

**TAB 72**

<b>ESTATE OF</b>	§	<b>IN</b>	<b>PROBATE</b>	<b>COURT</b>
	§			
<b>NELVA E. BRUNSTING,</b>	§	<b>NUMBER</b>	<b>FOUR (4)</b>	<b>OF</b>
	§			
<b>DECEASED</b>	§	<b>HARRIS COUNTY,</b>	<b>T E X A S</b>	

<b>CARL HENRY BRUNSTING,</b>	§	<b>IN</b>	<b>PROBATE</b>	<b>COURT</b>
<b>individually and as independent</b>	§			
<b>executor of the estates of Elmer H.</b>	§			
<b>Brunsting and Nelva E. Brunsting</b>	§			
	§			
<b>vs.</b>	§			
	§			
<b>ANITA KAY BRUNSTING f/k/a</b>	§			
<b>ANITA KAY RILEY, individually,</b>	§			
<b>as attorney-in-fact for Nelva E. Brunsting,</b>	§			
<b>and as Successor Trustee of the Brunsting</b>	§	<b>NUMBER</b>	<b>FOUR (4)</b>	<b>OF</b>
<b>Family Living Trust, the Elmer H.</b>	§			
<b>Brunsting Decedent’s Trust, the</b>	§			
<b>Nelva E. Brunsting Survivor’s Trust,</b>	§			
<b>the Carl Henry Brunsting Personal</b>	§			
<b>Asset Trust, and the Anita Kay Brunsting</b>	§			
<b>Personal Asset Trust;</b>	§			
<b>AMY RUTH BRUNSTING f/k/a</b>	§			
<b>AMY RUTH TSCHIRHART,</b>	§			
<b>individually and as Successor Trustee</b>	§			
<b>of the Brunsting Family Living Trust,</b>	§			
<b>the Elmer H. Brunsting Decedent’s Trust,</b>	§			
<b>the Nelva E. Brunsting Survivor’s Trust,</b>	§			
<b>the Carl Henry Brunsting Personal</b>	§			
<b>Asset Trust, and the Amy Ruth Tschirhart</b>	§			
<b>Personal Asset Trust;</b>	§			
<b>CAROLE ANN BRUNSTING, individually</b>	§			
<b>and as Trustee of the Carole Ann</b>	§			
<b>Brunsting Personal Asset Trust; and</b>	§			
<b>as a nominal defendant only,</b>	§			
<b>CANDACE LOUISE CURTIS</b>	§	<b>HARRIS COUNTY,</b>	<b>T E X A S</b>	

**CARL HENRY BRUNSTING’S MOTION FOR PROTECTIVE ORDER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Drina Brunsting, as attorney-in-fact for Carl Henry Brunsting, individually, filing this Motion for Protective Order with regard to improper audio and video recordings produced by Anita Brunsting (“Anita”), as well as additional recordings obviously still in the possession of Anita, Amy Brunsting (“Amy”), Carole Brunsting (“Carole”), and third parties to whom the recordings have been disclosed. In support of this motion, Carl would show as follows:

1. When Anita became trustee, Carl was excluded from distributions from his parents’ trusts. In fact, Carl’s entire family was even excluded from discussions concerning the trusts. But both Carole<sup>1</sup> and Candy told Carl and Drina about what appeared to be improper actions that had been taken. So, on March 9, 2012, before Carl ever filed this action, he requested information pursuant to Tex. R. Civ. P. 202. One thing which had been revealed to Carl was the placement of a GPS tracking device on his wife Drina’s car without her knowledge by an investigator hired to follow her. Carl suspected that recordings had also been made of conversations between one or more of the Defendants and either Carl or Drina, so copies of recordings were also requested in 2012. In light of the GPS tracking device placed on Drina’s car, perhaps it should not be—but it still is—a surprise to learn just how far the recordings went. The recordings, at least the ones which have finally been produced, included recordings of telephone conversations made without the consent of *either* party to the conversation.

2. In addition to emails between the Brunsting family members, included among the items Carl sought from Anita, Amy, and Carole in March, 2012 were:

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<sup>1</sup> At various times, Carole has taken different positions on whether there was wrongdoing and by whom. It is pretty obvious what causes Carole’s changes of heart. Despite complaining about Anita’s efforts to gain control over the trusts, Carole made video recordings from Carl’s hospital room in late May, 2011 and sent them to Anita and Amy. It can not be a coincidence that on June 15, 2011, Carole received a transfer from Anita of 1325 shares of Exxon Mobil stock. Likewise, it can not be a coincidence that Carole stopped complaining about Anita.

- All audio or video recordings of meetings, conversations, telephone messages, or other communications with Elmer, Nelva, or any of the Brunsting Descendants<sup>2</sup> concerning Brunsting Issues,
- All audio or video recordings of Nelva's execution of any documents.
- All audio or video recordings of evaluations of Nelva's capacity,
- All other audio or video recordings of any Brunsting family member, and
- All investigations made of any Brunsting family member, including any surveillance logs or reports.

3. When Carl made his Rule 202 filing, Anita and Amy hired an attorney, Bernard Mathews, who obtained a continuance of the hearing on Carl's Rule 202 requests by providing Anita's unsupported summary of trust activity and agreeing to provide, on a voluntary basis, what was being sought. Mr. Mathew's email dated April 11, 2012 about obtaining the information sought is attached as Exhibit 1. Mr. Mathews indicated in discussions with Carl's counsel that everything in his clients' possession which had been requested would be turned over. Six days later Mr. Mathews was fired. Attached as Exhibit 2 is the email by which Carl's counsel was notified there would be a change of counsel.

4. Thereafter, when Anita and Amy retained Mills, Shirley LLP as their new counsel, the Rule 202 hearing was again continued as to Anita and Amy, at their new counsel's request, so that information could continue to be gathered. The issue of Carole providing information was not

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<sup>2</sup> "Brunsting Descendants" was defined in the document to include Candace, Carole, Carl, Amy, Anita, and the children and grandchildren, if any, of Candace, Carole, Carl, Amy, and Anita.

delayed further, however, and an order requiring Carole to provide her information was signed on May 18, 2012.

5. While some documents were ultimately provided by Anita, Amy, and Carole, including a number of boxes made available for review at Mills, Shirley's offices in Galveston, very few emails were produced and no one produced any recordings or investigator's reports. Amazingly, on September 9, 2014 even though actively trying to negotiate a settlement in the case, Mills, Shirley suddenly sought to withdraw from its representation of Anita and Amy claiming that "a conflict had arisen between the parties and the attorneys." The Mills, Shirley withdrawal was allowed on September 18, 2014. At that point, there had still been a lack of production of emails, recordings and investigator's reports.<sup>3</sup>

6. Anita's current counsel entered his appearance in this matter on November 14, 2014, and Amy's current counsel entered his appearance on December 8, 2014. Through no less than 9 supplemental productions made since Mr. Featherston took over as Anita's counsel, no recordings or investigator's reports had been provided, but emails addressing the point he wanted to address began to show up as attachments to certain filings (See Anita's Objections to Candace Curtis' Application for Personal Representative filed on March 9, 2015, to which six emails previously unproduced by Anita were attached).

7. Then on July 1, 2015, Carl's counsel received an envelope by certified mail from Mr. Featherston which enclosed a CD containing supplemental production which had apparently been disclosed, at a minimum, to everyone else in the case. For various reasons, including the July 4

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<sup>3</sup> The Defendants continue to just ignore the investigator issues, although there have been no denials that there was an investigator following Drina. There can be no question there was an investigator though. Attached hereto as Exhibit 4 are emails exchanged among Anita, Amy, Carole, and Candy about the investigator.

holiday, Carl's counsel was unable to adequately review all the information on the disk when it first arrived. Once the materials had been reviewed, however, it was obvious that the disk contained illegally obtained recordings. As will be further explained, it was not until July 1, 2015 that any recordings were provided.

8. The disk contained items which were numbered 5814 to 5840. Included among those items were the following four audio recordings, at least three of which were made without the consent of either party to the conversations:

- (1) a 43 second phone conversation between Carl and his mother which, according to the file properties, was both created and modified on February 27, 2015<sup>4</sup> (Brunsting 5836.wav);
- (2) a phone conversation lasting 6 minutes and 44 seconds between Carl and Drina which, according to the file properties, was both created and modified on February 27, 2015 (Brunsting 5837.wav);
- (3) a telephone conversation lasting 19 minutes and 18 seconds between Carl and Drina which, according to the file properties, was both created and modified on April 22, 2011 (Brunsting 5838.wav); and

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<sup>4</sup> Nelva Brunsting died on November 11, 2011, so this could not have been just a copy of the original recording. The larger question raised by the dates on the audio files, however, is why they were not produced long ago. Who recorded them, where have they been, and to whom have they been given? Is this perhaps why Mills, Shirley suddenly had to withdraw? It seems unlikely that there can be a reasonable excuse for why these recordings, all made in 2011 and dealt with by someone again in February of this year, were not produced until July. That is particularly puzzling when on March 11, 2015 Anita filed a Motion to Compel complaining that Carl had not been specific enough about his damage disclosures and had not turned over all of his attorney's fee invoices.

(4) a telephone conversation lasting 8 minutes and 53 seconds between Carl and Drina which, according to the file properties, was both created and modified on March 21, 2011 (Brunsting 5839.wav).

9. The audio recordings<sup>5</sup> provide a basis for liability to both Carl and Drina pursuant to the Texas Civil Wire Tap Act found at Tex. Civ. Prac. & Rem. Code, Title 123.<sup>6</sup> That Act prohibits, among other things, the interception of a conversation transmitted over telephone wires without the consent of at least one of the parties to the conversation, as well as the further disclosure and the use of such intercepted transmissions. Neither Carl nor Drina consented to the recordings or even knew about them. The same is undoubtedly true of the recording of the short conversation Carl had with his mother. These recordings were made improperly, disclosed improperly, presumably have been used improperly, and are obviously intended to be used improperly in this litigation.

10. Although they have clearly been edited, nothing on these recordings suggests they were somehow found on an answering machine tape at Nelva's house as Anita's counsel claimed to be the case in discussions with Carl's counsel about these recordings. There is nothing on the recordings indicating the involvement of an answering machine. There is nothing on the recordings indicating an answering machine either picked up or ended the call. There is no answering machine message alerting anyone to a recording device. There is also nothing on the recordings themselves indicating the date on which they were recorded. The other flaw with the answering machine explanation is that when Drina called Carl at his mother's house, an answering machine never

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<sup>5</sup> It seems highly unlikely, of course, that these are the only recordings made.

<sup>6</sup> These recordings are also violations of Section 16.02 of the Texas Penal Code.

answered—a person always did. The timing of the earliest recording together with emails from that time period make the real explanation for the recordings clear, but very problematic for Defendants.

11. These appear to have been made through a well-orchestrated plans between Anita, Amy, and Carole.<sup>7</sup> Emails reflect discussions among the Brunsting sisters shortly after Carl became ill—both before and after Anita was even trustee—discussing ways to prevent Carl’s access to trust disbursements. (See Exhibit \_\_\_\_).

12. Carl spent some time at his mother’s house in December, 2010 when Drina suffered a herniated disc in her back trying to lift him. Carl’s recovery suffered so badly while he was staying at his mother’s house that Drina ended that arrangement. Then in early March, 2011, there are emails concerning APS complaints,<sup>8</sup> investigators, possible guardianship proceedings, and arrangements for a possible divorce between Carl and Drina so that Drina would not be Carl’s natural guardian. In March, Carole also approached Drina about having Carl spend time at his mother’s home again—allegedly to give Drina a break as Carl’s sole caregiver and to give Carl somewhere to go when Drina had to work or had to deal with her elderly father who lived in Beaumont. Drina believed Carole’s concern to be sincere and agreed.

13. On March 17, 2011, Faustino Vaquera purchased one ICD-OX312 Sony digital voice recorder at Best Buy and a 4200223 3' 1/8" M-M Patch Cable from Radio Shack. Vaquera was reimbursed for the purchase when he included it on his time sheet dated March 18, 2011. The time sheet with the attached receipts is attached hereto as Exhibit 3. That digital voice recorder is capable

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<sup>7</sup> Originally, Candy was also involved in the plans to prevent distributions to Carl for his medical needs until the explanations she was being given for what was happening stopped making sense.

<sup>8</sup> In that same month, to their frustration, their APS complaint against Drina was dismissed because unlike what had occurred when Carl was at his mother’s house, Drina was following medical advice in her care of Carl.



of voice activation and has 2 GB built-in memory which can be expanded to 16 GB. The earliest recording, based on the properties for the files produced was March 21, 2011, right after Carole made sure recordings of calls between Drina and Carl could be arranged by getting Carl back to his mother's house.

14. The CD recently produced by Anita's counsel also included various emails which have suddenly appeared out of some unknown location despite having been requested since March, 2012, including four emails from Carole to Amy and Anita between May 23, 2011 and May 25, 2011 which had attachments containing videos taken by Carole of Carl in his hospital bed after he had an adverse reaction to a medication which was itself life threatening. (Brunsting 5822-5825). These incredible invasions of Carl's privacy occurred while Carl was too ill to resist them and when no one who cared about him was around to prevent them. After making the recordings on her Android, Carole sent them to herself and to Anita and Amy. Like the illegal phone recordings, Carl did not consent to these video recordings and even in his incredibly ill state, it was clear he was very uncomfortable with them. Also like the illegal phone recordings, these had never been provided to Carl despite his request for any video recordings in 2012. The properties on the files containing the emails indicate the files were all modified on March 18, 2015. It is inexcusable that these were ever made and that they have been withheld from Carl since May, 2011, but where have they been since March 18, 2015?<sup>9</sup>

15. Carl requests that sworn affidavits be provided by Anita, Amy, and Carole specifying the date of every recording made within the categories requested, the party making the recording, the

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<sup>9</sup> And there has still been no production of the investigator's reports. Yet, as already stated, while withholding this and more, Anita filed a motion to compel Carl to do a better job of responding to requests for disclosure and to provide all of his information on the attorney's fees he had incurred, something which no one else in this case has been required to do.

means of recording, the current location of all original recordings and all copies of all recordings, all parties to whom the contents of recordings have been disclosed, and all uses which have been made of the recordings. Carl also requests that all original recordings and all copies of those recordings be turned over to Carl's counsel. Carl also requests that all copies which have been disclosed to any third parties, including the other counsel in this case, be retrieved and included in those materials turned over to Carl's counsel. Carl also requests that the identity of all investigators hired to follow Carl or Drina be provided, and that all investigator's reports be turned over. Carl also requests that Anita, Amy, and Carole be required to provide sworn testimony of their compliance and that they be prevented from using such recordings for any purpose, including in this proceeding.

WHEREFORE, PREMISES CONSIDERED, Carl Brunsting asks for the relief sought herein and for such other and further relief to which he may be entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

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fact for Carl Henry Brunsting*

**CERTIFICATE OF CONFERENCE**

Attempts to resolve these issues have thus far been unsuccessful. Discussions are continuing and the motion will be withdrawn if they are resolved.

/s/ Bobbie G. Bayless  
BOBBIE G. BAYLESS

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded on the \_\_\_\_ day of July, 2015, as follows:

Bradley Featherston  
1155 Dairy Ashford, Suite 104  
Houston, Texas 77079  
*via Telecopier*

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/s/ Bobbie G. Bayless  
BOBBIE G. BAYLESS