

have Defendants shown the relief requested by Curtis would interfere with the probate of a will, the administration of an estate, or any other purely probate function.

### **DEFENDANTS CONTINUE TO BE DISINGENUOUS WITH THE COURT**

All of the evidence in this case is uniquely in the possession of the Defendants. Defendants are being sued for concealing information they have a duty to divulge. Defendants concealed the facts from the District Court and appear to have knowingly misstated the law. Without an evidentiary hearing and a properly briefed court as to law and fact, one cannot competently determine applicability of the probate exception.

Defense counsel knows, as the Defendants' schedules disclose, that the appropriations Defendants refer to as "gifts"<sup>4</sup> occurred during the lifetime of Nelva Brunsting. By arguing a probate exception does not apply to inter vivos property transfers<sup>5</sup>, counsel attempts to taint the course of justice before this Court in an effort to produce an outcome other than that which would flow from the ordinary course of these proceedings.

Defense counsel, Bernard Mathews, appears to have perpetrated a fraud upon the District Court in Defendants' emergency motion, by citing to

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<sup>4</sup> Appellee's Brief "Statement of the Facts", P.2

<sup>5</sup> Appellant's Brief P.24 item 19 & pg 25, item 22, Wisecarver

the Property Code<sup>6</sup> and calling it the Probate Code, then bootstrapping a route test theory to the Supreme Court Opinion in Marshall that specifically decries the route test<sup>7</sup>. If, under state law, the state courts of general jurisdiction<sup>8</sup> would have jurisdiction over the dispute, then federal court jurisdiction would exist even under the now defunct route test.

Curtis filed four civil tort causes of action on February 27, 2012. At that point in time there was no action of any kind in any other court<sup>9</sup> and no wills had been filed. Curtis's complaint was dismissed on March 8, 2012. Again, there was no action of any kind in any other court and no wills had been filed with the Harris County Clerk Recorder. The doctrine of custodia legis does not apply as a bar to federal jurisdiction in this case.

## **BURDEN OF PROOF**

A fiduciary “has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.” *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied)<sup>10</sup>.

Additionally, when a plaintiff alleges self-dealing by the fiduciary as part of a breach-of-fiduciary-duty claim<sup>11</sup>, a presumption of unfairness automatically arises, which the fiduciary bears the burden to rebut. See *Houston v. Ludwick*, No. 14-09-00600-CV, 2010 WL 4132215, at \*7 (Tex. App.—

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<sup>6</sup> USCA5-434

<sup>7</sup> Appellants Opening Brief P. 13 under “The route test”

<sup>8</sup> Texas Property Code 115.001

<sup>9</sup> USCA5-6 item 3

<sup>10</sup> (citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 312–14 (Tex. 1984); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513–14 (Tex. 1942))

<sup>11</sup> USCA5 – 7, Curtis original Complaint Count I page 3, item 10,