for tender to and approval by the Court.

THE COURT: How long of a time period you think you need in a future date? Can it be accomplished in one day?

MR. MENDEL: The hearing?

THE COURT: Yes.

MR. MENDEL: The hearing can be accomplished in one day, yes.

THE COURT: On all these various matters?

MR. MENDEL: Yes. I would imagine the longest one is probably going to be Ms. Curtis' motion

to vacate. Everything else from the perspective of the other four parties, I think is going to be extremely short.

THE COURT: All right. And we have to be conscious of the Court's plenary power from the date of this motion for summary judgment that was -- when was that signed; was that February 25th?

MR. SPIELMAN: Yes, Judge, and I think that's an important thing that we're going to have to deal with as well. I think some of what Ms. Schwager has filed on behalf of Ms. Curtis may already be late. And as I mentioned -- something that Mr. Mendel neglected to mention - Judge, you were talking earlier about a Government Code, issues that were raised in Ms. Curtis' motion to vacate. There's also a separate document which I believe is filed as an amended objection to the appointment of any former judge or something, words to that effect. And I think we probably have to consider that objection as well at some point haven't had a -- we, the Co-Trustees, have not had a chance to respond to that --

THE COURT: Well, that objection is under a general rule of Government Code 74. It's not applicable to a probate judge's sitting by assignment, and it specifically is - as I mentioned earlier - that's

25.0022(r), says 74, Chapter 74 doesn't apply in this instance.

MR. SPIELMAN: Okay. I may have misunderstood, then Judge. I thought, I thought the issues were separate. But if we don't need to -- if that objection is being, I guess, denied, then it's been denied, and we don't have to deal with it anymore.

THE COURT: Well, that objection, as far as I can read in the motion to set aside, as far as her reference to Government Code 74.053(a), that's denied. And her issue about bond and Judge Stone's issue on having a bond under the Government Code 25.00231(e), doesn't apply in this circumstance to a judge sitting by assignment in a statutory probate court.

So, Ms. Schwager, what -- how soon could you be ready to make your argument?

MS. SCHWAGER: Well, my brief is very comprehensive; it has all the certified documents necessary that were not entered into the record by the Co-Trustees who admit that none of their exhibits were even authenticated in their motion which was untimely.

But I think I agree with Mr. Mendel's appraisement. I'd like some time to respond to the motion to exclude in case you overturn this February 25th order. As I mentioned, there are many more grounds

other than the objection to Judge Stone.

THE COURT: Okay. Well, Judge Comstock when can we fit this in?

JUDGE COMSTOCK: Well, so --

THE COURT: How much time -- do you want to try and do it next week, Ms. Schwager?

MS. SCHWAGER: The following week would be better. I have some hearings next week.

THE COURT: Okay.

JUDGE COMSTOCK: I believe Mr. Spielman suggested a couple of weeks. We do have some time Thursday, the 14th; that is the day before the Good Friday holiday.

THE COURT: Will that work for you, Ms. Schwager?

MS. SCHWAGER: Yes, Judge.

THE COURT: How about you, Mr. Mendel?

MR. MENDEL: Judge, that's -- the 14th is problematic for me. I have a long-standing commitment already that I can't move.

THE COURT: What about the 13th -- well, I don't know. I don't know what our court schedule is.

JUDGE COMSTOCK: We have a pretty tric -- pretty busy schedule on the 13th. I suggested the 14th because we were set for a two-week trial docket

including that date. We could try to fit something in on the 11th if that will provide enough time in the afternoon.

MS. SCHWAGER: I believe, Judge.

MR. MENDEL: The 11th would be good for myself, Your Honor.

THE COURT: And Ms. Schwager, I couldn't understand your response.

MS. SCHWAGER: Yes, sir.

THE COURT: It's okay with you?

MS. SCHWAGER: Yes.

THE COURT: All right. Mr. Spielman?

MR. SPIELMAN: That's fine; I'll make that work.

THE COURT: Okay. And, Ms. Bayless?

MS. BAYLESS: Well, Judge, I'm set for trial on the 11th. I don't yet know whether we would go on that day, so I think it will be fine. My involvement is not as important as the other people's, but I can -- I think I can make it work if I get --

THE COURT: Mr. Loyd?

MR. LOYD: Yes.

THE COURT: Is that okay with you?

MR. LOYD: Yes, sir.

THE COURT: And Mr. Reed, what are we

doing with your client?

MR. REED: I mean, hopefully we're going to get some action. I mean, that's what I would hope. I mean, I think what I'm seeing is we're seeing some resolutions of the main characters, and I'm hoping, kind of once you've got that finalized, we can figure out how to get our case moving or wrapped up itself, so.

THE COURT: Thank you. Judge Comstock, what time on the 11th?

JUDGE COMSTOCK: That's Monday. Of course, we have mental health in the morning. So, depending on how much time they need. You know, it's always risky setting something early in the afternoon on Monday. You know, if mental health goes long, then we have a problem.

THE COURT: Let's set it for 1:30 on Monday, April 11th.

JUDGE COMSTOCK: Okay.

THE COURT: And I'll try to get through my commitment docket as fast as I can, all right, gentlemen?

MR. SPIELMAN: With regard to the hearing being on the 11th, you want to set any specific deadlines perhaps whether it be the Co-Trustees responding to the motion to vacate or Ms. Curtis or Ms.

Schwager responding, I guess, just the supplement to the motion to exclude because the other parts of that motion have been fully briefed and sur replied and everything already.

THE COURT: Well, I think it's reasonable that any replies ought to be submitted to opposing counsel by 5 p.m. on that Friday before that. I guess that's the 8th?

MR. SPIELMAN: Yes, that works for me, Judge, and I think that works for everybody, hopefully, because, you know, I think - and I've done it myself - but in this case, there seems to always be sort of a last-second flurry of stuff that probably doesn't even make it onto your desk on time. So, having a deadline like that, I think might help everybody.

COURT'S RULING:

THE COURT: All right. Okay. Well, then I won't call a panel on the 5th of April. And I will see you folks back on Monday afternoon, April 11th.

MR. SPIELMAN: Understood.

THE COURT: All right. Y'all have a good week, and all of you are excused.

MR. LOYD: Thank you, Your Honor.

MR. SPILEMAN: Thank you, Judge.

* * * * *

The State of Texas)
County of Harris)

I, Hipolita Lopez, Official Court Reporter in and for the Probate Court Number Four of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $147.00. and was paid by MS. CANDACE L. CURTIS.

WITNESS MY OFFICIAL HAND this the 7th day of April, 2022.

/s/ Hipolita G. Lopez
HIPOLITA G. LOPEZ, Texas CSR #6298
Expiration Date: 10-31-22
Official Court Reporter
Probate Court Number Four
Harris County, Texas
201 Caroline, 7th Fl.
Houston, Texas 77002

TAB 49

FILED
11/21/2019 7:36 PM
Diane Trautman
County Clerk
Harris County - County Probate Court No. 4
Accepted By: ES

No. 412249-404

PLAINTIFF CANDACE LOUISE CURTIS STATUTORY BILL OF REVIEW

	NO. 412,249	
ESTATE OF NELVA E. BRUNSTING, DECEASED	§ § § § §	
Lead Case	CLOSED	Consolidated With
	NO. 412,249-401	
CARL HENRY BRUNSTING, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E. BRUNSTING	§	IN PROBATE COURT
vs.	§	NUMBER FOUR (4)
ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust;	§	HARRIS COUNTY, TEXAS
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, individuallyand as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, CANDACE LOUISE CURTIS	§	

	NO. 412,249-402	
CANDACE LOUISE CURTIS	§	
	§	
vs.	§	
	§	
Anita and Amy Brunsting	§	
	NO. 412,249-403	
CARL HENRY BRUNSTING,	§	
INDEPENDENT EXECUTOR OF THE	§	
ESTATES OF ELMER H. BRUNSTING	§	
AND NELVA E. BRUNSTING	§	
vs.	§	
	§	
CANDACE L. KUNZ-FREED AND	§	
VACEK & FREED, PLLC f/k/a	§	
	§	

STATUTORY BILL OF REVIEW

Contents

Cases

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ORIGINAL BILL OF REVIEW

TO THE HONORABLE JUDGE OF SAID COURT:

1. The procedure prescribed by Title 2 of the Texas Estates Code governs all probate proceedings.[1] Title 2 contains Subtitles A-P covering sections § 31.001 to § 753.002.

CONTEST TO PROCEEDINGS

2. Title 2 Subtitle A governs contests to proceedings in a probate court. Pursuant to Title 2 Subtitle A § 55.001, a person interested in an estate may, at any time before the court decides an issue in a proceeding, file written opposition regarding the issue. The person is entitled to process for witnesses and evidence, and to be heard on the opposition, as in other suits.[2]

3. Title 2 Subtitle F governs procedures for the correction of Orders or Judgments in "probate proceedings".

4. Pursuant to Title 2 Subtitle F § 55.251(a)

> *An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.*

5. § 55.251 (b) provides that a bill of review to revise and correct an order or judgment may be filed ***within two years of the date the order or judgment was entered.***

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[1] Tex. Estates Code § 21.006
[2] Added by Acts 2009, 81st Leg., R.S., Ch. 680 (H.B. 2502), Sec. 1, eff. January 1, 2014

6. The February 14, 2019 Order denying Plaintiff Curtis October 19, 2018 Plea to the Jurisdiction, and denying Plaintiff Curtis' October 8, 2018 Verified Plea in Abatement that incorporated the August 17, 2018 plea and the September 4, 2018 Addendum by reference, is hereby challenged. All Orders entered in 412249-401 are herein challenged as *void ab initio*[3] for want of subject matter jurisdiction, as hereinafter more fully appears.

STANDING

7. Petitioner, Candace Louise Curtis, the de jure co-trustee for the sole devisee named in the Wills of Elmer and Nelva Brunsting, is an interested person within the meaning of § 22.018 of Title I of the Texas Estates Code and does herein make timely appearance by Bill of Review for correction of Orders, Rulings and the Docket, as authorized by Tex. Est. Code § 55.251 (a) & (b).

APPLICABLE LAW AND STANDARD OF REVIEW

> *"A bill of review is a separate, independent suit to set aside a judgment that is no longer subject to a motion for new trial or appealable. Woods v. Kenner, 501 S.W.3d 185, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There are two types of bills of review: equitable and statutory. See id. at 191. Sheilah petitioned for a statutory bill of review. The purpose of a statutory bill of review is "to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by the probate court." Nadolney v. Taub, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).*
>
> *"We review a trial court's ruling on a petition for statutory bill of review for an abuse of discretion, indulging every presumption in favor of the trial court's ruling.* Woods, *501 S.W.3d at 190;* see also

[3] ab initio "before beginning"

Ablon v. Campbell, *457 S.W.3d 604, 608 n.8 (Tex. App.—Dallas 2015, pet. denied) (concluding that standard of review for trial court's ruling on statutory bill of review is abuse of discretion);* Chavez v. Chavez, *No. 01-13-00727-CV, 2014 WL 5343231, at *2 (Tex. App.—Houston [1st Dist.] Oct. 21, 2014, no pet.) (mem. op.) (same). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles."* Woods, *501 S.W.3d at 190. In re Ludington, NO. 01-16-00411-CV, at *7-8 (Tex. App. Jan. 19, 2017)*

*"Ordinarily, we review the denial of a bill of review under an abuse of discretion standard. Temple v. Archambo, 161 S.W.3d 217, 224 (Tex. App.—Corpus Christi 2005, no pet.)." Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

*"Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); Tex. Nat. Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002)." Price v. Univ. of Tex. at Brownsville Tex. Southmost Coll., NUMBER 13-16-00351-CV, at *6 (Tex. App. Nov. 16, 2017)*

JUDICIAL NOTICE

8. Judicial Notice is governed by Article II of the Texas Evidence Code. Petitioner herein moves the Court pursuant to §§ 201 & 202 of the Evidence Code to take Mandatory Judicial Notice of the relevant portions of the record as follows:

9. First Petitioner moves the court to take judicial notice that no Finding of Fact and Conclusion of Law after Hearing regarding any substantive issue related to the Brunsting Trust Controversy has ever been entered in this court and Petitioner objects to all unsworn testimony and unsupported assertions of any attorney to the contrary. Petitioner further moves the court to take judicial notice of:

A. The docket in 412248, 412249, 412249-401, 412249-402 and 412249-403

a. Dockets show the "Estates of *Elmer and Nelva Brunsting*" are "closed"

b. No actions seeking to reopen the estates were ever filed and limitations bar such action at this juncture.

c. The Docket has Candace Louise Curtis listed as "Defendant". No claims were filed against PLAINTIFF CURTIS in the seven and one half years between the filing of Curtis' breach of fiduciary action in the Southern District of Texas February 27, 2012 and Kunz-Freed's October 16, 2019 Motion to Appoint a Personal Representative in the "Estates of Elmer and Nelva Brunsting".

B. The Wills of Elmer and Nelva Brunsting

a. Call for independent administration

b. Sole devisee is the family trust

c. The Wills were not challenged and challenges are now barred by limitations.

C. The August 28, 2012 Orders admitting the Wills of Elmer and Nelva Brunsting and appointing Carl Henry Brunsting Independent Executor of the Decedents' Wills and Estates.

a. These Orders were not challenged.

D. The March 27, 2013 Orders approving the Inventory, appraisement and list of claims in each estate.

a. These Orders were not challenged and no changes have been made to either inventory.

E. The Drop Orders issued April 4, 2013, removing the estates from this Court's active docket.

   a. These Orders were not challenged, these estates have never been reopened and limitations have long since expired.

F. The Petition filed by Carl Henry Brunsting Individually and as Independent Executor on April 9, 2013 in 412249-401.

   a. A challenge to Jurisdiction can be raised at any time, is subject to neither doctrines of latches nor statutes of limitations, does not fall prey to the "*Not Pressed Not Passed upon Below*" rule and can even be raised for the first time on appeal.

G. The Preliminary Federal Injunction Issued April 19, 2013, that was made a part of this Court's record on February 6, 2015 in Case 412249-402 PBT-2015-42743.

H. The May 22, 2014 Order granting Plaintiff attorney's motion to remand.

   a. Mr. Spielman stood before the Court on his client's motion for sanctions June 28, 2019 disingenuously claiming Curtis federal case had been closed and terminated. The record shows the 4:12-cv-592 matter was remanded to this court for "*consolidation*" with the case pending here. Curtis v Brunsting was assigned docket Number 412249-402. (See Local Rules 2 – 2.9)

I. The February 19, 2015 Resignation of Carl Brunsting.

   a. After resigning as independent executor Carl has never bifurcated his personal claims as a trust beneficiary from claims alleged to belong to "estate of Elmer and Nelva Brunsting".

   b. Candace Curtis is not Carl et al.

J. The March 5, 2015 Case 412249-401 PBT-2015-76288 Agreed Order to Consolidate Cases, entered with no motion and no hearing, with no one representing the "estates of Elmer and Nelva Brunsting". Curtis v Brunsting thus vanished into "estates of Elmer and Nelva Brunsting", estates that had been closed more than two years[4].

THE WILLS OF ELMER AND NELVA BRUNSTING

10. The wills of Elmer and Nelva Brunsting both contain a provision for independent administration:

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

11. This same language is mirrored in the August 28, 2012 Orders appointing Carl Henry Brunsting Independent Executor for both estates.

[4] See Tex. Est. Code § 55.251 (b)

Defendant Kunz-Freed's Motion to Appoint Personal Representative or Administrator

12. Plaintiff has spent several years in Harris County Probate Court No. 4, with the Honorable Judge Christine Butts failing to rule on anything and then ceasing to appear, handing the reins of Probate Court No. 4 over to Associate Judge Clarinda Comstock.

13. Meanwhile, Vacek & Freed, the estate planning attorney defendants, have been neatly "sequestered" in the Harris County District Court with no one to prosecute the claims against them.

14. A March 4, 2019 decision entered in the Southern District of Texas by Chief Judge Lee Rosenthal in Johnston v. Dexel 373 F. Supp. 3d 764, 786 (S.D. Tex. 2019) is relevant here. Johnston v. Dexel, *supra,* is a matter arising out of Harris County Probate Court No. 4, in which current Associate Judge **Clarinda Comstock was a Defendant,[5] represented by Thompson Coe attorneys Zandra Foley and Cory Reed**.

15. Zandra Foley and Cory Reed now come before this court representing the estate planning attorney Defendants and seeking appointment of a Personal Representative or Administrator to represent "the estates of Elmer and Nelva Brunsting", complaining that the case against their client had been pending for an extended period of time (2,448 days), in which Probate Court No. 4 refused or otherwise failed to appoint an estate representative to prosecute their estate planning clients, Candace Kunz-Freed et al., in the Harris County District Court.

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[5] Filed September 27, 2016 in Liberty County

CLOSING THE INDEPENDENT ADMINISTRATION

16. Independent administration of estates is governed by the Texas Estates Code Title 2, Subtitle I Chapters 401-405.

Tex. Est. Code § 402.001

> *Sec. 402.001. GENERAL SCOPE AND EXERCISE OF POWERS. When an independent administration has been created, and the order appointing an independent executor has been entered by the probate court, and the inventory, appraisement, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisement, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.*[6],[7]

17. The question of when an independent probate administration closes[8] was addressed by the Honorable Lee H. Rosenthal in Johnston v. Dexel. It should be noted that there was no pour over will in Dexel, but there are pour over Wills in the Brunsting Trust controversy.

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[6] Independent administration of estates was formerly governed by the Texas Probate Code §§ 145-154A (Vernon 1980 and Vernon Supp. 1991). Section § 402.001 is a restatement of § 151 (b) . . . The filing of such an affidavit shall terminate the independent administration and the power and authority of the independent executor, but shall not relieve the independent executor from liability for any mismanagement of the estate or from liability for any false statements contained in the affidavit.

[7] The purpose of administration is to satisfy the decedent's debts and to distribute the remainder of the estate in accordance with the testator's wishes. See generally William J. Marschall, Jr., Independent Administration of Decedents' Estates, 33 Tex.L.Rev. 95, 116 (1954).

[8] "An independent administration is to close, and the authority of the personal representative is to terminate, when the estate has been settled." 1 TEXAS PRACTICE GUIDE PROBATE § 5:59 (2018) The executor may file a formal report or notice to close the administration after: [A]ll of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the independent executor's possession will permit, when there is no pending litigation, and when the independent executor has distributed to the distributes entitled to the estate all assets of the estate, if any, remaining after payment of debts.

"Texas law permits a person to state in her will that "no other action shall be had in the probate court in relation to the settlement of the person's estate [other] than the probating and recording of the will and the return of any required inventory, appraisement, and list of claims of the person's estate." TEX. EST. CODE § 401.001(a). This language creates an independent administration, allowing the estate's executor to take "any action that a personal representative subject to court supervision may take with or without a court order." Id. § 402.002.

After the probate court has entered "the order appointing an independent executor," and "the inventory, appraisement, and list of claims has been filed by the independent executor and approved by the court," the executor or interested parties may not take further actions in the probate court, "except where this title specifically and explicitly provides for some action in the court." Id. § 402.001.

*The independent administration's purpose is to "free an estate of the often onerous and expensive judicial *29 supervision which had developed under the common law system, and in its place, to permit an executor, free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay." Corpus Christi Bank & Tr. v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969); see Eastland v. Eastland, 273 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("The primary distinction between an independent administration and a dependent administration is the level of judicial supervision over exercise of the executor's power.").*

The independent executor's task is to pay claims against the estate and distribute the remaining assets under the will, a settlement agreement, or the Texas Estates Code. See TEX. EST. CODE § 403.051(a) ; Ertel v. O'Brien , 852 S.W.2d 17, 20–21 (Tex. App.—Waco 1993, writ denied) ("An independent executor is charged with the duty of paying the claims against the estate subject to the order and classification set out in the Probate Code."); cf. In re Roy , 249 S.W.3d 592, 596 (Tex. App.—Waco 2008, no pet.) ("As trustee of the estate's property, the executor is subject to high fiduciary duties."). "An independent administration is to close, and the authority of the

personal representative is to terminate, when the estate has been settled." 1 TEXAS PRACTICE GUIDE PROBATE § 5:59 (2018).”

18. Estates Code § 402.001 is a restatement of § 145(h) of the former Probate Code. This provision forecloses the executor and all interested persons from taking “further action” in the probate court except to the extent the code authorizes the probate court to take cognizance of matters “*incident to an estate*”.

> *In re Estate of Aguilar, No. 04-13-00368-CV, at *2-3 (Tex. App. Feb. 19, 2014) (“rejected the argument, asserting, "This section of the code does not deny the probate court's jurisdiction over a contested claim against an estate served by an independent executor." Id. Noting a probate court retains general jurisdiction to hear matters incident to an estate, this court held "[t]he probate court has subject matter jurisdiction over independent executors." Id. at 719; see also Columbia Rio Grande Regional Hosp. v. Stover, 17 S.W.3d 387, 393 (Tex. App.—Corpus Christi 2000, no pet.) (concluding section 145(h) does not deprive a probate court of jurisdiction over an independent administration); In re Estate of Lee, 981 S.W.2d 288, 291-92 (Tex. App.—Amarillo 1998, pet. denied) (rejecting jurisdictional challenge based on section 145(h) and holding probate court had jurisdiction to consider claim filed by independent executrix). ”)*

19. The claims that are authorized and the cases supporting continued action in the probate court, involve claims against the executor and challenges to rights in property within the decedent’s estate, none of which are relevant here. There have been no challenges to the will devising to the trust. There have been no challenges to the inventory or the list of claims nor to the drop order closing the “estates” and all of those things were res judicata and beyond review many years ago. Want of jurisdiction however, is never beyond review, is not subject to the not pressed not passed upon below rule and can be raised for the first time on appeal. *Tex. Ass'n of Bus. v. Tex.* Air. Control Bd., 852 S.W.2d 440, 445 (Tex.1993).

20. The "estate" poured over into the trust under the directive of the will. The rights in said property vested in the trust immediately at the death of the testator and the right of possession was complete with the Order approving the Inventory.

21. It is unnecessary to debate whether the matter filed five days after the estate was dropped from the active docket is a matter "incident to an estate", as one pivotal issue has received unanimous agreement from all courts of appeal.

> *("The pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it."); Garza v. Rodriguez, 18 S.W.3d 694, *5 698 (Tex. App.—San Antonio 2000, no pet.) ("Before a matter can be regarded as incident to an estate ... a probate proceeding must actually be pending."). Lawton v. Lawton NO. 01-12-00932-CV (Court of Appeals For the First District of Texas Mar. 6, 2014)*

22. Filing of a Bill of Review does not, in and of itself, reopen a closed estate. It is unnecessary to look further as no Bill of Review seeking to reopen the estate was ever filed and the closing of the estate at this juncture cannot be disturbed.

> *"a bill of review seeking to reopen an estate closed long ago does not render the estate "pending" as that word is used in section 5B of the Probate Code. In re Kenedy Mem'l Found., 159 S.W.3d at 143, Id. at 143-46. " n.21 (Tex. 2010), Frost Nat. Bank v. Fernandez, 315 S.W.3d 494, 505 n.21 (Tex. 2010)*

23. No one has challenged the approved inventory and no one has raised claims of adverse interests in rights to property within the inventory of the estate. The controversy among trustees and beneficiaries of the inter vivos trusts is not a probate matter.

24. The law of the case was established with the Findings of Fact and Conclusions of Law after hearing and preliminary injunction entered in the Southern District of Texas[9] and the unanimous opinion of the Fifth Circuit Court of Appeal published *Curtis v Brunsting 704 F.3d 406*. The doctrine of collateral estoppel precludes re-litigation of those issues.

JURISDICTION OVER TRUST PROCEEDINGS

25. 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.

26. 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…*

27. 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)*

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[9] Made a part of this Courts record on 2015-02-06 in Case 412249-402 PBT-2015-42743

*A "probate proceeding" includes an application, petition, motion, or action regarding estate administration, id. § 31.001(4) (West 2014), and a claim "related to the probate proceeding" includes an action for trial of the right to property that is estate property. Id. § 31.002(a)(6), (c); see also Wallace v. Wallace, No. 05-17-00447-CV, 2017 WL 4479653, at *3 (Tex. App.—Dallas Oct. 9, 2017, no pet.) (mem. op.). However, to trigger a statutory probate court's exclusive subject-matter jurisdiction over a cause "related to the probate proceeding," a probate proceeding must already be pending. See Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) (recognizing that "**a court empowered with probate jurisdiction may only exercise its probate jurisdiction over 'matters incident to an estate' when a probate proceeding relating to such matter is already pending in that court**" (quoting Bailey v. Cherokee Cty. Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993) (op. on reh'g))); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) ("[B]efore a matter can be regarded as incident to an estate . . . a probate proceeding must actually be pending.").*

28. Narvaez v. Powell 564 S.W.3d 49 (Tex. App. 2018))(emphasis added)

A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX.ESTATES CODE ANN. § 32.001(b). In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court. See Frost National Bank, 315 S.W.3d at 506. That requisite is satisfied here. Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the non-probate claims and the claims against the estate. See Shell Cortez Pipeline Co. v. Shores , 127 S.W.3d 286, 294 (Tex.App.—Fort Worth 2004, no pet.), citing Sabine Gas Trans. Co.

v.Winnie Pipeline Co. , 15 S.W.3d 199, 202 (Tex.App.—Houston [14th Dist.] 2000, no pet.) ; Goodman v. Summit at W. Rim, Ltd. , 952 S.W.2d 930, 933 (Tex.App.—Austin 1997, no pet.) (holding that probate court can exercise "ancillary" or "pendent" jurisdiction over a claim only if it bears some relationship to the estate). That is, probate courts exercise their ancillary or pendent jurisdiction over non-probate matters only when doing so will aid in the efficient administration of an estate pending in the probate court. Shell Cortez Pipeline , 127 S.W.3d at 294-95.

29. Valdez v. Hollenbeck 465 S.W.3d 217 (Tex. 2015)

Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 506 (Tex. 2010) (acknowledging that a court may exercise its probate jurisdiction over "matters incident to an estate" only when a probate proceeding is already pending in that court (quoting Bailey v. Cherokee Cnty. Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993))); In re Sims, 88 S.W.3d 297, 304 n. 3 (Tex. App.—San Antonio 2002, orig. proceeding) (same); Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) (same).

30. Herring v. Welborn 27 S.W.3d 132 (Tex. App. 2000))(emphasis added)

*Once a probate proceeding is under way, the statutory county court's authority to deal with all matters incident to an estate is triggered. See Schuld v. Dembrinksi, 12 S.W.3d 485, 487 (Tex.App.-Dallas 2000, no pet.) (allowing a partition proceeding among heirs to proceed in a county court at law because no probate proceeding was pending in the statutory probate court). "**In other words, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it.**"*

DOMINANT JURISDICTION

31. In Kunz-Freed's March 8, 2016 objection to Plaintiff Curtis' motion to transfer the District Court case to Probate Court 4, Kunz-Freed raises the issue of Dominant Jurisdiction and was correct. Such a transfer was improper and the motion should have been denied. Kunz-Freed argued as follows:

> *III.*
>
> *ARGUMENTS AND AUTHORITIES*
>
> *A. Ms. CURTIS' MOTION TO TRANSFER SHOULD BE DENIED*
>
> *3.1 The general common law rule in Texas is that the court in which suit is first filed acquires dominate jurisdiction to the exclusion of other coordinate courts. Curtis v. Gibbs, 511 S.W.2d 263, 267 {Tex. 1974); Cleveland v. Ward, 285 S.W. 1063 (Tex. 1926); Hardy v. McCorkle, 765 S.W.2d 910, 913 (Tex. App.-Houston (1st Dist.] 1989, orig. proceeding). In this case, the first lawsuit was the District Court suit, which would therefore be the court of dominate jurisdiction. Although Carl could have certainly filed similar claims against V&F in the Probate Proceeding, he decided to file separate proceedings. The principle of dominant jurisdiction dictates that this case should not be transferred arbitrarily once a lawsuit has been assigned to a particular court. Republic Royalty Co. v. Evins, 931 S.W.2d 338, 342 (Tex. App.- Corpus Christi 1996, no writ). To allow Ms. Curtis to now obtain a transfer of the legal malpractice suit at this juncture only encourages improper forum shopping."*

32. In Mayfield v Peek 546 S.W.3d 253 (Tex. App. 2017) it was determined that:

> *A court exercising original probate jurisdiction also has jurisdiction over "matters related to the probate proceeding" as specified in former Section 4B of the Probate Code. Act of June 19, 2009, 81st Leg., R.S., ch. 1351, § 4A, 2009 TEX.GEN.LAWS 4273, 4275 (formally codified at TEX.PROB.CODE ANN. § 4A, now repealed and replaced with TEX. EST.CODE ANN. § 32.001(a)(West 2014)). § 4B*

in turn provided that in a county with no statutory probate court, but a county court at law exercising original probate jurisdiction, one of the matters that can be "related" to a probate proceeding is the "interpretation and administration of an inter vivos trust created by the decedent whose will has been admitted to probate in the court." Id. at § 4B(3)(now codified at Tex. Est.Code ANN. 31.002(b)(3)). Though the textual grant of jurisdiction is not as broad as that given to a district court, it might fairly encompass Mayfield's claim because the transfer of property is an aspect of administration of a trust.

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

The Texas Supreme Court explains dominant jurisdiction this way:

The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts. As a result, when two suits are inherently interrelated, a plea in abatement in the second action must be granted. This first-filed rule flows from principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues. The default rule thus tilts the playing field in favor of according dominant jurisdiction to the court in which suit is first filed.

33. Incident to an Estate see Tex. Est. Code § 31.001

An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate. English v. Cobb, 593 S.W.2d 674, 676 (Tex. 1979); Falderbaum v. Lowe, 964 S.W.2d 744, 747 (Tex.App.-Austin 1998, no writ). Suits incident to an estate include those seeking to recover possession of or collect damages for conversion of property. Lucik v. Taylor, 596 S.W.2d 514, 516 (Tex. 1980).

34. Sec. § 31.001 SCOPE OF "PROBATE PROCEEDING" FOR PURPOSES OF CODE. The term "probate proceeding," as used in this code, includes:

> *(1) the probate of a will, with or without administration of the estate;*
>
> *(2) the issuance of letters testamentary and of administration;*
>
> *(3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;*
>
> *(4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;*
>
> *(5) a claim arising from an estate administration and any action brought on the claim;*
>
> *(6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and*
>
> *(7) a will construction suit.*

35. In the absence of the Legislature's inclusion of a matter in the types of claims a court exercising probate jurisdiction can hear, we use the "controlling issue test" to determine whether the matter falls within the court's jurisdiction. *See In re Puig,*351 S.W.3d 301, 304 (Tex. 2011). Under that test, a suit is "incident to an estate when the controlling issue is the settlement, partition, or distribution of the estate." *Id. Dowell v. Quiroz*, 462 S.W.3d 578, 582-83 (Tex. App. 2015)

36. An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate. *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).

37. Closing Procedures are not required of an independent executor, § 405.012. The Order approving the inventories and the Drop Orders issued April 4, 2013 completed the pour over process and the right of possession was vested. That was more than six years ago.

38. The trust does not pour over into the estate but quite the contrary. Settling the Brunsting trust can have no effect on the settlement, partitioning or distribution of the "estates of Elmer and Nelva Brunsting" and by that definition the Brunsting Trust controversy is not a matter "incident to the estate".

> *Although courts generally do not lose subject matter jurisdiction once it attaches, a probate court is a specialized court that can lose jurisdiction over matters incident to an estate if it loses jurisdiction over the probate matters. See Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.).* ***In other words, once an estate closes, incident claims are pendent or ancillary to nothing, and the probate court loses jurisdiction****. Id.; see also Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) ("the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it"); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) ("before a matter can be regarded as incident to an estate ... a probate proceeding must actually be pending")*
>
> *In Texas, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it. In Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581 (Tex. 1993), the Texas Supreme Court stated that a trial court* ***must have a probate case pending to exercise its jurisdiction over matters "incident to an estate."*** *See also In re Estate of Hanau, 806 S.W.2d at 904 (court lost jurisdiction to remove independent executrix after estate was closed). We hold that the probate court may only exercise "ancillary" or "pendent" jurisdiction over a claim that bears some relationship to the estate. Once the estate settles, the claim is "ancillary" or "pendent" to*

nothing, and the court is without jurisdiction. Goodman v. Summit at West Rim, Ltd. 952 S.W.2d 930 (Tex. App. 1997) (emphasis mine)

39. See Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co. 528 S.W.3d 201 (Tex. App. 2017)

> *("The trial court has power to hear all matters incident to an estate only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." (emphasis added) (citing Interfirst Bank–Hous. v. Quintana Petroleum Corp., 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.))); Pullen v. Swanson, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (stating that a statutory probate court's jurisdiction "to hear all matters incident to an estate necessarily presupposes that a probate proceeding is already pending in that court" (emphasis added)).*
>
> *The purpose of independent administration is to free the independent executor from judicial supervision by the probate court and to effect the distribution of an estate with minimal costs and delays. Sweeney v. Sweeney, 668 S.W.2d 909, 910 (Tex. App.—Houston [14th Dist.] 1984, no writ); Burke v. Satterfield, 525 S.W.2d 950, 955 (Tex. 1975).* ***The Estates Code codifies this purpose*** *by directing that after an independent executor is appointed and the inventory has been approved, "as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court." "TEX. EST. CODE ANN. § 402.001. In re Estate of Aguilar No. 04-13-00038-CV (Tex. App. Feb. 19, 2014).*

Texas Estates Code § 34.001

40. Texas Estates Code § 34.001 is referred to as the snatching statute. However, a judge of a statutory probate court "may transfer" to the judge's court from a district… court a cause of action related to a probate proceeding "**pending**" in the statutory probate court. There is no probate proceeding "**pending**" in this court.

THE TESTAMENTARY TRUST OF THE TESTATOR

41. When a person dies without leaving a valid will they are said to have died intestate. Any assets belonging to such individual at the time of death form a testamentary trust which is created by operation of law[10], to be administered and disposed of according to the laws of intestate succession.

> *§ 101.001(b), Subject to Section 101.051, the estate of a person who dies intestate vests immediately in the person's heirs at law.*

42. When a person dies leaving a valid will, the assets belonging to the individual at the time of death are held under a testamentary trust [11] and administered and disposed of according to the directives contained in the person's will.

43. Texas Estate Code § 22.012 defines "Estate" to mean a "decedent's property" as it exists originally and as the property changes in form. Subtitle C (§101.001 through §124.006), controls passage and possession of a decedent's estate.

> *§ 101.001 (a) Subject to Section 101.051, if a person dies leaving a lawful will:*
>
> *(1) all of the person's estate that is devised by the will vests immediately in the devisees;*

44. Tex. Est. Code § 101.051 (a) states that a decedent's estate vests in accordance with Section 101.001 (a) subject to the payment of various debts and

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[10] A testamentary trust of the decedent is created by operation of law Tex. Est. Code § 101.003
[11] A testamentary trust of the testator is created by operation of law § 101.003

obligations owed by the decedent prior to distributing the residual estate to the heirs or devisees as the case may be.

45. We are not talking about inheritance expectancy. Tortious interference with inheritance expectancy is not a recognized cause of action in Texas[12] and all three of the attorneys who filed such claims in this court know better as a matter of law.

46. We are talking about vested property interests (§ 101.001) in the corpus of an inter vivos trust (§ 254.001) and that question was already pending before two other courts when the April 4, 2013 drop order closed the "estates of Elmer and Nelva Brunsting" in this court. That was five days before ancillary matter No. 412249-401 was filed "ancillary" or "pendent" to nothing.[13]

DEVISE TO TRUST

47. When a person dies leaving a valid will devising to a trust, property devised to the trust described by Subsection (a) of Tex. Est. Code § 254.001 is not held under a testamentary trust of the testator but immediately[14] becomes part of the corpus of the trust to which the property is devised and must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendments.

48. According to *Texas. Property Code § 111.004*, The term "trust" refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property.

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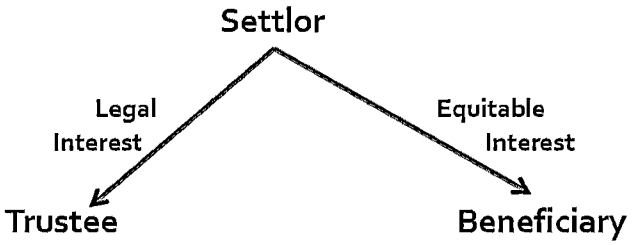
[12] See Neal Spielman's own admission in Case 4:16-cv-01969 Document 40 Filed in TXSD on 10/03/16 Page 4 of 6
[13] Goodman v. Summit at West Rim, Ltd. 952 S.W.2d 930 (Tex. App. 1997)
[14] The reference dates for determining "immediate" are November 11, 2011 for the vesting of property rights and April 4, 2013 for the closing of the residual estate and vesting of the right of possession. See Johnston v Dexel et al.



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49. The fundamental distinction between a trust agreement and an ordinary business contract is in the *separation of legal and equitable title*. The trustee is merely the depository of the bare legal title. The trustee is vested with legal title and right of possession of the trust property (the res) but holds it in a fiduciary capacity for the benefit and enjoyment of the beneficiaries, who are vested with equitable title to the trust property.

> *As this Court and the Tyler Court have explained, a trustee is merely the depository of the bare legal title. City of Mesquite v. Malouf, 553 S.W.2d 639, 644 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.); Faulkner v. Bost, 137 S.W.3d 254, 258 (Tex. App.—Tyler 2004, no pet.). "When a valid trust is created, the beneficiaries become the owners of the equitable or beneficial title to the trust property and are considered the real owners." Malouf, 553 S.W.2d at 644. "The trustee is vested with legal title and right of possession of the trust property but holds it for the benefit of the beneficiaries, who are vested with equitable title to the trust property." Faulkner, 137 S.W.3d at 258-59. The trustee has fiduciary duties to hold and manage the property for the benefit of the beneficiaries. TEX. PROP. CODE §§ 113.051, 113.056(a) (West 2007). In general, a trustee "owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty and fidelity over the trust's affairs and its corpus. " Herschbach v. City of Corpus Christi, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied); see InterFirst Bank Dallas, N.A. v. Risser, 739*

[15] Drawing Courtesy of Doctor Gerry Beyer, Regent Professor of Law, Texas A & M University

*S.W.2d 882, 888 (Tex. App.—Texarkana 1987, no writ). Scott argues the trust document excused him from the obligation to perform such duties. Martin v. Martin, No. 06-10-00005-CV, at *8-9 (Tex. App. Mar. 20, 2012)*

50. The Indenture is the instrument that expresses the fiduciary relationship governing the trustee with respect to the trust property. It is the indenture that defines the fiduciary obligations the trustee owes to the beneficiary with respect to the trust property.

DEFENDANTS MOTION TO APPOINT A PERSONAL REPRSENTATIVE

51. Chapter 404 of Subtitle I of Title 2 of the Texas Estates Code governs the question of appointing a successor administrator who succeeds an Independent Executor. Section § 404.004(a) allows the appointment of an administrator to succeed an independent executor only where the independent executor has ceased to serve "*leaving unexecuted parts or portions of the will*".

52. If assets otherwise belonging to a testamentary trust of the testator immediately vest in the trustees for the trust and become a part of the corpus of the trust at the death of the testator and, if the Order approving the Inventory immediately vests the right of possession in the trustee, what *parts or portions of the pour over will remained unexecuted when the drop order issued?*

POUR OVER PROCEDURES

53. Nelva Brunsting's Will is a pour over will devising solely to the family inter vivos trust. There are no other specific bequeaths. The pour over procedures are prescribed by Texas Estates Code § 254.001 et. seq.,

Texas Estates Code § 254.001(a) & (c)(1)&(2)

> *§ 254.001(a) A testator may validly devise property in a will to the trustee of a trust established or to be established (1) during the testator's lifetime by... the testator and another person,...*
>
> *§ 254.001(c) Unless the testator's will provides otherwise, property devised to a trust described by Subsection (a) is not held under a testamentary trust of the testator. The property:*
>
> *(1) becomes part of the trust to which the property is devised; and*
>
> *(2) must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendment to the instrument made before or after the testator's death.*

54. At the time of death, any property belonging to the Decedent forms a testamentary trust[16].

> *Under Texas law, during the period of administration, the decedent's estate in the hands of the executor or administrator constitutes a trust estate. The executor or administrator is more than a stake-holder, or the mere agent as a donee of a naked power of the heirs, legatees, and devisees. He has exclusive possession and control of the entire estate. He is charged with active and positive duties. He is an active trustee of a trust estate. Jones v. Whittington, 194 F.2d 812, 817 (10th Cir. 1952); see also Morrell v. Hamlett, 24 S.W.2d 531, 534 (Tex.Civ.App. — Waco 1929, writ ref'd) (estate property under administration is held in trust). Bailey v. Cherokee County Appraisal Dist, 862 S.W.2d 581, 584 (Tex. 1993)*

55. To argue that the independent executor of the estate is the real party in interest to claims against the estate planning attorneys is the equivalent of arguing that a testamentary trust of the testator was formed. This theory is in direct contradiction to the express language of the statute prescribing the pour over

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[16] The executor is trustee for a testamentary trust created by operation of law § 101.003

procedures and defeats the main purposes for the pour over process which is, unified administration and the avoidance of probate.

56. It would make sense that no testamentary trust (decedent's estate) would be created when the will devises exclusively to an existing trust, as any properties belonging to the Decedent at the time of death immediately become a part of the corpus of the trust and are to "*be administered and disposed of according to the provisions of the instrument establishing the trust.*"[17]

> *The concept of the "pour-over" is not difficult. It is simply a dispositive provision which directs that all or part of an estate is to be added to the corpus of an existing trust, to be administered according to and without the necessity of reiteration of the terms of the trust. The basic goal is to furnish a simple mechanism for adding the poured-over assets to the corpus of the existing trust in order to secure a* ***unified administration*** *of assets with whatever minimization of administrative expenses or detail is thus possible. In re Blount, 438 B.R. 98 (Bankr. E.D. Tex. 2010) (emphasis added)*

57. It has been said that there is no shorter interval of time than from when a testator dies and his estate passes to the devisees under his will.[18] Because the property rights, including the right of claims, immediately became a part of the corpus of the trust at the death of the testator, any argument that the claims filed in the District Court belonged to the decedent's estates after the inventory, appraisement and list of claims was approved, would defeat the purpose for this

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[17] Formerly Texas Probate Code § 37, section 37 deals with passage of title upon intestacy and under a will. The pertinent part of that section states "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will . . . shall vest immediately in the devisees or legatees of such estate . . .; subject, however, to the payment of the debts of the testator. . . . Tex.Prob. Code Ann. § 37 (West Supp. 1996). An ownership interest in property vests in a beneficiary immediately upon the death of the testator. *See Kelley v. Marlin,* 714 S.W.2d 303, 305-06 (Tex. 1986); *Johnson v. McLaughlin,* 840 S.W.2d 668, 671 (Tex.App. — Austin 1992, no writ).

[18] Hardy v. Bennefield 368 S.W.3d 643 (Tex. App. 2012); *In re Estate of Catlin, 311 S.W.3d 697, 703 (Tex.App.-Amarillo 2010, pet. denied)*

estate plan and negate the purpose and effect of § 254.001, the law such plans are made in reliance on. The rules governing statutory interpretation do not allow for prerogatives.[19]

CONVERSION IS NOT CONSOLIDATION

58. *Candace Louise Curtis v Amy and Anita Brunsting 4:12-cv-592* is not the "*Estate of Nelva Brunsting*",[20] nor is it a matter incident thereto.

59. Candace Louise Curtis v Amy and Anita Brunsting No. 4:12-cv-592, filed Southern District of Texas February 27, 2012, was remanded from the Southern District of Texas to Harris County Probate Court No. 4 in June 2014, to be "*consolidated with the case pending there*"[21] and was assigned ancillary Cause No. 412249-402.

60. The March 5, 2015 "Agreed Order to Consolidate Cases" is evidence of conversion, which is not a consolidation by any legal standard or measure.[22] WHO WAS REPRESENTING estate of Nelva Brunsting when this conversion agreement was signed?

61. *Candace Louise Curtis v Amy and Anita Brunsting* No. 412249-402 is NOT *Carl Brunsting et al.*, No. 412249-401

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[19] The seminal rule of statutory construction is to presume that the legislature meant what it said. Seals v. State, 187 S.W.3d 417, 421, No. PD-0678-04, 2005 WL 3058041, 2005 Tex.Crim.App. LEXIS 1966 (Tex.Crim.App. Nov. 16, 2005)

[20] Curtis v Brunsting 704 F.3d 406 (January 9, 2013)

[21] ORDER OF TRANSFER, SIGNED JUNE 3, 2014 Film code number PBT-2014-184792. There was no case **pending** in this court to consolidate with and the order accepting remand is void as a matter of law.

[22] See Rule 2 - 2.9 of the Local Rules of the Probate Courts

62. *Candace Louise Curtis v Amy and Anita Brunsting* **is** *Candace Louise Curtis v Amy and Anita Brunsting* **and no other cause**!

DEFENDANT ANITA AND AMY BRUNSTINGS RESPONSE TO MOTION TO APPOINT PERSONAL REPRESENTATIVE

63. There is no core "estate" pending in this court and matters relating to the Brunsting trust were not properly brought before this court.

64. On May 19, 2019 alleged trustee Amy Brunsting's attorney Neal Spielman filed a motion for sanctions seeking a judgment of contempt "*due to the conduct of Candace Louise Curtis*" and alleging that:

> *"Curtis is in contempt of this Court's Order Denying Plea and Motions filed by Candace Curtis dated February 14, 2019. Curtis has ignored this Court's findings and orders as to her meritless jurisdictional arguments."*
>
> *Curtis' dogged pursuit of these meritless claims, both before and after entry of the Order Denying Pleas and Motions filed by Candace Curtis reveals a disrespect for judicial authority; evidences an intent to exacerbate an already emotionally-charged matter; and continues a pattern of behavior that is either intentionally designed to harass, to waste Estate/Trust assets, and/or is recklessly pursued without regard to the law or the facts.*

65. In Mr. Spielman's motion for sanctions he says of Plaintiff Curtis: *"At best, she fails to comprehend the legal process"*[23].

ADMISSIONS

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[23] It should be noted that Pro Se Plaintiff Curtis obtained a unanimous opinion from the federal Fifth Circuit Court of Appeal **in this case**, published Curtis v Brunsting 704 F.3rd 406 (Jan. 9, 2013), wherein the Fifth Circuit Court of Appeal held that there was subject matter jurisdiction in the Southern District of Texas.

66. Mr. Spielman argued at the hearing on his motion for sanctions that he was forced to waste valuable time reading Plaintiff Curtis' "frivolous pleadings" and yet on Monday November 4, 2019, Spielman and Mendel filed Defendants Amy and Anita Brunsting's untimely response to Kunz-Freed's motion to appoint a personal representative, in which they adopt a Plaintiff Curtis argument.

> *"Because both Wills gift, devise and bequeath all property and estate to the Brunsting Family Living Trust, there is no need for such an appointment. As a result, Kunz-Freed's Motion to Appoint Personal Representative of Administrator should be denied..."*
>
> *"A "Successor Executor" is not required.*
>
> *The claims against Kunz-Freed are assets of the Brunsting Family Living Trust, and therefore are subject to the control of the Co-Trustees."*

67. Unfortunately, counsel has failed to follow this reasoning through to the unyielding deductions that flow therefrom and, thus, fail to perceive how their new found revelation raises problems of substantial significance.

68. If there was an "estate pending" in this court the appointment of a representative would be necessary and would have been necessary several years ago, but has not been necessary since the administrative closing of the "estate" April 4, 2013 vested the right of possession of those claims in the trustees.

69. Defendants do not cite to any authority for their sudden realization that the claims belong to the trustees and not the estate. Thus, while adamantly calling Plaintiff Curtis' pleadings "frivolous", they fail to realize the unavoidable conclusion that flows from page one paragraph two of Plaintiff Curtis' June 6,

2019 reply[24] to Defendant Amy Brunstings May 5, 2019 Motion for Sanctions. Paragraph 2 cites to Texas Estates Code § 254.001 which contains the pour over procedures.

70. The rights of claims belong to the trustees and not a testamentary trust of the testator (estate).

Temporary Administrator Gregory Lester

71. Mr. Lester's January 14, 2016 "*Report of Temporary Administrator Pending Contest*" never even mentions the pour over wills or the drop orders. However, Mr. Lester did have the following to say about the vacancy in the office of executor in regard to the District Court suit:

> *"A Notice of Vacancy of Party and Motion to Abate Proceeding was filed by counsel for Carl Henry Brunsting. Carl Henry Brunsting has filed a resignation as executor of the aforementioned estates. Until a successor executor is appointed, there is no plaintiff to pursue the action against Defendants and no plaintiff to respond to Defendants' summary judgment motions. The issue of who will serve as the successor executor of the Estate of Nelva E. Brunsting and the Estate of Elmer Brunsting must be resolved prior to resolving the claims against Defendants"*

72. While Mr. Lester never mentioned the pour over, will he did spend a great deal of time focusing on the **no contest clause** in the alleged August 25, 2010 *"Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment under Living Trust Agreement" (*8/25/2010 QBD/TPA) containing corruption of blood provisions.

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[24] The title to this instrument is an explanation of the proper direction in which fiduciary obligations flow

73. The Brunsting Trust is not an asset within the inventory of any decedent's estate and is not "incident" to any estate. *A Temporary Administrator's fiduciary authority and obligations do not extend to non-probate assets*. See Punts v. Wilson, No. 06-03-144-CV, 2004 WL 1175489, at *3 (Tex. App.-Texarkana May 28, 2004, no pet.) (holding independent executor owed no fiduciary duty to residuary beneficiary concerning accounts not included in decedent's estate)." In re Harden, No. 02-04-122-CV, at *1 (Tex. App. Jul. 15, 2004).

74. Looking back at the September 28, 2017 Fee Application of Temporary Administrator Gregory Lester we see that Mr. Lester spent more time with Defendants' attorneys than with all the other parties combined.

75. Mr. Spielman followed up the Temporary Administrator's report at the "status conference" before Associate Judge Clarinda Comstock on March 9, 2016, making a big deal out of what Mr. Lester said in his report and, as can be seen in the opening lines, Defendants clearly have their fiduciary obligations flowing in the wrong direction.

"Neal Spielman" March 9, 2016 Hearing Page 15:

> *6 But the point here, Judge, is* ***there seems***
> *7 to be no accountability on Ms. Curtis' behalf for the*
> *8 amount of money that is being spent in this case.*
> *9 Parties have, in the past, suggested, oh, let's not*
> *10 worry about the attorneys fees because that will all*
> *11 even out at the end of the story when everybody decides*
> *12 to divide by five, the corpus of the trust, and the*
> *13 winning parties or the prevailing parties can --*
> *14 everything can be adjusted through the division of that*
> *15 estate.*

16 But, Your Honor, if you look at what Mr.
17 Lester recommended/suggested/reported in his report,
18 there's now the very real possibility that there isn't
19 going to be a divide-by-five scenario because of the
20 no-contest clauses that are recognized as being properly
21 drawn by the Vacek & Freed Law Firm. And if that
22 happens, Judge, then the trust is now spending its own
23 money from those people, whether it be three or four,
24 that are still going to get a portion of the estate, a
25 portion of the trust proceeds when this is all said and
Page 16
1 done.
2 I'm rambling just a bit only because it's
3 such a circular discussion - is how do we get this case
4 finished, given, given the backtracking from everybody's
5 willingness to vest Mr. Lester with the authority to
6 proceed, and now the one person who doesn't like what he
7 said, after she filed motions for summary judgment that
8 are direct contradiction to the conclusions that he
9 reached. The very constant of having to come down here
10 and respond to those, to those motions for summary
11 judgment, the amount of money that that will waste is
12 insulting, is offensive to the parties.
13 I'd love to come up with a creative idea
14 to create some accountability, perhaps, if it comes in
15 the form of a sanction or perhaps it comes in the form
16 of some kind of bond being posted so that if it turns
17 out that one of the parties who is blowing things up as
18 it were and creating this increased attorneys fees, no
19 longer has an interest in the estate with which we can
20 even that out by the end of the day. Perhaps if Ms.
21 Curtis is ordered to post a bond against her claims or
22 to protect against the ability -- our ability to recover
23 fees from her if, as and when she loses her case,
24 perhaps then we can move forward with additional
25 hearings, additional motions and so forth.
1 Keep in mind, Judge, that it's not
2 simply -- it's not as simple as getting a date for Ms.

3 Curtis' summary judgment motions. There's been no
4 discovery, in terms of depositions done in this case,
5 not the least of which will be depositions from,
6 perhaps, even from the lawyers in the other district
7 court case who drafted the documents that can explain
8 what all went into those documents, what Nelva
9 Brunsting's state of mind was at the time. There's no
10 way to respond to those summary judgment motions right
11 now without the full weight of the discovery process
12 moving forward and all of the money that that's going to
13 cost.

76. In Defendant Amy Brunsting's Response to Defendant Candace Kunz-Freed's Motion to Appoint Personal Representative we find the following commentary on the Temporary Administrator's Report:

> *"The Temporary Administrator was charged with evaluating the merits of various claims, including the claims asserted against Kunz-Freed. The Temporary Administrator prepared a Report for the Court, as instructed. However, since that Report was submitted, there has been no further indication from the Court as to its ultimate use or purpose.*
>
> *Without a clearer understanding as to its ultimate use or purpose, it would appear that the expenditure of the associated funds was nothing more than a "waste" of Trust funds. Regardless of how many beneficiaries remain, and who they may be, The Brunsting Family Living Trust should not be further burdened by the costs of an appointed, third-party successor executor."*

77. Tex. Est. Code § 404.004(a) only allows the appointment of an administrator to succeed an independent executor where the independent executor has ceased to serve "**leaving unexecuted parts or portions of the will**". The estates are closed and have been closed. The Temporary Administrator's Report fails to identify any "unexecuted portions of the will".

78. The trust is not the estate, is not liable to the estate and, should have never been depleted to pay a temporary administrator that cannot even properly determine that his role as temporary representative for the "decedent's estate" is defined by the will.

79. While Plaintiff Curtis' reply to Amy Brunsting's motion for sanctions only cited Estates Code § 254.001, it is clear from the Defendant's statements that they have not followed through to the inescapable conclusions that follow.

Catch-22[25]

1. Under the un-ruptured law of the trust Amy and Anita are not trustees.

> *The Trust Code provides that, in an action by or against a trustee and in all proceedings concerning trusts, the trustee is a necessary party "if a trustee is serving at the time the action is filed." In re Webb, 266 S.W.3d 544, 548-49 (Tex. App.-Fort Worth 2008, pet. denied); see Tex. Prop. . §§ 111.004, 115.011.*

80. Not only has Amy argued that the instruments drafted by Vacek & Freed are valid, but in order *for Amy to have standing* to sue V&F for malpractice as the representative of "the trust", Amy would have to be a trustee. However, in order to prevail on those claims Amy would have to show that the instruments drafted by Vacek & Freed after Elmer became NCM are invalid, which in turn would show that Amy is not a trustee and has no standing to prosecute those claims from the onset. This is not to say that Anita and Amy do not have their own individual malpractice claims against the Vacek and Freed attorneys. They most certainly do, but not as trustees.

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[25] A paradox or problematic situation for which the only solution is denied by a circumstance inherent in the problem itself. (*See "Paradox of the Court", a.k.a. the counter dilemma of Euathlus)*

81. The recent admission by Defendants Amy and Anita Brunsting in their answer to Defendant Kunz-Freed's motion, calls for a quote from Plaintiff Curtis' June 12, 2019 RESPONSE TO THE FIDUCIARY'S APPLICATION FOR THE BENEFICIARY TO BE HELD IN CONTEMPT:

Page 6 Para. 17

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

82. The conclusion that the "*Estates of Elmer and Nelva Brunsting*" are not proper party plaintiffs to claims belonging to the trustees for the devisee invariably invokes jurisdictional questions. It should be clear from Defendants' own claims that Plaintiff Curtis' pleadings raising questions of who owns the rights of claims and what court should hear them[26] are not as frivolous as Defendants would have the court believe. They certainly were not questions raised with the intention to harass or delay.

The Drop Orders

83. Defendants have never mentioned the Drop Orders. The Drop Orders that were issued the day the inventories were approved are conclusive evidence that the

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[26] 2018-08-17 Plea in Abatement page 4 "*"Public policy does not favor the wasting of judicial or private resources. Permitting a case to proceed in the wrong court necessarily "costs private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings" Prudential, 148 S.W.3d at 136*

delay between the vesting of property rights (§ 101.001) and the right of possession had transpired with the approval of the inventory (§ 402.001) and that the estate was administratively closed with the drop order.

> *The "general rule is that a remainder vests when there is a person in being who has an immediate right to possession of property upon termination of an intermediate estate with only the right of possession postponed" and observing that "vested remaindermen are 'interested persons' under the Trust Code and can bring a cause of action for breach of fiduciary duty" against trustee. Summary of Snyder v. Cowell, No. 08-01-00444-CV (Tex. App. Apr. 10, 2003) from Aubrey v. United Heritage Credit Union, NO. 03-16-00233-CV TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN Apr 12, 2017*

84. Defendants Amy and Anita Brunsting **claim to be co-trustees** for the devisee trust, but those claims have never seen a hearing in this or any other court and are based upon the argument that improperly made changes to an irrevocable trust are valid.

85. The estate closed more than seven years ago. The period in which a competent trustee could have substituted as a plaintiff for claims belonging to the devisee trust have long since expired and clearly have not been pursued due to the alleged co-trustees own malfeasance and/or incompetence. Thus again we are presented with the same issue confronting the court In Re XTO Energy Inc. 471 S.W.3d 126 (2015).

> *Texas courts have held that a trust beneficiary may enforce a cause of action that the trustee has against a third party "if the trustee cannot or will not do so." See, e.g,. In re Estate of Webb, 266 S.W.3d 544, 552 (Tex.App. — Fort Worth 2008, pet. denied); Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.). Despite this*

broad language, a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so. To allow such an action would render the trustee's authority to manage litigation on behalf of the trust illusory.

Even Goebel concedes that the trustee's refusal to bring suit must be wrongful for her to be allowed to step into the trustee's shoes and maintain a suit on the Trust's behalf. See RESTATEMENT (SECOND) OF TRUSTS § 282 (AM. LAW INST. 1959) (if trustee improperly refuses or neglects to bring an action against a third person, beneficiary can maintain suit in equity against trustee and third person). What is less clear is the standard applied to determine whether the trustee's action is wrongful.

*We have found no Texas cases addressing the right of a beneficiary to enforce a cause of action against a third party that the trustee considered and concluded was not in the best interests of the trust to pursue. Generally, when a trustee is given discretion with respect to the exercise of a power, a court may not interfere except to prevent an abuse of discretion. See RESTATEMENT (SECOND) OF TRUSTS § 187. A power is discretionary if a trustee may decide whether or not to exercise it. See Caldwell v. River Oaks Trust Co., No. 01-94-00273-CV, 1996 WL 227520, at *12 (Tex.App. — Houston [1st Dist.] May 2, 1996, writ denied) (not designated for publication). When a trustee is granted the authority to commence, settle, arbitrate or defend litigation with respect to the trust, the trustee is authorized, but not required, to pursue litigation on the trust's behalf. See DeRouen v. Bryan, No. 03-11-00421-CV, 2012 WL 4872738 at *4 (Tex.App. — Austin Oct. 12, 2012, no pet.) (mem.op.); see also RESTATEMENT (SECOND) OF TRUSTS § 177 cmt c ("It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise."). Based on the language of the trust code and the trust indenture in this case, we conclude Bank of America's authority to determine whether to file suit on behalf of the Trust was discretionary.*

86. Defendant Amy Brunsting's assertions that she should prosecute the claims against Defendant Kunz-Freed certainly appear to indicate Amy's agreement that prosecuting the claims would not be unreasonable.

> *"B. If a successor executor is required, it must be Amy Brunsting.*
>
> *Because all estate assets "pour-over" into the Brunsting Family Living Trust, there is no need for a successor executor."*

87. However, Amy's expressed desire to be appointed executrix falls a little short of explaining how the conflicting interests involved in her request for appointment fails to be dispositive of that motion. Unsurprisingly, all of the alternatives presented in Defendants "PRAYER", assume subject matter jurisdiction in the probate court.

In Terrorem

88. While Defendant's solution involves diminishing the number of trust shares by eliminating beneficiaries' property interests, they claim to base this theory on the notion that the elimination of beneficial interests is for the protection of beneficial interests and is the trustee's duty. This theory is based upon very vague assertions of…

> *"a number of different terms, conditions and instructions to be implemented and followed by the trustees and beneficiaries. Included among these terms, conditions and instructions were rules intended for the "protection of beneficial interests", including without limitation rules dictating that the Founders' instructions were not to be contested*[27].

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[27] Amy Brunsting's & Anita Brunsting's November 4, 2019 Original Counterclaim page 2 of 8

89. Amy and Anita's claims that "*Carl and Curtis have taken actions*" that trigger the forfeiture provisions, and that "*Carl and Curtis' actions*" in triggering the forfeiture provisions were without just cause and were not in good faith" and claims that "*By their actions*", Carl and Curtis have forfeited their interests in the trust, is the same vague general language used throughout their dialog.

90. Allegation of a violation of a forfeiture clause requires a specificity these claims appear to be oblivious to.

Ard v. Hudson NO. 02-13-00198-CV (Tex. App. Aug. 20, 2015)

> *In terrorem [or forfeiture] clauses are intended to dissuade beneficiaries under a will or trust from filing vexatious litigation, particularly as among family members, that might thwart the intent of the grantor by making the gifts under the instrument conditional on the beneficiaries not challenging the validity of the instrument. In terrorem clauses are strictly construed to avoid forfeiture when possible. Thus, courts have enforced in terrorem clauses only when the intention of a suit is to thwart the grantor's intention. In re Estate of Boylan, No. 02-14-00170- CV, 2015 WL 598531, at *2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) (mem. op.) (citations and internal quotation marks omitted).*

91. Bringing legal action to enforce the trust and protect beneficial interests is not the type of action that seeks to thwart the grantor's intention, but is the exercise of the beneficiary's right and a fiduciary obligation of the Plaintiff in the case in point.

> *"An action to remove a trustee, like an action to remove an executor, is not an effort to vary the grantor's intent. Conte v. Conte, 56 S.W.3d 830, 833 (Tex. App.—Houston [1st Dist.] 2001, no pet.).*

"We join our sister courts in holding that a beneficiary has an inherent right to challenge the actions of a fiduciary and does not trigger a forfeiture clause by doing so.

*But that inherent right would be worthless absent the beneficiary's corresponding inherent right to seek protection during such an ongoing challenge of what is left of his or her share of the estate or trust assets, and any income thereon, that the testator or grantor, as the case may be, intended the beneficiary to have. We therefore also hold that a beneficiary exercising his or her inherent right to challenge a fiduciary may seek injunctive and other relief, including the appointment of a receiver, from the trial court to protect what the testator or grantor intended the beneficiary to have without triggering the forfeiture clause. *See, e.g., Lesikar v. Moon, 237 S.W.3d 361, 370-71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); McLendon v. McLendon, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied), disapproved on other grounds, Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382 (Tex. 1997), overruled on other grounds, Torrington Co. v. Stutzman, 46 S.W.3d 829, 840 & n.9 (Tex. 2001).*

Forfeiture provisions, or in terrorem clauses, in wills and trusts are to be strictly construed, and forfeiture is to be avoided if possible. In re Estate of Schiwetz, 102 S.W.3d 355, 365 (Tex.App. — Corpus Christi 2003, pet. denied).

*A breach of a no contest clause should be declared only when the acts of the parties come within the express terms of the clauses. Id. A lawsuit challenging the testamentary capacity of the testatrix is a type of contest that will result in forfeiture. See In re Estate of Hammill, 866 S.W.2d 339, 343 (Tex.App.-Amarillo 1993, no pet.). In re Montez, No. 04-07-00089-CV, at *1 (Tex. App. Dec. 12, 2007)*

Second, we question whether a forfeiture clause that prohibited a trust beneficiary from suing the trustee for fraud and intentional self-dealing would be valid. The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship. McLendon v. McLendon,862 S.W.2d 662, 679 (Tex.App.-Dallas 1993, writ denied) (trial court erred in failing to grant declaratory judgment that in

terrorem clause did not apply to beneficiary's action against executors of estate for fraud and breach of fiduciary duty). Texas Commerce Bk. v. Wood, 994 S.W.2d 796, 805 (Tex. App. 1999)

92. There is substantial question as to what instruments constitute "the trust" as clearly noted by the Honorable Judge Kenneth Hoyt in his April 19, 2013 Findings of Fact and Conclusions of Law after Hearing and Order for Preliminary Injunction.[28] However, questions surrounding the devisee are not properly before this court, as these are not issues incident to settling estates that were closed long ago and this is not the dominant court to assert original jurisdiction over those matters.

SANCTIONS

A void judgment does not create any binding obligations

93. This Court's Orders in the -401 proceeding are *void ab initio* for want of subject matter jurisdiction. Although a party may appeal a void judgment, he or she is not required to do so.

"It is one thing to say that a void order may be appealed from but it is another thing to say that it must be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded. An order which must be appealed from before it is ignored can hardly be characterized as `void' and binding on no one." Fulton v. Finch, 162 Tex. 351, 346 S.W.2d 823, 830 (1961).") Metro. Tra. Aut. v. Jackson, 212 S.W.3d 797, 803 n.3 (Tex. App. 2007).

94. *Leedy v. Leedy*, 399 S.W.3d 335, 340 (Tex. App. 2013)

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[28] Made a part of this Courts record on 2015-02-06 in Case 412249-402 PBT-2015-42743

"A judgment is void only when the issuing court had no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court." Browning v. Placke, 698 S.W.2d 362, 363 (Tex.1985). As Kedren points out, there is authority indicating that estoppel cannot prevent a party from challenging subject matter jurisdiction. See Shirley v. Maxicare, Tex., Inc., 921 F.2d 565, 568–69 (5th Cir.1991) (holding accepting benefits under judgment did not bar party from challenging subject matter jurisdiction); Rhodes v. State, 240 S.W.3d 882, 891 (Tex.Crim.App.2007) (" 'One who accepts the benefits of a judgment, decree, or judicial order is estopped to deny the validity or propriety thereof, or of any part thereof, on any grounds; nor can he reject its burdensome consequences.' The only exception to this principle is for challenges to the subject-matter jurisdiction of the court rendering the judgment.") (quoting Corpus Juris Secundum); Ex parte Williams, 65 S.W.3d 656, 658–59 (Tex.Crim.App.2001) (Keller, P.J., concurring) (examining civil authority and concluding that void judgments are not immune from estoppel considerations unless the invalidity of the judgment is due to a lack of subject matter jurisdiction); 31 C.J.S. Estoppel and Waiver § 172. Leedy v. Leedy, 399 S.W.3d 335, 340 (Tex. App. 2013)

Void for Vagueness

95. Even if the Court had subject matter jurisdiction, as a point of clarification, there were three different movants to three different motions to improperly transfer the District Court docket to probate Court 4. This Court's February 14, 2019 Order did not specifically identify which of the three movants was the particular "movant" the Order was addressing with its command to transfer that docket and bear the costs.

96. Reason would dictate it would be the party responsible for filing portions of the same suit in separate courts and then moving to have them consolidated in the wrong court. That would not be Plaintiff Curtis.

97. That would be attorney Bobbie G. Bayless' July 14, 2015, Motion to Transfer the District Court case to Probate Court Four (4) in which she herself admitted the actions she filed in divergent courts were related:

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

98. This clearly raises a question. Why would counsel seeking remedy for a client file related causes of action in separate courts where the damages sought in each action would be potentially impacted by the other and, where the same witnesses and some of the same evidence would be relevant to both causes? The answer appears to be abundantly obvious. Both state court actions were legally invalid lawsuits preemptively filed for the purpose of interfering with the real party's traditional right to choice of forum, an unethical tactic well known to Thompson Coe attorneys .[29]

99. Bobbie G. Bayless had no business dragging the Brunsting inter vivos trusts into a probate court under any theory.[30] In discussing the federal policy of abstention in regard to applications for anti-suit injunctions seeking to enjoin state court proceedings, the Fifth Circuit Court of Appeal had this to say: *(emphasis mine)*

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[29] Thompson Coe attorneys were chastised by the Texas Supreme Court for this same conduct on January 25, 2019, *In re Houston Specialty Ins. Co. 569 S.W.3d 138 (Tex. 2019)*

[30] Texas Property Code - PROP § 112.035 (a), (g)(1)(A), (B)(i)

> *Where the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism. See Moses H. Cone Hosp.,460 U.S. at 21-22, 103 S.Ct. at 940 (fact that substantial proceedings have occurred is a relevant factor to consider in deciding whether to abstain).* ***In fact, by filing a state suit after a federal action has been filed, the state plaintiff can be viewed as attempting to use the state courts to interfere with the jurisdiction of the federal courts.*** *We agree with Royal that if we were to hold that Jackson applied in this scenario, litigants could use Jackson as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action. Neither Jackson nor the concerns underlying it mandate such a result. Royal Ins. Co. of America v. Quinn-L Cap. Corp. 3 F.3d 877, 886 (5th Cir. 1993)*

100. "If" the Estate of Nelva Brunsting is not a proper party plaintiff "then" *Estate of Nelva Brunsting vs Candace Kunz-Freed et al.,* was not properly filed in the District Court by the real party in interest. "If the "estate of Nelva Brunsting" was closed when ancillary matter 412249-401 was filed, "then" ancillary matter 412249-401 was neither properly filed in that court by the estate, nor properly filed by Carl individually, as no estate was pending in the probate court. The independent executor had not yet been relieved of liability and Tex. Est. § 402.001 removed standing from Carl in both capacities, as the trust is not incident to an estate pending in that court and appears to have been already in the dominant possession of two other courts when those claims were filed.

101. What does all this say about abuse of the judicial process by the attorneys?

> *Under Texas law, the filing of a fictitious suit constitutes contempt by counsel, Tex.R.Civ.P. 13, and may serve as the basis for a host of sanctions, including dismissal with prejudice. Tex.R.Civ.P. 215 2b(5). Nor does our Texas judiciary lack the ability to reject collusive litigation. Felderhoff v. Felderhoff,473 S.W.2d 928, 932 (Tex. 1971)*

("We believe that our laws and judicial system are adequate to ferret out and prevent collusion. . . ."); cf. Whitworth v. Bynum,699 S.W.2d 194, 197 (Tex. 1985)

102. It seems rather apparent that these state court actions were improperly filed for the purpose of interfering with the jurisdiction of the federal court and depriving the real party of the traditional right to choice of forum.

Want or Excess of Jurisdiction

103. Disobedience of an Order issued without or in excess of jurisdiction constitutes no punishable wrong. *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (recognizing that lack of subject matter jurisdiction may be raised at any time, including in action to enforce underlying judgment, if void for lack of jurisdiction); *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (stating that only void judgment, which includes judgment rendered by court lacking subject matter jurisdiction, may be collaterally attacked); *Stewart v. USA Custom Paint Body Shop, Inc.*, 870 S.W.2d 18, 20 (Tex. 1994). *Glassman v. Goodfriend*, 347 S.W.3d 772, 778-79 (Tex. App. 2011)

"The jurisdiction of all Texas courts ... derives from the Texas Constitution and state statutes. Absent an express constitutional or statutory grant, we lack jurisdiction to decide any case." In re Allcat Claims Serv., L.P., 356 S.W.3d 455, 460 (Tex.2011) (citing Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex.1996) (per curiam)).

104. This Court terminated its plenary powers by its own hand when it approved the inventory and administratively closed the estate on April 4, 2013.

Judicial action taken after the trial court's plenary power has expired is void. Sw. Bell Tel. Co., 35 S.W.3d at 605;State ex. rel Latty v. Owens, 907 S.W.2d 484, 486 (Tex.1995); see also Scott & White

Mem'l Hosp. v. Schexnider, 940 S.W.2d 594, 596 n. 2 (Tex.1996) (declaring that court cannot issue sanctions order after its plenary power has expired); Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex.1990) (defining a void judgment as one rendered when a court has no jurisdiction over the parties or subject matter, no jurisdiction to render judgment, or no capacity to act as a court).

105. A trial court has inherent power to sanction bad faith conduct *during the course of litigation that interferes with administration of justice or the preservation of the court's dignity and integrity. Onwuteaka v. Gill,* 908 S.W.2d 276, 280 (Tex.App.-Houston [1st Dist.] 1995, no writ); *Metzger v. Sebek,* 892 S.W.2d 20, 51 (Tex.App.-Houston [1st Dist.] 1994, writ denied); *see Eichelberger v. Eichelberger,* 582 S.W.2d 395, 399 (Tex.1979). The power may be exercised to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of the court. *See Lawrence v. Kohl,* 853 S.W.2d 697, 700 (Tex.App.-Houston [1st Dist.] 1993, no writ. These core functions include hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgments, and enforcing judgments. *See Dallas Cnty. Constable Pct. 5 v. KingVision Pay–Per–View, Ltd.,* 219 S.W.3d 602, 610 (Tex.App.-Dallas 2007, no pet.).

106. The inherent power to sanction, however, has limits. *Gill,* 908 S.W.2d at 280. Because inherent power is " 'shielded from direct democratic controls, [it] must be exercised with restraint and discretion.' " *Shepherd v. Am. Broad. Cos.,* 62 F.3d 1469, 1475 (D.C.Cir.1995) , *quoted in Crowe v. Smith,* 151 F.3d 217, 226 (5th Cir.1998) (internal quotation omitted). Inherent power exists only to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process,

such as significant interference with the core judicial functions of Texas courts. *See Lawrence,* 853 S.W.2d at 699–700.

107. Inherent power is not a substitute for plenary power. *See Lane Bank Equip. Co. v. Smith So. Equip.,* 10 S.W.3d 308, 311 (Tex.2000) (citing *Hjalmarson v. Langley,* 840 S.W.2d 153, 155 (Tex.App.-Waco 1992, orig. proceeding)). Consequently, a court cannot rely on its inherent power to issue sanctions after its plenary power has expired. *Scott & White Mem'l Hosp.,* 940 S.W.2d at 596 & n. 2.

CONCLUSION

108. Probate is covered under Title 2 of the Estates Code, guardianship is governed under Title 3 and definitions are in Title 1. Trusts are covered under Subtitles A-C of Title 9 of the Texas Property Code, which is a different set of books entirely. The Brunsting Trust is not an asset of any probate estate.

109. There was no administration of any core estate "pending" in the probate court on April 9, 2013 when ancillary action 412249-401 was filed. Therefore, ancillary action number 412249-401 was filed "ancillary" or "pendent" to nothing, and this court was without jurisdiction to take cognizance of those claims.

110. There was no administration of any core estate "pending" in the probate court on June 6, 2014 when the Order Accepting Remand of Candace Louise Curtis No. 4:12-cv-592 from the federal court to Probate Court No. 4 was entered and the remand was received by this court "ancillary" or "pendent" to nothing.

111. The District Court action was not filed by a proper party plaintiff (real party in interest) and there was no administration of the estates "pending" in the probate

court on April 4, 2019 when this Court entered an Order to transfer the District Court case to the probate court.

112. This court could not exercise ancillary jurisdiction over the Brunsting trust because cause No. 412249-401 involving the Brunsting trust controversy is not incident to an estate,[31] nor was an estate "pending" in the probate court when 412249-401 was filed.

113. This court cannot exercise its original jurisdiction over an inter vivos trust already in the custody of another court.

114. The Estates of Elmer and Nelva Brunsting are not the real party in interest to claims involving the trust administration and neither state court action was properly filed by a plaintiff with standing. If they were valid at the time filed, a competent co-trustee would have substituted for the interim Plaintiff long ago.

115. Defendants are not trustees and have performed no affirmative duties for the benefit of the other beneficiaries. Quite the contrary, Defendants have held the property of the other beneficiaries conditional on the other beneficiaries surrendering a portion of their property to pay for Defendants' own transgressions. At the same time Defendants continued making in Terrorem threats based upon vague conclusory assertions.

116. This Court's jurisdiction over the Brunsting Trust was not properly invoked and therefore this Court is without subject matter jurisdiction.

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[31] The remedial estate is incident to the trust as the trust is the sole devisee. The estate is not a beneficiary of the trust and neither are the attorneys.

117. The Estates of Elmer and Nelva Brunsting are closed and any action on the motion to appoint a personal representative is immediately appealable, Eastland v. Eastland 273 S.W.3d 815 (Tex. App. 2008) (Cited 22 times with 1 Legal Analyses).

Further, Plaintiff sayeth naught.

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ATTORNEY FOR
CANDACE LOUISE CURTIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to all known counsel of record and unrepresented parties in the manner required by the Rules on this Tuesday, November 19, 2019.

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I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This July 5, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 50

CAUSE NO. 412,249-404

IN THE ESTATE OF	§	**IN THE PROBATE COURT**
NELVA E. BRUNSTING,	§	**NUMBER FOUR OF**
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER DENYING CANDACE LOUISE CURTIS' PETITION FOR BILL OF REVIEW

On February 14, 2019, the Court signed an Order Denying Candace Louise Curtis' Plea to the Jurisdiction filed October 19, 2018 and Candace Louis Curtis' Verified Plea in Abatement. Nine plus months later, on November 21, 2019 Candace Louise Curtis filed her Statutory Bill of Review complaining of the February 14, 2019 Order.

Having considered the Statutory Bill of Review filed by Candace Louise Curtis, the responsive pleadings and Brief in Response to her Bill of Review, the evidence if any, and the applicable law, the Court is of the opinion that the Bill of Review should be DENIED. It is therefore,

ORDERED that the Statutory Bill of Review filed by Candace Louis Curtis is DENIED. By this Order, the Court disposes of all claims, causes of action, and parties under Cause No. 412,249-404. This is a final judgment.

SIGNED this 3/2/2022 day of March, 2022.

Kathleen S. Stone
Presiding Judge

cc

SC

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Kathleen S. Stone
Presiding Judge

cc

SC

PROBATE COURT OF HARRIS COUNTY, TEXAS

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Witness my official hand and seal of office
This July 5, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

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