

REPORTER'S RECORD

VOLUME 1 OF 1

TRIAL COURT CAUSE NO. 412249-401

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

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

\* \* \* \* \*

MOTION TO COMPEL THE DEPOSITION OF CANDACE  
 KUNZ-FREED/MOTION TO QUASH/MOTION FOR PROTECTION

\* \* \* \* \*

On the 24th day of January, 2019, the following  
 proceedings came to be heard in the above-entitled and  
 numbered cause before the Honorable James Horwitz  
 Associate Judge of Probate Court No. 4, held in Houston,  
 Harris County, Texas:

Proceedings reported by Machine Shorthand

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1 January 24, 2019

2 PROCEEDINGS:

3 THE COURT: So, today in Case Number  
4 412,249 in the 401, The Estate of Nelva E. Brunsting.

5 We have Anita Brunsting's motion to compel  
6 the deposition of Candace Kunz-Freed and Candace  
7 Kunz-Freed's motion to quash and the motion for  
8 protection.

9 So, what I'd like to do in this proceeding  
10 is first hear the motion to compel; who would like to  
11 speak on that behalf?

12 MR. JADLOSKI: I can, Your Honor.

13 THE COURT: All right. Go right ahead,  
14 sir.

15 MOTION TO COMPEL

16 ARGUMENT BY MR. JADLOSKI:

17 MR. JADLOSKI: We filed -- first of all,  
18 Your Honor, we asked for a deposition of Ms. Kunz-Freed.  
19 She is the attorney who prepared the QBD - the Qualified  
20 Beneficiary Designation, a trust document - that would  
21 be the focus of this deposition that we requested. And,  
22 essentially, Your Honor, she was, both, the attorney who  
23 drafted the document and the notary on the document.  
24 So, she would be the only one that could testify as to,  
25 both, the sort of the validity of the document, why the

1 document was drafted the way it was, and would also be  
2 the only one to testify as to the decedent's capacity at  
3 the time that she signed the documents.

4           So, our basic position is that she's not  
5 only the best witness for this information - she's the  
6 only witness for this information; and we have to have  
7 that information in order to respond to Carl Brunsting's  
8 argument that the QBD is not enforceable.

9           So, that, in a nutshell, is our reason  
10 that we need the deposition, Your Honor.

11           THE COURT: All right. Do you have a  
12 response?

13                           ARGUMENT BY MS. FOLEY:

14           MS. FOLEY: Yes, Your Honor.

15           I'm Zandra Foley; I represent Ms. Freed  
16 who is the non-party witness that they're trying to  
17 compel.

18           And if I could give you a little  
19 background about the case, 'cause it's kind of long, and  
20 I'm not sure how much you've been able to read.

21           THE COURT: I'm kind of -- been trying to  
22 catch up. It is intertwined with other matters.

23           MS. FOLEY: It is. So, I'll keep this  
24 brief.

25           THE COURT: You take as much time as you

1 need, Counsel. Please feel free to sit.

2 MS. FOLEY: I actually do better when I  
3 stand 'cause I'm a hand-talker.

4 Okay. January 29th, 2013 - that's when my  
5 client was originally sued. She was sued in district  
6 court, and that was when Carl Brunsting was the executor  
7 of the estate at that point in time represented by Ms.  
8 Bayless. They chose to file that lawsuit in district  
9 court, the 164th, and they proceeded to litigate that  
10 lawsuit for two years. And in August of 2013, we did  
11 the written discovery, got verified responses to  
12 interrogatories from Mr. Brunsting --

13 THE COURT: Now, excuse me for  
14 interrupting you. But the subject matter of that was a  
15 malpractice claim?

16 MS. FOLEY: Malpractice claim. But  
17 essentially, similar to the claims being made in the  
18 probate matter regarding whether or not Ms. Brunsting  
19 had capacity; however, the allegation against my client  
20 is that she should have, in that lawsuit, that she  
21 should have known she did not have capacity and as a  
22 result breached various duties, you know, duties for  
23 negligence, breach of fiduciary duty, DTPA, et cetera.

24 So, we litigate that case. We're doing  
25 written discovery. They designate experts.

1                   And then in February of 2015, we decide to  
2 take Mr. Brunsting's deposition as the executor. We go  
3 to that deposition on February 3rd. He is deposed for  
4 three hours.

5                   THE COURT: Which year of February, 3rd?

6                   MS. FOLEY: 2015.

7                   THE COURT: Okay.

8                   MS. FOLEY: So, it's 2015, February 3rd.

9 He is deposed for three hours. I asked him every  
10 question related to: What are your claims? What  
11 evidence do you have of these claims? What did you see?  
12 Hear? What can you tell me? And he, essentially, said,  
13 "Nothing." That was generally the answers. He didn't  
14 have any evidence to backup any of these claims. After  
15 that deposition was over, sometime later, I get a call  
16 from Ms. Bayless telling me, "Oh, you know what - I  
17 don't think Mr. Brunsting had capacity when he said all  
18 that stuff to you."

19                   Now, my guess is already -- I'm trying to  
20 come up with my motion for summary judgment 'cause I'm  
21 trying to get this case dismissed for my client because  
22 there is no evidence to backup any of these claims.

23                   And then later, once we get the return  
24 from the -- they returned their deposition, the errata  
25 sheet, instead of being changes or corrections, what we

1 get is a letter from Ms. Bayless basically saying - yes,  
2 I don't think he had any capacity. He really didn't  
3 know anything and basically this deposition has no  
4 value. She says that having not made a single objection  
5 during that deposition, not saying anything about - oh,  
6 I think he may not have capacity of anything; as a  
7 matter of fact, said that he was, in fact, the executor  
8 and that he could give his deposition. So, when we're  
9 trying to gear up to get the case dismissed, then all of  
10 a sudden in March of 2015, she's - after she sends this  
11 letter - she let's us know what she's going to do now is  
12 have him resign as the executor. So, she files that in  
13 this court which, again, my client is not a party to  
14 this case - we're in district court - and then has the  
15 Court here remove him as the executor. And, now, of  
16 course, what happens in my case, it comes to a  
17 screeching halt. We can't do anything as a result of  
18 that because there is no executor to pursue the claim.

19 So, now, 2019, we've been through two  
20 presidents, and my client is still a party in that  
21 lawsuit - not this one - not able to do anything about  
22 trying to move her case along, to make efforts to get it  
23 dismissed, and to do anything to even just have a trial  
24 on the merits.

25 There was a motion that was filed in this

1 court to consolidate our case here, but again --

2 THE COURT: Who filed that motion?

3 MS. FOLEY: I believe Ms. Bayless filed it  
4 initially and maybe others then jumped in. But the deal  
5 was, again, based on what happened in my case from our  
6 standpoint, this was just a tactical move to prevent  
7 dismissal of the claim in district court. So, now  
8 we're --

9 THE COURT: So, are you opposing that  
10 motion for consolidation?

11 MS. FOLEY: We did oppose that motion.  
12 And as a result, there was no ruling.

13 Now, at some point there was a temporary  
14 executor who was appointed --

15 THE COURT: The administrator?

16 MS. FOLEY: Administrator - I'm sorry,  
17 Your Honor - to evaluate all the claims. So that  
18 happened. But now there is no one, and it's been that  
19 way for some time. And even though in the reply there's  
20 some accusations that that's somehow our fault - Ms.  
21 Freed is not party to this case and has no power to  
22 compel an executor to be appointed or administrator to  
23 be appointed or not.

24 So, the point is, is even though we're  
25 here now with no executor of the estate, no

1 administrator or anything, the first argument is that  
2 because she was the lawyer for Ms. Brunsting, there is  
3 an attorney-client privilege that she ethically has to  
4 protect. And just because they're all the siblings and  
5 the children of the -- of Ms. Brunsting, that does not  
6 give them a right for us to waive that privilege. That  
7 privilege is owed to the estate. And because there is  
8 no administrator or executor - who is the estate - that  
9 can direct whether or not those privileges can be  
10 waived, she cannot be subjected to that position.

11 I would argue that on top of that - if  
12 they're talking about taking a deposition in this case,  
13 in the probate case, with no administrator or executor -  
14 you don't even have all the necessary parties to take a  
15 deposition. So, that would also be incorrect.

16 And then lastly, it's just fundamentally  
17 unfair that we're going to now take Ms. Freed's  
18 deposition in this case knowing that there's another  
19 case pending, and she is in a situation where she can do  
20 nothing about it but sit there, not have due process to  
21 do the things any defendant would want to do to try to  
22 either move their case along to get to resolution or get  
23 it dismissed, but yet has to come into this case where  
24 there is still no administrator or executor, sit for a  
25 deposition and, essentially, she'd have to assert the

1 privilege every time.

2 THE COURT: Let me ask you a question.

3 MS. FOLEY: Yes, Your Honor.

4 THE COURT: In the other case, the  
5 district court case, your position is there's no  
6 representative of the estate at this time --

7 MS. FOLEY: Yes, Your Honor.

8 THE COURT: -- and therefore there is no  
9 one to request the deposition of Ms. Freed in that case.

10 MS. FOLEY: No, not exactly. There is no  
11 one to do anything because that case is now abated by  
12 result of -- there was a resignation. So, we can't do  
13 anything.

14 THE COURT: Resignation of the temporary  
15 administrator?

16 MS. FOLEY: Yes, Your Honor

17 THE COURT: And no one to replace that  
18 person?

19 MS. FOLEY: Right. And so, we're,  
20 essentially, frozen.

21 THE COURT: Okay. I'm sorry to interrupt  
22 you; I just needed to get that clear.

23 MS. FOLEY: No, that's okay.

24 And then on top of that, obviously -- I  
25 know we're not here on a consolidation, but just so you

1 understand why we were opposing it is, first of all,  
2 obviously, we litigated in the other court for two  
3 years. And to me, I felt like they're trying to undo  
4 things because it didn't go their way when she's, you  
5 know, set for a deposition.

6           Second of all, obviously, there's all  
7 kinds of other sorts of parties and claims over here  
8 that we believe would prejudice us with respect to the  
9 lawsuit against Ms. Freed in the other court mainly  
10 because it's just one party, and she's suing Ms. Freed  
11 and her firm against whoever is going to be representing  
12 the estate. And so therefore, our ability to quickly  
13 move through the system in order to get to a  
14 resolution - whether it be, you know, by trial or what  
15 not - would be impacted if we are then put into this  
16 case with all of these other issues that really have  
17 nothing to do with the claims against my client. And  
18 I'm specifically talking about the claims. I understand  
19 that some of the facts intersect, but the claims against  
20 my client - nobody's ever going to find in that case  
21 whether or not Ms. Brunsting had capacity or not; that's  
22 not the question that will be asked. The questions will  
23 be: Was my client negligent? Did my client breach a  
24 fiduciary duty? Did she violate the DTPA? Because  
25 she's the only party in that case, meaning none of the

1 children are in that particular case; it is just the  
2 estate versus the lawyer and the law firm, then there  
3 will be no impact on whatever the findings are in this  
4 court with regard to the probate of estate. There won't  
5 be. The only thing that will be determined is whether  
6 or not my client breached a duty.

7                   And so, for all of those reasons - yes,  
8 there is no -- either we don't have all the necessary  
9 parties, even if you wanted to do a deposition at this  
10 point, but on top of that, because there is not one,  
11 there is nobody who can waive any privilege that my  
12 client has with the estate at this time.

13                   And so therefore, we are opposing or  
14 resisting presenting for a deposition at this time.

15                   THE COURT: Okay. Go ahead.

16                   MR. SPIELMAN: Your Honor, my name is Neal  
17 Spielman, and I represent one of the trustees or one of  
18 the apparent trustees of the estate - Amy Brunsting.

19                   Can I ask the Court, just because of the  
20 way things have gone on in this case, can I ask the  
21 Court to notice which parties and which counsel are here  
22 because there is a party that isn't here who we may want  
23 to --

24                   THE COURT: I think that's a good idea.  
25 Why don't you go ahead and give your name and who you

1 represent to the court reporter.

2 MS. FOLEY: Hello. My name is Zandra,  
3 Z-A-N-D-R-A, Foley with Thompson Coe, and I represent  
4 Candace Kunz-Freed and Vacek & Freed.

5 MS. CAROLE BRUNSTING: My name is Carole  
6 Brunsting; I'm a beneficiary; and I'm a pro se litigant.

7 MR. SPIELMAN: As I mentioned, my name is  
8 Neal Spielman, and I represent Amy Brunsting.

9 MR. JADLOSKI: My name is Tim Jadloski,  
10 and I represent Anita Brunsting.

11 MS. BAYLESS: My name is Bobbie Bayless; I  
12 represent Carl Brunsting.

13 MR. SPIELMAN: Okay. Thank you. And the  
14 party that's not here is Candace Curtis who is another  
15 one of the Brunsting siblings. She is also a Pro Se  
16 Plaintiff.

17 THE COURT: Okay.

18 ARGUMENT BY MR. SPIELMAN:

19 MR. SPIELMAN: Your Honor, you know, as  
20 you're learning this case, there are some unique things  
21 to it - it's got a very long history and multiple  
22 different issues and pending motions that have been  
23 heard but not yet ruled upon overtime.

24 One of the things that's unique, in my  
25 mind, with respect to what I'd like talk to you about is

1 that I find myself arguing against Ms. Foley as it  
2 pertains to today's limited issue of - should we be able  
3 to proceed forward with her client's deposition, but I  
4 will likely be arguing in conjunction and with Ms. Foley  
5 when it comes to the concept of whether or not the  
6 documents that Ms. Freed drafted were properly drafted,  
7 are enforceable, and things like that. So, it's a  
8 little unique to be arguing against somebody that, in  
9 the bigger picture, you're probably going to wind up  
10 being allied with.

11 The issue, Judge, with respect to Ms.  
12 Foley is that -- so there's a couple of things that she  
13 left out.

14 The district court case - at least as I  
15 understand it - based on what I have perceived or  
16 determined or believed to be the live pleading, I  
17 believe Ms. Foley left out that there is an aiding and  
18 abetting claim in which her clients are accused of  
19 aiding and abetting improper activities by the trustees,  
20 one of whom is my client, the other --

21 MR. JADLOSKI: The other is my client,  
22 Anita Brunsting.

23 MR. SPIELMAN: Either of our clients are  
24 parties or have ever been parties to the district court  
25 case. And both of our -- both, Anita and Amy, are

1 accused of or have fiduciary breach claims pending  
2 against them in this court --

3 THE COURT: Filed by the?

4 MR. SPIELMAN: Filed by Carl Brunsting and  
5 Candace Curtis.

6 THE COURT: And Carl is now presumed to  
7 be -- well, let me say this: He's resigned as the  
8 representative of the estate; is that correct?

9 MR. SPIELMAN: Now has his wife, Drina  
10 Brunsting, acting within the confines of this lawsuit,  
11 the probate court lawsuit as, I believe they call her,  
12 the "Attorney in Fact," I think is what --

13 MS. BAYLESS: Yes, she's operating under  
14 power of attorney, Your Honor, as to this case.

15 THE COURT: Is your client still the  
16 executor?

17 MS. BAYLESS: No, Your Honor.

18 THE COURT: In what way did he cease to be  
19 the executor?

20 MS. BAYLESS: He resigned. Let me give  
21 you just a little bit --

22 THE COURT: No, I'll let you speak at a  
23 time.

24 MS. BAYLESS: Okay. Yes, he resigned.

25 THE COURT: I don't want to interrupt too

1 much his flow.

2 MR. SPIELMAN: If he did resign, that  
3 was -- there was a proceeding in this courtroom that had  
4 to do -- my recollection -- it was anonymous, the  
5 resignation, and two competing applications to be named  
6 the -- I might be using the wrong words, but the  
7 "replacement executor". That process, I believe,  
8 resulted in the Court's appointment of Mr. Lester as the  
9 temporary administrator whose specific mandate was to  
10 evaluate the merits of both the claims pending in this  
11 case and the claims pending in the district court case.

12 Mr. Lester prepared and submitted to this  
13 Court a comprehensive report for which the estate was  
14 required to pay him upwards of - I believe it was  
15 10-if-not-closer to - \$11,000.

16 In his report, he mentions to the Court or  
17 concludes that the documents that are at issue in the  
18 case were properly drafted and enforceable as written.  
19 He didn't address the issue about whether or not Nelva  
20 Brunsting had capacity at the time they were signed  
21 which again speaks to why it's important to get  
22 information from Ms. Freed about capacity... Sorry, I'm  
23 trying to keep this constrained, but I, myself, have now  
24 gotten twisted up in how complicated this is.

25 THE COURT: Join the club.

1 MR. SPIELMAND: There is also a conspiracy  
2 claim in the district court case in which it's alleged  
3 that the Vacek & Freed Law Firm conspired with the  
4 co-trustees, Amy and Anita. Those causes of action - I  
5 don't see how they can ever be addressed in the district  
6 court case until we have first resolved the issues that  
7 are pending in this case, at least the issues that  
8 relate to the drafting of these documents, the Qualified  
9 Beneficiary Documents, and other documents that were  
10 drafted and executed during a period of time in which I  
11 believe it is Carl's position and Candace Curtis'  
12 position that they were drafted in violation of the  
13 trust documents which would have been irrevocable and  
14 not subject to change at that point in time.

15 So, either we are going to be persuaded by  
16 Mr. Lester's report and find that those allegations or  
17 those contentions are - right now as they exist - false,  
18 incorrect, and capable of being dismissed or, we need to  
19 move forward with the deposition of Ms. Freed, the  
20 drafter of those documents, so that we can begin to  
21 evaluate whether or not those documents were properly  
22 drafted, are compliant with the law as it relates to  
23 Qualified Beneficiary Designations versus irrevocable  
24 language in trust documents, and the capacity and undue  
25 influence issues. I believe that's where Amy and

1 Anita's positions will sort of dovetail into Ms. Foley's  
2 client's positions and ultimately result in a resolution  
3 of the majority of what is at issue in the case, and I  
4 would expect all of what is at issue in the district  
5 court case.

6 I think, while my client did not file the  
7 consolidation, as we were now in 2019 and given the  
8 twists and the turns that this whole case has taken and  
9 the need to now address Ms. Bayless' summary judgment, I  
10 think the need for Ms. Freed's deposition is very  
11 important at this time.

12 We can -- I guess the Court can bring that  
13 case over and still keep it separate through a 403  
14 designation but then consolidate it for discovery  
15 purposes.

16 As to the privilege, I think that's,  
17 frankly, Ms. Foley's strongest argument, one which I  
18 could see myself making if our situations were reversed;  
19 but the Court has ways to solve that problem by either  
20 simply ruling that the privilege doesn't apply, in which  
21 case, there is protection for Ms. Freed to speak about  
22 what would otherwise be privileged issues; or, the  
23 Brunsting siblings could agree to collectively waive the  
24 privilege which, frankly, I'm not so sure we could  
25 expect; or, we could take the example of using a

1 temporary administrator to evaluate and waive the  
2 privilege specific to allow the deposition to proceed.

3 My client has an application to be the  
4 replacement administrator, which is what the Will  
5 documents call for.

6 There is also a pending, similar motion by  
7 Candace Curtis. Those motions have, again, they've been  
8 argued; they haven't been ruled on. They are, I guess,  
9 pending. But I think that to the extent that there  
10 might be a conflict between who should take that role in  
11 a more permanent way - a temporary, finite-defined  
12 appointment - to waive the privilege and allow the  
13 deposition to proceed solves -- I think is another  
14 mechanism by which the attorney-client privilege can be  
15 solved and resolved.

16 The bottom line, Judge, is that if you  
17 really do sort of look at the evolution of the cases  
18 together - not necessarily the evolution, but the issues  
19 of the cases together - I can't see any sort of  
20 methodical, logical approach that says that evaluating  
21 what's going on in this case shouldn't take precedence  
22 over evaluating Ms. Freed's conduct or the law firm's  
23 conduct but with respect to the drafting. Those things  
24 are intertwined. And before we can know whether or not  
25 malpractice was committed or conspiracy was engaged in

1 or there was an aiding and abetting and breaching of  
2 fiduciary duties - we have to know if the documents  
3 themselves will hold up under a factual, legal analysis.

4 Mr. Lester says that at least on the legal  
5 analysis, they do; on a factual analysis, we have, at  
6 the very minimum, Ms. Curtis suggesting that her mother  
7 was incompetent or unduly influenced. And again, I  
8 think, as we've said, the best way to start getting to  
9 the bottom of that is with this deposition in talking to  
10 Ms. Freed about her interactions with Nelva Brunsting in  
11 the ramp-up to drafting of and execution of both the  
12 documents that are at issue in this case.

13 THE COURT: Do you see any value in the  
14 deposition if Ms. Freed were to utilize the  
15 attorney-client privilege and the work-product  
16 privilege? And if that existed, do you see much value  
17 in taking her deposition?

18 MR. SPIELMAN: Well, Judge, I suppose it  
19 may come down to the way the questions are asked; but at  
20 least with respect to the issues of capacity and  
21 influence - if the allegations in this case are that  
22 Nelva Brunsting was unduly influenced to execute those  
23 documents, I suspect we'll be talking to Ms. Freed about  
24 what her involvement -- not involvement, what her  
25 observations were with respect to potential issues of

1 undue influence, who may have been at different meetings  
2 with Nelva Brunsting, if anybody - in which case, by the  
3 way, I don't know that the attorney-client privilege  
4 would apply - what were the circumstances that went on  
5 with respect to Nelva Brunsting's execution of the  
6 documents the day she literally came to, I believe - I  
7 don't know this for sure; I assume - that she went to  
8 the law -- lawyer's office to execute the documents,  
9 what was their execution meeting like? What was Ms.  
10 Brunsting's state of mind? What did it appear to be?  
11 What did Ms. Freed do, if anything, to evaluate that  
12 state of mind on that particular day which I believe  
13 starts to speak to some of the issues about whether  
14 somebody is competent or incompetent, has capacity or  
15 lacks capacity on the day of execution? I believe these  
16 are all things that are very relevant to our 401/402  
17 proceeding that can be addressed even if the  
18 attorney-client privilege might apply all the way.

19 I will tell you that I think that Ms.  
20 Freed can only benefit herself by talking about what  
21 happened in attorney-client circumstances in the broader  
22 picture. And I think that giving her the way out,  
23 allowing her to talk about those things without  
24 violating the privilege - I expect that that will  
25 ultimately benefit her whether her case moves forward in

1 the district court or gets brought over and is dealt  
2 with in totality with everything else we've got here or  
3 just as a 403.

4 THE COURT: Okay. And I'd like you to  
5 address an issue which, if I understand it correctly,  
6 the party that initiated this 401 suit isn't available  
7 or present to respond to the motion to compel, is  
8 that -- am I correct in that assumption?

9 MR. SPIELMAN: I don't know if that's  
10 exactly correct, but it's also --

11 THE COURT: We don't have a representative  
12 of the estate at this point

13 MR. SPIELMAN: Well, it's not exactly --  
14 there's more to it.

15 THE COURT: All right.

16 MR. SPIELMAN: Now, I wasn't involved when  
17 this whole thing started, but I believe that it all  
18 started in February of 2012 when Candace Curtis filed a  
19 lawsuit in federal court alleging many of the same  
20 things that were then issued -- or that then became at  
21 issue when this 401 proceeding was initiated by Carl in  
22 April of 2013.

23 The federal lawsuit filed by Candace  
24 Curtis is what eventually has become recognized as the  
25 402 in this court which has been consolidated with the

1 401. So, while it's true that Carl has brought  
2 claims... I'm stopping, Judge, because I'm noting that  
3 in my file that I have in front of me, I use, "et al"  
4 all the time, and I don't know, then, if Carl brought  
5 his claims in an individual capacity or just as the  
6 executor of the estate. I think he brought them in his  
7 individual capacity which means he is represented  
8 through Ms. Bayless by virtue of a power of attorney.  
9 So, whether there is -- my recollection -- and I know  
10 someone will correct me if I'm wrong. My recollection  
11 is that the estate is not actually a party to this 401  
12 proceeding even though this 401 proceeding is  
13 subordinate to or ancillary to the base case. I'm not a  
14 hundred percent sure about that.

15 THE COURT: Okay.

16 MR. SPIELMAN: But that also does speak to  
17 the issue that Ms. Foley raised which is, you don't --  
18 if I'm right, you don't need an estate representative to  
19 proceed with the deposition in this case because the  
20 estate isn't in this case or whatever that, whatever  
21 that adds to the story.

22 THE COURT: Anything else?

23 MR. SPIELMAN: Just whatever more  
24 questions you have for me.

25 THE COURT: All right. I'd like to hear

1 from Ms. Bayless, please.

2 MS. BAYLESS: Thank you, Your Honor. I'm  
3 going to sit, if it's okay.

4 THE COURT: Sure. Absolutely.

5 MS. BAYLESS: Although, I'm tempted by Ms.  
6 Foley's argument that it's better to stand. I agree  
7 with her.

8 THE COURT: You can stand and sit at all  
9 different times. Whatever you want.

10 ARGUMENT BY MS. BAYLESS:

11 MS. BAYLESS: A lot of ground has been  
12 covered. I hope I pick up on all of the issues that  
13 have been brought up.

14 As Mr. Spielman just said, you know, he  
15 says that he doesn't believe the estate is a party to  
16 this action. That's not true. The action was brought  
17 when my client was executor on behalf of the estate and  
18 himself, individually. So, there is a party, the party  
19 that holds the privilege that can't - Ms. Foley is  
20 right - can't deal with that issue. I don't think that  
21 issue is solved by saying - well, let's appoint somebody  
22 for five minutes to say, okay, we waive the privilege.  
23 The siblings certainly can't get together and say -  
24 okay, we'll waive the privilege. It's not their  
25 privilege. So, that is an issue, and it's an issue that

1 when -- there's a lot of things that led us to this.

2 I will tell you that I don't know if  
3 the Court has ever represented a party who has suffered  
4 from encephalitis before, but I had no idea this was an  
5 issue until Ms. Foley took my client's deposition. In  
6 my interactions with him - there was no issue. But  
7 under the stress of a deposition, a video-taped  
8 deposition, the symptoms of his encephalitis came  
9 rushing back.

10 THE COURT: When was the approximate date  
11 of that deposition?

12 MS. BAYLESS: I think Ms. Foley said --

13 THE COURT: 2015?

14 MS. FOLEY: February 3rd, 2015.

15 MS. BAYLESS: And so, immediately, I took  
16 steps to get him out as executor because it was clear it  
17 was not appropriate for him to have that role.

18 Where we've tumbled since then is a long  
19 and windy road. We've been to federal court. Many of  
20 us - I guess everybody at this table - is a defendant in  
21 a RICO action in federal court filed by one of the other  
22 parties in the case. So, the malpractice case -- and  
23 let me get back to the beginnings of that --

24 THE COURT: Let me ask you one more  
25 question, quickly.

1 MS. BAYLESS: Sure.

2 THE COURT: When did you obtain your power  
3 of attorney?

4 MS. BAYLESS: Well, there was a power of  
5 attorney that predated all of this action.

6 Subsequently, there was an evaluation done and even  
7 another power of attorney has been done under the  
8 guide -- under the guidance of medical professionals.

9 THE COURT: All right. Go ahead.

10 MS. BAYLESS: And, again, I don't know if  
11 the Court's had any involvement with encephalitis  
12 victims, but there are many things about -- many  
13 functioning things that Mr. Brunsting does just fine.  
14 What he can't deal with is the stress that is brought on  
15 by confrontation with strangers under, you know,  
16 basically what all of us would call nerve-racking  
17 situations. Apparently, he didn't have any of that with  
18 me; and so, until his deposition, these problems didn't  
19 surface. But since then -- and we have an affidavit  
20 from his physician about some of these issues and about  
21 the power of attorney and his ability to, you know,  
22 enter into a power of attorney at various stages and  
23 that kind of thing. We can go into that in an  
24 evidentiary hearing if the Court wishes.

25 The way we got to this spot, though, is

1 that initially when all of this controversy came up, we  
2 had a tolling agreement - Ms. Foley's client and I had  
3 a -- and my client had a tolling agreement - because we  
4 saw that there was overlap between these issues among  
5 the trustees and the beneficiaries. And, frankly, I  
6 envision that we would be able to resolve these issues -  
7 crazy me - at some point in time, and the malpractice  
8 issues might not be needed or they might go away because  
9 the issues could be resolved among the beneficiaries.

10 So, initially, we had a tolling agreement. They didn't  
11 want to continue the tolling agreement as was their  
12 right; and so, at that point, there wasn't really  
13 anything to do other than file the action or it would be  
14 lost to limitations.

15 So, you know, regardless of how we got --  
16 regardless of who may have made the better decision or  
17 the worse decision - that's how we got where we are. We  
18 tried to prolong that. We tried to put that off, and it  
19 didn't work; and so, now we are where we are.

20 Subsequently, it's come to light that my  
21 client is not a proper party to pursue a lawsuit. He  
22 may be able to do other things, but he's not the proper  
23 party to pursue a lawsuit on behalf of the estate. And  
24 since then, there's been so much fighting about who  
25 should do that, who should jump into that role that

1 we're still mired in this mess that allowed us to also  
2 get taken over to federal court; had to go to the Fifth  
3 Circuit to get back over here to try and sort things  
4 out.

5 Yes, there's been a temporary  
6 administrator who was assigned one task which was to  
7 make a recommendation to the Court about some issues.  
8 I'm not sure he really even addressed the issues he was  
9 asked to address, but he doesn't resolve those issues.

10 I tend to agree with Ms. Foley on this  
11 question, and I've tried to make that clear to the  
12 parties who want to take her deposition, and I don't  
13 think this is a very good exercise of time, anybody's  
14 time, on where the case should be going right now to get  
15 it back on track.

16 I have a motion for partial summary  
17 judgment on file which does not deal with the issue of  
18 capacity at all; it is based upon the structure and  
19 construction of the Trust instrument and whether it's  
20 enforceable. It is based upon some other transfers from  
21 the Trust and whether they violated the Trust. It  
22 doesn't have anything to do with capacity. I don't  
23 think that - and the parties are not here, and I  
24 hesitate greatly to speak for them because half the time  
25 I don't know what they're saying - but I don't think

1 they've claimed incapacity in any of their issues. I'm  
2 not saying at some point in time it may not be necessary  
3 to talk to Ms. Freed. I think it probably will be  
4 unless we can get all this resolved which some of us  
5 have been trying to do without much success. But I  
6 don't think this is the time for that. I don't think  
7 the right parties are engaged or even exist at this  
8 moment, and I think there are other things, other  
9 issues, that need to be resolved that can be resolved  
10 that don't have anything to do with what ultimately  
11 would be a very complicated, factually-intense question  
12 of capacity and undue influence. I don't even know,  
13 frankly, if Ms. Foley's client would have the expertise  
14 to address capacity. I don't even know if she would be  
15 the proper witness to addressing capacity. Point is - I  
16 don't know why we're dealing with those issues when  
17 there's so many other issues that need to be addressed  
18 that might lead us in the direction of a resolution.

19           There's a farm in Iowa that is worth a lot  
20 of money that is just sitting there that has to be  
21 divided among these family members, and nobody can even  
22 get to the point of addressing that.

23           So, I find myself aligned with Ms. Foley  
24 as Mr. Spielman had said he thought it was strange that  
25 he was opposing her in this situation. I find it

1 strange. I'm aligned with her. I don't think this is  
2 the right time to take her client's deposition. Will  
3 that time come? Maybe. Maybe not. I don't know the  
4 answer to that right now, but I do know that if they're  
5 saying - this is what they said when we last had a  
6 hearing before Judge Butts - that they needed this  
7 deposition in order to defend my motion for summary  
8 judgment. There is not a single shred of anything in my  
9 motion about capacity or undue influence. So, I don't  
10 think they need it to address my motion.

11 Now, my motion is a partial motion for  
12 summary judgment; I'm not suggesting that that ends the  
13 case, but the point is - we don't ever deal with  
14 anything. We deal with more sometimes than we do at  
15 other times. But to take this deposition, get bogged  
16 down in - what do we do with the privilege with a  
17 witness that I don't think makes any difference on the  
18 issues that are currently before the Court, seems like  
19 to me, you know, a little bit of a wrong-headed  
20 direction.

21 THE COURT: Do you have any opinion on who  
22 might represent the estate?

23 MS. BAYLESS: I will tell you that I don't  
24 think any of these siblings can agree on that. I mean,  
25 some may agree with others, but there's always somebody

1 who doesn't agree. I mean, we had a big fight just over  
2 Mr. Lester, but I think I almost feel like it has to be  
3 a third party. Sorry to have to say that, but I  
4 think --

5 THE COURT: Do you think your client has  
6 capacity to agree to a person should we find somebody  
7 that's suitable to everybody else?

8 MS. BAYLESS: Well, I think that my client  
9 is -- he's represented by his wife through a power of  
10 attorney, and she certainly has capacity. So, yes, I  
11 think, I think that there is not a problem in terms of  
12 my party in this case agreeing to someone. I don't  
13 believe he has the capacity to be that person.

14 THE COURT: Ms. Candace Curtis? Is that  
15 you?

16 MS. CAROLE BRUNSTING: No, I'm Carole  
17 Brunsting.

18 THE COURT: You're Carole, I apologize.  
19 We haven't heard from you. Do you want to -- I think  
20 maybe she should be sworn.

21 (Ms. Carole Brunsting sworn)

22 THE COURT: Would you like -- please be  
23 seated. Would you like to opine on any of these matters  
24 in regard to who might be somebody that can be appointed  
25 to represent the estate and -- well, let's talk about

1 that first.

2 MS. CAROLE BRUNSTING: I really -- first,  
3 I really appreciate you asking me that question.

4 THE COURT: Sure.

5 ARGUMENT BY MS. CAROLE BRUNSTING:

6 MS. CAROLE BRUNSTING: And I would like to  
7 be considered as the person that fills that role only  
8 because -- or one of the reasons is because I have  
9 attended every single hearing. I have been extremely  
10 involved in this case. I was there with my parents from  
11 beginning to end. I've done my best to reach out to all  
12 my siblings to the best of my ability. And, I mean, I  
13 have a vested interest in getting this resolved. So,  
14 and also, too, I really feel like I'm a very fair and  
15 balanced person - at least I try to be. So, I would  
16 like to be considered as a possible person to take the  
17 contact role.

18 THE COURT: Thank you for that statement.

19 Have you talked to your siblings about  
20 that as a possibility?

21 MS. CAROLE BRUNSTING: I have done my  
22 best. My siblings will not speak with me. I have done  
23 my best to try and re-establish some type of a  
24 relationship because I find myself -- I feel like I'm  
25 always kind of in the middle, and I'm trying not to take

1 sides; and honestly - and you may not believe me - I  
2 have not taken a side. I see both sides, and I struggle  
3 with that; but I also keep in mind all the time that I  
4 spent with my parents and all the time that my father  
5 talked about this Trust and what it meant to him; and I  
6 know my siblings, and I know that they need for this to  
7 be resolved because of a lot of things that have  
8 happened over the past eight or nine years. And I also  
9 have a vested interest and really want to see this over  
10 and done with.

11                   So, like I said, I take this extremely  
12 seriously. And that is why I leave work and I come  
13 here. I've never missed a hearing. I read as much as I  
14 possibly can. I reread the Trust and I reread the QBD.  
15 I do my best to understand as much language as possible.  
16 I understand that in that role, that that person would  
17 have to hire an attorney, and I understand that. But, I  
18 really want to see this moving forward, and it's  
19 something that if I needed to try to reach out to my  
20 siblings, I would be willing to do. I really feel like  
21 I could make a good case for that. I can try.

22                   THE COURT: All right. Does anybody else  
23 have any concluding comments? Please. You raised your  
24 hand first.

25

1                   FURTHER ARGUMENT BY MR. JADLOSKI:

2                   MR. JADLOSKI: Thank you, Judge.

3                   Just to sort of get back to why I feel --  
4 and it's very important that we've gone through all of  
5 the sorted history of this case, and it's complicated.

6                   MS. BAYLESS: Not all.

7                   MR. JADLOSKI: No, not all of it, but a  
8 very good portion of it so I think, Judge, you have some  
9 idea of what's happened here as much as anyone can.  
10 It's a little bit of a mess.

11                   But I think if we can get back to the  
12 issue at hand here which is - does my client, does Mr.  
13 Spielman's client, have the right to take this  
14 deposition at this time? I think the important thing to  
15 consider there is, there's two issues that we are being  
16 asked to respond to; but yet, if we're not allowed to  
17 take this deposition, we can't get the information that  
18 we need.

19                   One is, Mr. Brunsting, Carl Brunsting, has  
20 raised the issue of whether or not the QBD is, in fact,  
21 enforceable; and the second issue is whether or not  
22 Nelva Brunsting, Decedent, had the capacity to sign the  
23 QBD when she signed it, and that's at least been raised  
24 by Ms. Curtis in her pleadings even though she hasn't  
25 filed a motion for summary judgment or anything like

1 that, but it's been raised in the pleadings. The one  
2 issue comes from the pleading, and the other one comes  
3 from the summary judgment that's on file.

4 If you look at those two issues, Your  
5 Honor, I'm not entirely sure that either one of them  
6 actually implicates the attorney-client privilege and  
7 I'll tell you why.

8 First of all, Judge, when it comes to the  
9 capacity issue - there is a rule in the Texas Rules of  
10 Evidence, Texas Evidence 503(d)4, which deals with  
11 precisely these kinds of issues, a situation where you  
12 have an attorney who is -- who drafted a document and,  
13 essentially, also functioning as a witness on that  
14 document. I think that's what happened here,  
15 essentially, because you have Ms. Kunz-Freed who  
16 drafted -- who drafts the QBD. And then there's the one  
17 who is there who notarizes Nelva's signature on the QBD.  
18 And as far as we understand, Your Honor, she was the  
19 only one who was there on the date that she signed the  
20 document, and that's the date that's important for  
21 capacity because as you know, she could have capacity on  
22 that day and not have it on another day or vice versa.  
23 And so, it's really important - the only person who was  
24 there to observe her and able to comment on the kinds of  
25 observations that a lay witness would typically make

1 regarding capacity is Ms. Kunz-Freed.

2           Now, there's also case law, Your Honor,  
3 that deals with a -- there's a -- I believe it's the  
4 Cochron v. Cochron which is in the Houston Court of  
5 Appeals that deals with the situation where an attorney  
6 is also a witness. So, you're seeing that application,  
7 you're seeing that application of rule -- I'm sorry.  
8 You're seeing that application of the Rule 503 exception  
9 being applied to an attorney who was also a witness on a  
10 document.

11           And then if you look - and these are all  
12 cited in our response, Your Honor - there's also the  
13 case of In Re: Estate of Kam which was in the El Paso  
14 Court of Appeals in which was citing to Brown versus  
15 Traylor which was a Houston opinion that talks about a  
16 situation which a notary is allowed to testify -- was  
17 allowed to testify, again, as to capacity that's -- and  
18 because the note -- in the same way that a witness  
19 typically would be.

20           Now, if you look at, if you look at,  
21 again, coming back to this situation. Ms. Kunz-Freed  
22 was, both, the attorney and the notary; and therefore,  
23 even if she couldn't testify about capacity as the  
24 attorney because of the attorney-client privilege, she  
25 could certainly testify about capacity as the notary who

1 observed the person when they signed their signature.

2 Now, moving on to the second issue which  
3 is the issue of whether or not Ms. Kunz-Freed could  
4 testify about the drafting of the QBD itself so we could  
5 get to whether or not the terms of the QBD are valid.

6 In her response to our motion to compel  
7 and also in her motion for protection and to quash, Ms.  
8 Kunz-Freed raised the idea that, you know - well, Judge,  
9 maybe there's another source that we could get that  
10 information from her. Have we exhausted all of the  
11 possible sources from which we could determine whether  
12 or not those documents are valid? And, frankly, Judge,  
13 there is no other source. She is the only source. So,  
14 asking us to exhaust the sources before we depose Ms.  
15 Kunz-Freed is really -- there are no other sources to  
16 exhaust. She was the one who drafted the document. She  
17 was the one who witnessed who was there on the day that  
18 Ms. Brunsting signed the document.

19 And so, frankly, Your Honor, I just don't  
20 see how we can do this deposition without asking  
21 questions that even touch upon the attorney-client  
22 privilege. And if you're uncomfortable with that, Your  
23 Honor, then I would say that you have the power under  
24 Rule of Civil Procedure 192.4 to specifically limit us  
25 to those issues which the Court is comfortable saying

1 are not part of the -- would not be covered by the  
2 attorney-client privilege.

3 So, I believe, Judge, so in essence,  
4 Judge, I believe:

5 1. Because of the pleadings and the  
6 motion for summary judgment that are on file, we do need  
7 to answer these questions so that my client can respond  
8 to the claims relating to the QBD and;

9 2. I really don't think that there is  
10 a -- I really don't think there's an attorney-client  
11 privilege issue here; and if there is, there is a  
12 procedural work-around that the Court could utilize.

13 THE COURT: Thank you for that. Let me  
14 ask you a question.

15 MR. JADLOSKI: Yes, Your Honor.

16 THE COURT: In Ms. Freed's response, she  
17 talks about that there's other witnesses present when  
18 the QBD was executed. I'm just curious. Is that a fact  
19 that you contest? Are you aware that there are other  
20 witnesses?

21 MR. JADLOSKI: We are not -- we're not --  
22 no, Your Honor, we're not aware of witnesses --

23 THE COURT: Wait. I didn't understand  
24 that.

25 MR. JADLOSKI: We are not aware that there

1 were any witnesses.

2 THE COURT: I just wanted to know that.

3 All right. Anybody else? Yes? Go ahead,  
4 ma'am.

5 FURTHER ARGUMENT BY MS. CAROLE BRUNSTING:

6 MS. CAROLE BRUNSTING: I just want to make  
7 one more comment as far as to my mother's capacity.

8 I was her care giver per my parents' --

9 THE COURT: I appreciate your wanting to  
10 say that. I don't know that that's on point for what I  
11 have to deal with today.

12 MS. CAROLE BRUNSTING: Well, it is because  
13 it talks to capacity, and I'm thinking that there is a  
14 lot of information I have; and perhaps I need to be  
15 deposed because it does impact this QBD because I was my  
16 mother's care giver. I was there. And, I mean, I was  
17 one of the ones taking care of my mother, and she spoke  
18 with me about a lot of things, and then things were  
19 going on. So, it's really hard to hear all this going  
20 on when I'm thinking - okay, I have a lot of facts that  
21 may pertain to this.

22 THE COURT: All right. Thank you.

23 MS. FOLEY: If I may respond, Your Honor?

24 THE COURT: Yes, ma'am.

25

1                    FURTHER ARGUMENT BY MS. FOLEY:

2                    MS. FOLEY: Okay. So, nobody's going to  
3 remember this because me and Bobbie were the only ones  
4 there. She has been deposed in the other case. I don't  
5 know if you remember that. It was a long time ago.

6                    MS. CAROLE BRUNSTING: I do.

7                    MS. FOLEY: She was present at some of the  
8 meetings between my client and Ms. Brunsting because she  
9 brought her there. So, yes, there are other sources of  
10 that information, number one.

11                    Number two, what I hear from these parties  
12 is that - hey, you've got to let us take just part of  
13 her deposition so we can move our case forward. And  
14 nobody's really considering what my client is going to  
15 have to deal with which means if you take her  
16 deposition, and she only has to answer, you know,  
17 questions that aren't privilege, that means that at some  
18 point, she's going to have to sit again for another  
19 deposition.

20                    So, my thing is, if we're going to compel  
21 her deposition, why not get somebody put in place so my  
22 client only has to sit once and answer whatever  
23 questions that need to be answered.

24                    The other thing I want to point out is  
25 that there are cases out there where - and this comes

1 with the problem of who is going to be the administrator  
2 or the executor - but there are cases out there where  
3 lawyers are compelled by a trial judge, for whatever  
4 reason, to waive that privilege. They sit. They waive  
5 that privilege. And then later on get sued because they  
6 didn't appeal it. And I don't want to put my client in  
7 that position given what the fighting has been between  
8 these siblings. And so, I ask that we not be put in  
9 that position. And I think it solves it if the Court  
10 would just appoint someone to be the executor or the  
11 administrator; and then if people want to take a  
12 deposition - I get it; that's fine; we'll have to sit  
13 for that, but it doesn't put my client in a precarious  
14 position when having to deal with the privilege issues  
15 of what comes next after that. And then, obviously,  
16 too, it makes my day because my client now has somebody  
17 that's there in her lawsuit so she can be able to move  
18 that along.

19                   But, then the last point I want to make is  
20 that based on what everybody has said about this  
21 capacity issue, it sounds like nobody really thinks that  
22 there is really an issue there anyway. There is no  
23 evidence whatsoever. And the thing is, is that all  
24 these allegations that were made in that lawsuit against  
25 my client, had to do with that - that she somehow was

1 duped because she did not have capacity; yet, when she  
2 sends her letter saying, oh --

3 THE COURT: When you say your client was  
4 duped --

5 MS. FOLEY: I'm sorry. They're saying  
6 about Ms. Brunsting. My client's client. My client's  
7 client was duped by Ms. Freed into signing off on  
8 documents. She made these allegations. She had her  
9 client verify interrogatories before she declared to be  
10 incapacitated saying that - yes, all this stuff is true,  
11 and then sends a letter saying, "Well, he had no  
12 personal knowledge. He was never there. He doesn't  
13 know anything. It's all useless information now." So,  
14 the question is - well, then where did all that come  
15 from? Somebody filed those claims. Somebody made those  
16 allegations. Somebody is saying that is a fact; yet,  
17 there is not a single person, based on what you've heard  
18 so far, that has any knowledge of that whatsoever.

19 So, you know -- and, yes, there was a  
20 tolling agreement in place that was filed because we  
21 were led to believe that it was actually a 202  
22 deposition that was requested initially of us. So, we  
23 thought we were given documents to help you decide  
24 whatever your probate issue is. And then once we  
25 figured out this does not seem right, we went ahead and

1 said - no, we're not extending any tolling. And you  
2 heard her just say, "So, we went ahead and filed a  
3 lawsuit," and it's because there was no due diligence  
4 done, no investigation as to any of these claims. It  
5 was simply - just let me file that lawsuit to get those  
6 claims out there so we can have somebody to go blame and  
7 seek money from. There is absolutely no evidence of any  
8 of these claims. I know I'm harping on the wrong thing,  
9 but I just wanted to point that out based on what you  
10 said everybody agrees, really, is what you heard. The  
11 others aren't really capacity, is not an issue. Well  
12 then, if that's the case, why is my client even sued in  
13 the first place?

14 But, anyways, so I would just say in  
15 closing:

16 If we're going to make my client sit for a  
17 deposition, I'd like for her to only have to sit once,  
18 and I'd like for her to not have to be put in a position  
19 to where she's going to be just requested to waive  
20 privilege like they suggested with no basis and then  
21 have to deal with what to do after that. Should we sit  
22 there and wait for privilege or do we have a duty to  
23 make sure we protect it until somebody - meaning a  
24 representative of the estate - gives us some direction  
25 on that?

1 Thank you, Your Honor.

2 FURTHER ARGUMENT BY MS. BAYLESS:

3 MS. BAYLESS: Judge, since I heard my  
4 letter paraphrased several times now by Ms. Foley, that  
5 is not at all what it said.

6 But the point is what I am saying here  
7 today -- well, first of all, we had lots of  
8 documentation. We had lots of evidence about these  
9 claims. Did that mean that we didn't want to try to  
10 continue a tolling agreement so that we can fight the  
11 fight with the siblings and get that resolved so that we  
12 didn't have to file more lawsuits? That's what I was  
13 saying. I wasn't saying there was no due diligence,  
14 that capacity wasn't an issue. I'm not saying that  
15 capacity isn't an issue. At some point - I'm saying in  
16 my motion that is pending before this court - capacity  
17 is not an issue. And if somebody heard me say  
18 otherwise, let me correct it right now.

19 What I'm talking about today is what the  
20 Court has in front of it that's been on file since  
21 before the RICO case and all the Fifth Circuit travels  
22 and all of that kind of stuff. That has been on file  
23 for sometime now. It's a motion that does not go to the  
24 capacity issue in any form. And so, the issue always, I  
25 think, has been how splintered this thing gets, and we

1 go off on this rabbit trial and that rabbit trail, and I  
2 think that's what taking this deposition at this time  
3 does - is it takes us down another rabbit trail. This  
4 case needs to get on track for everybody's benefit so  
5 that it can be resolved in total.

6 And I think anybody who thinks taking Ms.  
7 Freed's deposition is going to do that, is just not  
8 thinking through what the issues are. That's my point.  
9 And even if the Court denied my motion for summary  
10 judgment, it wouldn't be because they didn't have the  
11 evidence to address the capacity issue because capacity  
12 is not an issue in that motion. That's all I was trying  
13 to say.

14 THE COURT: All right.

15 FURTHER ARGUMENT BY MR. SPIELMAN:

16 MR. SPIELMAN: Judge, I'm sorry; if you  
17 can indulge me just a minute.

18 We've talked a lot about a lot, and that's  
19 what happens. Judge Comstock will tell you. Everything  
20 about this case, once you start talking about it,  
21 something, some other layer of it gets unpeeled. I  
22 think the one thing that everybody will ultimately agree  
23 with is that we do need the Court's help in getting us  
24 moving. Anita and Amy believe that the way to get us  
25 moving is through this deposition. 

1 The reason, while capacity is a point in  
2 this lawsuit, to be specific -- start over.

3 Amy and Anita filed a no-evidence summary  
4 judgment against Candace Curtis and the claims that she  
5 has brought in this lawsuit.

6 Candace Curtis' claims include the  
7 capacity issue, or at the very least, her response to  
8 our no-evidence summary judgment raises the capacity  
9 issue.

10 So, with respect to our ability to try to  
11 get this case moving by dismissing Candace Curtis'  
12 portion of the case, we are precluded from doing so  
13 because of the issues that she has brought up in her  
14 response. That motion has not yet been heard because we  
15 now need to address what she says is evidence of  
16 capacity and would like to do that through Ms. Foley's  
17 client. That is the full story now on why capacity is  
18 being discussed in the broader sense of this litigation.

19 Ms. Bayless says that capacity doesn't  
20 relate to her MSJ. I can't remember its contents. If  
21 she says it doesn't - it doesn't. But let's be very  
22 clear what her motion does say.

23 She is seeking, from this Court, summary  
24 judgment on the issue that the documents drafted by Ms.  
25 Foley's client were drafted improperly, contrary to law,

1 and in violation of other portions of the primary trust  
2 documents. That is the very issue that is pending in  
3 the district court case. If she is - I assume - that  
4 Ms. Foley would not want this Court doing anything about  
5 that issue in this case for fear of how that might then  
6 show up in the district court case. It is my belief,  
7 and it is Anita's belief - or my client's belief and  
8 Anita's belief, the lawyers' belief - that the way to  
9 deal with and learn more about the circumstances  
10 pertaining to the drafting and the creation of the  
11 documents is by examining the person, the lawyer, who  
12 drafted them. We want to know why she drafted them,  
13 what were the circumstances behind why they were  
14 drafted, how does their drafting not violate other  
15 aspects of the prior-in-time trust documents; and from  
16 that information, we hope to be able to, not only resist  
17 multiple causes of action brought by Candace Curtis and  
18 Carl Brunsting, but also put together a comprehensive,  
19 fair, balanced, accurate response to the motion for  
20 summary judgment. And that's what I have to say about  
21 that.

22 THE COURT: Counsel, for the two  
23 trustees - do you have an opinion as to her request to  
24 be named as a temporary administrator or administrator  
25 for this estate? Can you speak on behalf of your

1 clients as to that?

2 MR. SPIELMAN: I can do so -- yes, I can.

3 So, two things, Judge.

4 If we do that, then we are - and I don't  
5 mean this disrespectfully - then we are putting a person  
6 in that position who is the only person who was never  
7 considered for that position amongst all of the  
8 Brunsting siblings. So, we are now going far afield of  
9 what - at least on paper - Elmer Brunsting and Nelva  
10 Brunsting wanted with respect to the succession of their  
11 executors. That's one concern in the global picture.

12 In the smaller picture - if I understand  
13 the position of Candace Curtis correctly - the  
14 reason she wants to be named as the replacement executor  
15 is because she thinks that my client, Amy, is  
16 disqualified because of the fact that Amy is a defendant  
17 in this 401 and 402. If that is the reason for  
18 disqualifying Amy, then Carole Brunsting is likewise  
19 disqualified because - with all due respect while Ms.  
20 Carole Brunsting describes herself as, "in the middle  
21 and not taking a side" - she is absolutely a defendant  
22 in claims asserted by, both, Carl and Candy: Money  
23 hadn't received, conversion, breach of fiduciary duty.  
24 They are abs -- Carl and Candy, separately but in  
25 conjunction through the pendency of this lawsuit, are

1 absolutely trying to get into Carole Brunsting's pocket  
2 unless she has worked out a deal with them that the rest  
3 of us don't know about.

4           So, my point for that is - if Amy  
5 Brunsting, who is the next in line, is disqualified  
6 because she is a litigant, a defendant, then Carole is  
7 disqualified and we're nowhere.

8           If Carole is not disqualified, then  
9 neither is Amy, and let's do what the Will says and let  
10 Amy Brunsting take over as the executor of the two  
11 estates and all of these problems are solved.

12           THE COURT: So, in short, you believe your  
13 client would object?

14           MR. SPIELMAN: Yes.

15           THE COURT: Okay. And how about you,  
16 Counsel?

17           MR. JADLOSKI: I believe my client would  
18 object, but to know for sure, Judge, I'd have to discuss  
19 it with her.

20           THE COURT: Okay. I appreciate everybody  
21 coming in. It's very persuasive. I am going to take  
22 this under -- go right ahead if you'd like to say one  
23 more thing.

24           FURTHER ARGUMENT BY MS. CAROLE BRUNSTING:

25           MS. CAROLE BRUNSTING: Yeah, Mr. Spielman

1 keeps talking about Candy's case about the 402. It was  
2 never consolidated. So, it's my understanding that that  
3 case went away.

4 THE COURT: Okay.

5 MS. CAROLE BRUNSTING: So, it's the 401  
6 but it was supposed to be brought over from the federal  
7 court, consolidated with the 401 - that never happened.  
8 So, it's my understanding that Candy's case is no more,  
9 and that's why she never takes much involvement with  
10 what happens in the probate court.

11 FURTHER ARGUMENT BY MR. SPIELMAN:

12 MR. SPIELMAN: Judge, that's, first of  
13 all, that's -- let me say this.

14 One, I believe that the various docket  
15 sheets will prove that that's absolutely incorrect.  
16 However, if the Court would like to put an order in the  
17 case that says that Ms. Candace Curtis' claims in this  
18 case have been non suited, I wouldn't object to that  
19 either, but I don't believe that what Ms. Brunsting just  
20 said about there not being a consolidation order as to  
21 the 402 to the 401 is correct.

22 And I think, Judge, if you look in the  
23 Court's file around May of 2014-ish, I think that would  
24 be where you would look to see that the 402 was  
25 opened -- no, actually the 402 wasn't opened until

1 February of 2015. But in May of 2014, the Court's file  
2 reflects the federal court sending Candace Curtis'  
3 claims to Probate Court 4 where they were always  
4 discussed. There are multiple motions that were filed  
5 by Ms. Curtis and her attorney at the time within the  
6 401 that ultimately led to the opening of the 402. And  
7 I'm quite positive that there was an order consolidating  
8 the 402 and the 401. However, I would be equally happy  
9 with an order dismissing Ms. Curtis' claims.

10 THE COURT: All right. Thank you.

11 FURTHER ARGUMENT BY MS. BAYLESS:

12 MS. BAYLESS: If I could just raise one  
13 other point.

14 This came up when Mr. Lester was  
15 appointed, and that's the issue of how a temporary  
16 administrator gets paid. And there was a lot of  
17 discussion about the fact that the money in the case is  
18 in Trust, and I think Ms. Curtis was one of the big  
19 objectors to the appointment of temporary administrator  
20 resulting in fees that would have to be paid by the  
21 Trust and that that was not appropriate, and I think  
22 some other -- I don't know, Carole, did you object to  
23 that?

24 MS. CAROLE BRUNSTING: Did [sic].

25 MS. BAYLESS: So, I just say that so that

1 the Court has that in mind in trying to formulate a plan  
2 that that is also an issue that would seem to have been  
3 able to overcome it with Mr. Lester, but frankly, I  
4 don't remember how we did now.

5 COURT'S RULING:

6 THE COURT: All right. Well, I think that  
7 as often in cases like this, people tend to try to put a  
8 lot of different food in their mouth at one time and  
9 choke when it probably is best resolved by taking a bite  
10 at a time.

11 And I'm going to take this matter for the  
12 motion to compel the deposition and the contravening  
13 motion to quash under consideration. I'll give you an  
14 answer by tomorrow.

15 So, thank you for your time.

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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 \$351.00.  
18 and was paid by Ms. Candy Curtis.

19 WITNESS MY OFFICIAL HAND this the 6th day of  
20 February, 2019.

21  
22 /s/ Hipolita G. Lopez  
23 HIPOLITA G. LOPEZ, Texas CSR #6298  
24 Expiration Date: 12-31-20  
25 Official Court Reporter  
Probate Court Number Four  
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