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REPORTER'S RECORD

VOLUME 1 OF 1

COURT CAUSE NO. 412.249-401

APPELLATE NO. _____

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

* * * * *

MOTION FOR PARTIAL DISTRIBUTION

MOTION FOR CONTINUANCE

* * * * *

On the 18th day of February, 2015, the following proceedings came to be heard in the above-entitled and numbered cause before the Honorable Christine Butts Judge of Probate Court No. 4, held in Houston, Harris County, Texas:

Proceedings reported by Machine Shorthand

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1 who is trustee under this instrument. And I may give
2 this Court a little bit of background before I explain
3 why I think it's appropriate.

4 The restatement of the trust was done in
5 January 2005. Elmer, one of the grantors passes away in
6 April of 2009. After Elmer's death, the trustee of this
7 trust is Nelva, of the 2005 trust.

8 In June of 2010, which you don't have in
9 front of you, but I have a copy here if this Court would
10 like to see - Nelva does a Qualified Beneficiary
11 Designation. She doesn't change any provisions on the
12 trust other than to say, "I want there to be
13 advancements." So, to the extent the beneficiaries got
14 property during their life, I want those to be treated
15 as advancements. That's the first Qualified Beneficiary
16 Designation. And she, she purports to use, both, her
17 general power of appointment under this 2005 instrument
18 and her limited power of appointment.

19 She then does, in August of 2010, a new
20 Qualified Beneficiary Designation that was attached as
21 an exhibit to a response. In this -- it's our
22 contention, as a wholesale amendment of the trust. It's
23 not a three-page exercise.

24 The August has no revocation language. It
25 doesn't revoke prior designations; it doesn't undo prior

1 designations. We believe one of the legal issues you'll
2 face, going forward, is that the exercise in June
3 prohibits the exercise in August because it wasn't
4 revoked/undone; it was a testamentary division, and we
5 know that the only way you can undo a testamentary
6 division is you have to revoke it in writing, execute
7 with live formalities.

8 So, but Counsel is right - the QBD of
9 August of 2010 removes or appoints Anita and Amy as
10 trustees of Candace's trust. It also severely limits
11 Candace's right to receive funds out of that trust, but
12 it still has language in there to suggest that the
13 beneficiary should be given a liberal use of these
14 assets. And, you know, even in this document that we've
15 objected to, it says, "The terms, 'support' and
16 'maintenance' may include but are not limited to
17 investment, a family business, purchase, primary
18 residence, entry into a business, vocation, profession
19 commensurate with Beneficiaries' abilities, interest,
20 recreational or educational travel, expenses incident to
21 marriage or child birth and for the reasonable comfort
22 but not luxurious support of the beneficiaries."

23 Very broad.

24 There is no dispute that she's not
25 received a single distribution out of this trust. In

1 fact, the federal court, in granting the injunction
2 indicated that one of the reasons why they granted the
3 injunction was that Anita and Amy never funded these
4 trusts.

5 The Decedent passed away in November 11,
6 2011. The Court signs its injunction order in April of
7 2013, April 19, 2013; and Judge Hoyt, relying on the
8 fact that, one, they haven't provided county records
9 plan like they were supposed to; and two, they didn't
10 fund this trust within -- once the judge signed this
11 order, it still hadn't been funded.

12 So, there's no dispute my client hasn't
13 received any distributions even though she's allowed to.

14 It's our position that as soon as the
15 Court entered this injunction, the discretion ability of
16 Anita and Amy stopped as it relates to -- as it relates
17 to making distributions out of that trust. The Court
18 specifically says that you're not supposed to do
19 anything, and I'm going to weigh in, and you coming to
20 me if you want to make a distribution. We believe that
21 removes that discretionary ability and puts it squarely
22 on the shoulders of the judge who is enforcing that
23 injunction.

24 It's our position that, Your Honor, you're
25 the judge enforcing that injunction. This injunction is

1 now down in front of you under the 402. We have filed a
2 notice of filing of the injunction, and we filed the
3 various lawsuits that the injunction arose out of in the
4 402.

5 What we're asking for today is a
6 disbursement of \$40,000 to our client. It's to give her
7 some use and benefit of this trust. She was being
8 supported by Mom, and there is no dispute that Mom would
9 routinely support her during her life. That was the
10 reason why one of the QBDS was done - was to treat as a
11 advancement to monies paid. That has now stopped.
12 There's been no support, and she should be entitled to
13 that - some modicum of income and support from these
14 trusts for that period of time. I mean, it's been well
15 over four years that we're, now, in this talking about
16 having not gotten any benefit from the trusts that the
17 parents clearly intended for her to receive the benefit
18 from.

19 So, we're asking you to authorize a
20 disbursement of \$40,000 from the trust to my client.
21 What she does with that funds is up to her, and we're
22 not asking you to authorize to pay as our fees. We're
23 not asking you have it paid directly to our firm. It's
24 a disbursement that will go to our client for her, for
25 her benefit and support. She does owe us monies. And

1 if, you know, just like any client which you hand cash
2 out to them, if she chooses to pay my fee then I'll be
3 grateful. But I don't want any ties to bind or require
4 her to make that payment because I agree with Counsel -
5 I don't think that a creditor can compel a beneficiary
6 to make payments.

7 The -- an important place to note is that
8 all the objections seem to stem from this idea that
9 she's going to use these funds to pursue this
10 litigation. We are in this litigation, and we're going
11 to pursue this litigation whether the funds get paid or
12 not. But I don't believe that it's equitable for any of
13 the beneficiaries in this trust not to get use of
14 that -- of those funds for their other maintenance or
15 needs during the course of this litigation. I think the
16 beneficiary should have the ability to come ask for what
17 the purpose of that trust was there to deal with.

18 We're asking that the 40 come out her
19 share. We're not asking that it be taxed against any
20 other beneficiary's share of the trust.

21 There is an argument that suggests that,
22 while you can't do this because the actions of Candace
23 violate the no-contest clauses within the instrument,
24 the lawsuit that Candace has alleged against Amy and
25 Anita relate to -- or against Anita, relate to transfers

1 that she made as trustee of the Brunsting Family Living
2 Trust at that time. This is while Momma was still
3 alive. These are trusts that aren't authorized by the
4 trust instrum -- or distributions not authorized by the
5 trust instrument that she has complained of. It doesn't
6 impact a challenge to the trust instrument - just the
7 trustee's performance under this instrument. So, I
8 don't believe that we are walking on thin ice as to the
9 enforceability of the no-contest language that's found
10 in Exhibit 1, the 2005 restated trust.

11 With regard to Exhibit 2, this is the QBD
12 that was done last in time, the August 2010 QBD. It
13 does have varying expansive, no-contest language. We
14 are challenging this document, not for a breach on the
15 part of Amy and Anita under this document, just as to
16 its judicial effectiveness. It's a dec action. And
17 this Court is well aware that a declaratory judgment
18 action as to rights and the enforcement of documents is
19 typically cut out and removed from contest provisions.

20 So, I think it's important to understand
21 the litigation if they're going to rely on that to say
22 that somehow we're going to forfeit our request.

23 The challenges against Anita relate to
24 transfers made prior to this QBD ever being done in
25 relation as to 2005 as her conduct as a fiduciary.

1 Obviously, holding a fiduciary accountable is something
2 this Court is well aware of.

3 The challenges to this QBD that was done
4 in 2010 are declaratory in nature. The respective
5 rights of Candace under this document that was, one,
6 that never terminates an earlier QBD; two, is done after
7 the death of the other grantor and the actions are the
8 trust had become irrevocable at that time.

9 So, I believe we're well within safe
10 footing as it relates to the other contest and the
11 forfeiture; but again, we're only asking for the \$40,000
12 to be taxed against her side. I believe this Court,
13 relying on the injunction, can exercise that discretion.

14 THE COURT: Is your client disabled?

15 MR. OSTROM: She's, Your Honor, she's not
16 disabled. She -- no, she's not disabled.

17 THE COURT: Well, to say that she receives
18 support from her aging parents before they passed away
19 is not compelling at all to support the argument that
20 she should receive a portion of her inheritance at this
21 point prior to litigation being settled. So, that's the
22 first -- my first thought on it.

23 MR. OSTROM: Your Honor, I don't know why
24 Mom was sending her checks. That was a --

25 THE COURT: Well, I mean, that's between

1 them, but it's not compelling to me. I'm not going to
2 continue to enable Candace for whatever -- you know, I'm
3 not saying enable in the context of, you know, that's
4 necessarily bad; but it's just -- I'm not going to
5 continue that pattern because that would violate the
6 trust terms because this money is supposed to be -- it's
7 got to have some sort of standard for distribution.

8 MR. OSTROM: Well --

9 MS. SMITH: It does.

10 MR. OSTROM: -- it has a standard for
11 distribution, but there has to be a deans testing of
12 that standard. It's not just, you know -- and again,
13 that's, I think, that's where we're getting into -- when
14 we talk about support and maintenance under the trust
15 instrument - it's very broad. And --

16 THE COURT: Is it HEMS? I mean, Health
17 Education, Support, Maintenance?

18 MS. SMITH: No, ma'am. It's a very, very
19 very, modified HEMS. It's not broad at all. It is so
20 narrow that it almost chokes you. It even discusses the
21 character of the person at issue.

22 THE COURT: Okay.

23 MR. OSTROM: Your Honor, I read the
24 support language right off the trust. I mean, it was --
25 she can take trips if she wanted to, you know. If

1 what --

2 THE COURT: Just as long as it wasn't
3 luxurious, right?

4 MR. OSTROM: Well, no, she couldn't do a
5 luxurious lifestyle. Yeah, she's supposed to be
6 supported up to the level she's accustomed to and not
7 this luxurious lifestyle.

8 THE COURT: But, I mean, the point for me,
9 though, is if she's not disabled, the first point she
10 made was she received these checks from Mom. We would
11 imagine they'd be support checks. And that that --
12 she's been without those checks for four years, and we
13 need to make those up in the form of a distribution, and
14 I'd be open to that idea if all of the other
15 beneficiaries were open to that -- to receiving a like
16 distribution.

17 So, that's the first issue.

18 The second is that the other beneficiaries
19 are making sacrifices, I would imagine. I know that
20 Carole has. The last time we were here, she talked
21 about how it was brought up that she had to sell a horse
22 in order to pay her attorney. And the -- I'm really
23 nervous about making any kind of distribution at this
24 point unless it's for the benefit of all of the
25 beneficiaries. Like, we allow distributions for the

1 payment of taxes, I think, at some point, didn't we? Or
2 is that this case?

3 MR. OSTROM: We did but that was violated.
4 You know, we allowed -- we were here -- and to these,
5 both these points, I think these are critical issues in
6 the case.

7 Candace and Carl didn't receive the assets
8 the other beneficiaries did. We're talking about
9 hundreds of shares of stock that came out in 2011, both,
10 Exxon and Chevron stock, that have gone to these
11 respective beneficiaries and their kids. We're talking
12 about cash that came out of bank accounts of the trust
13 while Momma was alive that have gone to people who
14 weren't Carl and Candy. So, I think it's --

15 THE COURT: But Candace received an
16 on-going stream of payments from her mother, right?

17 MR. OSTROM: Right. But what the -- and
18 you'll look at the master's report. It details how much
19 people received.

20 Candace and Carl are clearly on the
21 back-end of that. Carl for sure; he receives zero.
22 Candace is the next least. Then Anita, Amy and Carole
23 because the master went through, identified payments
24 that were taken out of the trust, identified stock they
25 received, identified --

1 THE COURT: Were any of these after Mom
2 passed away?

3 MR. OSTROM: No, these were all during
4 Mom's lifetime while Anita was trustee.

5 So, I think it's -- it's not that they are
6 just sacrificing. I mean, we're apparently here in this
7 litigation because my client didn't get benefit of the
8 trust, Carl didn't get benefit of the trust, and these
9 other clients, the other beneficiaries did, to a
10 disproportionate amount.

11 Moreover, I think it's, it's one thing to
12 say we need to find some balance amongst the
13 beneficiaries, and you're uncomfortable to make this
14 distribution. But there is no evidence that any income
15 has been paid under these trusts to any beneficiaries.
16 It's not that, okay, maybe we have a stringent HEMS
17 standard. The evidence is, and you won't hear anybody
18 object otherwise, that there have been zero
19 distributions other than a request for attorneys fees
20 that I made in the federal proceeding that have come out
21 of this trust for the benefit of Candace. Even though
22 she's entitled to this income, we're offering a zero
23 amount. So, it's not, well, maybe 2000 is appropriate,
24 maybe 1000 is appropriate. There's not even a
25 reasonable amount that's allocated to her right now.

1 So, whatever that reasonable amount should
2 be, it should be something. It can't be zero in
3 relation to, in relation to her right to receive the
4 benefit of this trust that was set up to help her.

5 And to the last point.

6 Yes, Your Honor, we've come here and asked
7 for distributions out of the trust, and Maureen did that
8 for the taxes. And I objected to it saying I didn't
9 think we should do this because it required other
10 things.

11 Your Honor, you signed an order that
12 allowed for the payment of taxes.

13 We have since found out that pursuant to
14 that order, Anita also paid the releasing fees or
15 commission to the brokers, to the CPA there in Iowa,
16 even though, at the hearing, I specifically objected to
17 that.

18 Now what I've been told by Mr. Featherston
19 is -- sorry, I wasn't the lawyer at the hearing. I just
20 read the order. It wasn't clear in the order. Maybe
21 that was something -- and I didn't make clear in this
22 order; nonetheless, her client, Anita, has spent money
23 that wasn't authorized by the Court.

24 THE COURT: After the injunction was in
25 place --

1 MR. OSTROM: That was after the
2 injunction.

3 THE COURT: She made distributions that
4 were not --

5 MR. OSTROM: It was a payment; it wasn't a
6 distribution. It was a payment to -- it was a leasing,
7 a reletting payment. The lease on the land had expired.
8 The trustee wasn't supposed to do anything in relation
9 to the property.

10 The CPS who also does the accounting and
11 the tax filings, the broker for these leases, okay.
12 When they sought application -- when Maureen sought
13 application to this court regarding that lease, we
14 objected. One of our reasons for objecting is that we
15 didn't want to relet by that broker at some discounted
16 price. The Court overruled our objections, said, "I'm
17 going to let them pay the CPA's fees. I'm not letting
18 them pay the brokerage fee even though it's the same
19 company, the same person." And actually, those fees did
20 get paid.

21 MS. BAYLESS: If I can interrupt just one
22 second.

23 I just looked at this order today. The
24 Court or somebody interlineated that accounting fees
25 could be paid so long as they related to the preparation

1 of tax returns. That's interlineated in the order.
2 It's very clear. It's not ambiguous at all. And fees
3 have been paid to this accounting firm that do not
4 relate to the preparation of tax returns.

5 MR. OSTROM: My point being that people
6 seem to still be using the trust not directed by any
7 restrictions of this injunction, but my client doesn't
8 have that ability and is the one who is in the
9 litigation trying to get access to her trust.

10 THE COURT: But that's a reason -- I mean,
11 it's a reasonable mistake; it's not something that was
12 done on purpose and it probably did -- it was paid in
13 violation of the order, or the injunction, because it
14 wasn't specifically mentioned in the order. And I think
15 I remember that. I think I'm the one who interlineated
16 that language, and it was based on your objection, you
17 know, that we want to make sure that, you know, that, I
18 guess, the payments were tax-related but...

19 Is it well-settled that gifts, prior to
20 Nelva's death, would be factored in and accounted for
21 and go to reduce the ultimate inheritance passing to the
22 beneficiaries?

23 MR. OSTROM: Is it well-settled? I don't
24 think it is. The, the Qualified Beneficiary Designation
25 that allowed for that issue that my client acknowledges,

1 I don't believe, part of that order that
2 we've been talking about, was that we were supposed to
3 receive the tax filings as in a relatively short period
4 of time after they've been done. I don't believe I have
5 received, and it may be because of the gap in
6 representation, but I haven't received any of the 2013
7 tax filings.

8 THE COURT: Okay. I think it's important
9 to look at those, and I don't know what kind of income
10 this trust is generating, but I will say this:

11 I think distributions actually may be
12 necessary to avoid a higher income tax rate because if
13 no distributions to the beneficiaries are being made,
14 that income is being taxed at the highest possible rate
15 to the trust where as if distributions were made to the
16 beneficiaries of that income, then they would be taxed
17 the beneficiary's rate. So, I just want to bring that
18 issue up - that I think distributions, to the extent
19 there's income, would be more favorable as far as income
20 taxes go and would be -- and the trustees would be
21 abiding closely to their fiduciary duty by making such
22 distributions.

23 MS. SMITH: Your Honor, the last tax
24 return that I remember seeing, there wasn't that much
25 income at all. I don't think that taxes were a big

1 issue.

2 THE COURT: Okay. Well good. Well
3 then --

4 MS. BAYLESS: I'm not sure if that's the
5 case, but if we got a tax return --

6 MS. SMITH: Look at 2011.

7 THE COURT: If the amount is over \$8,000
8 then that's the threshold when it becomes an issue, so
9 FYI. And I know you know that already - I just, you
10 know, have to state it for my own peace of mind.

11 Okay. Anything else?

12 MR. OSTROM: I don't believe so, Your
13 Honor.

14 THE COURT: All right. It's nice to see
15 everyone.

16 MR. OSTROM: Thank you.

17 MR. SPIELMAN: Thank you, Judge.

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1 The State of Texas)
2 County of Harris)
3

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

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

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$346.00
18 and was paid by Ms. Candace Curtis.

19 WITNESS MY OFFICIAL HAND this the 30th day of
20 June, 2016.

21
22 /s/ Hipolita G. Lopez
23 HIPOLITA G. LOPEZ, Texas CSR #6298
24 Expiration Date: 12-31-16
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