

No. _____

IN THE COURT OF APPEALS
FOR THE FIRST OR FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS

=====
In Re Candace Louise Curtis

Relator
=====

Original Proceeding from the Harris County Probate Court No. 4

Cause No. 412,249-401 et seq.
=====

PETITION FOR WRIT OF MANDAMUS
=====

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STATEMENT OF THE CASE

Texas Rule of Appellate Procedure 52.3 (d) (1) The controversy among the real parties in interest only involves the settling of a family living trust. It was first filed in the Southern District of Texas as a breach of fiduciary, seeking accounting and fiduciary disclosures. The matter went to the Fifth Circuit under the probate exception, where the dismissal was reversed and the case remanded for further proceedings January 9, 2013. While these events were transpiring, both settlors’ pour-over wills were recorded in the state probate court and letters testamentary were issued to Relator’s brother Carl Brunsting for independent administration. On January 29, 2013, while the federal case was in transition from the circuit court to

the Southern District of Texas, the independent executor filed malpractice claims against the settlors' estate planning attorneys in Harris County's 164th Judicial District Court.

April 5, 2013 the inventory appraisal and list of claims were approved for both settlors' estates and drop orders were issued removing both estates from the active probate docket. Five days later Relator's brother Carl Brunsting filed non-probate tort claims, related solely to the living trust, in the probate court, as ancillary to the closed estates.

Tex. R. App. P. 52.3 (d) (2) Respondent is the Honorable James Horwitz, presiding judge of Harris County Probate Court No. 4. The Honorable James Horwitz became the presiding judge of Harris County Probate Court No. 4 in January 2019.

Tex. R. App. P. 52.3 (d) (3) The Honorable James Horwitz denied Relator's plea to the jurisdiction and plea in abatement; declined act to dismiss for want of jurisdiction and entered orders, or permitted the entry of orders, in the complete absence of statutory probate court jurisdiction. The orders challenged are as follows:

- [Tab 26] 2014-06-05 412249-401 Motion to Enter Remand as a Transfer and Order Accepting the federal "REMAND" as a Transfer.

- [Tab 35] February 14, 2019 Order denying Relator’s plea to the jurisdiction and pleas in abatement and declaring jurisdiction proper in the probate court.
- [Tab 42] Summary Judgment Order entered at a pretrial conference on February 25, 2022 by visiting former probate court Judge Kathleen Stone that deprived Relator of all rights and remedies with no evidentiary hearing or specific findings of fact.
- [Tab 43] March 11, 2022 Severance Order relating to a December 6, 2021 Rule 11 Agreement [Tab 39]
- [Tab 50] March 2, 2022 Order denying Relator’s Statutory Bill of Review

STATEMENT OF JURISDICTION

This Court has original jurisdiction to issue the requested writ of mandamus.

This court’s mandamus jurisdiction is governed by § 22.221 of the Texas Government Code. A court of appeals may issue writs of mandamus against “(1) a judge of a statutory probate court” *See* TEX. GOV’T CODE § 22.221(a); TEX. R. APP. P. 52.1. Venue is governed under § 22.201(b) and § 22.201(o) of the Texas Government Code.

ISSUES PRESENTED

- A. *Whether the trial court abused its discretion in entering the orders complained of in a non-probate matter in a statutory probate court without a pending estate administration or estate representative.*
- B. *Whether the trial court abused its discretion in failing to dismiss Cause No. 412,249-401 for want of jurisdiction when the cause was filed ancillary to a closed estate; in an independent administration of a pour-over will; after the inventory, appraisal and list of claims had been approved by the probate court and the administration had been dropped from the active docket.*
- C. *Whether the nature of the claims, and the relief sought, in a petition filed in a statutory probate court after the probate was closed, invoked the jurisdiction of a probate court or, whether the mandatory venue provisions*

of Tex. Property Code § 115.001(a) places original and exclusive jurisdiction over a living trust in the District Court and, whether the statutory probate court's failure to dismiss for want of jurisdiction constituted an abuse of the trial court's discretion.

- D. Whether remanding a non-probate case from the federal court to a probate court that the federal case had not been removed from and whether accepting the federal remand as if it was an in-state transfer was an abuse of discretion. [Tab 9, Tab 10 & Tab 26]*
- E. Whether allowing transmogrification of the federal non-probate case into "Estate of Nelva Brunsting No. 412,249-402" and subsequently dissolving "Estate of Nelva Brunsting No. 412,249-402" into "Estate of Nelva Brunsting No. 412,249-401", effectively vanishing the federal case while converting the federal plaintiff into a state court defendant, was an abuse of discretion. [Tab 29].*
- F. Whether Relator has been denied due process and a meaningful opportunity to be heard by these acts and failures to act.*
- G. Whether the Harris County Clerk erred in allowing a matter to be filed ancillary to a closed estate and/or whether the local rules of the Harris County probate courts are in conflict with state law?*

STATEMENT OF FACTS

Curtis v Brunsting, Southern District of Texas [No 4:12-cv-592]

The record establishes the facts. The first filed case involving this trust was filed by Relator on February 27, 2012 in the Southern District of Texas [No 4:12-cv-592] [Tab 1]; was dismissed under the probate exception on March 8, 2012; then reversed and remanded January 9, 2013, in a unanimous opinion holding the family living trust to contain no property belonging to a decedents' estate and finding the probate exception inapplicable on all four legs of the test; *Curtis v Brunsting* 704 F.3d 406 (January 9, 2013). [Tab 2]

On April 9, 2013, a hearing was had in the Southern District of Texas on Relator's application for preliminary injunction [Tab 3]. The preliminary injunction was issued against Co-Trustee Defendant Anita Brunsting and Co-Trustee Defendant Amy Brunsting. A memorandum of the preliminary injunction was published April 19, 2013 [Tab 4]. The federal trial court entered an order appointing a Special Master to assemble books and records of accounts and to provide a competent trust accounting [Tab 5]. The Report of Special Master was filed August 8, 2013 [Tab 6]. September 3, 2013 hearing was had on the report [Tab 7]. Up to this point Relator was pro se.

On January 6, 2014, Houston attorney Jason Bradley Ostrom (Ostrom) filed Notice of Appearance as counsel of record for Relator [Tab 8]. May 9, 2014 Ostrom filed a 1st amended complaint to pollute diversity [Tab 9], and on May 9, 2014 Ostrom filed an unopposed Motion to "Remand" the non-probate case to Harris County Probate Court No. 4, [Tab 10] from which the case had never been removed.

Estate of Elmer H. Brunsting [No. 412,248]

Docket sheet in 412,248 [Tab 11] shows: April 2, 2012, the will of Elmer H. Brunsting [No. 412,248] was filed in Harris County Probate Court No. 4 [Tab 12]. On August 28, 2012 statement of death and other facts was recorded in estate of Elmer H. Brunsting [No. 412,248] [Tab 13], Elmer passed April 1, 2009. August

28, 2012 is an order entered admitting the will of Elmer H. Brunsting [No. 412,248] and issuing Letters Testamentary to Carl Henry Brunsting as “Independent Executor” [Tab 14]. An order approving the inventory, appraisement and list of claims was entered April 4, 2013 [Tab 15] and a Drop Order was issued April 5, 2013 [Tab 16]

Estate of Nelva E. Brunsting [No. 412,249]

Docket sheet in 412249 [Tab 17] shows: April 2, 2012 the will of Nelva E. Brunsting [No. 412,249] was filed in Harris County Probate Court No. 4 [Tab 18]. August 28, 2012 statement of death and other facts were entered [Tab 19]. August 28, 2012 an order admitting the will of Nelva E. Brunsting and issuing Letters Testamentary [No. 412,249] was entered [Tab 20]. The inventory, appraisement and list of claims were filed [Tab 21] and approved April 4, 2013 [Tab 22] and a Drop Order was issued April 5, 2013 [Tab 23] closing the administration.

Estate of Nelva E. Brunsting [No. 412,249-401]

Docket sheet in 412,249-401[Tab 24] shows: On April 9, 2013, five days after the probate administrations had closed, Carl Henry Brunsting, represented by Attorney Bobbie G. Bayless, filed a “petition for declaratory judgment, for an accounting, for damages, for imposition of a constructive trust, and for injunctive relief, with request for disclosures” in Harris County Probate Court No. 4 [Tab 25].

May 28, 2014, Ostrom filed a Motion to Enter a Transfer Order and the

order approving the federal remand as a transfer was entered June 5, 2014 [Tab 26]. February 17, 2015, incapacitated independent executor Carl Henry Brunsting tendered his resignation and substituted his wife Drina as his attorney in fact. Carl's application to resign was approved February 19, 2015 [Tab 27].

February 19, 2015 the participating attorneys all signed an Agreed Docket Control Order [Tab 28] and March 5, 2015 the participating attorneys all signed an Agreed Order to Consolidate "*Estate of Nelva Brunsting 412,249-402*" with "*Estate of Nelva Brunsting 412,249-401*" [Tab 29]. On June 26, 2015 Defendant Co-Trustees filed a No-evidence Motion for Summary Judgment [Tab 30]. On July 13, 2015 Relator filed her "pro se" Response to Defendant Co-Trustees' No-evidence motion [Tab 31].

On October 8, 2018 Relator filed a pro se plea in abatement [Tab 32] and on October 19, 2018 Relator filed a pro se Plea to the Jurisdiction, [Tab 33] along with a proposed order [Tab 34]. On February 14, 2019 the Honorable James Horwitz entered an Order denying Relators pleas to the jurisdiction and pleas in abatement [Tab 35]. November 4, 2019, after thumbing their noses at the preliminary injunction [Tab 4] for more than 6 ½ years, Defendant Co-Trustees, Amy and Anita Brunsting filed "Original Counterclaims" [Tab 36]. October 15, 2021 Relator filed an answer to Defendants' "Original Counterclaims" [Tab 37]

and an Addendum to her civil tort claims [Tab 38]. December 5, 2021 Rule 11 Agreement Certified 18210428 [Tab 39]. January 6, 2022 Application to Sever Certified 18292335 [Tab 40]. February 11, 2022 a hearing was had on the Severance motion 412249-401 [Tab 41]. February 25, 2022 Order for Summary Judgment [Tab 42] was entered at a pre-trial conference. See Transcript of 2022-03-31 Pre-Trial Conference [Tab 48]. On March 14, 2022 an Order severing Carl's claims from those of Relator was entered [Tab 43] and on March 18, 2022 Carl filed nonsuit of Relator [Tab 44]. March 27, 2022 Relator, Candace Curtis, filed a motion to vacate and set aside the February 25, 2022 Order for Summary Judgment [Tab 45]

Estate of Nelva E. Brunsting [No. 412,249-402]

Docket 412,249-402 Certified 2019-08-22 [Tab 46]

Estate of Nelva E. Brunsting [No. 412,249-403]

2019-04-10 Docket 412249-403 Certified 2019-08-22 [Tab 47]

Estate of Nelva E. Brunsting [No. 412,249-404]

November 22, 2019 Relator filed a Statutory Bill of Review asking the probate court to vacate the February 14, 2019 Order and dismiss for want of jurisdiction [Tab 49]. Three years later, on March 2, 2022, an Order was entered Denying Relator's Statutory Bill of Review 412,249-404 [Tab 50].

Additional Facts of Record including transcripts of hearings:

Tab 51 2022-03-04 Anita-Mendel Fee Demand.
Tab 52 2022-03-04 Amy-Spielman Fee Demand.
Tab 53 2019-03-01 Order to transfer District Court 164 Case to Probate Court 4
Tab 54 2014-12-05 Case 412249-401 Anita Objection to Carl and Candy
distribution
Tab 55 August 25, 2010 QBD
Tab 56 2007 Amendment
Tab 57 Pre-settlement accounting
Tab 58 Anita called - change the trust
Tab 59 Report of Temporary Admin
Tab 60 Order Appointing Temp Admin
Tab 61 June 15, 2010 QBD
Tab 62 2005 Restatement
Tab 63 Wiretap Hearing Transcript Estate of Nelva E Brunsting August 3, 2015
Tab 64 2019-01-24 Hearing Transcript
Tab 65 2019-06-28 Hearing Transcript
Tab 66 2022-01-06 Carole Emergency Motion Hearing Transcript
Tab 67 2022-02-11 Hearing Transcript Severance Motion 412249-401
Tab 68 2022-02-25 Hearing Transcript Pretrial Conference
Tab 69 2022-03-31 Hearing transcript Brunsting 412249-401
Tab 70 2021-11-04 Hearing Transcript Estate of Nelva Brunsting 412,249-403

ARGUMENT AND AUTHORITIES

“We review questions of law under a de novo standard of review without deference to the trial court's conclusion.” See *Interstate Northborough P' ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996).” *Willmann v. City of San Antonio*, 123 S.W.3d 469, 481 (Tex. App. 2003). “Issues of statutory construction are questions of law.” *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). “We review a traditional summary judgment de novo”, *Provident Life & Accident Ins. Co. v. Knott* 128 S.W.3d 211 (Tex. 2003). “We also review de novo the trial court's legal conclusions on the

construction of wills and trusts." *In re Gonzales*, 580 S.W.3d 322, 327 (Tex. App. 2019) "We interpret trust instruments the same way as wills, contracts, and other legal documents." *Lesikar v. Moon*, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) citing *Goldin v. Bartholow*, 166 F.3d 710, 715 (5th Cir. 1999). "The meaning of the trust instrument is a question of law when no ambiguity exists." *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ). "If the court can give a definite legal meaning or interpretation to an instrument's words, it is unambiguous, and the court may construe the instrument as a matter of law, *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). If the language is uncertain or reasonably susceptible to more than one meaning, however, it is ambiguous, and its interpretation presents a fact issue precluding summary judgment. *Id.* at 394." A trust instrument need not contain any particular language to be effective. For an express trust to be shown, however, (1) the words of the settlor ought to be construed as imperative and thus imposing an obligation on the trustee, (2) the subject to which the obligation relates must be certain, and (3) the person intended to be the beneficiary must be certain." *Brelsford v. Scheltz*, 564 S.W.2d 404, 406 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), quoted in *Pickelner v. Adler*, 229 S.W.3d 516, 526 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Whether a trial court has subject-matter jurisdiction is a question of law

subject to de novo review. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). Standing is a component of subject-matter jurisdiction, *State v. Naylor*, 466 S.W.3d 783, 787 (Tex. 2015), and a constitutional prerequisite to maintaining suit. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004).

The existence of subject-matter jurisdiction and standing are rigid questions of law that are not negotiable and cannot be waived. See *State v. Naylor*, 466 S.W.3d at 792; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444-45 (Tex. 1993). Both are essential to a court's power to decide a case, *M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704 (Tex. 2001). Appellate courts always have jurisdiction to resolve questions of standing and jurisdiction. *State v. Naylor*, 466 S.W.3d at 787.

A motion to dismiss based on the court's lack of subject-matter jurisdiction is the functional equivalent of a plea to the jurisdiction. *Narvaez v. Powell*, 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet).

“A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit. The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case. The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached. This does not mean that evidence cannot be offered on a

*dilatory plea; on the contrary, the issues raised by a dilatory plea are often such that they cannot be resolved without hearing evidence. And because a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case. But the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction. Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion. Kaelin v. Crago, No. 13-16-00226-CV, at *4 (Tex. App. Jan. 26, 2017)”*

"In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case." Narvaez v. Powell, 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet.) (citing Miranda, 133 S.W.3d at 226). “We construe pleadings liberally in favor of the pleader and accept the factual allegations in the pleadings as true. A plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction.” Tex. Ass'n of Bus., 852 S.W.2d at 446.

Carl’s April 9, 2013 Petition [Tab 25] claims “Venue” is proper in Harris County, Texas, pursuant to Tex. Civ. Prac. & Rem. Code § 15.002 (a)(1) [Tab A] and while that may be true, Section III of Carl’s Petition, Titled “Jurisdiction”, reads as follows:

“Plaintiff brings this cause of action pursuant to Chapters 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code. More specifically,

Plaintiff brings this proceeding to:

(a) establish, construe the terms of, and determine the rights and liabilities of the parties under the Family Trust, the Successor Trusts, and the trusts purportedly created pursuant to the terms of the tainted 8/25/10 QBD;

(b) Require an accounting of all the trusts and other transactions resulting from Anita, Amy, and Carole's exercise of control over Elmer and Nelva's remaining assets, however held;

(c) determine damages resulting from Anita, Amy, and Carole's wrongful acts, including, but not limited to, numerous breaches of fiduciary duties;

(d) impose a constructive trust over assets wrongfully transferred, as well as anything of value obtained through the use of assets wrongfully transferred;

(e) obtain injunctive relief to preserve Elmer and Nelva's assets, however held, until the records concerning the transfers of assets can be examined and appropriate remedies can be sought so that the improper transfers can be reversed and the assets can be properly allocated and distributed.”

Chapter 37 of the Texas Civil Practice and Remedies Code [Tab B] only relates to standing as it regards declaratory judgment actions. A probate court does have the authority to render a declaratory judgment on matters within its original jurisdiction. However, the only jurisdictional reference in Carl's April 9, 2013 Petition is to Chapter 115 of the Texas Property Code.¹

Texas Property Code § 115.001(a) places original and exclusive jurisdiction over trust disputes in the district court, with only one exception.

¹ See Property Code, [Tab M], [Tab N], [Tab O], [Tab P], [Tab Q], [Tab R], [Tab S].

Texas Property Code § 115.001(a), [Tab T], reads:

“(a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, ...”

The exception stated in section (d) reads as follows:

“(d) The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on: (1) a statutory probate court;”

Statutory Probate Court Jurisdiction

“A statutory probate court may exercise only that jurisdiction accorded it by statute.” *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933-34 (Tex.App.-Austin 1997, no pet.); *City of Beaumont v. West*, 484 S.W.2d 789, 791 (Tex.Civ.App.-Beaumont 1972, writ ref'd n.r.e.).

Tex. Gov't. Code § 25.1031(c)(4) [Tab D] identifies Harris County Probate Court No. 4 as a statutory probate court as that term is defined at Texas Estates Code § 22.007(c). [Tab E]

(c) "Statutory probate court" means a court created by statute and designated as a statutory probate court under Chapter 25, Government Code. For purposes of this code, the term does not include a county court at law exercising probate jurisdiction unless the court is designated a statutory probate court under Chapter 25, Government Code.

Disagreement Among the Courts of Civil Appeals

To eliminate confusion, prevent the proliferation of confusion, and to resolve a split among the courts of appeals, Relator is compelled to cite two cases

inapposite to the dominant view. The first case is *Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.*, 528 S.W.3d 201 (Tex. App. 2017). The Lee Court was dealing with a claim against the trustee of a testamentary trust that was brought thirteen years after the probate administration had closed (see *Loss of Jurisdiction supra*). In considering the ambit of Texas Estates Code § 32.007 [Tab U] the Lee Court held a statutory probate court’s jurisdiction over trust disputes was “independent” from its statutory probate jurisdiction:

“Our review of the legislative framework for a statutory probate court's jurisdiction shows that the court's trust jurisdiction is independent of its probate jurisdiction.” Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

The second case is *Goepp v. Comerica Bank & Trust, N.A.*, No. 03-19-00485-CV (Tex. App. July 9, 2021), considering the ambit of Texas Estates Code § 32.006 [Tab U].

*“Section 32.006 concerns a statutory probate court's independent jurisdiction, not its jurisdiction over causes related to the probate proceeding. See Lee v. Lee, 528 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)” Goepp v. Comerica Bank & Trust, N.A., No. 03-19-00485-CV, at *4 n.3 (Tex. App. July 9, 2021)*

Goepp is the only case known to cite to *Lee* for this proposition and neither court explains from whence a statutory probate court derives a jurisdiction independent from its statutory probate jurisdiction. The explanation is that both opinions were issued without regard to a fundamental and guiding legal principle

governing statutory construction. “When seeking to understand statutory definitions, the word being defined is the most significant element of the definition's context.” In re Ford Motor Co., 442 S.W.3d 265, 271 (Tex. 2014) “It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.” State v. \$1,760.00 in U.S. Currency, 406 S.W.3d 177, 181 (Tex. 2013).

Chapter 25, Government Code Is Controlling

Tex. Gov't Code § 25.0021 – Jurisdiction

(a) If this section conflicts with a specific provision for a particular statutory probate court or county, the specific provision controls, except that this section controls over a specific provision for a particular court or county if the specific provision attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

(b) A statutory probate court as that term is defined in Section 22.007(c), Estates Code, has:

(1) the general jurisdiction of a probate court as provided by the Estates Code; and

(2) the jurisdiction provided by law for a county court to hear and determine actions, cases, matters, or proceedings instituted under:

(A) Section 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, or 714.003, Health and Safety Code;

(B) Chapter 462, Health and Safety Code; or (C) Subtitle C or D, Title 7, Health and Safety Code.

Texas Government Code § 25.0021(a) defines the limits and explicitly controls when, as is the case in point, the court attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

Tex. Gov't Code § 25.0021 – Jurisdiction

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(A) Section 166.046, 192.027, 193.007, 552.015, 552.019, 711.004, or 714.003, Health and Safety Code;

(B) Chapter 462, Health and Safety Code; or (C) Subtitle C or D, Title 7, Health and Safety Code.

Tex. Gov't. Code § 25.0003(e) [Tab C] provides that, in a county that has a statutory probate court, a statutory probate court is the only county court created by statute with probate jurisdiction. Any analysis must therefore begin with a review of the legislative delegation of authority accorded to a statutory probate court. It is

a court of limited jurisdiction. *Narvaez* , 564 S.W.3d at 54. For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. *In re Hannah* , 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing Tex. Est Code § 21.006, Tex. Est. Code §32.001(a), Tex. Est. Code § 33.002, Tex. Est. Code § 33.052, Tex. Est. Code § 33.101).

Texas Estates Code § 22.029 defines probate matter; probate proceedings; proceeding in probate; and proceedings for probate as synonymous: “*The terms "probate matter," "probate proceedings," "proceeding in probate," and "proceedings for probate" are synonymous and include a matter or proceeding relating to a decedent's estate.*”

Texas Estates Code Section 31.001 defines “probate proceeding”: [Tab I]

The term "probate proceeding," as used in this code, includes:

- (1) the probate of a will, with or without administration of the estate;*
- (2) the issuance of letters testamentary and of administration;*
- (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;*
- (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;*

(5) a claim arising from an estate administration and any action brought on the claim;

(6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;

(7) a will construction suit; and

(8) a will modification or reformation proceeding under Subchapter J, Chapter 255.

Probate proceedings are actions in rem, Texas Estates Code § 32.001(d)

[Tab J]. None of Independent Executor Carl Brunsting's tort claims and none of the purposes stated in his 412,249-401 petition have anything to do with a pending "probate proceeding" as that term is defined by § 31.001 of the Texas Estates Code.

The Controlling Issue Test

*Under the former Probate Code, the Texas Supreme Court held that "a cause of action is appertaining to or incident to an estate if the Probate Code explicitly defines it as such or if the controlling issue in the suit is the settlement, partition, or distribution of an estate." In re SWEPI, L.P., 85 S.W.3d 800, 805 (Tex. 2002) (internal quotation marks omitted); see also In re Kholaiif, No. 14-18-00825-CV, 2018 WL 5832899, at *2 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (applying the "'controlling issue' test" after the codification of the Estates Code).*

"For relator's suit to be subject to the jurisdiction and venue provisions of the Texas Estates Code, it must qualify either as a "probate proceeding" or a "matter related to a probate proceeding" as defined by the Estates Code." In re Hannah, 431 S.W.3d 801, 807-09 (Tex. App. 2014)

“We agree with Hannah’s conclusion that the nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim,” Narvaez v. Powell, 564 S.W.3d 49, 56 (Tex. App. 2018)

A number of more recent unpublished opinions apply the controlling issue test in a variety of circumstances that help to explain the test in context, among which are *Mortensen v. Villegas*, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021) a judicial analysis of *In re Hannah*, and *Hawes v. Peden* No. 06-19-00053-CV, at *2 (Tex. App. Dec. 16, 2019) also citing *In re Hannah*, *supra*.

“For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. *In re Hannah*, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101).

Finally, a probate court may also exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX. EST. CODE ANN. § 32.001(b). Yet for a probate court to have such authority to exercise jurisdiction over matters incident to an estate, it is axiomatic that there must necessarily be a probate proceeding then pending in such court. *Frost Nat'l Bank*, 315 S.W.3d at

506; Narvaez, 564 S.W.3d at 57.” Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)”

Johnson v. Johnson, No. 04-19-00500-CV (Tex. App. Jan. 15, 2020) and Davis v. Merriman, No. 04-13-00518-CV, at *7-8, citing Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App. 1997).

The nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim. Texas Estates Codes § 32.006 and § 32.007 are located in Title 2, Subsection A. Title II governs the administration of decedent’s estates. No part of Title 2 attempts to create jurisdiction in a statutory probate court beyond the boundaries of the limited delegation of authority specifically defined in Tex. Gov't Code § 25.0021.

Any other conclusion opens the door to a variety of actions in statutory probate courts by or against trustees, well beyond the boundaries contemplated by the legislative framework defining statutory probate court jurisdiction. Without regard to probate matters, a beneficiary, trustee or co-trustee could bring suit in a statutory probate court against a contractor, subcontractor, owner or officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds. Tex. Prop. Code Ann. § 162.002, including but not limited to actions disputing payments made to contractors or

subcontractors under a construction contract for the improvement of real property. TEX. PROP. CODE § 162.001(a). Material Suppliers could sue contractors and subcontractors in a statutory probate court on payment bonds and under the Trust Fund Act. Without regard to probate matters, contractors or sub-contractors could bring suit in a statutory probate court to determine whether trust funds used were reasonably necessary overhead expenses of managing the fund. Tex. Prop. Code Ann. § 162.031. Actions could be brought in statutory probate courts in regard to labor union trust funds, employee-benefit trust funds, pension and disability Trust funds, inmate trust funds, major event trust funds, and disputes involving all kinds of other trusts could be heard in a statutory probate court. The Texas Legislature placed clearly defined limits on the subject matter of a statutory probate court in Tex. Gov't Code § 25.0021. There is no legislative delegation of authority for a statutory probate court to assume any jurisdiction independent from probate, guardianship, mental health, or eminent domain proceedings.

Legal Standard for Extraordinary Relief by Mandamus

A writ of mandamus may issue if (1) the petitioner has ‘no other adequate means’ to attain the desired relief; (2) the petitioner has demonstrated a right to the issuance of a writ that is ‘clear and indisputable;’ and (3) the issuing court, in the exercise of its discretion, is satisfied that the writ is ‘appropriate under the circumstances, *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005).

No Adequate Appellate Remedy

Generally, mandamus relief is appropriate "only if the court clearly abused its discretion and the party has no adequate remedy by appeal." *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding). However, signing a void order is an abuse of discretion. If the challenged order is void, the Relator need not show he or she has no adequate appellate remedy. *Id.*; *In re Keeling*, 227 S.W.3d 391 (Tex. App. 2007). Failure to rule on jurisdiction is a trial court abuse of its discretion as it acts "arbitrarily, unreasonably, or without regard to guiding legal principles", see *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

The Harris County Clerk declined to produce an appellate record from more than one cause number citing Texas Rule of Appellate Procedure 34.1 (Tex. R. App. P. 34.1). If the appellate record does not demonstrate that the base probate proceeding was closed when Carl filed his Petition for Declaratory Judgment on April 9, 2013, the appellate court must presume that the orders are jurisdictionally valid. See *PNS Stores, Inc.*, 379 S.W.3d at 273 "courts presume that judgment being collaterally attacked is valid unless record establishes jurisdictional defect, effectively rebutting the presumption."

Loss of Jurisdiction

Although courts generally do not lose subject matter jurisdiction once it attaches, a probate court is a specialized court that can lose jurisdiction over

matters incident to an estate if it loses jurisdiction over the probate matters. *See Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.). In other words, once an estate closes, incident claims are pendent or ancillary to nothing, and the probate court loses jurisdiction. *Id.*; *see also Schuld v. Dembrinski*, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) ("the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it"); *Garza v. Rodriguez*, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) ("before a matter can be regarded as incident to an estate ... a probate proceeding must actually be pending"). *Lawton v. Lawton*, No. 01-12-00932-CV, at *4-5 (Tex. App. July 10, 2014)

There was no probate matter pending in Harris County Probate Court No. 4 when Carl Brunsting filed his petition on April 9, 2013 [Tab 25] and both estates had closed [Tab 16 & 23]. Carl's tort claims were filed after the inventory was approved in an independent administration and drop orders had issued. Carl's action was neither specifically nor explicitly authorized by Title II of the Texas Estates Code, but was prohibited by Texas Estates Code § 402.001. [Tab L]

Complete Absence of Statutory Probate Jurisdiction

The purpose of independent administration [Tab F] is to free the independent executor from judicial supervision by the probate court and to effect the distribution of an estate with minimal costs and delays. *Sweeney v. Sweeney*, 668

S.W.2d 909, 910. (Tex. App.—Houston [14th Dist.] 1984, no writ); *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975). The Estates Code codifies this purpose by directing that after an independent executor is appointed and the inventory has been approved, "*further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court*", Texas Estates Code § 402.001. The record reflects that both Settlers' wills provide for independent administration. [Tab 12 p.2] [Tab 18 p.2] [Tab 50 p.13]

"I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisal and list of claims as required by law."

Independent Executor Carl Brunsting exceeded the authority granted by the testators' wills [Tab 13 & 19], violated Texas Estates Code § 402.001 and lacked standing to file non-probate claims as ancillary to a closed probate, with no bonafide "claims" (Tex. Est. Code § 22.005) [Tab E] brought on behalf of, or against, the decedent's "estate" as that term is defined at Texas Estates Code § 22.012 [Tab E]. In his individual capacity Carl lacked standing to bring tort claims in a statutory probate court without a pending probate administration, see *Mortensen v. Villegas*, 630 S.W.3d 355 (Tex. App. 2021) . [Tab G]

Carl's April 9, 2013 tort action raises only issues relating to the sole devisee,

the family living trust. All rights title and interest in estate property, if any, vested in the trust beneficiaries with the approval of the inventory on April 4, 2013 [Tab K].

Estate means a decedent's personal property (Tex. Est. Code § 22.012). Property, within the meaning of the Estates Code, is defined at Texas Est. Code § 22.028 [Tab H]

"Sec. 22.028. PERSONAL PROPERTY. "Personal property" includes an interest in:

- (1) goods;*
- (2) money;*
- (3) a chose in action;*
- (4) an evidence of debt; and*
- (5) a real chattel."*

Carl's April 9, 2013 complaint uses "Estate of Nelva Brunsting" as a mere label rather than as a term used to describe a container object holding property. The "Estate of Nelva Brunsting" is not a party in interest to any action in the probate court, as the tort claims listed in the inventory [Tabs 15 & 22] are not property belonging to the decedent's estate. Rather, they are derivative claims belonging to the cestui que of the sole devisee, in whom those rights vested with the approval of the inventory and the closing of the administration. These events transpired five

days before Carl's non-probate related tort claims were filed as "ancillary".

"The third-party plaintiff moniker is not a feature of or limitation on a decedent's claim had she brought one before death. Rather, it is a part of the procedural posture of the posthumous litigation. The status of "third-party plaintiff" is a characteristic arising out of and internal to the litigation. Indeed, while beneficiaries' claims are in a sense derivative, beneficiaries are entitled to their own independent recovery that does not benefit the estate. In other words, while the beneficiaries in some sense wear the decedent's shoes, they need not follow in the estate's footsteps." In re Ford Motor Co., 442 S.W.3d 265, 279-80 (Tex. 2014)

February 14, 2019 Order Denying Relator's Plea to the Jurisdiction

An order denying Relator's plea to the jurisdiction was entered in the probate court on February 14, 2019. This was the first substantive ruling ever entered in 412,249-401, filed April 9, 2013. An examination of this Order [Tab 35] in context is revealing, as the court:

"finds that subject matter jurisdiction is proper in Harris County Probate Court No. 4 with regard to the Estates of Nelva and Elmer Brunsting as well as the assets contributed to Trusts related to those Estates. The Court also finds that no other court has dominant jurisdiction regarding claims related to these Estates. Therefore, the Pleas in Abatement, the Plea to the Jurisdiction and all other relief requested by the pleadings first enumerated in this Order, filed by Candace Curtis, lack merit and should be, in all things, DENIED.

This Order claims jurisdiction over the decedents' estates and assets contributed to Trusts related to those Estates. However, assets of the estates, if any, vested in the trust with the approval of the inventory and the drop orders closing the estates administrations April 4, 2013, five days before Carl filed his tort action.

Statute of Limitations

Elmer passed April 1, 2009 [Tab 13]. Carl's April 9, 2013 tort action [Tab 25] missed the four year statute of limitations for bringing claims on behalf of Elmer's estate by 8 days, Tex. Civ. Prac. & Rem. Code § 16.004 (a). All of the real property and the lion's share of the other remaining assets are contained within the corpus of Elmer's share of **the trust**. Because Carl did not obtain letters within 12 months of Elmer's passing, the tolling provisions of Tex. Civ. Prac. & Rem. Code § 16.062(a) are inapplicable.

The running of the general statute of limitation is not interrupted (tolled) by a proceeding in a suit to establish a claim that has not been properly presented, and a suit against the heirs does not stop the running of the statute of limitations on a claim that is required to be submitted to the probate court for approval. 18 Tex.Jur.2d 461 "Decedents ' Estates", § 579, "Tolling of statute of limitations" (1960); Jackson v. Fielder, 15 S.W.2d 557 (Tex.Com.App. 1929); Markward v. Murrah, 136 S.W.2d 649 (Tex.Civ.App. San Antonio 1940, aff'd at 138 Tex. 34, 156 S.W.2d 971 (1941)).

When a claim that has been barred by a general statute of limitations is approved by the court, the judgment of approval may be set aside in a direct proceeding brought for that purpose, by showing that the bar of the general statute was complete when the claim was approved and that there existed no fact that

suspended the bar of the statute. 18 Tex.Jur.2d 486 "Decedents ' Estates", § 618, "Appeal from action approving claim barred by limitation" (1960). Furr v. Young, 578 S.W.2d 532, 536 (Tex. Civ. App. 1979)

Res Judicata

The Brunsting family living trust does not contain assets belonging to a decedents' estate, Curtis v Brunsting 704 F.3d 406 (Jan. 2013) [Tab 2]. An examination of the approved inventories [Tab 15 & 22] reveals that the only asset contributed to the trusts related to the decedents' estates was a 2000 Buick le Sabre that has never appeared on any trust accounting and that no one appears to even want.

Conversion - Agreed Order to Consolidate Cases

Not only was the federal remand improper, it was received as a transfer, which Defendants also knew was improper [See Tab 51 p.9 1/9/2015 entry]. The February 14, 2019 Order denying Relator's plea to the jurisdiction and pleas in abatement identify the federal case as having been "transferred" into **Cause No. 412,249-402:**

"Cause No. 412,249-402, pending in Harris County Probate Court No. 4, into which the above-referenced U.S. District Court case was transferred on February 9, 2015, and in which Candace Curtis, by and through her counsel, signed an Agreed Docket Control Order and the March 16, 2015 Agreed Order to Consolidate Cases;"

An examination of the record shows that “independent executor” Carl Brunsting’s resignation was accepted February 19, 2015, due to lack of capacity [Tab 27], only ten days after the federal court remand was accepted as a “transfer” [Tab 35]. Ostrom never filed an appearance in the probate court. Nonetheless, on February 20, 2015, the day after the independent executor’s resignation was accepted, Ostrom, and the other participating attorneys signed an “agreed docket control order”, and then went on to sign an “Agreed Order to Consolidate Cases” [Tab 29] showing the federal case, (*Candace Curtis v. Amy Brunsting, Anita Brunsting and Does 1-100*) as “**Estate of Nelva Brunsting 412,249-402**”, being dissolved into “**Estate of Nelva Brunsting 412,249-401**”.

The February 19, 2019 Order was the first dispositive ruling entered in the action Carl filed 5 years, 10 months, 11 days earlier. On November 12, 2021 an Order was issued denying Carl’s Motion to have the August 25, 2010 Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement (8/25/2010 QBD) declared void. That order too was in error. A testamentary instrument requires the signatures of two disinterested witnesses. Because it claims to be testamentary and says it is to take effect at the passing of Nelva Brunsting, the QBD [Tab 55] is void on its face as a testamentary instrument for lack of two disinterested witness signatures.

Judgments Void for Want of Jurisdiction

A judgment that is void for lack of jurisdiction is a nullity that can be attacked at any time. See *Gaddy v. State*, 433 S.W.3d 128, 142 (Tex. App. 2014). A judgment rendered without jurisdiction is void. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (orig. proceeding) (per curiam) (citing *Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973)); see also *Gulf C.&S.F. Ry. Co. v. Rawlings*, 16 S.W. 430, 431 (Tex. 1891). Mandamus will lie to vacate, set aside or prevent the enforcement of a void judgment or order. See *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973) (orig. proceeding); *State v. Ferguson*, 125 S.W.2d 272, 274 (Tex. 1939) (orig. proceeding); see also *In re Florance*, 377 S.W.3d 837, 840 (Tex. App.—Dallas 2012, orig. proceeding).

When the court enters an order in the absence of jurisdiction it is not necessary to debate the merits. The conclusory summary judgment order entered February 25, 2022, by visiting former judge Kathleen Stone, is void for want of jurisdiction, as are all of the orders entered in 412,249-401, 412,249-402, 412,249-403, 412,249-404 and 412,249-405. “Courts are erected to settle controversies, not to multiply them.” *Ex parte Lillard*, 314 S.W.2d 800, 805 (Tex. 1958). Questions thus arise as to how one simple family trust controversy was multiplied exponentially and maintained in stasis, without disingenuous intentions?

Mandamus Relief Is Warranted

When jurisdiction and venue issues are involved, mandamus relief is particularly appropriate to “spare litigants and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” In re Team Rocket, L.P., 256 S.W.3d 257, 262 (Tex. 2008); In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004). For a wrongfully denied plea in abatement or to the jurisdiction, the need for mandamus relief is even more acute given that the appellate remedy for the improper denial of a plea in abatement or to the jurisdiction is ‘virtually automatic’ reversal. As this Court stated before, failing to correct such an error at the mandamus stage results “in an irreversible waste of resources” 256 S.W.3d at 263.

CONCLUSION

This case has nothing to do with any inheritance expectancy; it is a living trust controversy that involves only property interests governed under trust instruments and Title 9 of the Property Code. The only records required for a proper determination on Jurisdiction are record index Tabs 11 through 25. The relevant facts are independent administration under pour-over wills, where the sole devisee is a living trust and, that non-probate related tort claims were filed in the statutory probate court by Carl individually, and as executor, after the estate administration had closed, pour-overs were complete and drop orders had issued.

There was no probate proceeding pending when Carl filed his civil tort

action in the statutory probate court. None of Carl's claims, and none of the claims listed in the inventory, are probate related "claims" as the term is defined in Texas Estates Code § 22.005 [Tab E]. Without a pending probate administration, the statutory probate court did not have the jurisdiction to hear Carl's petition from the onset. The trial court's express refusal to dismiss for want of jurisdiction violates its ministerial duty and the Supreme Court's instruction that jurisdictional issues must be decided at the "earliest opportunity" and "as soon as practicable." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004).

Mandamus should issue on this point alone. See *Narvaez*, 564 S.W.3d at 49, 57-58, in reviewing a probate court's exercise of pendent and ancillary jurisdiction, "*the fundamental question ... is whether there was a close relationship between [the non-probate claims and the probate proceeding] such that the probate court's exercise of jurisdiction will aid it in the efficient administration of the [estate].*" *Schuchmann v. Schuchmann*, 193 S.W.3d 598, 603 (Tex. App.—Fort Worth 2006, pet. denied). A probate court has jurisdiction "to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction." *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 934 (Tex. App.—Austin 1997, no pet.) (applying the predecessor to Texas Estates Code § 32.001(b).

STATEMENT REGARDING ORAL ARGUMENT

Relator respectfully requests oral argument. The questions raised are purely questions of law and the relevant facts are clear. The interest of justice and the effective use of the peoples' limited court resources may be better served in obtaining a quicker ruling on the core issue raised by this Petition, but no evidentiary hearing has been had on these issues as due process would demand, and, thus, in the event there is any reservation or hesitation to issue the writ requested by this petition, Relator would decline to waive oral argument.

PRAYER

Relator has shown that (1) the statutory probate court had a nondiscretionary duty to dismiss for want of jurisdiction, (2) that a demand for specific performance was made by pleas in abatement, plea to the jurisdiction and by statutory bill of review and, (3) that the probate court refused to perform its nondiscretionary duty to dismiss for want of jurisdiction.

Relator thus prays that this Court grant this petition, that the probate court judge be ordered to dismiss all actions filed as ancillary to 412,249 for want of jurisdiction and, to vacate, set aside and hold all orders entered or relating to Cause Numbers 412,249-401; 412,249-402; 412,249-403; 412,249-404, and 412,249-405 as null and void ab initio for want of jurisdiction in the statutory probate court.

Relator requests such other and further relief to which she may be entitled.

Respectfully Submitted,

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ATTORNEY FOR RELATOR

RULE 52.3(J) CERTIFICATION

I certify that I have reviewed the factual statements contained in this Petition for Writ of Mandamus and have concluded that every factual statement in the Petition is supported by competent evidence included in the Appendix or Mandamus Record.

CERTIFICATE OF COMPLIANCE

I, _____, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the total word count of this document is 6,674 and is in compliance with TEX. R. APP. P. 9.4(i)(2)(B)

VERIFICATION

I, _____, hereby certify under penalty of perjury that the documents and records presented in this mandamus petition, whether certified, water marked as unofficial, printed off the web, or acquired in the course of

litigation, are true and correct copies of the actual instruments and authorities they are purported to be.

Relator requests such other and further relief to which she may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on _____ 2022, a true and correct copy of the above and foregoing Petition for Writ of Mandamus together with a true and correct copy of the Appendix filed herewith, has been forwarded to the parties as follows:

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