Petitioner, judgment creditor Candace Louise Curtis, herein declares and states that she brought suit against Anita and Amy Brunsting for breach of fiduciary duty in the Southern District of Texas on February 27, 2012 seeking a mandatory trust accounting and disclosures.[[1]](#footnote-1)

The general elements that establish a breach of fiduciary are:

(1) a fiduciary relationship between the plaintiff and defendant;

(2) the defendant must have breached his fiduciary duty to the plaintiff; and

(3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. [[2]](#footnote-2)

On April 9, 2013, after a full evidentiary hearing in the Southern District of Texas, the Court held Petitioner to be a beneficiary of the family trust and found Defendants to be acting as trustees thus owing fiduciary duties to Plaintiff. The Court further found anomalies in the trust instruments presented by the Defendants and that Defendants had failed to perform in accordance with the duties required by the trust instruments presented.

The Court further found that after for more than two years of occupying the office of trustee, Anita Brunsting had failed to establish books and records of accounts, and failed to provide a required accounting. The Court enjoined Defendants from wasting the estate and appointed a Special Master to assemble books and records of accounts to get a grip on the trust’s assets. The Court published the Order April 19, 2013.

[T]he burden of proof at the preliminary injunction phase tracks the burden of proof at trial.[[3]](#footnote-3) The elements which a movant is required to prove for issuance of a preliminary injunction are (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable harm if the injunction is not issued, (3) that the threatened harm exceeds any harm flowing from the injunction, and (4) that the injunction would serve the public interest.[[4]](#footnote-4)

The preliminary injunction, now registered with this Court, not only enjoined Defendants from wasting the estate but commanded them to deposit trust income into an appropriate account for the beneficiary. Defendants have steadfastly refused to do so.

For eight years Defendants have assumed the position that they are co-trustees and for eight continuous years Defendants have refused and otherwise failed to perform a single affirmative duty for the benefit of the other beneficiaries. Defendants, judgment debtors, are in perpetual contempt of the foreign Court Orders, are in perpetual breach of trust, have acted maliciously, in bad faith and with reckless indifference to the rights of the beneficiary.

In view of the trustee/beneficiary complete failure to affirmatively provide a benefit to the other beneficiaries, even when commanded by a preliminary injunction issued by a federal court, debtors have established by policy, practice and the passage of time, the existence of a passive trust.[[5]](#footnote-5) If an express trust becomes dry or passive title to trust property vests immediately in the beneficiaries.[[6]](#footnote-6) A trustee of a dry or passive trust has no power to convey the trust property without the direction and consent of the beneficiary.[[7]](#footnote-7) The trustee of a passive trust "generally is responsible only for conveying the property to the beneficiary or in accordance with his directions.[[8]](#footnote-8)

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“In light of what appears to be irregularities in the documents and the failure of the Trustee to act in accordance with the duties required by the Trust, the Court ENJOINS the Trustee(s) and all assigns from disbursing any funds from any Trust accounts without prior permission of the Court. However, any income received for the benefit of the Trust beneficiary is to be deposited appropriately in an account. However, the Trustee shall not borrow funds, engage in new business ventures, or sell real property or other assets without the prior approval of the Court. In essence, all transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in this case.”

in name only, that the trust was a passive trust and that there was no evidence or insufficient evidence to show that she had any duties or responsibilities in connection with such trust.

Passing of time has made Defendants claims to be cotrustees moot.

1. Case 4:12-cv-00592 Document 1Filed in TXSD on 02/27/12 [↑](#footnote-ref-1)
2. Jones v. Blume , 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied); see also Navigant Consulting, Inc. v. Wilkinson , 508 F.3d 277, 283 (5th Cir. 2007) (reciting the same elements). [↑](#footnote-ref-2)
3. Thalheimer v. City of San Diego , 645 F.3d 1109, 1116 (9th Cir. 2011) [↑](#footnote-ref-3)
4. Landmark Land Co., Inc. v. Office of Thrift Supervision, 990 F.2d 807 (5th Cir. 1993); Tesfamichael v. Gonzales, 411 F.3d 169 (5th Cir. 2005), In re Hardaway, CASE NO: 06-20691, ADVERSARY NO. 06-2084, at \*2 (Bankr. S.D. Tex. Mar. 1, 2007) [↑](#footnote-ref-4)
5. See Zahn v. Nat'l Bank of Commerce of Dallas , 328 S.W.2d 783, 791 (Tex. Civ. App.–Dallas 1959, writ ref'd n.r.e.) ; Griggs v. Jefferson Bank & Trust Co. , 57 S.W.2d 390, 391 (Tex. Civ. App.–Texarkana 1933, writ dism'd). King Henry’s Statute of Uses of 1535 is codified at Texas Property Code § 112.032. Obligations of the fiduciary must be legally enforceable by the Cestui que. [↑](#footnote-ref-5)
6. In re Estate of Lee, 551 S.W.3d 802, 814 (Tex. App. 2018); Rife v. Kerr, 513 S.W.3d 601, 611-12 (Tex. App. 2016) (citing Moore v. City of Waco , 85 Tex. 206, 210, 20 S.W. 61, 62 (1892) ); Lanius v. Fletcher , 100 Tex. 550, 555, 101 S.W. 1076, 1078 (1907) ; Bohn v. Bohn , 420 S.W.2d 165, 172 (Tex. Civ. App.–Houston [1st Dist.] 1967, writ dism'd). [↑](#footnote-ref-6)
7. See Humphries v. Wiley , 76 S.W.2d 793, 797–98 (Tex. Civ. App.–Texarkana 1934, writ dism'd) ; Paschal v. Evans , 30 S.W. 923, 924 (Tex. Civ. App. 1895, no writ). [↑](#footnote-ref-7)
8. Nolana Development Ass'n v. Corsi, 682 S.W.2d 246, 249 (Tex. 1984) [↑](#footnote-ref-8)