

REPORTER'S RECORD

VOLUME 1 OF 1

COURT CAUSE NO. 412.249-401

APPELLATE NO. \_\_\_\_\_

|   |                     |   |                      |
|---|---------------------|---|----------------------|
| 5 | THE ESTATE OF:      | ) | IN THE PROBATE COURT |
| 6 | NELVA E. BRUNSTING, | ) | NUMBER 4 (FOUR) OF   |
| 6 | DECEASED            | ) | HARRIS COUNTY, TEXAS |

\* \* \* \* \*

MOTIONS HEARING

\* \* \* \* \*

On the 9th day of December, 2014, 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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A-P-P-E-A-R-A-N-C-E-S:

Mr. Neal E. Spielman  
Griffin & Matthews  
Attorney at Law  
SBN 00794678  
1155 Dairy Ashford  
Suite 300  
Houston, Texas 77079  
281.870.1124  
ATTORNEY FOR:  
AMY BRUNSTING

Mr. Jason B. Ostrom  
Attorney at Law  
SBN 24027710  
5020 Montrose Blvd.  
Suite 310.  
Houston, Texas 77006  
713.863.8891  
ATTORNEY FOR:  
CANDACE CURTIS

Ms. Bobbie G. Bayless  
Bayless & Stokes  
Attorney at Law  
SBN 01940600  
2931 Ferndale  
Houston, Texas 77098  
713.522.2224  
ATTORNEY FOR:  
CARL H. BRUNSTING

Ms. Darlene Payne Smith  
Crain, Caton & James  
Attorney at Law  
SBN 18643525  
Five Houston Center  
1400 McKinney St.  
Suite 1700  
Houston, Texas 77010  
713.658.2323  
ATTORNEY FOR:  
CAROLE ANN BRUNSTING

Mr. Brad Featherston  
The Mendel Law Firm, L.P.  
Attorney at Law  
SBN 24038892  
1155 Dairy Ashford  
Suite 104  
Houston, Texas 77079  
281.759.3213  
ATTORNEY FOR:  
ANITA K. BRUNSTING

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

VOLUME 1  
(MOTIONS HEARING)

|                                   |        |      |
|-----------------------------------|--------|------|
| December 9, 2014                  | Page   | Vol. |
| PROCEEDINGS.....                  | 4      | 1    |
| ARGUMENT BY MR. OSTROM.....       | 5      | 1    |
| ARGUMENT BY MS. BAYLESS.....      | 21, 23 | 1    |
| ARGUMENT BY MS. SMITH.....        | 32     | 1    |
|                                   | Page   | Vol. |
| COURT'S RULING.....               | 30     | 1    |
| COURT REPORTER'S CERTIFICATE..... | 39     | 1    |

1 December 9, 2014

2 PROCEEDINGS

3 THE COURT: Calling to order Cause Number  
4 412.249 in the 401.

5 We're here on The Estate of Nelva  
6 Brunsting. And if you would, perhaps, starting with Ms.  
7 Smith, just make announcements - your name, who you  
8 represent, and we'll just go along counsel table.

9 MS. SMITH: Darlene Payne Smith for Carole  
10 Brunsting, and Carole Brunsting is present.

11 MS. BAYLESS: Bobbie Bayless on behalf of  
12 Carl Brunsting.

13 MR. OSTROM: Jason Ostrom on behalf of  
14 Candy Curtis.

15 MR. SPIELMAN: Neal Spielman on behalf of  
16 Amy Brunsting.

17 MR. FEATHERSTON: Brad Featherston on  
18 behalf of Anita Brunsting.

19 THE COURT: And, I'm sorry, you're  
20 representing Amy?

21 MR. SPIELMAN: Yes, Your Honor. In fact,  
22 we filed our notice of appearance yesterday afternoon.  
23 And when I left the office, we had the fax cover page to  
24 everybody, but we hadn't gotten the e-file confirmation  
25 yet.

1 THE COURT: Okay. And it didn't make it  
2 to my file so. Well welcome. And what is your name?

3 MR. SPIELMAN: Neal Spielman.

4 THE COURT: Okay. Will you spell your  
5 last name for me?

6 MR. SPIELMAN: S-P-I-E-L-M-A-N.

7 THE COURT: Okay. We're here on three  
8 things:

9 Number one, Candace's motion for  
10 distribution of trust funds.

11 Number two, Carl Brunsting's motion for  
12 distribution of trust funds.

13 And finally, Carl Brunsting's motion to  
14 modify preliminary injunction.

15 And so, I guess it makes sense to start  
16 with Mr. Ostrom.

17 ARGUMENT BY MR. OSTROM:

18 MR. OSTROM: Sure, Your Honor, I'll be  
19 happy to approach.

20 Your Honor, I want to give the Court some  
21 procedural background.

22 We really have two proceedings in front of  
23 you right now as counsel sitting here at this table.  
24 The first proceeding, I was not involved in; and this  
25 was an action brought by Ms. Bayless' client in relation

1 to the estate and in relation to these trusts that form  
2 part of this estate. Ms. Bayless' client is the  
3 executor of Ms. Brunsting's estate, and she has brought  
4 claims against Anita and Amy alleging various breaches  
5 on their part in relation to the trust that we're  
6 discussing today.

7           The other proceeding was a proceeding that  
8 was filed in federal court. This was a proceeding  
9 initiated by my client, pro se, in federal court. In  
10 that lawsuit, my client sued Anita and Amy for breaches  
11 of trust relating to some sub trusts that were created  
12 as a result of -- or should have been created as a  
13 result of Nelva's death and that she was a beneficiary  
14 of. In that action, the federal judge filed a -- or  
15 signed an order transferring that cause to this court.

16           My understanding, from trying to work  
17 within the Clerk's Office here and the Clerk's Office in  
18 federal court, is that the physical file has not landed  
19 on your desk yet. And we are still trying to work  
20 through that process. In essence, what we're being  
21 told, because the two systems cannot speak  
22 electronically to each other, they can't just transfer  
23 the file. I physically have to request documents that  
24 they certify. Then I have to go file it with the clerk  
25 here to view the file. And we're talking about a case

1 that has a long history, and it actually went up to the  
2 Fifth Circuit. Judge Hoyt was reversed and came back  
3 down and is pending in front of him.

4 In that proceeding, the judge issued a  
5 preliminary injunction. And I don't know if this  
6 Court's seen that injunction. I've got copies here if  
7 you'd like to see it. It was attached to one of Ms.  
8 Bayless' files. That injunction removed all the power  
9 from the trustees to make any financial decisions  
10 regarding the trust. The specific language, so that  
11 there was no confusion, it says, "In essence, all  
12 transactions of financial nature shall require  
13 preapproval of the Court pending a resolution of  
14 disputes between the parties in this case." That's the  
15 language that --

16 THE COURT: And what page was that?

17 MR. OSTROM: That's on the fifth page of  
18 the Memorandum And Order Of Preliminary Injunction.  
19 And, in essence, the Court has stopped the trustees from  
20 taking any action. This is important because of one of  
21 the objections that was asserted to our motion  
22 requesting fees which is the Di Portanova case. I want  
23 to use this language to point out the distinction with  
24 Di Portanova.

25 Di Portanova involved a court substituting

1 discretion for the trustees when the trustees aren't  
2 given the ability to exercise discretion. That's not  
3 what's happened here.

4           What's happened here is the Court has made  
5 preliminary findings that Amy and Anita had failed to  
6 act in accordance with the trust. They need to be  
7 prohibited from taking any further action with regards  
8 to the trust until such time the case is resolved.

9           So, we didn't seek approval from Anita or  
10 Amy to allow our client to receive a distribution from  
11 the trust; in fact, the parties - and Mr. Featherston is  
12 aware of this - but the parties had already developed a  
13 process with prior counsel going to the Court and asking  
14 for attorneys fees.

15           Judge Hoyt has already entered an order  
16 once providing a 5,000-dollar attorney fee advance to my  
17 side along with a 5,000-dollar attorney fee advance to  
18 the trustee. The -- and then you had the experience of  
19 being in front of the trustee's prior counsel, Maureen  
20 McCutchen, when she asked you to go ahead and make a  
21 ruling allowing a distribution to pay the taxes  
22 associated with the real estate and enter into this  
23 lease arrangement on the Iowa farm property.

24           So, the parties have already begun and  
25 consented to this order and taking actions in this order



1 in both of the cause numbers even though this order was  
2 only entered in my case. I don't believe this Court has  
3 entered an order to this effect as related to Ms.  
4 Bayless' case.

5 So, we have two actions. And my client is  
6 here asking, now, pursuant to this order, for relief  
7 which is the payment of her attorney's fees.

8 Since that 5,000-dollar payment, we  
9 received no additional payments for attorney's fees.

10 Aside from -- we've been to mediation, and  
11 we couldn't get the case resolved in mediation.

12 Aside from a claim that my client's  
13 lawsuit is a violation of the intererim clause, which  
14 I'll address, there is no other grounds to suggest that  
15 my client should not be entitled to the benefits of the  
16 trusts that were created for her and her siblings.

17 The intererim clause, I think, is a  
18 grasping-at-straws prohibition.

19 This Court is probably very familiar with  
20 the law surrounding intererim clauses.

21 An intererim clause only appears in what  
22 I'm going to call the "QBD". It does not appear in the  
23 initial trust instrument that my client is not objecting  
24 to or the initial trust instrument that sets up the sub  
25 trust that my client's beneficiary of.

1           The intererim clause only appears in the  
2 document that my client wishes to challenge. The  
3 document that my client wishes to challenge is  
4 referenced as a "QBD". This is -- this was, in our  
5 position, an attempt to amend a trust that was otherwise  
6 irrevocable.

7           THE COURT: You're calling it a "QBD"; is  
8 that an acronym for --

9           MR. OSTROM: Qualified Beneficiary  
10 Designation.

11           THE COURT: Okay. And so what about the  
12 no-contest of our trust clause in the restatement?

13           MR. OSTROM: We don't challenge that  
14 trust. So, that trust -- we've got no complaints about  
15 the original trust, the restated trust or the sub trusts  
16 that were created by the restated trust. All the  
17 actions that Nelva and Elmer took together during their  
18 lifetime, we don't have complaints of -- over; it is  
19 what happens after Elmer passes away. After he dies,  
20 it's our position that that trust becomes irrevocable,  
21 and it's only certain things that any of the grantor  
22 and/or trustee can do at that stage.

23           What happens is after Elmer's death, this  
24 Qualified Beneficiary Designation was done which  
25 purports to execute the disclaimer language in the

1 trust. They're trying to say this is a disclaimer.  
2 That's going to be their legal position. It's our  
3 position that this isn't a disclaimer - it's a wholesale  
4 amendment of the trust. It changes dispositive schemes,  
5 it adds intererim clauses, it appoints a trust protector  
6 that wasn't found in the original trust agreement. In  
7 fact, it contains language that speaks in the terms of  
8 an amendment to the trust.

9 THE COURT: I don't have any of that in my  
10 file.

11 MR. OSTROM: Your Honor, you don't because  
12 that is part of the file that we're trying to get over  
13 to you. These are arguments that I've raised in a  
14 declaratory judgment action in relation to this  
15 document, okay. But it is, it is an issue I wanted to  
16 discuss because that's the sole basis of our intererim  
17 challenge is - are we in violation of the terms of the  
18 trust by challenging this document that we believe,  
19 legally, doesn't have -- isn't grounded? I bring this  
20 up because that's the only basis to deny any relief for  
21 my client as it relates to this trust. She's not been  
22 accused of stealing or improperly managing these assets.  
23 She wasn't in charge of any of these assets.

24 Mainly, what we're trying to do is get her  
25 some relief on these attorneys fees that she's now

1 obligated to pay.

2           The said Article 10 Section 10 in the  
3 trust that we have not challenged, not the QBD  
4 amendment, but the Article 10 Section F and the trust  
5 says that there is going to be "no limitations are to be  
6 placed upon the beneficiary regarding withdrawals from  
7 his respective trust shares."

8           And further on in Section 10, it's  
9 creating those sub trusts. There is no language in  
10 there that puts in place a spend thrift provision. I  
11 don't think that a spend thrift provision is applicable  
12 because this is my client requesting a distribution of  
13 these funds to pay her attorney. This isn't me as a  
14 creditor coming after the trust trying to force the  
15 trust to pay when my client won't. We are doing this on  
16 behalf of our client so that she will have the funds  
17 necessary to pursue these actions that at least a  
18 federal court judge believed had some merit and  
19 authorized, on prior occasion, the distribution of  
20 attorneys fees.

21           So, for that -- for those reasons, we'd  
22 ask that this Court continue the practice that was  
23 started by Judge Hoyt, review our attorneys fees as  
24 submitted - I think we submitted some billing statements  
25 in camera - and make a fair and equitable decision as to

1 the distribution of those fees.

2 Your Honor, we would ask that if the  
3 Court's uncomfortable, it could just reserve how that's  
4 allocated at this point. I mean, I think you're going  
5 to hear from other counsel that these fees ultimately  
6 are going to be allocated somewhere at the end of this  
7 day.

8 Now, if the Court is uncomfortable  
9 allocating it to any one party - that's fine - or if the  
10 Court can allocate it to Candy's trust, the provision,  
11 and we're comfortable with that as well. But we believe  
12 that the Court does have the authority to do this in  
13 keeping with Judge Hoyt's prior order. And we'd ask for  
14 an award of the attorney fees as we previously  
15 submitted.

16 THE COURT: Okay. Let me read Judge  
17 Hoyt's order carefully again.

18 It specifically carves out income received  
19 for the benefit of the trust beneficiary. Does that --  
20 are those income distributions being made directly to  
21 the beneficiary or simply deposited into the trust  
22 account?

23 MR. OSTROM: They're just being deposited  
24 into -- they should be, according to this order,  
25 deposited into a trust account that's allocated for the

1 beneficiaries. I think right now, all they're doing is  
2 being deposited in a trust account; is that right,  
3 Bobbie?

4 MS. BAYLESS: As far as I know.

5 MR. OSTROM: My understanding.

6 THE COURT: One of my concerns is  
7 characterizing these attorney fees as somehow the  
8 health, education, maintenance and support of the  
9 beneficiary. That's the HEMS standard, and all the  
10 distributions need to meet that standard, right?

11 MR. OSTROM: You know, I don't -- I didn't  
12 see that in their respective trusts. So, in their sub  
13 trusts, I didn't pick up a HEMS standard. The language  
14 that I was regarding on is that there weren't going to  
15 be limitations placed on beneficiaries regarding  
16 withdrawals from their respective shares. And I  
17 don't -- I'm sorry, I don't have the trust instrument in  
18 front of me right now. I'll be happy to go back and  
19 check that standard. The -- I think this is clearly for  
20 the benefit and support of Ms. Curtis.

21 If this lawsuit is not brought or if she  
22 doesn't bring these claims and challenge this QBD, the  
23 Qualified Beneficiary Designation, it would, in essence,  
24 take the control of the trust away from her, put it with  
25 Anita and Amy as her trustees, individuals who have --

1 who the court-appointed master in federal court have  
2 already found have unequivocally distributed properties.

3           So, the master's finding in federal court  
4 went through what Anita and Amy did as trustees -- or  
5 really, not Amy - Amy hadn't taken any action yet as  
6 trustee - what Anita did as a trustee. And there were  
7 irregularities in her disbursements of those funds. She  
8 paid, she paid her personal credit cards with trust  
9 assets. She made distributions to her children for  
10 education and a vehicle. That was on top of trust fund  
11 fees that she was paying to herself and distributions of  
12 stock shares that came out of the trust that she had no  
13 authority under the trust instrument to make.

14           So, if Carole -- if my client isn't  
15 permitted to obtain funds to free herself from the  
16 control of Anita and Amy as trustees, she's, in essence,  
17 not able to defend, one, the wrongs that have occurred  
18 to her trust and protect her own -- the use of this  
19 property moving forward because they will, in essence,  
20 be her trustees.

21           THE COURT: Okay. Well I'm still -- I  
22 mean, I understand that, and I believe that's, you know,  
23 may be true - she has no other resources of -- she has  
24 no other resources. But I'm still bound by the language  
25 of the trust which -- I mean, the way I read it, and you

1 can correct me, and I'll hand you this trust, but it, it  
2 really sets out, clearly, that distributions are to be  
3 made to Candace for her health, education, maintenance  
4 and support. It does give her a general testamentary  
5 power of appointment where she has a lot more freedom,  
6 but that's only when she passes away.

7           And the other thing that's a sticking  
8 point for me is the no-contest clause which, though I'm  
9 not necessarily reading this as a contest to this  
10 particular trust, it's a contest to a subsequent  
11 amendment or disclaimer, whatever you're calling it; but  
12 it still says that founders do not -- and, founders, I  
13 guess they mean by "founders" or "settlers" or  
14 "trustors" "do not want to burden this trust with the  
15 cost of a litigated proceeding to resolve questions of  
16 law or fact unless the proceeding is originated by the  
17 trustee or with the trustee's written permission."

18           So, I mean, I just -- it's really clear  
19 Mom and Dad are saying, we don't want our kids to fight,  
20 and we're not going to allow our estate to be fettered  
21 away by paying for that fight.

22           MR. OSTROM: And I don't disagree that  
23 that's what Mom and Dad would like to have had happened,  
24 but I'm almost certain that Mom and Dad weren't going to  
25 consent to \$300,000 worth of Exxon stock being sent



1 without following the terms of the trust.

2 I'm certain that Mom and Dad didn't  
3 believe that Amy -- or that Anita would not follow the  
4 terms of the trust. And they couldn't have foreseen in  
5 their, at least Elmer couldn't have, in that no-contest  
6 provision, that after he dies, and this trust is  
7 supposed to be irrevocable, that they decide to go enter  
8 into new agreements.

9 Elmer, who is the grantor under that  
10 initial no-contest provision would have been -- couldn't  
11 have foreseen what his wife would do to make an  
12 otherwise irrevocable trust to change it.

13 Additionally, while those are noble  
14 intentions, Your Honor, you and I both know that whether  
15 we prevail or not, we can be relieved of our obligations  
16 under violation of the no-contest clause just by showing  
17 a good faith in our position as it relates to  
18 challenging the instrument.

19 THE COURT: And I'm not even getting that  
20 far down the road. I'm just -- I'm looking at -- this  
21 sentence just has -- happened to be in the intererim  
22 clause in this trust. And so I'm not even questioning  
23 whether or not this violates that clause. But what I am  
24 saying is that as part of that clause, then -- I mean,  
25 just to be clear, we'll call them, "Mom and Dad." They

1 said that they don't want any of the trust assets to be  
2 used unless the trust -- to pay attorney fees unless the  
3 trustee consents to that.

4           So, for me, that's, that's a problem. And  
5 everyday-people are faced -- I mean, one of the biggest  
6 problems with the American judicial system is that  
7 people are often unable to pursue wrongdoings against  
8 them because they can't afford to hire a lawyer, and  
9 this is one of those cases. And I'm not sure that going  
10 against what the trustee or what the trust terms are and  
11 allowing your client to pay their lawyer, that puts -- I  
12 mean, if it was an advance, you know, and you can make  
13 an argument that it was for her health, education,  
14 maintenance and support --

15           MR. OSTROM: Going back to the maintenance  
16 issue, I think it absolutely is. She's going to use  
17 resources, one way or another, trying to pay me. Those  
18 are her resources. If she can't pay the -- if she can't  
19 pay the light bills, the food, the shelter, the -- those  
20 other items, it's not telling her she can't hire a  
21 lawyer. It's not saying she can't have that part of  
22 what she has to do to protect her assets. And this is  
23 her asset. She is the beneficiary of this trust. She  
24 invested with a beneficiary interest in this trust.  
25 It's hers.

1                   What's basically -- what I'm hearing is  
2 that, yes, you have this interest in this trust; you're  
3 the beneficiary; the trustee is the one that owes you  
4 the fiduciary obligation, but you can't use this money  
5 to protect yourself. You can't use this money as  
6 maintenance or support to make sure that the trustee who  
7 owes you the fiduciary obligations actually conforms  
8 with those fiduciary obligations. That's what --  
9 that's -- it's not just they can't redress the wrong,  
10 it's saying there is no way that makes or support, which  
11 I think it does, contemplates the need to use those  
12 resources to help protect this asset.

13                   And I would posit to this Court that she  
14 should be able to use these resources - her funds and  
15 her share of this estate - to hold her fiduciaries  
16 accountable. And I think that's exactly what Judge Hoyt  
17 saw when he started initiating and allowing the  
18 attorney's fees to get paid.

19                   THE COURT: Let's keep all sidebar  
20 comments --

21                   MS. SMITH: I'm shocked that we're here on  
22 the same case that he's never been involved in, and it's  
23 misstating everything that happened.

24                   THE COURT: Well, you'll have your  
25 opportunity to speak. I just don't want -- you know,

1 we've got to keep a record here, and I want to keep it  
2 clean. Okay.

3 MR. OSTROM: That's all I have.

4 THE COURT: Okay. Thank you, Mr. Ostrom.  
5 Okay. I have a question.

6 I read the restatement of the trust, and I  
7 see where -- where was it? We had the trustees, and  
8 they were named: Carl and Amy. And somehow, Amy and  
9 Anita became trustees, and I never saw how that  
10 happened. Can someone answer that for me?

11 MR. OSTROM: Do you want to address that?

12 MS. BAYLESS: Sure.

13 Your Honor, when the Qualified Beneficiary  
14 Designation was signed shortly thereafter, Nelva  
15 resigned as Trustee, allegedly resigned as trustee, and  
16 appointed Anita as her successor trustee. And the  
17 Qualified Beneficiary Designation had changed the  
18 trustees to Anita and Amy once she was deceased.

19 My client became ill shortly before the  
20 Qualified Beneficiary Designation was signed and was not  
21 involved in a lot of what went on, but that's the  
22 chronology.

23 THE COURT: Okay. And so is the primary  
24 asset, in this estate, a qualified retirement plan?

25 MS. BAYLESS: I'm sorry?

1 THE COURT: Is the primary asset a  
2 qualified plan? So, this beneficiary -- Qualified  
3 Beneficiary Designation - I don't even know what that  
4 is.

5 MS. BAYLESS: Yeah, it's a nomenclature  
6 I'm not really familiar with it either, but it's what  
7 the trust said could be done. It's basically a power of  
8 appointment, I think you would call it, but they call it  
9 a Qualified Beneficiary Designation. But the primary  
10 asset is the Iowa farm.

11 THE COURT: I see. Okay. So, we have  
12 some objections. Who would like to voice their  
13 objection first?

14 ARGUMENT BY MS. BAYLESS:

15 MS. BAYLESS: Let me say this and save  
16 time, Your Honor.

17 I filed the request -- my understanding is  
18 that the federal case was transferred to this Court with  
19 its order in place. Had it not been, I would have been  
20 seeking, from this Court, injunctive relief to keep  
21 everything frozen as had happened in federal court. So,  
22 that's -- and now that's gotten complicated because that  
23 file is not over here, and I understand that. But there  
24 are orders which Judge Hoyt said would remain in place  
25 during the transfer.

1                   And my concern was that when Amy and Anita  
2 lost their last counsel, we had been led, and when I say  
3 "we," Mr. Ostrom and I, had been led to believe that  
4 they were in the process of obtaining counsel; and  
5 frankly, I was a little surprised there wasn't a  
6 substitution before the withdrawal.

7                   But my concern became when they didn't get  
8 counsel and didn't get counsel that we had two trustees  
9 floating around out here that were under injunctive  
10 orders that we couldn't really communicate with easily  
11 and that type of thing. So, that was the reason. And I  
12 didn't file a motion to remove them - I filed a motion  
13 to modify the injunctive relief so that we had somebody  
14 in control of the assets or in control of whoever was in  
15 control of the assets that could be monitored and we had  
16 a concern.

17                   Initially, Anita obtained a new counsel,  
18 but it wasn't until yesterday that Amy obtained counsel.  
19 But that was my concern, and so I don't intend --

20                   THE COURT: So, you wish to withdraw that?

21                   MS. BAYLESS: Yes.

22                   THE COURT: Okay. So, we're left, really,  
23 with any objections to Candace's motion for distribution  
24 of trust funds.

25                   MR. OSTROM: I think Ms. Bayless -- I

1 believe Ms. Bayless also requested a distribution as  
2 well.

3 THE COURT: And we'll hear that, I just  
4 wanted -- if you want to go ahead and make your case and  
5 then we can -- the objections can be made to both  
6 requests for distributions? I mean, do you have an  
7 objection to that?

8 MR. FEATHERSTON: Seems like a logical way  
9 to proceed, Your Honor.

10 THE COURT: Okay.

11 FURTHER ARGUMENT BY MS. BAYLESS:

12 MS. BAYLESS: And I can be very brief,  
13 Your Honor.

14 Frankly, my client has undertaken a number  
15 of steps -- undertook to pursue discovery, took  
16 depositions, obtained, personally, all of the trust  
17 records that we have now; initiated the probate  
18 proceedings so that there was a party that could proceed  
19 against the attorneys who prepared the documents. I  
20 mean, he's been doing a lot of stuff. He was not  
21 involved in the federal court case but watched as, both,  
22 Amy and Anita and Candy received the distribution for  
23 attorneys fees. So, at that point, we didn't know  
24 whether that would be a one-time distribution or whether  
25 it would be on an ongoing basis and be treated the same

1 way. It's obviously expensive litigation. And so to  
2 the extent parties are receiving distributions for base,  
3 and I don't question that that is -- may well be the  
4 proper thing to happen if this dispute is going to be  
5 sorted out properly, we didn't want to be continuing to  
6 stand on the sideline because he is belaboring more for  
7 much of what is going on, and he's not been doing that  
8 with trust resources.

9           So, when Mr. Ostrom filed another request  
10 for fees -- and, frankly, I told Mr. Ostrom when he did  
11 it the first time, that was going to be a bad precedent  
12 unless everybody was participating in that way. And so  
13 when he filed that again, I informed him that we were  
14 going to make a similar request because we didn't think  
15 one party alone should be receiving distributions for  
16 attorneys fees.

17           I'm not disputing that all of the parties  
18 probably need distributions for attorneys fees. And so  
19 rather than couching it as an objection to his request,  
20 I made my own request.

21           THE COURT: Okay. Well, let me just  
22 say -- I mean, in other fiduciary litigation cases that  
23 have involved trusts, we've always waited until the end  
24 to award attorney fees, and one of the reasons for that  
25 is because one of the factors that's required in making



1 an award of attorney fees is whether, you know, you kind  
2 of apply those fees to the, to the rules. And one of  
3 the tenants is those attorney fees have to be reasonable  
4 in relation to the, to the damages sought. And so here  
5 we're kind of flying blind. We've got attorney fees  
6 being requested, but we have -- I have no idea what the  
7 Iowa farm is, the value of it is. I have no idea what  
8 the damages could be. So, to say you're entitled to  
9 these fees without knowing all of those things, I just  
10 don't see how I can do that because I can do it at the  
11 end of the game when everything becomes clear, and I'm  
12 sitting there, you know, writing a decision. But until  
13 I know, I just feel like there are just a lot of things  
14 missing in my mind that would enable me to make a  
15 reasonable ruling as to the -- as to the reasonableness  
16 of the fees. Does that make any sense?

17 MS. BAYLESS: Sure. Makes a lot of sense.

18 I mean, I just think that the difficulty  
19 that this case faces is there are some very complicated  
20 issues. Many of them are legal issues, and we may be  
21 able to resolve them through motions for summary  
22 judgment in a fairly short order which, I say "short  
23 order," you know, in the nature of litigation, you know,  
24 not tomorrow, of course. But -- and that may help. It  
25 might also help the Court with the issue of what's

1 reasonable -- or even, for example, I think one of the  
2 issues is going to be enforceability of the no-contest  
3 clause. I mean, if we deal with some of the legal  
4 issues - that may help.

5 My point is, in the filing, it's sort of  
6 acknowledging - yes, it's expensive litigation; and,  
7 yes, there are assets there which will ultimately be  
8 divided among the siblings. And the idea that they  
9 can't get that sorted out because of the legal expenses  
10 being more than they can bear without what they're  
11 entitled to from the trust, is also sort of illogical.  
12 But I certainly understand the process. I just don't  
13 want to be the only one who is sitting over here  
14 watching that happen.

15 And so to the extent the Court decided,  
16 well, we've got to figure out a way to systematically  
17 maybe not pay the fees but contribute to them or  
18 something, I want to be in that line. My client needs  
19 to be in that line. And to the extent the Court says,  
20 I'm not going to do that until the end of the case, I  
21 certainly understand why that might occur also.

22 But I do think there are some -- they're  
23 not all legal issues, but there are a lot of legal  
24 issues that are complicated legal issues, but they are  
25 issues that can be resolved without a trial. And then

1 that might narrow everyone's focus, and maybe we could  
2 then get it resolved at a mediation. We're just kind of  
3 throwing up everything in the air in mediation. It was,  
4 it was not a pretty sight. So, it might help to narrow  
5 some of those as well.

6 THE COURT: Well, is it -- would it be  
7 possible -- I'm completely sympathetic with this  
8 litigation going forward and attorneys being paid as it  
9 goes forward. I mean, I'm very sympathetic to your  
10 cause, Mr. Ostrom, it's just that I don't -- I would  
11 feel -- I would feel like I wasn't going out on a limb  
12 if everyone needs attorney fees, and you guys came up  
13 with some sort of way to agree on how those would be  
14 paid as the trust litigation progresses. I mean, I  
15 would be open to something like that.

16 MS. BAYLESS: Right. I sort of thought  
17 that was the direction we would head in because,  
18 frankly, when Mr. Ostrom got paid \$5,000 before, Amy and  
19 Anita's counsel got paid \$5,000 before. So, I sort of  
20 assumed - that was different counsel - and rather than  
21 the objections, I sort of assumed we were all going to  
22 be working in some cooperative spirit for something that  
23 was helpful but wasn't doing everything because  
24 obviously then you're determining the case but determine  
25 the case. I get that. But I don't think there is any

1 question that there are five siblings here who are going  
2 to end up with trust assets at the end of the day. And  
3 so, you know, you can, you can hope for things to be  
4 agreed upon or worked out. That doesn't mean that  
5 happens. But I certainly think that there is a middle  
6 ground there considering the assets in the trust that --  
7 the Iowa farm is worth in excess of \$2 million. So,  
8 it's also not liquid, but there are liquid assets in the  
9 trust.

10 But, you know, the Iowa farm is kind of  
11 the curse and the blessing in the case. It can't go  
12 anywhere so it's preserved, but it's also not liquid.  
13 And because there are some other liquid assets, you  
14 know, minimal distributions, even if it's two off the  
15 beneficiaries, would be helpful in that regard in moving  
16 the case toward a resolution as opposed to what else can  
17 we fight about?

18 THE COURT: I think that's a good point  
19 too. I think it would make it more possible to make --  
20 rather than make it, obviously, to pay attorney fees,  
21 but just simply distributions to all five beneficiaries  
22 in equal amounts. I mean, of course, we would  
23 absolutely be open to something like that, and that  
24 would enable the beneficiaries to fund, you know, any --  
25 or pursue the causes of action that they -- to defend

1 the cause of action that result from all this.

2 MR. OSTROM: Your Honor, and to your  
3 point, we agreed to the payment of attorneys fees for  
4 their counsel, previously. That was an order that Judge  
5 Hoyt entered. And so, I've done that in the past.

6 When we filed our application for our  
7 motion for payment of attorneys fees, the trustees were  
8 not represented. It was just Anita. And I fully  
9 expected that we would get down here, and we could  
10 attempt to work out a deal because if Anita's complying  
11 with this temporary injunction, her attorneys aren't  
12 getting paid either. And the same should be true for  
13 Amy, that I don't believe any one client has a whole  
14 bunch of expendable resources outside of the trust to  
15 pay the attorneys fees.

16 So, I would be willing to work out an  
17 agreement in that regard as well, but we are met with  
18 objections like Ms. Bayless said.

19 THE COURT: Well, I'm just not, I'm not --  
20 I just don't feel like I can -- I don't feel like that,  
21 under the terms of the trust and pursuant to the terms  
22 of the trust, I can allow attorney fees to be paid at  
23 this time. I think I could absolutely make a  
24 distribution to all five beneficiaries if everyone  
25 agreed to that. And to me, that seems like the most

1 plausible solution to this rather than talk about  
2 attorney fees at all.

3 I mean, make a distribution and let each  
4 beneficiary decide whether that's a good use of their  
5 money to spend on the litigation, to spend that  
6 distribution on litigation.

7 MR. OSTROM: And, Your Honor, not opposed  
8 to that. What I don't know is that we have all the  
9 information we need right today because we came at this  
10 from the attorney fee angle. I don't know what that  
11 looks like, like what would be a fair partial  
12 distribution. 'Cause what we're talking about, in  
13 essence, would be a partial distribution out of the  
14 trust, and what that partial distribution looked like,  
15 what assets we would pick from, how much income is  
16 thrown off from the Iowa farm. There's some issues that  
17 counsel and I would have to work through if we are going  
18 to get to that resolution today.

19 COURT'S RULING

20 THE COURT: I'm not asking you to get to a  
21 resolution. I'm just saying, I don't feel comfortable  
22 awarding attorney fees at this time -- or that's not  
23 really the right language, but allowing the trustees to  
24 make a distribution for the purpose of paying attorney  
25 fees; however, if -- I'm just trying to soften that

1 blow, Mr. Ostrom, by saying if you guys present to me an  
2 agreed order that sets out a plan for a partial  
3 distribution, I would absolutely be open to that.  
4 That's, that's all I'm saying.

5 MR. OSTROM: Okay. Thank you.

6 THE COURT: So, I think that we can get to  
7 where your clients need to be, easily, if you can all  
8 agree to a partial distribution.

9 MR. OSTROM: Okay.

10 THE COURT: But I don't know what the  
11 assets are. I don't know what the liquidity is. I  
12 mean, I'm flying blind, and so that's why you guys will  
13 have to work on that without me and then present it.

14 MR. OSTROM: So, is it safe to say that my  
15 request for attorney's fees is denied at this time? It  
16 sounds like that's where we're at.

17 THE COURT: I mean, it is. I hate to say  
18 that because I'm so sympathetic to your problem and your  
19 client's problem; but on the other hand, you know, I've  
20 got, you know, Mom and Dad on my shoulder telling me,  
21 through this restatement of trust, I can't do it as much  
22 as I want to, you know. I can feel sympathy all day  
23 long, but the terms of the trust don't allow me to go  
24 there. But I am telling you where the trust terms allow  
25 me to go and that's in the direction of allowing a

1 partial distribution.

2 MR. OSTROM: Okay. Very good, Your Honor.

3 MS. SMITH: Do you mind if I speak because  
4 I got dragged down here on an attorneys fees motion?

5 THE COURT: Sure.

6 ARGUMENT BY MS. SMITH:

7 MS. SMITH: My client, Carole, who doesn't  
8 get mentioned and always gets left out, has had to sit  
9 in court, in Judge Hoyt's court, not being a party but  
10 coming to observe, and she has had to watch, as Candace,  
11 who you have sympathy for but shouldn't, pro se, would  
12 stand up at the stand. And when you get the file, you  
13 will understand my frustration. And I apologize for  
14 anything that was sidebar, but I've had to sit and watch  
15 this and watch what has happened to Carole through a  
16 very non-sympathetic Candy.

17 She filed this in federal court. She has  
18 literally cost the trust, through this ridiculous cause  
19 of action, more money than the master's report found was  
20 even irregular.

21 Judge Hoyt is a very nice man. I had  
22 never seen him before. I'm a probate lawyer. I don't  
23 find myself in that jurisdiction. She would stand at  
24 the podium and read DTPA pleadings for hours on end.  
25 And my client, Carole, would sit there realizing, at



1 some point in life, she would have to be paying for  
2 stuff Candace's boyfriend wrote. It was horrible. It  
3 was a nightmare to be there.

4 So, at some point, Judge Hoyt, who had had  
5 enough, and I can't say anything because if I make an  
6 appearance for Carole, she's paying attorney's fees in  
7 federal court and for the pleasure of getting sued by  
8 her brother in this court. So, I just have to sit there  
9 and watch. And at some point Judge Hoyt said, "I'm  
10 done. Find a lawyer."

11 Never happened.

12 We have these resets and these resets and  
13 these resets. "Find a lawyer."

14 And at one point she comes and says, "I  
15 don't have any money to pay a retainer."

16 So, for Mr. Ostrom to come in your court  
17 and say the ridiculous statement that some pattern had  
18 been set by Judge Hoyt, he just wanted this woman to  
19 stop reading at a fast pace that his court reporter  
20 could probably, at sometimes, not even keep up with this  
21 diatribe. And all the while, me and my client are  
22 sitting in the back going, "Oh, my gosh. You have to  
23 pay for this."

24 And then she gets this master appointment  
25 who, again, I'm sure was a very nice person. It would

1 have been really nice if they had a probate auditor's  
2 idea of what a trust should look like or what an  
3 accounting should look like, but it cost, again, my  
4 client, Carole, being one of the beneficiaries, an arm  
5 and a leg. It was awful. And at the end of the day,  
6 the bill would choke a goat. It was horrid. And I kept  
7 thinking to myself, I'm not in this. I would come to  
8 every third or fourth hearing just to see what was going  
9 on. And I was watching my client's inheritance slipping  
10 away due to Candace's frivolous and just-crazy  
11 proceeding.

12                   Now, am I saying that Amy and Anita have  
13 been perfect trustees? I never got to see the master's  
14 report, so I don't know. I have no idea. I do know  
15 that what part of it, I did get from Maureen McCutchen,  
16 the prior, a statement of what went on - is that we  
17 spent more in litigation costs and fees and paying him  
18 than the irregularities by -- and I don't know that to  
19 be true. So, I don't want to make a mistake to this  
20 Court 'cause I don't have it. I don't have the report  
21 that was so expensive that I had to sit down when Judge  
22 Hoyt announced how much this man was going to be paid.  
23 I've never been so shocked in my life. I've had  
24 receivers that have run businesses on less money than  
25 this cost.

1                   And so, to say that you're sympathetic - I  
2 know you don't know the case - but I promise, Carole has  
3 no sympathy. And she just sees her inheritance draining  
4 away while to try to pay me, unbeknownst to me, she's  
5 selling a horse she loves just to try to pay part of her  
6 attorney's fees. So, I don't have any sympathy.

7                   So, if you're looking to me for an  
8 agreement on a partial distribution, you're not going to  
9 get it.

10                  And then we go to the case that's in this  
11 court.

12                  My client, without counsel, drug all of  
13 her power of attorney stuff and said, "I'm here. I  
14 don't need a lawyer. Let me out. Here's all the stuff.  
15 Look at it. Take it. Do whatever you want." And they  
16 still won't let her go. And I can't even get the  
17 executor to go file a missing bonds report after he's  
18 been appointed for a gazillion years just to get the  
19 final hopeful little inkling so they might release her.

20                  So, if you're looking for sympathy from me  
21 or any agreement from me, I feel like my client's head  
22 has been stomped on, and she gets to sit in the back  
23 corner and ignored.

24                  Notice, nobody said anything about what  
25 was important for her. It's all about paying somebody

1 else's attorney's fees while she sits back there and  
2 watches what her mom and dad worked so hard for in a  
3 case she's not involved in. And I've warned her: "You  
4 get in - you're stuck with this crazy woman reading all  
5 this stuff, and you're going to have to pay me to sit  
6 there and argue it."

7           And then with the injunction she got in  
8 place, just to pay taxes of \$300, cost attorneys fees of  
9 a thousand. I'm not talking about me. I wasn't in it.  
10 So, to pay \$300 costs a thousand dollars.

11           So, I know I should not have spoken out of  
12 turn, and I'm sorry, but I am really pissed. And I'm  
13 just beyond angry that we're still doing this. I don't  
14 believe either one of their clients went to mediation in  
15 good faith. At all. I only wish I could have gotten  
16 the mediator to cite so that we might have gotten some  
17 sanctions for it. But my client is the person who sat  
18 in the back and sits there and watches her whole  
19 inheritance being spent.

20           So, if you think I'm going to be  
21 sympathetic to a distribution so they can pay hundreds  
22 of thousands of attorneys fees, I'm not.

23           Thank you.

24           THE COURT: Well, in response to that, I  
25 mean, you painted a pretty ugly picture of what happened

1 over in federal court, and I don't want that to happen  
2 here. And so to me, that's just -- to me that's one  
3 more argument to make sure that Candace is represented  
4 by an attorney here because she can, honestly, she can  
5 pursue her case pro se here because she's not, she's not  
6 acting as a fiduciary. And so that just is one more  
7 reason why a partial distribution might be a good idea  
8 because with her represented by counsel, it will -- you  
9 presumably save everyone some time.

10 But, number two, and I'm not trying to  
11 argue at all - I'm just trying to bring you guys to the  
12 table and realize how a partial distribution might be  
13 beneficial for everyone.

14 And the second reason why it might be  
15 beneficial to Carole is that, you know, she's worried  
16 that her inheritance would be fettered away with  
17 attorney fees. And if she can receive a partial  
18 distribution that she doesn't have to pay out to  
19 attorney fees, at least she can start preserving those  
20 distributions. And she's getting, you know, something  
21 meaningful, whereas, you know, if this continues for  
22 five years, there may be nothing left.

23 So, those are two arguments in favor of  
24 that, you know, that might cause Carole to agree to a  
25 partial distribution. Perhaps, I don't know, but I

1 don't feel like that -- and I'm not necessarily  
2 sympathetic to any of the parties - I'm sympathetic,  
3 honestly, to the attorneys. I mean, I've been in Mr.  
4 Ostrom's shoes where I needed to pursue something that  
5 was, you know, what I felt was a good transaction, and I  
6 wasn't getting paid. So, those are my thoughts.

7 I've already ruled. And I just wish you  
8 guys the best in pursuing some other avenues for  
9 solutions.

10 MS. SMITH: Thank you.

11 MR. OSTROM: Thank you, Your Honor.

12 THE COURT: Does anyone have a proposed  
13 order on this?

14 MR. FEATHERSTON: I do.

15 MR. OSTROM: I have no objections.

16 MS. SMITH: It's fine.

17 MS. SPIELMAN: No objection.

18

19 \* \* \* \* \*

20

21

22

23

24

25

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 \$244.00  
 18 and was paid by MS. CANDANCE L. CURTIS

19           WITNESS MY OFFICIAL HAND this the 21st day of  
 20 June, 2016.

21

22                           /s/ Hipolita G. Lopez  
 23                           HIPOLITA G. LOPEZ, Texas CSR #6298  
 24                           Expiration Date: 12-31-16  
 25                           Official Court Reporter  
                           Probate Court Number Four  
                           Harris County, Texas  
                           201 Caroline, 7th Fl.  
                           Houston, Texas 77002