

CAUSE NO. 412249-401

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

MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

CANDACE CURTIS hereby files her findings of fact and conclusions of law, requesting full explanations behind the following orders, instruments used in issuing those orders and other relevant findings and law:

1. February 25, 2022 Summary Judgment Order

1.2 The February 25, 2022 . Summary Judgment Order only refers to the 2005 Restatement (the restatement) and the Nov 5, 2021 Motion for Summary Judgment (The Motion). Article IV of the restatement identifies Carl and Amy as the settlor’s successor Co-Trustees and names Candace Curtis as the alternate.

2. The Instruments

2.1 What documents did the court determine to contain the provisions for the Elmer H. Brunsting Decedent’s trust?

2.2 What documents did the court determine to contain the provisions for the Nelva E. Brunsting Survivors’ trust?

2.3 What, if any, amendments or modifications did the court determine to be valid parts of each of the foregoing trusts?

2.4 When and how were each of the instruments authenticated?

3 In determining the validity of trust amendments;

3.1 Did the court consider Article III of the restatement's limitations on amendment?

3.2 Did the Court consider the June 2008 determination that Elmer was non-compos mentis, as rendering the trust irrevocable under Article III?

3.3 Did the Court consider the April 1, 2009 passing of Elmer Brunsting as rendering the trust irrevocable under Article III?

3.4 Did the Court consider Texas Property Code § 112.051's limitation on the Settlor's capacity to change a trust that has become irrevocable by the express terms of the instrument creating it?

4 In reviewing the trust agreement;

4.1 Did the Court construe the trust instruments to ascertain the intentions of the settlors?

4.2 Did the Court construe the trust instruments to determine the obligations of the trustee?

4.3 Did the Court construe the trust instruments to determine the rights of the beneficiary?

4.4 Did the Court consider the right of the beneficiary to compel the trustee to perform the obligations owed to the beneficiary by the trustee?

In re Estate of Lee (2018)

"[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)

5 Did the Court evaluate whether or not the trustee had performed the obligations of the office?

5.1 Have the trustees performed the obligations of the office?

5.2 Did the Court consider Article VIII Section D terminating the Survivors trust at the passing of Nelva Brunsting November 11, 2011?

5.3 Did the Court consider Article IX Section D terminating the Decedents trust at the passing of Nelva Brunsting November 11, 2011?

5.4 Did the Court consider the commands in Article X that the terminated trusts be distributed into five separate but equal shares?

5.5 Did the Court consider the Defendants complete disregard for the commands in Article VIII Section D and Article IX Section D terminating the Survivors and Decedents trusts and the command in Article X that the terminated trusts be distributed into five separate but equal shares, one for each beneficiary?

5.6 Did the Court consider the Defendants complete disregard for the command in Article X that the separate trusts be terminated and distributed into five separate but equal shares for the beneficiary's?

5.7 Did the Court consider the Defendants complete disregard for the common law obligation and the preliminary injunction's affirmative command that income be deposited into an appropriate account for the beneficiary?

3. Causation

6 In contemplating Summary Judgment and reaching its findings of fact and conclusions of law;

6.1 Did the Court consider the unanimous opinion of the federal Fifth Circuit Court of Appeals in Curtis v Brunsting 704 F.3d 406 as res judicata?

6.2 Did the Court consider the findings of fact and conclusions of law in the Memorandum of Preliminary Injunction issued against the Co-Trustee Defendants April 19, 2013 as res judicata? [filed in 412,249-402 2/11/2015]

6.3 Did the Court consider the findings of fact in the Order issued in the Southern District of Texas May 9, 2013, appointing a Special Master to produce the required trust accounting Anita failed to produce as res judicata?

6.4 Did the Court consider these judicial determinations that Anita had failed to account, failed to disclose and failed to perform the obligations required by the trust as the cause for litigation being brought?

6.5 Would there be any other way for the beneficiary to compel the trustee to perform the obligations owed to the beneficiary other than to file suit to enforce those fiduciary obligations and to compel the fiduciary to perform the duties owed?

7 Defendants filed their original answer in the Southern District of Texas on March 1, 2013, in which they admit owing Candace Curtis fiduciary obligations, including all of the duties imposed by the trust, the common law and statute.

8 The trust, Article VIII D and Article IX D required the trustee to divide and distribute the trust assets into five separate but equal shares at the passing of the last Settlor. In the memorandum of preliminary injunction issued April 9, 2013 in the Southern District of Texas, the court found that Anita Brunsting had failed to perform the obligations required of the trustee. The Court's May 9, 2013 Order appointing a Special Master established that Anita was unable to produce a competent accounting record even after 2 ½ years after assuming the office of sole trustee.

8.1 Can just cause for Candace Curtis bringing action to enforce fiduciary obligations not be found in the findings of fact and conclusions of law entered by a United States District Judge after hearing witness testimony at a full evidentiary hearing?

*"It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. See **duPont v. S. Nat'l Bank** , [575 F.Supp. 849, 864](#) (S.D. Tex. 1983), modified, [771 F.2d 874](#) (5th Cir. 1985). " *Goughnour v. Patterson*, No. 12-17-00234-CV, at *25-26 (Tex. App. Mar. 5, 2019)*

9 The only element remaining in Candace Curtis breach of fiduciary claim at that time was to establish a "benefit to the trustee" or, "injury to the beneficiary".

4. Unclean Hands

10 On November 4, 2019, after 7 years, 11 months and 25 days of refusing to perform a single obligation for the benefit of the other beneficiaries, even those compelled by a preliminary injunction, imposter Co-Trustees Anita and Amy Brunsting had the audacity to file "Original Counter Claims" alleging the beneficiary had forfeited their property interests. (Anita's passive aggressive plan all along). The only duty performed thus far has been accountings that are required by the trust, but were only produced after being judicially compelled and books and records were assembled by the Special Master.

11 On November 5, 2021, after 9 years, 11 months and 26 days of refusing to perform a single obligation for the benefit of the other beneficiaries, imposter Co-Trustees Anita and Amy Brunsting had the audacity to file a motion for Summary Judgment alleging the beneficiary had triggered a forfeiture provision.

5. In Considering Forfeiture

12 The February 25, 2022 Summary Judgment Order only refers to the 2005 Restatement. Article IV identifies Carl and Amy as the successor Co-Trustees to Nelva and names Candace Curtis as the alternate.

13 Forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.

14 The interorem clause in the restatement prohibits bringing litigation, or causing litigation to be brought, for the purpose of advancing any theory which, if assumed as true, would enlarge (or originate) a claimant's interest in this trust or in the Founders' estates, 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 any such litigant or contestant shall pass as if he or she or it had predeceased us, regardless of whether or not such contestant is a named beneficiary. Clearly, with Carl disabled, Amy and Candace are the de jure trustees under the restatement as Nelva could not alter the trust after it became irrevocable.

15 Neither the Summary Judgment Motion nor the Courts Summary Judgment Order identifies a specific act or action by the beneficiary that challenges the settlor's intentions.

- 15.1 What specific acts or actions by the beneficiary triggered a forfeiture provision in what instrument?
- 15.2 On what date or dates did these acts or actions occur and how did these acts or actions challenge the Settlers Trust Agreement?
- 15.3 What causes of action asserted and/or declarations sought by Carl or Candace challenge the settlors' intent?
- 15.4 What motions, responses, and/or replies filed by Carl or Candace challenged the settlors' intent?

6. Breach

- 6.1 Did the Court consider these no-contest claims as coming from Anita and Amy Brunsting as Co-Trustees or, as coming from Anita and Amy Brunsting as beneficiaries?
- 6.2 Did the Court fail to consider Defendants Rule 11 agreement as a breach of the fiduciary obligation of impartiality?
- 6.3 Did the Court fail to consider Defendants demand that their attorney fees be paid from the trust as a challenge by a beneficiary to the Settlers trust, as plainly stated on page one of Anita's December 5, 2014 objection to distributions from the trust to pay attorney fee creditors of the beneficiary?
- 6.4 Did the Court consider Defendants attorney fees to be paid from the trust, as compensation for assisting the Defendant Co-Trustees in performing the affirmative fiduciary obligations of the office they claim to occupy?
- 6.5 What affirmative obligations had the Defendant Co-Trustees performed for the benefit of Candace Curtis or Carl Brunsting in the 7 years, 11 months and 25 days prior to filing their November 4, 2019 "Original Counter Claims"?
- 6.6 What affirmative obligations had the Defendant Co-Trustees performed for the benefit of Candace Curtis or Carl Brunsting in the 9 years, 11 months and 26 days prior to filing their November 5, 2021 Summary Judgment Motion?
- 6.7 What affirmative obligations had the Defendant Co-Trustees performed for the benefit of Candace Curtis or Carl Brunsting in the 10 years, 10 months, 15 days prior to entry of the February 25, 2022 summary judgment order

- 6.8 Did the Court fail to consider the alleged Co-Trustee Defendants complete failure to perform the obligations required by the trust instrument as a challenge by the Co-Beneficiary Defendants to the settlor's intentions?
- 6.9 Did the Court fail to consider the alleged Co-Trustee Defendants efforts to have the beneficiary sanctioned, for her efforts to enforce the obligations of the trustee, as a breach of the fiduciary duty of undivided loyalty?
- 6.10 Did the Court consider the alleged Co-Trustee Defendants efforts to disenfranchise the beneficiary, under a no-contest clause, for her efforts to enforce the obligations of the trustee, as a breach of the fiduciary duty of undivided loyalty?

7. Awarding Fees

- 7.1 In determining that the defendants attorney fees were to be paid by Candace Curtis or from her share of the trust, did the Court;
- 7.2 Consider Defendant Anita Brunsting's December 5, 2014 objection to distributions from "the trust" to pay attorney fee creditors?
- 7.3 Consider Defendant Anita Brunsting's December 5, 2014 statement that the trust did not authorize distributions to pay attorney fee creditors?
- 7.4 Consider Defendant Anita Brunsting's December 5, 2014 statement that the trust prohibits distributions to pay attorney fee creditors of the beneficiary?
- 7.5 Did the Court consider Defendants June 26, 2015 No-evidence Motion?
- 7.6 Did the Court consider Candace Curtis July 13, 2015 reply to Defendants June 26, 2015 No-evidence Motion with demand to produce evidence?
- 2007 Amendment In holding the "First Amendment To The Restatement To The Brunsting Family Living Trust" had not been unauthenticated;
- 7.7 Did the Court consider the deposition testimony of Candace Kunz-Freed, authenticating the 2007 Amendment as Exhibit 3? [3/20/2019 Deposition transcript P. 9 ln. 21 to P.10 ln. 1-4]
- 7.8 Did the Court consider that the 2007 Amendment and its source were both verified in the Southern District of Texas on February 27, 2012 [Doc 1-10 p.19 of 30]¹ by an affidavit attached with a Jurat [P.32]?

¹ [Filed in the closed base case No. 412,249 on 2/10/2015, p.79, 217, 267, 510]

7.9 Did the Court consider the numerous Bates stamps [V&F 000252, P7031, P444-445, P-35, P6449-6450] or that the sources of those exhibits were fiduciary disclosures obtained from Anita Brunsting and the product of discovery from the attorneys representing the Vacek & Freed estate planning attorney defendants?²

7.10 In *terrorem* clauses, also referred to as forfeiture or no-contest clauses, make gifts in a will or other instrument conditional on the beneficiary not challenging or disputing the validity of the instrument. *Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Martin asserts that this clause and his subsequent challenge of the will's validity do not deny him the opportunity to sue Jurgens for breach of fiduciary duties. We agree. *By statute, a forfeiture clause does not prevent a beneficiary from seeking redress against a fiduciary for breach of the fiduciary's duties.* EST. § 254.005(b); see *Lesikar v. Moon*, 237 S.W.3d 361, 370–71 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (A beneficiary has an inherent right to challenge the actions of a fiduciary, and he does not trigger a forfeiture clause by doing so.); *McLendon v. McLendon*, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied) ("The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship."). [Jurgens v. Martin, 631 S.W.3d 385 \(Tex. App. 2021\)](#)

Cawthon v. Cochell, Tex.Civ.App., [121 S.W.2d 414, 416](#), states:

"In the class of cases to which this case belongs an accurate definition would be that it is a trust which is not expressed but is imposed upon a person by a court of equity upon the ground of public policy so as to prevent him from holding for his own benefit and advantage that which he has gained by reason of a fiduciary relation subsisting between him and those for whose benefit it is his duty to act." Such use of another's property gives rise to a constructive trust on the principles stated in 4 Pomeroy, Equity Jurisprudence, 5th Ed., § 1051, which states: *Fisher v. Kerlin*, 279 S.W.2d 637, 643 (Tex. Civ. App. 1955)

² Case 4:12-cv-00592 Document 1-10 , Filed in TXSD on 02/27/12 Page 19 of 30

A fiduciary will not be allowed to retain proceeds arising from a violation of his fiduciary duty. See *International Bankers Life Insurance Co. v. Holloway*, [368 S.W.2d 567, 576](#) (Tex. 1963).

*“It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. See **duPont v. S. Nat'l Bank**, [575 F.Supp. 849, 864](#) (S.D. Tex. 1983), modified, [771 F.2d 874](#) (5th Cir. 1985). ” *Goughnour v. Patterson*, No. 12-17-00234-CV, at *25-26 (Tex. App. Mar. 5, 2019)*

For the foregoing reasons, Curtis requests findings of fact and conclusions of law.

Respectfully submitted,

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