

**TAB 36**

ESTATE OF	§	IN PROBATE COURT
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
DECEASED	§	HARRIS COUNTY, TEXAS
_____	§	
CARL HENRY BRUNSTING, et al	§	
v.	§	
ANITA KAY BRUNSTING, et al	§	

**AMY BRUNSTING’S & ANITA BRUNSTING’S  
ORIGINAL COUNTERCLAIM**

TO THE HONORABLE JUDGES HORWITZ AND COMSTOCK:

AMY BRUNSTING (“Amy”) and ANITA BRUNSTING (“Anita”) (collectively “Co-Trustees”) have been sued individually and in various capacities by their sister, Candace Louise Curtis (“Curtis”) and their brother, Carl Henry Brunsting (“Carl”), each of whom has amended and/or supplemented their petitions on numerous prior occasions.

In light of the numerous amended and/or supplemental petitions filed by Curtis and Carl, Co-Trustees file these Original Counterclaims, individually and in various identified capacities, including without limitation, as Co-Trustees of The Restatement of The Brunsting Family Living Trust (the “Brunsting Family Living Trust”).

Each allegation, assertion, claim or cause of action made by Amy and/or Anita in this Original Counterclaim is in addition to and/or in the alternative to any other allegation, assertion, claim or cause of action made by them in this Original Counterclaim.

## I. BACKGROUND FACTS

The Brunsting Family Living Trust was created by Elmer Henry Brunsting and Nelva Erleen Brunsting (together, “Founders” or “Trustors” and each a “Founder” or “Trustor”), on or about October 10, 1996. Over time, additional documents pertaining to The Brunsting Family Living Trust were executed by one or both of the Founders, including without limitation, a Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed by Nelva E. Brunsting on or about June 15, 2010 (the “June 2010 QBD”), and another Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed by Nelva E. Brunsting on or about on August 25, 2010 (the “August 2010 QBD”). Elmer Henry Brunsting was not a party to either document, as he died on April 1, 2009.

Through the Brunsting Family Living Trust and the August 2010 QBD, the Founders set out a number of different terms, conditions and instructions to be implemented and followed by the trustees and beneficiaries. Included among these terms, conditions and instructions were rules intended for the “protection of beneficial interests”, including without limitation rules dictating that the Founders’ instructions were not to be contested.

This “no-contest” language appears in both the Brunsting Family Living Trust **and** the August 2010 QBD, and was included because the Founders did not want to burden the trust with the costs of a litigated proceeding to resolve questions of law or fact, unless originated by a trustee or with a trustee’s written permission. The penalty for those who violated the no-contest provision was the forfeiture of any amounts the violator is or may have been entitled to receive. In such an event, a violator’s interest would pass as if the violator(s) had predeceased the Founders.

The Founders identified certain specific acts which, if taken, would trigger a forfeiture. Prohibited acts include but are not limited to originating (or causing to be instituted) a judicial proceeding:

- To construe or contest the trust(s);
- To resolve any claim or controversy in the nature of reimbursement;
- Seeking to impress a constructive or resulting trust;
- Alleging any theory, which if assumed as true, would enlarge (or originate) a claimant's interest in the trust or the Founder's Estates;
- Unsuccessfully challenging the appointment of any person named as a Trustee or unsuccessfully seeking the removal of any person acting as a Trustee;
- Objecting to any action taken or proposed to be taken in good faith by the Trustee, if such action is determined to have been taken in good faith;
- Objecting to any construction or interpretation of the trust, or any amendment to it, and such objection is later adjudicated to be an invalid objection; and/or
- In any other manner contesting the trust or any amendment to it, including its legality or the legality of any provision thereof, on the basis of incapacity, undue influence or otherwise, or in any other manner attacking or seeking to impair or invalidate the trust or any amendment, or any of their provisions.

The Founders further expressed their intentions regarding application and enforcement of these prohibited acts by including other instructions and conditions in the Brunsting Family Living Trust and/or the August 2010 QBD. These other instructions and conditions include but are not limited to:

- Application of the forfeiture penalty even if it is determined that the judicial proceeding was initiated in good faith, with probable cause;
- Application of the forfeiture penalty even if is determined that the judicial proceeding was initiated to do nothing more than construe the application of the no-contest provision;
- Cautioning a trustee against settling any contest, attack or attempt to interfere with the Founders' estate plan; and

- Requesting that the Court take into account the Trustor’s firm belief that no person contesting or attacking the Trustor’s estate plan should take or receive any benefit from the estate.

Against the backdrop of these forfeiture provisions, Curtis and Carl each elected to proceed with the origination of their respective judicial proceedings. By way of summary, but not limitation, Carl and Curtis’ respective claims have included/currently include:

<u>Carl’s Claims</u>	<u>Curtis’s Claims</u>
<p>(1) Construction of Trust and Suit for Declaratory Judgment;            (2) Demand for Trust Accounting;            (3) Breach of Fiduciary Duties;            (4) Conversion;            (5) Negligence;            (6) Tortious Interference with Inheritance;            (7) Constructive Trust;            (8) Civil Conspiracy;            (9) Fraudulent Concealment;            (10) Liability of Beneficiaries;            (11) Removal of Trustees;            (12) Receivership Over Trust;            (13) Self-Dealing;            (14) Criminal Wiretap Claim;            (15) Civil Wiretap Act;            (16) Invasion of Privacy and Intrusion on Seclusion; and            (17) Request for Injunctive Relief.</p> <p><u>Declarations Sought by Carl:</u></p> <ul style="list-style-type: none"> <li>• 8/25/10 QBD <i>in terrorem</i> clause void.</li> <li>• Construe validity, terms, responsibilities and obligations of documents signed by Elmer and Nelva.</li> <li>• That Carl’s actions do not violate <i>in terrorem</i> clause (if valid).</li> <li>• That Carl’s actions are done in good faith, so <i>in terrorem</i> not triggered.</li> </ul>	<p>(1) Breach of Fiduciary Obligation;            (2) Extrinsic Fraud;            (3) Constructive Fraud;            (4) Intentional Infliction of Emotional Distress;            (5) Breach of Fiduciary Duty;            (6) Fraud;            (7) Money Had and Received;            (8) Conversion;            (9) Tortious Interference with Inheritance Rights;            (10) Declaratory Judgment Action;            (11) Demand for Accounting;            (12) Unjust Enrichment; and            (13) Conspiracy.</p> <p><u>Declarations Sought by Curtis:</u></p> <ul style="list-style-type: none"> <li>• “Modification Documents” (June 2010 QBD, August 2010 QBD and Exercise of Testamentary Power of Appointment) are not valid.</li> <li>• <i>In terrorem</i> clause not capable of enforcement.</li> </ul>

## II. CLAIMS AND CAUSES OF ACTION

Beginning with the filing of their respective original petitions/complaints, both Curtis and Carl have asserted (and/or continue to assert) claims and causes of action, or otherwise taken action through the filing of various motions, objections and/or responses/replies which violate the Founders' restrictions and trigger the forfeiture provisions. Once triggered, a prior or subsequent amendment of their pleadings does not and cannot "untrigger" the forfeiture. Consistent with the Founders' wishes and cautions, the Co-Trustees assert that:

- one or more of the causes of action asserted and/or declarations sought by Carl trigger the forfeiture provisions;
- one or more of the causes of action asserted and/or declarations sought by Curtis trigger the forfeiture provisions;
- one or more of the motions, responses, and/or replies filed by Carl trigger the forfeiture provisions;
- one or more of the motions, responses, and/or replies filed by Curtis trigger the forfeiture provisions;
- Carl did not have just cause to bring the action, and it was not brought in good faith;
- Curtis did not have just cause to bring the action, and it was not brought in good faith;
- Carl has forfeited his interest, and thus his interest passes as if he has predeceased the Founders;
- Curtis has forfeited her interest, and thus her interest passes as if she has predeceased the Founders;
- If Carl has not forfeited his interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and Anita's expenses in defending against Carl's claims are to be charged against his interest dollar-for-dollar;
- If Curtis has not forfeited her interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and Anita's expenses in defending against Curtis' claims are to be charged against her interest dollar-for-dollar;

and/or

- All expenses incurred by Amy and Anita to legally defend against or otherwise resist the contest or attack by Carl and/or Curtis are to be paid from the Trust as expenses of administration.

As a more specific example, but not by way of limitation, in his First Amended Petition for Declaratory Judgment, Carl “*seeks declaratory relief construing the...terms...[of the] Family Trust.*” The Brunsting Family Living Trust specifically prohibits an action to construe or contest the trust. Carl also seeks to impose a constructive trust, another claim that is specifically prohibited by Brunsting Family Living Trust.

Likewise, as a non-exclusive/non-limiting example, Curtis also seeks a declaration by the Court construing the terms of the Brunsting Family Living Trust, including, in particular, a finding that the QBDs affecting the terms of the Brunsting Family Living Trust are invalid. Curtis’ requests violate the Brunsting Family Living Trust’s terms.

Consistent with the Founders’ wishes and cautions, the Co-Trustees request that the Court enter one or more declarations setting forth and confirming all or any of the Co-Trustees’ assertions above. The Co-Trustees further seek a recovery/reimbursement of all attorney’s fees, expenses and court costs associated with this matter, whether in accordance with the terms of the Brunsting Family Living Trust; in accordance with the Declaratory Judgment Act; as a sanctions/penalty for actions taken in bad faith, in equity, or otherwise.

### **III. PRAYER**

Co-Trustees, Amy Brunsting and Anita Brunsting, pray that the Court declare:

- A. Carl and Curtis have taken actions that trigger the forfeiture provisions;
- B. Carl and Curtis’ actions in triggering the forfeiture provisions were without just cause and were not in good faith;

- C. The forfeiture provisions are enforceable and applicable in this case;
- D. By their actions, Carl and Curtis have forfeited their interests in the trust as though they had predeceased the Founders;
- E. All expenses, including attorney's fees, incurred to legally defend against or otherwise resist the contest or attack by Carl and/or Curtis are to be paid from the Trust as expenses of administration.
- F. Co-Trustees be reimbursed their reasonable attorneys' fees and court costs;
- G. Co-Trustees recover prejudgment and post-judgment interest as allowed by law.
- H. Co-Trustees receive such other and further relief, general and special, legal and equitable, to which they may be entitled.

Respectfully submitted,

GRIFFIN & MATTHEWS

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 4<sup>th</sup> day of November 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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