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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 NUMBER FOUR (4)
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;	§ § § § § § § § §	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

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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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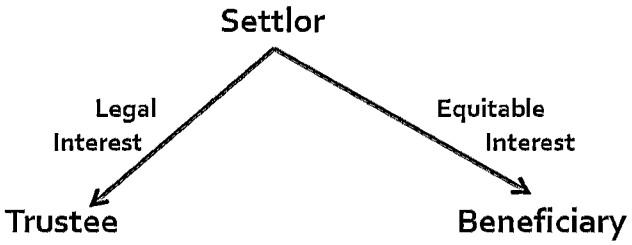
[12] See Neal Spielman's own admission in Case 4:16-cv-01969 Document 40 Filed in TXSD on 10/03/16 Page 4 of 6
[13] Goodman v. Summit at West Rim, Ltd. 952 S.W.2d 930 (Tex. App. 1997)
[14] The reference dates for determining "immediate" are November 11, 2011 for the vesting of property rights and April 4, 2013 for the closing of the residual estate and vesting of the right of possession. See Johnston v Dexel et al.



[15]

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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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.