TAB 45

CAUSE NO. 412249-401

CANDACE LOUISE CURTIS Plaintiff	§ § §	IN THE STATUTORY PROBATE COURT
VS	§ §	OF HARRIS COUNTY, TEXAS
ANITA K. BRUNSTING AND AMY RUTH BRUNSTING, et al. and Does 1-100, Defendants	§ § § §	PROBATE COURT NO.4

MOTION TO VACATE OR SET ASIDE FEBRUARY 25, 2022, ORDER

PLAINTIFF / COUNTER-DEFENDANT, CANDACE LOUISE CURTIS, files this MOTION TO VACATE OR SET ASIDE THE FEBRUARY 25, 2022, ORDER, granting summary judgment (1) disposing of all of CURTIS' claims for relief and (2) unlawfully subjecting CURTIS' **vested** 1/5 share of the Survivor's and Decedent's trusts and/or personal asset trust to forfeiture for the payment of DEFENDANTS' attorney's fees. The Order constitutes and abuse of discretion, for the following reasons:

A. *This Court lacks subject matter jurisdiction over the BRUNSTING FAMILY LIVING TRUST by Tex. Est. Code 32.005, 32.006, 32.007, lack of a probate estate or independent executor, Curtis vs. Brunsting, Registration of Foreign Judgment, Void Remand Order and Void Order of Transfer*

B. *Former Judge Kathleen Stone failed to render judgment and lacks authority to sign the Order*

C. *CO-TRUSTEES' Motion and the Court's order were untimely*

D. *CO-TRUSTEES' Motion fails to identify each element of PLAINTIFF'S claims upon which they allege there is no evidence*

E. *There was ample evidence in the record that CO-TRUSTEES violated their fiduciary duties, converted CURTIS' interest to their own use and benefit, and committed fraud.*

F. *The Court violated CURTIS' Constitutional right to due process in failing to declare the August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to living trust void and severable from the trust.*

G. *DEFENDANTS have not satisfied their burden of producing evidence to prove that CANDACE CURTIS violated the "no contest" provision of the Restatement*

H. *The Court erred in ruling that Co-trustees' attorneys' fees shall be taken out of CANDACE CURTIS' share, as CANDACE CURTIS' share is not alienable or subject to claims of judgment creditors*

I. *Attorneys' fees may not be granted in Texas absent a contract or statute authorizing attorneys' fees.*

J. *The Orders violated CANDACE CURTIS' Constitutional right to due process—notice and a meaningful opportunity to be heard.*

I. STANDARD OF REVIEW

1. A trial Court's review of an order granting summary judgment[1] is reviewed de novo. *Joe v. Two Thirty-Nine Joint Venture*, 145 S.W.3d 150, 156-57 (Tex. 2004). In reviewing a

[1] Rule 166a (traditional) and Rule 166a(i) states that summary judgment may be granted:

> **(a)For Claimant.** A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> **(c)Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) **the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records**, if any, **on file at the time of the hearing, or filed thereafter** and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the **issues expressly set out in the motion or in an**

traditional summary judgment, the appellate court considers whether the successful movant at the trial level carried the burden of showing that there is no genuine issue of material fact, and that judgment should be granted as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

2. No-evidence motions are reviewed under the same standard as a directed verdict. *King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750-51 (Tex. 2003).* The Appeals Court reviews the evidence in the light most favorable to the nonmovant and disregard all contrary evidence and inferences. Id. A trial court must grant a proper no evidence motion for summary judgment, unless the nonmovant produces more than a scintilla of probative evidence to raise a genuine issue of material fact on the challenged element of the claim. TEX.R. Civ. P. 166a(i). Notably,

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answer or any other response. Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal…

(d)Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

more than a scintilla of evidence exists in the federal record DEFENDANTS have been trying to escape since 2013.

III. FACTS AND PROCEDURAL HISTORY

3. NELVA AND ELMER BRUNSTING established the BRUNSTING FAMILY LIVING TRUST October 10, 1996. The Trust was superseded and amended in its entirety by the Restatement of January 6, 2005. The 1st amendment to the trust occurred in 2007. No valid amendments exist after ELMER BRUNSTING'S June 9, 2008, incapacity, when the trust could no longer be amended or revoked—except by Qualified Beneficiary Designation applicable only to the disposition of the settlor's share of assets. The Controlling Instruments are the Restatement of 2005, 1st Amendment of 2007, and 6/15/10 Qualified Beneficiary Designation. The August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment is void and severable from the trust.[2] Certificates of Trust executed after June 9, 2008, are likewise, void.

4. While the trust allowed NELVA BRUNSTING to alter the disposition of her share via Qualified Beneficiary Designation, the record reveals that the only valid "QBD" was executed June 10, 2010. *Exhibits C and D, which are documents attached to CO-TRUSTEES' Motion that remain undisputed by the parties.* The August 25, 2010, QBD is disputed because it is void on its face for the lack of two attesting witnesses—aside from other objectionable defects.

5. The surviving settlor, NELVA BRUNSTING, passed away November 11, 2011, with Article X of the Restatement requiring distribution of the trust(s) within a reasonable time after payment of certain expenses listed in the trust.

6. PLAINTIFF CANDACE CURTIS sent two demand letters, requesting an accounting of the trusts in December of 2011 and January 2012. Because these letters were ignored,

[2] Exhibit A, January 6, 2005, Restatement, Exhibit B, 2007 1st Amendment to Restatement, Exhibit C, 6/15/10 QBD and Exhibit D, void 8/25/10 QBD and Testamentary Power of Appointment

CANDACE CURTIS sued AMY BRUNSTING AND ANITA BRUNSTING in federal court under diversity jurisdiction, 28 U.S.C. § 1332.[3]

7. PLAINTIFF'S 2012 federal lawsuit is the **first lawsuit** between the parties, in which California Plaintiff, CANDACE CURTIS' sued acting CO-TRUSTEES, ANITA AND AMY BRUNSTING ("CO-TRUSTEES") in the *Southern District of Texas, Houston Division, Cause No. 4:12-cv-00592*. The suit was brought to compel an accounting and disclosures and for breach of fiduciary duty, constructive trust, intentional infliction of emotional distress, and fraud concerning the BRUNSTING SURVIVOR AND DECEDENT'S FAMILY LIVING TRUSTS.

8. The federal case was properly filed in the Southern District of Texas based upon diversity jurisdiction, 28 U.S.C. §1332, but was[4] dismissed *sua sponte* on March 8, 2012, by the district judge on the basis of the probate exception to federal jurisdiction. The Court erred in dismissing the case under the probate exception, prompting an appeal to the 5th Circuit Court of Appeals by CANDACE CURTIS—which was successful when the panel ruled in CURTIS' favor in 2013. The 5th Circuit held that the probate exception did not apply, and this dispute was proper in the U.S. District Court based upon diversity jurisdiction. *See Curtis vs. Brunsting,* 710 F.3d 406 (5th Cir. 2013).[5]

9. On April 2, 2012, Vacek and Freed filed the will of ELMER BRUNSTING *(Estate of Elmer Brunsting, Cause No. 412248*) and the will of NELVA BRUNSTING *(Estate of Nelva Brunsting, Cause No. 412249*) with the Harris County Probate Court Clerk. Both wills were pour over wills and required only the filing and approval of an inventory to conclude probate. This was

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[3] Exhibit E, Original Complaint of *Candace Louise Curtis vs. Anita K. Brunsting, et al. Cause No. 4:12-cv-00592 (S.D. Tex. 2012).*

[4] Aside from this case and subsequent appeal, the only other matter filed by CURTIS was an action for racketeering / organized crime which was dismissed under Federal Rule of Civil Procedure 12b(6), which is not at issue in this case because DEFENDANTS do not seek fees relative to this case.

[5] Exhibit F, Curtis vs. Brunsting 710 F.3d 406 (5th Cir. 2013)

accomplished April 5, 2013, when the Court approved the inventory and closed the case, issuing a drop order. *See Drop Order April 5, 2013.*[6]

10. On April 5, 2012, CO-TRUSTEES submitted a partial accounting prepared by estate planning attorneys, Vacek and Freed. This partial accounting revealed the misapplication of fiduciary assets, unauthorized and unnoticed to the remaining beneficiaries, CANDACE CURTIS, CARL BRUNSTING, AND CAROL BRUNSTING.[7] It remained insufficient to qualify as a proper trust accounting in breach of the trustees' duty to keep accurate books and records.

11. On April 15, 2012, while the federal case was on appeal, Attorney Bobbie Bayless filed an application in Harris County Probate Court No. 4 to probate the will of NELVA BRUNSTING and issue letters testamentary to independent administrator CARL BRUNSTING.

12. On April 25, 2012, the record for CURTIS' 5th Circuit appeal was complete and before the panel for consideration.

13. On April 28, 2012, the Harris County probate court issued letters testamentary, naming CARL BRUNSTING as independent executor of the Estate of Nelva Brunsting.

14. On January 9, 2013, the Fifth Circuit Court of appeals reversed and remanded the matter to the federal district court, holding that the probate exception did not apply to this lawsuit and the parties were completely diverse. Exhibit F, *Curtis vs. Brunsting*, 710 F.3d 406 (5th Cir. 2013).

15. The Fifth Circuit Opinion states as follows:[8]

> *"Plaintiff, the beneficiary of a trust, sued defendant co-trustees of the trust, for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas dismissed the case for lack of subject matter jurisdiction,*

[6] Exhibit G, Drop Order April 5, 2013.
[7] CO-TRUSTEES AMY AND ANITA BRUNSTING are also beneficiaries of the trusts.
[8] Exhibit F, *Curtis v Brunsting 704 F.3d 406, 412 (Jan 9, 2013)*

concluding that the case fell within the probate exception to federal diversity jurisdiction. The beneficiary appealed."
"The circuit court found that the case was outside the scope of the probate exception under the first step of the inquiry because the trust was not property within the custody of the probate court. Because the assets in a living or inter vivos trust were not property of the estate at the time of decedent's death, having been transferred to the trust years before, the trust was not in the custody of the probate court and as such the probate exception was inapplicable to disputes concerning administration of the trust..."
"...The record also indicated that there would be no probate of the trust's assets upon the death of the surviving spouse. Finding no evidence that the trust was subject to the ongoing probate proceedings, the case fell outside the scope of the probate exception. The district court below erred in dismissing the case for lack of subject-matter jurisdiction." Curtis v Brunsting 704 F.3d 406, 412 (Jan 9, 2013).

27. On January 29, 2013, while the federal suit was in transit back to the Southern District of Texas, Attorney Bobbie G. Bayless, filed legal malpractice claims against the Brunsting's estate planning attorneys, Vacek and Freed law firm, in *Harris County Texas Judicial District Court 164,_Cause No. 2013-05455*, representing Carl Brunsting as "Executor for the estates of Elmer and Nelva Brunsting".

28. On April 5, 2013, the probate matter, *the Estate of Nelva Brunsting, Cause No. 412429,* was closed by the Court's approval of the inventory and issuance of a drop order, closing the case. This prevented any subsequently transferred case from being deemed "ancillary", "incident to" or "related to" an estate matter in this conundrum of cases.

29. After returning to the Southern District of Texas, Candace Curtis reapplied for a preliminary injunction. Hearing was had April 9, 2013, and injunction issued with a Memorandum and Order of Preliminary Injunction issued April 19, 2013.[9]

30. Judge Kenneth Hoyt of the U.S. District Court for the Southern District of Texas found a substantial likelihood that CANDACE CURTIS would prevail on the merits of her claims against

[9] Exhibit H, *Memorandum of preliminary injunction published April 19, 2013.*

CO-TRUSTEES, recognizing numerous breaches of fiduciary duty to the beneficiaries. *Exhibit H.* His Order found evidence on the elements of CURTIS' claims and specifically noted that the only thing left to be accomplished by CO-TRUTEES was to distribute the trust assets. After 11+ years, the trusts have still not been distributed.

31. Also on April 9, 2013, Bobbie Bayless filed CARL BRUNSTING'S PETITION FOR DECLARATORY JUDGMENT, for Accounting, Damages, the Imposition of a constructive trust, injunctive relief and disclosures, naming AMY BRUNSTING, ANITA BRUNSTING, AND CAROL ANN BRUNSTING as defendants, with CANDACE CURTIS a nominal defendant only for purposes of declaratory judgment. This lawsuit essentially mirrored the relief CURTIS had already sought, pending in the *Southern District of Texas, Cause No. 4:12-cv00592.*

32. On April 10, 2013, Defendants' Counsel, George Vie III, in 4:12-cv-592 filed notice of a lawsuit brought in the state probate court.

33. Due to the continued failure of CO-TRUSTEES failure to provide a proper accounting for 2 ½ years, Judge Hoyt found that the appointment of a special master was necessary and in the best interests of all parties[10]. A Special Master was appointed May 9, 2013.

34. The Special Master's Report was filed August 8, 2013, finding that CO-TRUSTEES failed to maintain proper books and records and account to the beneficiaries, noting missing receipts for certain disbursements, and concluding that the Quicken files kept by CO-TRUTEES were "more for use as an electronic checkbook to keep bank balances as opposed to a more fully integrated bookkeeping system.[11]"

35. Due to Judge Hoyt's admonition that CANDACE CURTIS retain counsel to complete discovery, CURTIS retained JASON OSTROM OF OSTROM AND SAIN to complete

[10] Exhibit I, *See Order Appointing Special Master.*
[11] Exhibit J1, Special master's report, page 3.

discovery. JASON OSTROM appeared in federal court for CURTIS, but never filed a NOTICE OF APPEARANCE in probate court No. 4—to give him authority to act on CURTIS' behalf in probate court.

36. On May 9, 2014, JASON OSTROM filed a 1st Amended Complaint, naming CARL BRUNSTING as an involuntary plaintiff to pollute diversity, stating that a declaratory judgment action was necessary because relief could not be had without the addition of necessary, indispensable parties for complete adjudication. Naming CARL BRUNSTING as an involuntary PLAINTIFF was improper. CARL BRUNSTING should have been sued as a nominal DEFENDANT like CAROL BRUNSTING—the remaining beneficiary.

37. On May 9, 2014, OSTROM filed a Motion to Remand in the federal court and on May 28, 2014, OSTROM filed a Motion to Enter Transfer Order[12] in the probate court, when this case had never been removed from any State Court and it could not be "transferred" between federal and probate court. The basis of the "remand"[13] was the probate exception to federal jurisdiction, held inapplicable by the 5th Circuit Court of appeals, but subsequently deemed to apply by OSTROM'S wrongful pollution of diversity—all in an attempt to force CURTIS' federal lawsuit into probate court where the attorneys could raid the trusts free from Judge Hoyt's supervision.

38. On May 15, 2014, Judge Kenneth Hoyt signed the Order granting Plaintiff's motion to remand, admittedly issued in error by Judge Hoyt's September 30, 2020, Order denying Plaintiff Rule 60 Relief based on fraud on the court.[14] On June 3, 2014, probate judge Christine Butts signed the unlawful Order of Transfer of Federal Cause No. 4:12-cv-00592; Candace Louis Curtis vs. Anita Kay Brunsting et al., to probate court No. 4. The remand was signed May 15th,

[12] Exhibit J2, Motion to Enter Transfer Order
[13] Exhibit K1 Motion to Remand
[14] Exhibit X Order denying Plaintiff's Motion for Rule 60 Relief.

2014,[15] with Judge Hoyt unaware that the case was never removed to his court to merit remand. *See Order Granting Plaintiff's Motion to Remand and Court's Report denying CURTIS' Rule 60 Relief dated September 30, 2020, admitting that remand was an improper remedy*, but asserting that the federal court had lost jurisdiction of the case. Though JASON OSTROM never entered an appearance in probate court No. 4 to give him authority to act on CURTIS' behalf, he signed the Transfer Order granted June 3, 2014[16]. The transfer Order was signed to render CANDACE CURTIS' federal claims "ancillary to" or "incident to" an existing estate, when no estate was open since April 5, 2013.

39. CANDACE CURTIS' federal case was allegedly made part of the probate court record on February 9, 2015, designated *ancillary case 412249-402, the Estate of Nelva Brunsting* instead of the appropriate caption, Cause No. 4:12-cv-00592; *Candace Louise Curtis vs. Anita K. Brunsting et al.*

40. On March 16, 2015, an order was signed by Judge Christine Butts of Probate Court No.4, consolidating CARL BRUNSTING'S declaratory judgment action and CANDACE CURTIS' federal claims into *Cause No. 412429-401[17], the second Estate of Nelva Brunsting.* CURTIS' status as the PLAINTIFF suddenly changed to nominal defendant and the caption of the federal matter disappeared, bringing into question the very existence of CURTIS' federal claims, which appeared to vanish into thin air.

41. On or about February 17, 2015, and despite the closed probate and his incapacity, CARL BRUNSTING resigned as Independent Executor of the *Estate of Nelva Brunsting.* Two years after the estate was closed, CARL BRUNSTING attempted to unlawfully substitute his wife, DRINA BRUNSTING, as Independent Executor, when CANDACE CURTIS was named

[15] Exhibit K2, Order to remand
[16] Exhibit L1, Order of Transfer dated June 3, 2014
[17] Exhibit L2, Agreed Consolidation Order

successor Independent Administrator under the applicable will—and there was nothing left to administer in a closed estate. *See Will of Nelva Brunsting filed as Cause No. 412249 in Harris County Probate Court No. 4.*

42. CARL BRUNSTING'S lack of capacity deprived him of the ability to resign, as well as standing to serve, requiring a Court order to appoint a successor independent administrator—something that was not legally possible since the estate was closed on or about April 5, 2013. No independent administrator has been appointed for the closed estate since then.

43. Pursuant to Texas Estates Code Section 32.001[18] f/k/a Tex. Prob. Code Section 5A, the Vacek and Freed malpractice action was transferred to Probate Court No. 4 on April 4, 2019, as an ancillary case to the closed *Estate of Nelva Brunsting and designated* Cause No. 412249-403.

44. Though Cause Numbers 412249-401 (Estate of Nelva Brunsting)[19], 412249-402 (Curtis vs Brunsting designated Estate of Nelva Brunsting and later consolidated with 401), 412249-403 (Legal malpractice action against estate planning attorneys, Vacek and Freed filed by CARL BRUNSTING), 412249-404 (Statutory Bill of Review) and 412249-405 (severed claims of CARL BRUNSTING vs. AMY AND ANITA BRUNSTING from 401 on March 11, 2022) were all deemed ancillary matters to the *Estate of Nelva Brunsting* (originally filed as 412249), the Estate had been closed since April 5, 2013. This left no estate for any of these matters to be deemed ancillary to.

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[18] Sec. 32.001. GENERAL PROBATE COURT JURISDICTION; APPEALS. (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction also has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.(b) A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.

[19] Cause No. 412249-401 allegedly included claims and counterclaims between CARL BRUNSTING (incapacitated since 2015 when he resigned as independent administrator) and CAROL BRUNSTING, claims and counterclaims between CARL BRUNSTING and CO-TRUSTEES, AMY AND ANITA BRUNSTING (similar to the claims asserted against CO-TRUSTEES by CANDACE CURTIS), and the federal lawsuit filed by CANDACE CURTIS against ANITA AND AMY BRUNSTING (CO-TRUSTEES). See Cause No. 412249-401.

45. After consolidating CURTIS' federal claims with Cause No. 412249-401 in 2015, the Court recently severed CURTIS' claims against AMY AND ANITA BRUNSTING[20], along with CO-TRUSTEES' counterclaim for forfeiture of CANDACE CURTIS' vested share of a spendthrift trust, which is not alienable or subject to claims of creditors. *See Response to Candace's Motion for Distribution of Trust Funds and Response to Carl's Motion for Distribution of Trust funds[21], in which Defendants admit:*

1. Distributions to pay legal-fee creditors are not authorized by the trust and therefore, the motions must be denied

2. Distributions to pay legal-fee creditors are prohibited by the trust, and therefore, the motions must be denied.

3. The Court lacks jurisdiction to decide the distributions for legal-fee creditor issue because there are no allegations of fraud, misconduct, or clear abuse of discretion with respect to Candace's and Carl's request that the trust pay their attorneys' fees.

46. Despite the admissions above, CO-TRUSTEES' seek over $537,000 in attorneys' fees from CURTIS' personal asset spendthrift trust and/or share of the BRUNSTING FAMILY TRUST, which is immune from judgment creditors and not alienable, voluntarily or involuntarily by this Court's Order.

47. On June 12, 2020, CANDACE CURTIS registered the federal lawsuit was a foreign judgment in *Harris County District Court No. 151, Cause No. 2020-35401*[22], seeking enforcement of the memorandum and order granting Preliminary Injunction, issued by Judge Hoyt April 19, 2013. According to statute, the registration of foreign judgment immediately became an enforceable judgment in Texas, requiring the trustees to distribute the trust in

[20] Exhibit M, Order of Severance dated March 11, 2022.
[21] Exhibit N, *See Response to Candace's Motion for Distribution of Trust Funds and Response to Carl's Motion for Distribution of Trust funds*
[22] Exhibit O, Petition to register foreign judgment

accordance with Article X by creating 5 separate personal asset trusts. The Order is enforceable in Texas and may not be violated regardless of the probate court's attempts to evade it. CURTIS' interest vested on the date of the surviving settlor's death, November 11, 2011. It has at all times been part of spendthrift trusts and is not alienable or subject to judgment creditors' claims.

48. On or about March 11, 2022, the Court granted CO-TRUSTEES' motion for severance of CARL'S lawsuit against the CO-TRUSTEES, designating the severed matter Cause No. 412249-405. The severance was subsequent to the CO-TRUSTEES Rule 11 Agreement with CARL BRUNSTING (void for CARL'S incapacity to sign) to forego CO-TRUSTEES' claim for forfeiture against CARL BRUNSTING only but not CANDACE CURTIS, when CARL'S claims against them were nearly identical to CURTIS' claims. This breached CO-TRUSTEES' duty of loyalty and equal treatment of the beneficiaries to CURTIS.

49. On February 25, 2022, Kathleen Stone appeared in place of Probate Court No. 4 Judge James Horwitz for a pre-trial conference and hearing on COTRUSTEES' Motion for Sanctions and contempt and to exclude evidence against CURTIS. **Without first rendering summary judgment against CURTIS in open court, Stone simply announced that she had talked to Judge Horwitz and was granting CO-TRUSTEES' Motion for summary judgment against CURTIS.**[23] The order was based upon the void August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to Living Trust Agreement.

50. The Court failed to consider the multi-part response to summary judgment filed by CURTIS in 2015 and 2021, and failed to consider Judge Hoyt's Memorandum and order of Preliminary Injunction or the Special Master's Report, which proved CO-TRUSTEES breached their fiduciary duties and engaged in self-dealing, granting the untimely Motion against CURTIS. The February 25, 2022, Order purports to unlawfully dispose of all of her claims (including

[23] Exhibit P, Transcript of Oral Hearing February 25, 2022, Exhibit S, February 25, 2022, Order.

declaratory judgment, breach of fiduciary duty, conversion, fraud, intentional infliction of emotional distress) and subject her inalienable 1/5 interest in the spendthrift trusts to the claims of CO-TRUSTEES' attorneys for fees.

51. The August 25, 2010, QBD was not sworn to by CO-TRUSTEES as legitimate, not properly in evidence, and was void on its face by the lack of two witnesses—rendering it severable from the trust. This meant that the only "no contest" provision applicable was the clause in the 2005 Restatement.

52. KATHLEEN STONE abused her discretion in signing the void February 25, 2022, Order, which must be vacated and set aside for the reasons stated herein.

53. CURTIS has objected to KATHLEEN STONE as a former judge without a bond and oath on file, required by the Estates Code, Government Code and Texas Constitution. *See Objection to Former Judge Kathleen Stone for which Stone should have disqualified herself and voided the order.*[24]

IV. THE BRUNSTING FAMILY LIVING TRUST

54. On October 10, 1996, ELMER AND NELVA BRUNSTING established the BRUNSTING FAMILY LIVING TRUST, known as the:

ELMER H. BRUNSTING and NELVA E. BRUNSTING, Trustees, or the Successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended. ("BRUNSTING FAMILY LIVING TRUST")

And/or

[24] Exhibit R, *See Amended Objection to Former Judge Kathleen Stone.*

ELMER H. BRUNSTING and NELVA E. BRUNSTING, Trustees, or the successor trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

55. On January 12, 2005, the 1996 BRUNSTING FAMILY LIVING TRUST was amended and superseded in its entirety by the 2005 Restatement to the Brunsting Family Living Trust. ANITA KAY RILEY N/K/A ANITA BRUNSTING was removed as successor trustee by the 2005 Restatement and CARL BRUNSTING AND AMY BRUNSTING were designated successors, with CANDACE CURTIS sole alternate.

56. Article IC of the Restatement states that the trust was created for the use and benefit of ELMER H. BRUNSTING AND NELVA E. BRUNSTING, and to the extent provided by the trust, for other trust beneficiaries listed as:

CANDACE LOUIS CURTIS	Born March 12, 1953,
CAROL ANN BRUNSTING	Born October 16, 1954,
CARL HENRY BRUNSTING	Born July 31, 1957,
AMY RUTH TSCHIRHART	Born October 7, 1961,
ANITA KAY BRUNSTING	August 7, 1963,

57. Article IV was subsequently revoked and amended September 6, 2007, by the 1st Amendment, which superseded the Restatement's Article IV in its entirety.

58. Elmer was declared non compos mentis on June 9, 2008. No changes could be made to the Decedent's trust after that date, including appointment of successor trustees.

59. While a QBD properly executed by the surviving founder could alter the disposition of a Founder's share of trust assets, a QBD did not allow any amendment to change the designation of successor trustees after the death or incapacity of either SETTLOR, which occurred June 9, 2008—when ELMER was declared non compos mentos.

60. On July 1, 2008, an Appointment of Successor Trustee was allegedly executed by Nelva *based on and after Elmer's incompetence*, but this document is void for contradicting the trust as

a prohibited amendment after ELMER was no longer able to make legal decisions.[25] ELMER BRUNSTING did not sign the document. Since ANITA BRUNSTING was removed by the Article IV of the 2005 Restatement and AMY BRUNSTING was removed by the 1st Amendment (replacing Article IV in its entirety) this purported July 1, 2008, Appointment of Successor Trustee is void.

61. NELVA BRUNSTING executed a Qualified Beneficiary Designation on her share June 15, 2010[26], for the purpose of permitting CURTIS to receive an early distribution of her inheritance due to her son's medical needs. This was consistent with NELVA'S authority to alter the disposition of ***her share of the Survivor's trust***. It did not alter the designation of successor trustees in the trust document and could not alter the disposition of ELMER'S share. *Exhibit C, 6/15/10 Qualified Beneficiary Designation.*

62. Clearly recognizing the July 1, 2008, power of appointment to be void, Vacek and Freed drafted a Qualified Beneficiary Designation and Testamentary Power of Appointment, naming ANITA KAY BRUNSTING as Successor Trustee. DEFENDANTS allege that NELVA BRUNSTING signed the document on August 25, 2010 ("8/25/10 QBD"). *See 8/25/10 QBD and Testamentary Power of Appointment.* Given the fact that the 8/25/10 QBD was a testamentary instrument that only became effective, if at all, upon the death of NELVA BRUNSTING, it could only be enforced if it satisfied the statutory prerequisites of a testamentary instrument, as provided for in Article 251.051 of the Texas Estates Code. The 8/25/10 QBD is void on its face for the lack of signatures by two witnesses. Article 251.051 of the Texas Estates Code.

63. CARL BRUNSTING was in a coma July 3, 2010, leaving CANDACE CURTIS the sole

[25] Exhibit S, July 1, 2008, Appointment of Successor Trustee
[26] Exhibit C, 6/15/10 QBD and D, 8/25/10 QBD and Testamentary Power of Appointment.

successor trustee via the 2007 1st Amendment to the Trust. This is a fact the court was required to determine by virtue of CURTIS' declaratory judgment action.

64. ELMER BRUNSTING passed away April 1, 2009, at which time the trust was divided into a Decedent's and Survivor's Trust. The surviving founder, NELVA BRUNSTING passed away November 11, 2011, which is the date CANDACE CURTIS' share of the trusts vested and was required to be distributed to a spendthrift trust for CANDACE'S benefit for life. After payment of certain last expenses, the trusts were required to be distributed within a reasonable period of time, according to Article X of the Restatement.[10]

65. Article X required the TRUSTEE(S) to distribute the remaining trust(s) assets at the time of the SURVIVING SETTLOR'S death (or a reasonable time thereafter) in equal shares of 1/5 to CANDACE LOUISE CURTIS[27], CAROL ANN BRUNSTING, CARL HENRY BRUNSTING, AMY RUTH TSCHIRHART n/k/a AMY BRUNSTING, and ANITA KAY BRUNSTING, subject to any valid QBD altering a settlor's share and the payment of the following expenses: (a) expenses of last illness, funeral and burial expenses of the surviving founder, legally enforceable claims against the surviving founder, (c) expenses of administering the surviving founder's estate, (d) any inheritance, estate or other death taxes payable by reason of the surviving founder's death, together with interest and penalties thereon, and (e) statutory or court ordered allowances for qualifying family members. *Article VIII D, Restatement, Exhibit A.* The same expenses identified above were permitted to be paid from the DECEDENT'S share upon ELMER BRUNSTING'S death.

[27] While the entire trust was inalienable and not subject to claims of the beneficiaries' creditors (including judgment creditors as in this case), CANDACE CURTIS'1/5 share vested 11/11/11 and was to be held in a spendthrift trust, which was not alienable or subject to claims of creditors because she was not the trustee of her personal asset trust required to be created by the TRUSTEE(S), but admittedly not done in breach of their fiduciary duties.

66. Although the BRUNSTING FAMILY LIVING TRUST contains a "no contest clause", it does not prohibit beneficiaries from seeking to compel the trustees to account, distribute, or perform their fiduciary duties and does not prohibit any beneficiary from filing suit on any valid claims unless the beneficiary brought such claim to enlarge their share of the trust at the expense of another beneficiary. The "no contest" clause provides in Article XI C:

> ...Founders do not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact unless the proceeding is originated by the Trustee or with the Trustee's written permission.
>
> Any person, agency or organization who shall originate (or who shall cause to be instituted) a judicial proceeding to construe or contest this trust, or seeking to impress a constructive or resulting trust, or alleging any other theory which, if assumed as true, would enlarge (or originate) a claimant's interest in this trust...without the trustee's written permission, shall forfeit any amount to which that person, agency, or organization is or may be entitled and the interest of such litigant or contestant shall pass as if he or she had predeceased us, regardless of whether or not such contestant is a named beneficiary. Restatement XI.

66. CANDACE LOUIS CURTIS never filed any claim to enlarge her share of the trust at the expense of another beneficiary, but sought to enforce the trust in accordance with the settlor's intentions at all times. The 2013 federal lawsuit and preliminary injunction proves this. Id.[28]

67. Similarly, CANDACE CURTIS never challenged the "trust" but only the void 8/25/10 QBD which violated the express terms of the trust and is void on its face, rendering severable. CANDACE CURTIS did not assert any cause of action which would "enlarge" her interest in the trust. Based on Article XIV O and Article XII of the Restatement (imposing liability on the Trustees for bad faith, willful misconduct and/or gross negligence), CANDACE CURTIS'

[28] Nor did CURTIS need AMY OR ANITA'S permission to file suit because she is the de jure sole trustee of both trusts by the terms of the instrument itself.

lawsuit against the Co-trustees did not violate the "no contest" clause of the Restatement. The August 25, 2010, QBD is void and severed from this trust under the Article 251.051 of the Texas Estates Code and the terms of the Decedent's and Survivor's Trusts.

68. ANITA AND AMY BRUNSTING are the parties who asserted a theory which, if assumed true, would enlarge their share at CURTIS' expense. CO-TRUSTEES violated the no contest clause of the Restatement Article XI C. This necessarily means that their shares flow to their descendants, *See Exhibit A Restatement XI C and Exhibit D, August 25, 2010, QBD, respectively.*

69. AMY AND ANITA BRUNSTING challenged the trust by the very execution of the void, severable 8/25/10 QBD, contradicting Article XI Section C of the Restatement. According to the irrevocable trust and CURTIS' vested interest in her 1/5 share, even had she violated Article XI Section C, her interest would flow to her descendants per stirpes, not increase the share of any beneficiary or be subject to any judgment creditor, as prohibited by the "no contest" clause of Article XI Article C of the Restatement cited herein.

70. Restatement Article XIV Section O provides:

> If any provision of this agreement is declared by a court of competent jurisdiction to be invalid for any reason, such invalidity shall not affect the remaining provisions of this agreement. The remaining provisions shall be fully severable, and this agreement shall be construed and enforced as if the invalid provision had never been included in this agreement.

71. Restatement Article XI Section C, provides the standard for forfeiture to one's descendants:

> ...originating (or causing to be instituted) a judicial proceeding to construe or contest this trust instrument...or alleging any other theory which, ***if assumed as true, would enlarge (or originate) a claimant's interest in this trust...***

72. The unsworn Qualified Beneficiary Designation and Testamentary Power of Appointment dated August 25, 2010, is void ab initio because it violates the trust, does not specifically amend the prior unrevoked Qualified Beneficiary Designation, dated June 15, 2010, and fails for the lack of two witnesses as a testamentary instrument, notwithstanding the fact that it is not in evidence by the failure of DEFENDANTS to include an affidavit attesting to its validity and authenticity.[29]

73. Significantly, the 8/25/10 QBD does not have to be valid for ANITA and AMY BRUNSTING'S shares to be forfeited to their descendants. Article XI Section C assumes the theory to be true, looking at the intent of the beneficiaries in bringing the claim "to enlarge their share." By attempting to unlawfully take CANDACE'S share to pay their attorneys' fees incurred in defending themselves, ANITA AND AMY BRUNSTING attempted to enlarge their share at CURTIS' expense, thereby forfeiting their shares to their descendants.

74. This is without even considering whether the document is digitally forged—of which there is some evidence, but Plaintiff Curtis does not have the burden of bringing forth evidence. Federal Judge Hoyt granted CURTIS injunctive relief, recognizing irregularities in the alleged trust documents produced by Anita Brunsting, which were missing pages, among other problems. The 8/25/10 QBD was produced to CURTIS in three different versions as "duplicate originals".[30] The three QBD's are not reflected in CANDACE FREED'S notary logs or notes.[31] The Case History Notes provided in discovery by Candace Freed have an approximate 2-week gap both before and after August 25, 2010, in notary entries. NELVA BRUNSTING certified by handwritten note that she did not execute the 8/25/10 QBD, re-appointing ANITA BRUNSTING.

75. In a further effort to convert CURTIS' vested interest, ANITA and AMY BRUNSTING'S attorneys filed a traditional and no evidence motion for summary judgment against CANDACE

[29] Exhibits C and D.
[30] Exhibit V, 3 signature pages of 8/25/10 QBD & Testamentary Power of Appointment
[31] Exhibit T and U, Log and Notes of Candace Freed produced with oral deposition.

CURTIS in June of 2015 and November 5, 2021, alleging that she forfeited her share to them by violating the void 8/25/10 QBD—not in evidence. The 2015 Motion for Summary Judgment was answered by CURTIS in multiple parts as well as the November 5, 2021, untimely Motion for summary judgment, but the Court failed to timely rule upon the Motions prior to the expiration of the deadlines set forth in 2021 docket control order.[32]

76. ANITA AND AMY BRUNSTING'S traditional and no evidence motion for summary judgment was untimely filed on November 5, 2021, beyond the October 15, 2021, deadline set by the Court's June 2021 docket control order, without evidence of a valid 8/25/10 QBD and Testamentary Power of Appointment.

77. CURTIS nevertheless filed a further 5-page response to said motion and the court set the matter for consideration by submission on December 14, 2021—the deadline for hearing summary judgment motions. The Court's February 25, 2022, Order has not been rendered upon or signed by the presiding judge, but by a former judge without notice to the parties and admittedly without having reviewed the Motion for Summary Judgement—beyond the deadline for ruling on the Motion.

78. Furthermore, sufficient evidence exists in the record to support CURTIS' claims for conversion, breach of fiduciary duty, fraud, constructive trust, and other claims, via the Federal Court's 2013 Preliminary Injunction granted to CANDACE CURTIS, finding a substantial likelihood that she would prevail on her claims. Likewise, there is evidence of willful misconduct and bad faith on the part of ANITA BRUNSTING, who was found to have engaged in prohibited self-dealing and comingling, with irregularities in the trust documents presented to the federal judge.

[32] Exhibit Y, Docket Control Order June 2021

79. The special master's report proves that ANITA BRUNSTING engaged in fraud on the beneficiaries through the prohibited self-dealing and comingling of more than $150,000 after Nelva resigned as trustee and Anita took over. The Special Master's Report reveals that CO-TRUSTEES wasted $180,000 in taxes paid as a result of failing to distribute the income as the trust required.

80. CO-TRUSTEES' admit breaching their fiduciary duties by failing to account and distribute as required by Article X. *See Federal Preliminary Injunction, memorandum and order, Federal Master's Report, and discovery responses of AMY AND ANITA BRUNSTING, all revealing breaches of fiduciary duties, including but not limited to the duty to account, distribute, fully disclose all relevant information to the beneficiaries, treat all beneficiaries equally, refrain from self-dealing, avoid willful misconduct, bad faith and/or gross negligence.* AMY'S attorney, Neil Spielman, admitted on the record that the trust was not distributed for 11+ years due to CANDACE CURTIS' initiation of litigation to make them distribute the funds. *See Unsworn Declaration of Candice Schwager.*

81. Proof of self-dealing by ANITA is the fact that the trust did not authorize "mommy" to allow ANITA BRUNSTING the right to give monetary gifts to herself of $150,000+ while serving as trustee. While the trust allowed either Settlor to make gifts during their lifetimes via a valid QBD, Article VI A specifically states, **"Neither of us shall have the power to direct our Trustee to make gifts of any trust principal or income."** Restatement VIA. This necessarily dictates that ANITA BRUNSTING AND AMY BRUNSTING engaged in fraud on the beneficiaries and prohibited self-dealing of hundreds of thousands of dollars when neither SETTLOR had the power to authorize a TRUSTEE to make such gifts. This is a breach of fiduciary duty, which the Court should not have ignored.

82. CO-TRUSTEES admit breach of fiduciary duty by acknowledging that they have still not distributed the trust into 5 personal asset trusts and/or shares, as required reasonably soon after the death of NELVA BRUNSTING. They ADMIT that they have not distributed the assets TO ANY OF THE BENEFICIARIES, due to CURTIS' initiation of litigation This excuse is not permitted under the law or the trust.

83. CANDACE CURTIS' share vested on November 11, 2011, and was required to be distributed.[33] Notably, her share has not been distributed to her after 11+ years, which is evidence of breach of fiduciary duty via DEFENDANTS' own admissions.

84. A Pre-Trial Conference was set for February 24, 2022, at 10:00 a.m. At the last minute a hearing was noticed for February 25, 2021, at 3:00 p.m. (instead of 2022), to hear the Third Contempt Motion and the Motion to Exclude Testimony/Evidence, and the Pretrial Conference originally set for hearing on February 24, 2022, was rescheduled to February 25, 2022, at 3:00 p.m. with a defective notice stating that hearing would occur February 25, 2021.

85. Without notice that former judge Kathleen Stone would be appearing in place of Probate Court No. 4's Judge James Horwitz and the opportunity to object, and with no bond or oath on file in the Harris County clerk's office, Kathleen Stone appeared February 25, 2022. Without RENDERING judgment in open court on Defendants' motion for summary judgment, she announced she had spoken to Judge Horwitz and would be signing the Order[34]. See Transcript of *February 25, 2022, hearing, inaccurately referring to Stone as the Judge of Probate Court No. 4.*

86. On February 25, 2022, The Pre-Trial Conference did not occur and the two motions to be heard were never heard. Stone admits to not reading the motion and states on the record that she

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[33] Article X states that if CANDACE CURTIS shall predecease the settlors or die before the complete distribution of her share, the balance of her share shall be distributed to CANDACE'S then living descendants, per stirpes.

[34] Exhibit P, Transcript of Oral Hearing February 25, 2022

spoke with Judge Horwitz and was signing the Order, disinheriting CURTIS, and purporting to unlawfully distribute her share to CO-TRUSTEES' attorneys. The Order further unlawfully provided that attorneys' fees of CO-TRUSTEES would be paid from CURTIS' share when her share was not subject to claims of judgment creditors or alienable – whether voluntary or involuntary.

87. With evidence to support CURTIS' claims in the record since 2013, JUDGE KATHLEEN STONE signed by February 25, 2022, Order, disposing of CANDACE CURTIS' claims and purporting to subject her 1/5 interest and/or personal asset spendthrift trust to the opposing counsel's attorneys' fees. No statute or contract authorized attorneys' fees from CANDACE CURTIS to Neil Spielman or Stephen Mendel and her share vested November 11, 2011—making it inalienable and not subject to the claims of judgment creditors.

88. Furthermore, JUDGE KATHLEEN STONE abused her discretion in signing the February 25, 2022, Order[35], purporting to alienate her share of the trust for DEFENDANTS' attorneys' fees, when it was not subject to the claims of judgment creditors as a vested interest in a spendthrift trust and no contract or statute authorizes fees against CANDACE CURTIS by DEFENDANTS' attorneys. Stone subsequently signed an Order denying CURTIS' Bill of Review, challenging the court's jurisdiction—to which CURTIS objects.

89. On or about March 23, 2022, CURTIS filed a written objection for former judge serving in this case, based on her lack of oath and bond. This requires that STONE disqualify herself and void the February 25, 2022, Order granting summary Judgment and March 11, 2022, order denying CURTIS' bill of review, challenging the jurisdiction of this court.

[35] Exhibit Q, Order of February 25, 2022.

V. ARGUMENTS AND AUTHORITIES

A. This Court lacks subject matter jurisdiction over the BRUNSTING FAMILY LIVING TRUST by Tex. Est. Code 32.005, 32.006, 32.007, lack of a probate estate or independent executor, Curtis vs. Brunsting, Registration of Foreign Judgment, Void Remand Order and Void Order of Transfer

91. Section 115.001 of the Texas Property Code provides the district court with exclusive jurisdiction over trusts in Texas, except for the authority expressly provided to the statutory probate court. Tex. Prop. Code 115.001 provides:

> 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, including proceedings to:
> (1) construe a trust instrument.
> (2) determine the law applicable to a trust instrument.
> (3) appoint or remove a trustee.
> (4) determine the powers, responsibilities, duties and liability of a trustee.
> (5) ascertain beneficiaries
> (6) make a determination of fact affecting the administration, distribution, or duration of a trust.
> (7) determine a question arising in the administration or distribution of a trust
> (8) relieve a trustee from any or all of the duties, limitations and restrictions otherwise existing under the terms of the trust instrument or of this subtitle.
> (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and
> (10) surcharge a trustee.
>
> **(a-1)**
> The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).
> **(b)**
> The district court may exercise the powers of a court of equity in matters pertaining to trusts.
> **(c)**
> The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision.

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

92. CANDACE CURTIS filed her suit for accounting, disclosure, breach of fiduciary duty, conversion, fraud, intentional infliction of emotional distress (and ultimately, declaratory judgment) in federal district court for the Southern District of Texas under diversity jurisdiction. The Fifth Circuit held that jurisdiction was proper in the U.S. District Court for the Southern District of Texas, Houston Division. *Curtis vs. Brunsting. Id.* The Fifth Circuit court of appeals held that the probate exception to federal jurisdiction did not apply, reversing and remanding to U.S. District Court Judge Kenneth Hoyt for further proceedings.

93. After oral hearing and consideration of the evidence, Judge Kenneth Hoyt issued a preliminary injunction over the trust in favor of CANDACE CURTIS against CO-TRUSTEES, ANITA K BRUNSTING AND AMY BRUNSTING. Judge Hoyt granted CURTIS' Application for Preliminary Injunction April 13, 2013, and issued a Memorandum and order on the 19th day of April 2013. Judge Hoyt detailed findings of irregularities in purported trust documents and held that CURTIS was substantially likely to prevail on her claims against ANITA AND AMY BRUNSTING. *See Memorandum and Order of Preliminary Injunction issued April 19, 2013.*

94. CURTIS was admonished to retain an attorney for discovery purposes, so she hired attorney JASON OSTROM. Almost immediately after being retained, JASON OSTROM committed attorney misconduct by amending her Complaint to pollute diversity, filing a motion to remand her case to probate court, when it had never been removed from probate court, and filing a motion to enter transfer order in the probate court, when he never officially appeared for CANDACE CURTIS in probate court and lacked authority to do so.

95. A claim for declaratory judgment was added and CARL BRUNSTING was included as an involuntary plaintiff when the proper procedure for declaratory judgment actions was to sue CARL BRUNSTING as a nominal defendant, as was done with CAROL BRUNSTING.

96. Though CURTIS' federal case, *Cause No. 4:12-cv-00592* had never been filed in or removed from Probate court No. 4 of Harris County, Texas, CURTIS' counsel caused the matter to be unlawfully "remanded" to Probate Court No. 4 and caused Judge Christine Butts to sign a void order accepting transfer. *See Order for Remand, Order accepting transfer signed by Judge Christine Butts, and Order denying Rule 60 Motion for Relief of Judge Kenneth Hoyt, in which Judge Hoyt acknowledges that remand was improper.* The only procedure to transfer a case between state and federal courts is removal or remand. Consequently, both orders are void—a fact acknowledged by Judge Hoyt in his order denying CURTIS' Rule 60 Motion to reopen the case.

97. The Transfer Order states that it is pursuant to Tex. Est. Code. 32.005, 32.006, and 32.007, but none of these statutes apply in this scenario because the case was never filed in probate court and original and exclusive jurisdiction is in the district court. Cases may not be transferred from federal to probate court other than removal and remand. No estate was pending for *Curtis vs. Brunsting* to be deemed ancillary to, and the case has already been registered in the district court, with original jurisdiction. The Petition to Register the Foreign Judgment is a final order, which has not been transferred.

98. Sections 32.005, 32.006 and 32.007 provides as follows:

> Sec. 32.005. EXCLUSIVE JURISDICTION OF PROBATE PROCEEDING IN COUNTY WITH STATUTORY PROBATE COURT. (a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings, regardless of whether contested or uncontested. A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is

concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court.

Sec. 32.006. JURISDICTION OF STATUTORY PROBATE COURT WITH RESPECT TO TRUSTS AND POWERS OF ATTORNEY. In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of:
(1) an action by or against a trustee.
(2) an action involving an inter vivos trust, testamentary trust, or charitable trust;
(3) an action by or against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
(4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Sec. 32.007. CONCURRENT JURISDICTION WITH DISTRICT COURT. A statutory probate court has concurrent jurisdiction with the district court in:
(2) an action by or against a trustee;
(3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code;
(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;

99. 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).

100. Finally, a probate court 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),*

Sabine Gas Transmission Co. v. Winnie Pipeline Co., 15 S.W.3d 199, 200 (Tex. App. 2000).

96. While Section 115.0001 provides a statutory probate court with concurrent jurisdiction with the district court, who have original and exclusive jurisdiction over living trust lawsuits, except for that provided to statutory probate courts, in order to transfer a case from even District Court to probate, an estate must be pending, rather than closed. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 932 n.1 (Tex. App. 1997).

97. The Estate of NELVA BRUNSTING was closed April 5, 2013, leaving no possibility for any subsequently transferred case to be deemed "ANCILLARY" OR "INCIDENT TO". Tex. Est. Code. 32.005, 32.006, 32.007.

98. CURTIS' federal lawsuit was never lawfully transferred to probate court no. 4 and subject matter jurisdiction cannot be waived or agreed to. CURTIS' lawsuit was assigned as ancillary *Cause No. 412249-402* and renamed *Estate of Nelva Brunsting* before being "consolidated" with *Cause No. 412249-401*, a declaratory judgment / breach of fiduciary duty lawsuit filed by CARL BRUNSTING against the CO-TRUSTEES which was wrongfully designated *Estate of Nelva Brunsting*.

99. Both "ancillary" matters involved solely the BRUNSTING FAMILY LIVING TRUST and were never ancillary to any pending estate because the ESTATE OF NELVA BRUNSTING, Cause No. 412249, was closed April 5, 2013. *See approval of inventory and drop order, signed April 5, 2013.* Without an estate, no lawsuit could lawfully be transferred to the probate court as an ancillary matter.

100. Even had the estate not been closed, the court would have lost jurisdiction over ancillary matters when the inventory was approved and the estate matter closed. In *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex.App.-Austin 1997, no pet.), the court held that a probate court abused its discretion in continuing to exercise ancillary jurisdiction over pendent claims

once the estate was dismissed from the probate proceeding. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930 (Tex.App.-Austin 1997, no pet.) The court of appeals held that "the probate court had no discretion to continue to exercise ancillary jurisdiction after it dismissed the estate from the proceeding." *Id.* at 934. The court explained its holding by noting that a probate court's ancillary jurisdiction arises only over a claim that bears some relationship to the estate. *See id.* at 933. If the estate is dismissed from the probate proceeding, the claim loses its ancillary nature since there is no claim within the court's jurisdiction to which the ancillary or pendent claim relates. *See id.* Because it found the claims against the city to be ancillary or pendent to nothing, the court held the probate court lost jurisdiction.[36] Id. See also *Sabine Gas Transmission Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 200-01 (Tex. App. 2000).[14]

102. In Texas, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997). *See also Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581 (Tex. 1993).* This is because "[l]oss of jurisdiction is characteristic of specialized courts." Id. *See In re Estate of Hanau,* 806 S.W.2d 900, 904 (Tex.App. — Corpus Christi 1991, writ denied) (court lost jurisdiction to remove independent executrix after estate was closed). "

103. In *Bailey v. Cherokee County Appraisal District,* 862 S.W.2d 581 (Tex. 1993), the Texas Supreme Court stated that a trial court must have a probate case pending to exercise its jurisdiction over matters "incident to an estate." *See also In re Estate of Hanau,* 806 S.W.2d at

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[36] A court may exercise only the jurisdiction accorded it by the constitution or by statute. *City of Beaumont v. West,*484 S.W.2d 789, 791 (Tex.Civ.App. — Beaumont 1972, writ ref'd n.r.e.). Subject matter jurisdiction may not be enlarged by an agreement between the parties or by a request that the court exceed its powers. *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 445 (Tex. 1993); *Burke v. Satterfield,* 525 S.W.2d 950, 953 (Tex. 1975). A probate court is a specialized court that exists primarily for the limited purpose of administering decedents' estates. *See generally* Tex. Prob. Code §§ 5, 5A (West Supp. 1997). *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997)

904 (court lost jurisdiction to remove independent executrix after estate was closed). The Supreme Court held that the probate court may only exercise "ancillary " or "pendent" jurisdiction over a claim that bears some relationship to the estate. *Bailey v. Cherokee County Appraisal District,* 862 S.W.2d 581 (Tex. 1993)Once the estate settles, the claim is "ancillary " or "pendent" to nothing, and the court is without jurisdiction. Id. If it ever had jurisdiction, which is denied, jurisdiction was lost April 5, 2013. This made the Transfer Order void, even if it were possible to "transfer" a case from federal to state court –other than by removal or remand, which it is not.

104. An analogous situation occurs in cases in which a court loses jurisdiction over an indispensable party. The court in which the proceeding was pending loses subject matter jurisdiction over the cause when an indispensable party is nonsuited. *Travis Heights Improvement Ass'n v. Small,* 662 S.W.2d 406, 413 (Tex.App. — Austin 1983, no writ); *see also Royal Petroleum Corp. v. McCallum,* 135 S.W.2d 958 (1940). The Goodman Court held that the estate is an "indispensable party" to any proceeding in the probate court and the estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate. *Goodman v. Summit at West Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App. 1997). *Smith Inc. vs. Sheffield, No. 0302-00109-CV (Tex. App.—Austin, 2003).*

105. The estate has been closed and a drop order was issued since April 5, 2013. Furthermore, CARL BRUNSTING resigned due to incapacity on February 17, 2015. Therefore, neither the independent administrator nor the estate are parties to this litigation. Due to the fact that both are indispensable parties to any proceeding in the probate court and the fact that probate has been long since closed, there was no estate pending at the time CANDACE CURTIS' federal case was allegedly remanded and/or transferred to Probate Court No. 4. *Smith Inc. vs. Sheffield, No. 0302-*

00109-CV (Tex. App.—Austin, 2003). This deprives the court of jurisdiction over the alleged ancillary lawsuit of CANDACE CURTIS VS. ANITA K. BRUNSTING et al, Cause No. 4:12cv-00592, U.S. District Court for the Southern District of Texas (Houston Division, 2013).

B. ***Former Judge Kathleen Stone failed to render judgment and lacks authority to sign the Order***

C. CANDACE CURTIS filed an objection and amended objection to any former judge presiding over this case aside from the Honorable Judge James Horwitz on the basis that Judge Horwitz is the only judge with an oath and bond on file in Harris County probate court no. 4. This requires JUDGE KATHLEEN STONE to disqualify herself and void the order granting summary judgment and denying CURTIS' bill of review.

D. When a party files a timely objection to an assigned judge under section 74.053 of the Texas Government Code, the assigned judge's disqualification is mandatory. See TEX. GOV'T CODE § 74.053(a)-(c); *Starnes v. Chapman,* 793 S.W.2d 104, 107 (Tex.App. — Dallas 1990, orig.proceeding). *See Mercer v. Driver,* 923 S.W.2d 656, 658 (Tex.App. —Houston [1st Dist.] 1995, orig. proceeding); Starnes, 793 S.W.2d at 107.

E. Subsections 74.053(b) and (d) allow a party to make one objection to an assigned judge, and unlimited objections to an assigned former judge who was not a retired judge. See TEX. GOV'T CODE § 74.053(b) and (d); Garcia v. Employers Ins. of Wausau, 856 S.W.2d 507, 509 (Tex.App. —Houston [1st Dist.] 1993, writ denied). If the assigned judge overrules a timely section 74.053 objection, that judge's subsequent orders are void and the objecting party is entitled to mandamus relief. See Amateur Athletic Found. v. Hoffman, 893 S.W.2d 602, 603 (Tex.App. — Dallas 1994, orig. proceeding); Rubin v. Hoffman, 843 S.W.2d 658, 659 (Tex.App. — Dallas 1992, orig. proceeding).

F. Section 74.053 Subsection (b) provides:

> If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case. Except as provided by Subsection (d), each party to the case is only entitled to one objection under this section for that case.

G. Subsection (d) provides:

> A former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice.

H. Texas Government Code Sec. 25.0017 requires visiting judges to take the oath and provides:

> (a) A person who is a retired or former judge shall, before accepting an assignment as a visiting judge of a statutory county court, take the oath of office required by the constitution and file the oath with the regional presiding judge…
> (c) A retired or former judge may be assigned as a visiting judge of a statutory county court only if the judge has filed with the regional presiding judge an oath of office as required by this section.

I. KATHLEEN STONE does not have an oath or bond on file with the presiding judge of Harris County Probate Court. Due to the statutory mandate that any statutory probate judge presiding over this case have an oath of office and bond on file, PLAINTIFF objects to any former or visiting judge hearing this case that does not have both on file with the Harris County Probate Clerk and Harris County Commissioners, including but not limited to KATHLEEN STONE. PLAINTIFF has confirmed that only the HONORABLE JAMES HORWITZ has an oath of office and bond on file to preside over cases in probate court No. 4. Therefore, CURTIS objects to any other assigned judge other than the Honorable Judge James HORWITZ. Accordingly, JUDGE STONE must disqualify herself and void the orders signed.

J. Section 25.0017 (a) requires any visiting judge to take the oath of office required by the Texas Constitution before accepting an assignment as a visiting judge of a statutory probate court and file the oath with the regional. Presiding judge. Tex. Govt. Code. Sec. 25.0017. The Statute requires the regional presiding judge

(b) shall maintain a file containing the oaths of office filed with the judge under Subsection (a).

(c) A retired or former judge may be assigned as a visiting judge of a statutory county court only if the judge has filed with the regional presiding judge an oath of office as required by this section.

112. Section 25.0021 provides:

(b) A person who is a retired or former judge shall, before accepting an assignment as a visiting judge of a statutory probate court, take the oath of office required by the constitution and file the oath with the presiding judge of the statutory probate courts.

(c) The presiding judge shall maintain a file containing the oaths of office filed with the judge under Subsection (b).

(d) A retired or former judge may be assigned as a visiting judge of a statutory probate court only if the judge has filed with the presiding judge an oath of office as required by this section.

(e) When a retired or former judge is appointed as a visiting judge, the clerk shall enter in the administrative file as a part of the proceedings in the cause a record that gives the visiting judge's name and shows that:

(1) the judge of the court was disqualified, absent, or disabled to try the cause;

(2) the visiting judge was appointed; and

(3) the oath of office prescribed by law for a retired or former judge who is appointed as a visiting judge was duly administered to the visiting judge and filed with the presiding judge.

(f) "Administrative file" means a file kept by the court clerk for the court's administrative orders and assigned a cause number. Tex. Govt. Code. Sec. 25.00221.

113. Judge Stone has failed to satisfy the requirements of Section 25.0017 or Section 25.00221 of the Texas Government Code, violating the Texas Constitutional mandate that an oath be on file and statutory requirement for STONE to have a bond on file with the presiding judge of the Harris County probate court.

C. ***CO-TRUSTEES' Motion and the Court's order were untimely***

114. The Court issued a docket control order in June of 2021, setting the deadline for motions for summary judgment to be filed by October 15, 2021. The November 5, 2021, motion for summary judgment was untimely beyond the October 15, 2021, deadline set forth in the June 2021 court's docket control order. Additionally, the court's February 25, 2022, Order granting summary judgment was untimely, beyond the December 31, 2021, deadline for hearing dispositive motions or pleas subject to interlocutory appeal and February 7, 2022, deadline for hearing dispositive motions not subject to interlocutory appeal. Therefore, the February "unnoticed" hearing on Defendants' summary judgment motion was untimely as a matter of law, rendering the February 25, 2022, order voidable and/or void.

115. ANITA AND AMY BRUNSTING'S repeat traditional and no evidence motion for summary judgment was untimely field beyond the deadline set by the Court's June 2021 docket control order. CURTIS nevertheless filed a further 5-page response to said motion and the court set the matter for consideration by submission on December 14, 2021—the deadline for hearing summary judgment motions. The Court's February 25, 2022, Order has still not been rendered upon or signed by the presiding judge, but by a former judge with no authority to rule, render or sign the Order.

D. ***CO-TRUSTEES' Motion fails to identify each element of PLAINTIFF'S claims upon which they allege there is no evidence***

116. The Court unlawfully granted CO-TRUSTEES' "no evidence" motion for summary judgment on PLAINTIFFS' claims ***without pointing to any essential element of PLAINTIFFS' claims upon which they claim there was no evidence.*** PLAINTIFF asserted claims for breach of fiduciary duty, conversion, intentional infliction of emotional distress, fraud, declaratory judgment, constructive trust, as well as suing for an accounting and disclosures. *See Plaintiff's*

Complaint in Cause No. 4:12-cv-00592, U.S. District Court for the Southern District of Texas (Houston Division, 2012) and 2nd Amended Petition filed in this case.

117. Texas Rule of Civil Procedure 166a(i) permits a party to obtain a "no evidence" motion for summary judgment after adequate time for discovery, but **requires the movant to "state the elements as to which there is no evidence." Tex. R. Civ. P. 166a(i). Each element of PLAINTIFF'S claims, upon which DEFENDANTS allege there is no evidence, must be specifically identified. Defendants' Motion failed to do this.**

118. **Defendants pointed to no element of any cause of action upon which Defendants contend there is no evidence, but pointed merely to a list of allegations pled. Plaintiff objects to the failure of DEFENDANTS to identify each essential element of PLAINTIFF'S claims upon which they contend there is no evidence.**

119. Only once the movant satisfies this burden does the nonmovant bear the burden of "'raising a genuine issue of material fact'" for each challenged element . *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002) (quoting Tex. R. Civ. P. 166a(i)). A nonevidence challenge will be sustained when "'(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.'" *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

120. The record reveals substantial evidence to support PLAINTIFFS' claims for breach of fiduciary duty, conversion, fraud, constructive trust, intentional infliction of emotional distress, and declaratory judgment via the federal court's findings in its Memorandum and Order granting

PLAINTIFF extraordinary injunctive relief. *See April 19, 2013, Memorandum and Order and Preliminary Injunction, certified copies attached hereto and incorporated by reference, Special Master's Report.* Based upon PLAINTIFF'S allegations, upon which more than a scintilla of evidence exists in the record, summary judgment was an abuse of discretion.

121. Were this not so, the federal court would not have granted CURTIS a preliminary injunction against CO-TRUSTEES, finding a substantial likelihood that she would prevail on her claims. *See Certified Copies of Preliminary Injunction, Memorandum and Order, Special Master's report, Affidavit of Candace Curtis.* Likewise, there is evidence of willful misconduct and bad faith on the part of AMY AND ANITA BRUNSTING, who were found to have engaged in prohibited self-dealing with irregularities in the trust documents presented to the federal judge. Id.

122. The record already contains more than sufficient evidence that CO-TRUSTEES breached their fiduciary duties (to account, fully disclose, treat all beneficiaries impartially and equally, good faith and fair dealing, not commingle or self-deal), intentionally inflicted emotional distress upon PLAINTIFF (by setting out to disinherit her with a void testamentary Qualified Beneficiary Designation dated 8/25/10), converted her share of the BRUNSTING FAMILY Survivor's and Decedent's Trusts to their own use and benefit, and committed fraud via the use of a fraudulently procured document. PLAINTIFF was also entitled to declaratory judgment of the rights and liabilities of the parties, and she was denied the Constitutional right to due process via jury trial by the Court's February 25, 2022, Order, granting summary judgment on all of her claims.

4. Clearly, the Court also failed to consider CURTIS' multi-part response to DEFENDANTS' 2015 and amended 2021 motions for summary judgment, *July 13, 2015,*

Response to June 26, 2015, no evidence motion for partial summary judgment[37], *Response to Co-trustees' untimely November 5, 2022, Motion*[38], *Memorandum of Law on QBD*[39], *and Addendum to motion for summary judgment*[40], *attached hereto and incorporated by reference.*

5. The Court failed to consider the April 19th Memorandum and Order granting Preliminary Injunction of Judge Hoyt, finding a substantial likelihood that PLAINTIFF would prevail on her claims against CO-TRUSTEES, listing their numerous breaches of fiduciary duty and noting irregularities in the trust documents DEFENDANTS produced. *See Certified Memorandum and Order of Preliminary Injunction granted to CURTIS April 19th, 2013.* The Court failed to consider the Special Master's Report, which proves breach of fiduciary duty.

6. The record already contained more than sufficient evidence that CO-TRUSTEES breached their fiduciary duties (duty to account, fully disclose, duty of loyalty, duty to treat all beneficiaries impartially and equally, duty of good faith and fair dealing, duty not to commingle or self-deal), intentionally inflicted emotional distress upon PLAINTIFF, converted her share of the BRUNSTING FAMILY Survivor's and Decedent's Trusts to their own use and benefit—to pay their attorneys' fees, and committed fraud via the use of a Qualified Beneficiary Designation and Testamentary Power of Appointment that is void on its face, notwithstanding evidence of digital forgery.

13. PLAINTIFF had no burden to produce evidence where sufficient evidence was already in the record and the court could decide summary judgment as a matter of law in CANDACE CURTIS' favor. *See Defendant's exhibits listed above, Federal Affidavit of Candace Curtis*[41], *swearing that all evidence in this case was uniquely in the possession of the defendants,*

[37] Exhibit Z
[38] Exhibit AA
[39] Exhibit BB
[40] Exhibit CC
[41] Exhibit DD.

Preliminary Injunction, Memorandum and order of U.S. District for the Southern District of Texas, Judge Kenneth Hoyt, Special Master's Report, and Registration of Foreign Judgment, citing more than a preponderance of evidence justifying extraordinary injunctive relief and holding that CANDACE CURTIS was likely to win based on the evidence produced. These documents are all part of the record.

E. *The Court violated CURTIS' Constitutional right to due process in failing to declare the August 25, 2010, Qualified Beneficiary Designation and Testamentary Power of Appointment to living trust void and severable from the trust.*

123. The Court violated CANDACE CURTIS' Constitutional right to due process of law and a jury trial by granting summary judgment on all of her claims and not issuing a declaratory judgment as to the validity of the 8/25/10 QBD at issue in this case. PLAINTIFF pled for declaratory judgment and was entitled to findings of fact, as well as a declaration by the court as to which documents constituted "the BRUNSTING FAMILY LIVING TRUSTS", necessarily mandating that the Court find that the 8/25/10 QBD is void and severable by the terms of the trust and failure to comply with the statutory prerequisites for a testamentary power of appointment.

124. Without the Court declaring which documents constitute "the trust", it could not determine the rights and liabilities of the parties or grant summary judgment based upon a purported legitimate document that continues to be in dispute.

125. The only document produced by DEFENDANTS to satisfy their burden of proof on their forfeiture counterclaim was the 8/25/10 Qualified Beneficiary Designation and Testamentary Power of Appointment under Living Trust Agreement, which is void on its face for the lack of attesting witnesses as required by the Code and because it contradicts the terms of the trust, rendering it severable. All testamentary instruments such as the 8/25/10 QBD which purported to take effect upon the death of NELVA BRUNSTING must be properly witnessed and notarized by

two disinterested witnesses. *See 8/25/10 QBD and* Article 251.051 of the Texas Estates Code. Since the document is void, it is severable from the trust.

126. Article XIII (3) states:

Power of Appointment or Qualified Beneficiary Designation. Whenever this trust declaration gives a trust beneficiary the power or authority to appoint a beneficiary of the trust, the designation must be in writing and be acknowledged **in the form required of acknowledgements by Texas law or exercised by a will executed with the formalities required by law of the trust beneficiary's residence**. Since the 8/25/10 QBD did not take effect until NELVA BRUNSTING' death, the document was testamentary. **Without satisfying Article 251.051 of the Texas Estates Code, the document is void and severable from the trust.**

127. Article 251.051 of the Texas Estates Code sets forth the requirements for testamentary instruments and requires that any such instrument be signed, notarized and witnessed by two witnesses. "Texas Estates Code section 251.051 requires, inter alia, a last will and testament be (1) in writing, (2) signed by the testator, and (3) attested to by two or more credible witnesses. *See* Tex. Est. Code Ann. § 251.051 (West 2014). " *Lemus v. Aguilar*, 491 S.W.3d 51, 56 (Tex. App. 2016)

128. The 8/25/10 was not witnessed and in fact, AMY, ANITA, and CAROL BRUNSTING admit that none of them witnessed NELVA BRUNSTING'S signature on this 8/25/10 QBD. Because the 8/25/10 QBD and testamentary power of appointment fails to satisfy *See* Tex. Est. Code Ann. § 251.051 (West 2014) and violates the trust, it is void and severable to the extent it was ever actually part of the trust.

129. Article VIV Section O states:

> If any provision of this agreement is declared by a court of competent jurisdiction to be invalid for any reason, such invalidity shall not affect the remaining

provisions of this agreement. The remaining provisions shall be fully severable, and this agreement shall be construed and enforced as if the invalid provision had never been included in this agreement.

130. Due process requires the Court to declare the rights and liabilities of the parties pursuant to CANDACE CURTIS' Application for Declaratory Judgment. CURTIS was denied this Constitutionally protected right. See U.S. Constit. Amend XIV, Texas Constit, Art. I Sec. 8

G. ***DEFENDANTS have not satisfied their burden of producing evidence to prove that CANDACE CURTIS violated the "no contest" provision of the Restatement***

131. In a traditional summary-judgment motion[42], the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See*

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[42] Rule 166a (traditional) and Rule 166a(i) states that summary judgment may be granted:

> **(a)For Claimant.** A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> **(c)Motion and Proceedings Thereon.** The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) **the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records**, if any, **on file at the time of the hearing, or filed thereafter** and before judgment with permission of the court, show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the **issues expressly set out in the motion or in an answer or any other response.** Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal…
>
> **(d)Appendices, References and Other Use of Discovery Not Otherwise on File.** Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment;

Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). We take as true evidence favorable to the nonmovant and resolve all doubts in its favor. *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995).

132. To be entitled to a traditional summary judgment under Tex. R. Civ. P. 166(a), a defendant must conclusively negate at least **one essential element of each of the plaintiffs causes of action or conclusively establish each element of an affirmative defense**. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). The movant is entitled to summary judgment if the evidence disproves, as a matter of law, **at least one element of each of the plaintiff's causes of action or conclusively establishes each element of an affirmative defense**. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *see Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996). *Martin-De-Nicolas v. AAA Tex. Cnty. Mut. Ins. Co.*, No. 03-17-00054-CV, at *5-6 (Tex. App. Apr. 19, 2018). If the movant's motion and summary judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

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or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

(f)Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by

(i)No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

133. Significantly, DEFENDANT CO-TRUSTEES obtained traditional summary judgment on a counterclaim, forfeiture, ***without satisfying their burden to produce evidence showing that no genuine issue of material fact occurred*** because the unsworn declaration that they attached to their motion for summary judgment did not authenticate any of the exhibits included.

134. AMY AND ANITA BRUNSTING'S lawyers filed a traditional motion for summary judgment against CANDACE CURTIS, alleging that she forfeited her share to them by violating the void 8/25/10 QBD on June 26, 2015, and November 5, 2021. CURTIS responded to their motions July 13, 2015, and November 17, 2021, including a Memorandum of Law on the August 25, 2010, Qualified Beneficiary Designation and Testamentary power of appointment dated September 28, 2020, (attaching three signature pages of the document-which appears to be digitally altered, notary logs and notes of CANDACE FREED showing no entries for 8/25/10 to reflect the three anomalous documents) and an Addendum dated October 15, 2021.

135. ANITA AND AMY BRUNSTING produced the following unsworn documents with their traditional and no evidence motion for summary judgment:

Exhibit A The Restatement of The Brunsting Family Living Trust.
Exhibit B Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about June 15, 2010.
Exhibit C Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about on August 25, 2010.
Exhibit D Excerpts from Deposition of Candace Kunz-Freed (March 29, 2019).
Exhibit E Excerpts from Deposition of Candace Kunz-Freed (June 27, 2019).
Exhibit F Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code §452.051 (signed July 23, 2015).
Exhibit G Report of Temporary Administrator Pending Contest.
Exhibit H Unsworn Declaration of Anita K. Brunsting.
Exhibit I Resignation of Original Trustee executed on or about December 21, 2010.
Exhibit J Memorandum and Order Preliminary Injunction (signed April 19, 2013).

Exhibit K Order (signed September 23, 2020).
Exhibit L Unsworn Declaration of Neal E. Spielman

136. It was DEFENDANTS' burden to produce sworn testimony concerning the authenticity of the purported 8/25/10 QBD, not Plaintiff's. Plaintiff demanded Defendants produce the original 8/25/10 QBD on July 13, 2015 and they have not because they cannot. No one witnessed the document as the law requires of testamentary evidence. Therefore, even if it were in evidence sworn by affidavit, whether it was digitally altered to add Nelva's signature or not, it is void on its face for failure to comport with statute. Notably, the Court could not decide DEFENDANTS' Rule 166a traditional motion for summary judgment without considering evidence. But this is precisely what it did in GRANTING DEFENDANTS' Motion for Summary judgment on their counterclaim of forfeiture. While the 8/25/10 QBD was attached as an exhibit to their motion, it was not sworn to and was not evidence. PLAINTIFF has disputed the validity of this document from the outset AS NOT PART OF THE TRUST and the document is void on its face for failing to have two disinterested witnesses attest to it. PLAINTIFF objects to the court granting summary judgment on DEFENDANTS' counterclaim with no evidence to justify it—DEFENDANTS' own the burden of burden of proof AND of bringing forth the evidence to be disputed.

137. ***Without attaching a sworn affidavit attesting to the authenticity and validity of the August 25, 2010, QBD and Testamentary Power of Appointment to Living Trust, witnessed by two disinterested persons, there is no evidence in the record from which the Court could rule that CANDACE CURTIS forfeited her share.***

138. DEFENDANTS' have produced no evidence to satisfy their burden of proof that CURTIS ***violated the "no contest" clause by asserting any claim which would enlarge her share of the trust,*** as set forth in the Article 11 Section C of the 2005 Restatement of the BRUNSTING FAMILY LIVING TRUST.

139. CANDACE LOUIS CURTIS never filed any claim **to enlarge her share of the trust** at the expense of another beneficiary, but sought to enforce the trust in accordance with the settlor's intentions at all times. The 2013 federal lawsuit and preliminary injunction proves this. Id.[43]

140. CANDACE CURTIS never challenged the "trust" but only the void 8/25/10 QBD which violated the express terms of the trust, rendering it void and severable. Based on Article XIV Section O and Article XII Section F of the Restatement (imposing liability on the Trustees for bad faith, willful misconduct and/or gross negligence), CANDACE CURTIS' lawsuit against the acting Co-Trustees did not violate the "no contest" clause of the Restatement and the August 25, 2010, QBD is void and severed from this trust under the terms of the trust and Texas Estates Code f/k/a Texas Probate Code.

128. The Trust Code expressly provides beneficiaries with the right to compel a fiduciary to perform the fiduciary's duties; seeking redress against a fiduciary for a breach of the fiduciary's duties; or seeking a judicial construction of a will or trust (§ 112.038), and the foregoing cannot be construed to trigger a forfeiture provision; Texas Trust Code § 111.0035(b)(6) which is exactly what the Court has done.

129. "The right to challenge a fiduciary's actions is inherent in the fiduciary / beneficiary relationship." *McLendon, 862 S.W.2d at 678." Lesikar v. Moon, 237 S.W.3d 361, 370 (Tex. App. 2007) Texas Property Code § 111.0035(b)(6)* (The terms of a trust will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties; from seeking redress against a fiduciary for a breach of the fiduciary's duties; or seeking a judicial construction of a will or trust. (§ 112.038)

[43] Nor did CURTIS need AMY OR ANITA'S permission to file suit because she is the de jure sole trustee of both trusts by the terms of the instrument itself.

H. ***The Court erred in ruling that Co-trustees' attorneys' fees shall be taken out of CANDACE CURTIS' share, as CANDACE CURTIS' share is not alienable or subject to claims of judgment creditors***

130. Article XI Section A of the Restatement provides:

> No beneficiary will have the power to anticipate, encumber, or transfer any interest in the trust. No part of the trust will be liable for or charged with any debts, contracts, liabilities, or torts of a beneficiary or subject to seizure or other process by any creditor of a beneficiary.

131. The foregoing language indicates that the BRUNSTING FAMILY LIVING TRUST was created as a spendthrift trust, which is immune from creditors by its very terms. See Article XI Section A-C. Article XI Section C specifically states that the Founders "do not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact..." This necessarily voids the order granting Neil Spielman and Stephen Mendel attorneys' fees out of CANDACE CURTIS' share, which is held in a spendthrift trust.

132. Texas Probate Code Sec. 122.206 governs Spendthrift Trusts and provides:

> An assignment of property or interest that would defeat a spendthrift provision imposed in a trust may not be made under this subchapter.

133. Texas Property Code Sec. 112.035 governs spendthrift trusts and provides:

> (a) A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.
>
> (b) A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by this subtitle.
>
> (c) A trust containing terms authorized under Subsection (a) or (b) of this section may be referred to as a spendthrift trust.
>
> (f) A beneficiary of the trust may not be considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have

the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity, holds or exercises:
(1) a presently exercisable power to:
(A) consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is:
(i) exercisable only on consent of another person holding an interest adverse to the beneficiary's interest; or
(ii) limited by an ascertainable standard, including health, education, support, or maintenance of the beneficiary; or
(B) appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;
(2) a testamentary power of appointment; or
(3) a presently exercisable right described by Subsection (e)(2).

Acts 2017, 85th Leg., R.S., Ch. 62 (S.B. 617), Sec. 2, eff. September 1, 2017.

134. Upon the April 2009 death of ELMER BRUNSTING, two trusts were created: with the property being divided into two shares: The Survivor's and Decedent's trusts, Restatement Article VII, Section B.

135. Article VIII Section D provides that the Survivor's trust SHALL terminate at the Surviving Founder's death and

136. Article IX governs administration of the Decedent's trust and permits the surviving founder to pay/apply for the survivor's benefit all of the net income and up to $5000 in principal per year. Article IX Section A. The surviving founder continued to have fiduciary duties to the remainder beneficiaries with respect to the Decedent's trust.

137. Article IX Section D provides that the Decedent's trust SHALL terminate at the Surviving Founder's death.

138. Upon the surviving founder's death, November 11, 2011, both trusts terminated and were required to be distributed in accordance with Article X, dividing all trust property by five and distributing 1/5 of the total assets to each beneficiary: CANDACE LOUISE CURTIS, CAROL

ANN BRUNSTING, CARL HENRY BRUNSTING, AMY RUTH TSCHIRHART N/K/A AMY RUTH BRUNSTING, ANITA KAY RILEY N/K/A ANITA K. BRUNSTING.

139. Article X Section B governs the distribution of CANDACE LOUISE CURTIS' share and states that it shall be held in trust with the trustee distributing as much of the net income and principal of CURTIS' personal asset trust which the trustee deems necessary for her health, education, maintenance and support—for her lifetime. CANDACE CURTIS' right to the net income and principal of the trust is not alienable, voluntarily or involuntarily other than the execution of a testamentary power of appointment, valid living trust, or last will and testament—which is not at issue in this case.

140. Clearly the settlors made the BRUNSTING FAMILY LIVING TRUST and specifically, CANDACE CURTIS' share—unalienable and not subject to creditors, including judgment creditors NEIL SPIELMAN AND/OR STEPHEN MENDEL,

I. Attorneys' fees may not be granted in Texas absent a contract or statute authorizing attorneys' fees.

130. "Texas follows "the American Rule" prohibiting recovery of attorney's fees unless provided by contract or statute." *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 663 (Tex. 2009). CO-TRUSTEES point to no legal authority which would permit them to recover their attorneys' fees incurred in defending themselves rendering the February 25, 2022, Order purporting to pay CO-TRUSTEES' legal fees out of CANDACE CURTIS' vested share of the BRUNSTING FAMILY LIVING TRUST.

131. CANDACE CURTIS has no contract for services with CO-TRUSTEES' attorneys, Neil Spielman and/or Stephen Mendel. CO-TRUSTEES point to no legal authority which would permit them to recover attorneys' fees from CURTIS, contractual or statutory. Furthermore, the BRUNSTING FAMILY LIVING TRUST makes clear that no portion of the spendthrift trust was

to be used for litigation costs. For this reason, the February 25, 2022, Order purporting to award NEIL SPIELMAN AND STEPHEN MENDEL attorneys' fees from CANDACE CURTIS' vested share of the spendthrift trust is void.

J. The Order violated CANDACE CURTIS' Constitutional right to due process—notice and a meaningful opportunity to be heard.

132. The Court had a duty to determine the validity of the documents attached and issue a declaratory judgment on the rights and liabilities of the parties and failed to do so. CANDACE CURTIS plead for and paid for a jury trial to determine the issues of fact in this case which remain unresolved and was deprived of this Constitutional right by the Court's February 25, 2022, Order, purporting to dispose of all of her claims and ruling against CURTIS on CO-TRUSTEES counterclaim of forfeiture without any evidence to justify this ruling. This was a complete deprivation of the Constitutional right to due process of law under the U.S. and Texas Constitutions. U.S. CONSTIT. AMEND. XIV, TEXAS CONSTIT. ART. I, SEC. 8. For this reason, the FEBRUARY 25, 2022, ORDER granting summary judgment against PLAINTIFF constitutes an abuse of discretion and must be vacated and/or set aside.[44]

133. A proper reading of the trust instrument 92005 restatement as amended in2007) reveals that the lawful trustees for the family trust are CARL BRUNGING and CANDACE CURTIS.

134. A list of the affirmative fiduciary duties performed by the DEFENDANT CO-TRUSTEES reads "*this page intentionally left blank*" and a passive trust results in merger and the trust collapses, *Property Code § 112.032.*

[44] DEFENDANTS attached the BRUNSTING FAMILY LIVING TRUST, 2005 RESTATEMENT, 1st Amendment, 6/15/10 Qualified Beneficiary Designation, and 8/25/20 Qualified Beneficiary Designation and Testamentary Power of Appointment to Living Trust, to their motion with unsworn declarations and the court had a duty to determine which documents constitute the trust, given PLAINTIFF'S allegations of fraud and the 8/25/10 QBD's invalidity on its face.

135. When merger occurs the trustee's only authority is to transfer the assets to or as directed by the beneficiary. It is true that "[a] spendthrift trust must be based on an active trust. If it is merely passive or inactive, there can be no spendthrift trust." Long v. Long , 252 S.W.2d 235, 247 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.). Likewise, "[a] trustee who has no duty except to make payments as they become due is the trustee of a 'passive' or 'dry' trust." Daniels v. Pecan Valley Ranch, Inc. , 831 S.W.2d 372, 379 (Tex. App.—San Antonio 1992, writ denied). Moreover, "[i]f a trustee is not given affirmative powers and duties, the trust is 'passive' or 'dry,' and legal title is vested in the beneficiaries , not the named trustee." Nolana Dev. Ass'n v. Corsi , 682 S.W.2d 246, 249 (Tex. 1984). Consequently, "[A] merely passive trust cannot constitute a valid spendthrift trust because the beneficiary is considered the real owner of the property." Daniels , 831 S.W.2d at 379. In re Estate of Lee, 551 S.W.3d 802, 814 (Tex. App. 2018)

VI. CONCLUSION AND PRAYER

136. For the reasons stated herein, PLAINTIFF respectfully prays that the Court vacate and set aside the February 25, 2022, Order, granting summary judgment against her and permit this matter to proceed to trial.

Respectfully Submitted,

Candice Schwager

Candice Schwager
Schwager Law Firm
16807 Pinemoor Way
Houston, Texas 77058
832.857.7173
candiceschwager@outlook.com
ATTORNEY FOR CANDACE CURTIS

CERTIFICATE OF SERVICE

I Candice Schwager hereby certify that the foregoing document was served on all counsel of record on the 27th day of March 2022.

Candice Schwager

Candice Schwager

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.