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NO. 412,249-**401**

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

CO-TRUSTEES' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGES HORWITZ AND COMSTOCK:

AMY RUTH BRUNSTING ("Amy") and ANITA KAY BRUNSTING ("Anita") (the "Co-Trustees"), in their individual capacities and as the co-trustees of The Brunsting Family Living Trust a/k/a The Restatement of The Brunsting Family Living Trust (the "Trust") file this Motion for Summary Judgment.

I. INTRODUCTION

The Co-Trustees have been sued by their sister, Candace Louise Curtis ("Curtis") and their brother, Carl Henry Brunsting ("Carl"). While independently represented, Curtis and Carl's various claims and causes of action against the Co-Trustees are thematically, if not substantively similar. As a result, the Co-Trustees have been forced to file counter-claims against both Carl and Curtis to protect and promote the below identified Trustors' stated intents and objectives.

Discussed in this Motion are **four (4) key issues**, encapsulating the various claims/counter-claims. Each of these issues must be resolved in the Co-Trustees' favor via summary judgment:

1. By pursuing their claims, Carl and Curtis have each triggered the Trust's forfeiture provisions (or other similar provisions in other trust documents);

2. No unauthorized distributions were made by Anita;

3. During their tenure, the Co-Trustees have not materially breached any duties; and

4. Attorneys' fees and expenses incurred by the Co-Trustees are the obligation of the Trust, Carl, and/or Curtis.

II. EVIDENCE SUPPORTING CO-TRUSTEES' REQUESTED RELIEF

The exhibits identified and referred to throughout this Motion constitute evidence upon which the Court may rely in granting the relief requested. All such exhibits are incorporated by reference as if fully restated herein. The Co-Trustees' evidence and exhibits are identified as follows:

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

Exhibits and analysis set forth in one section of this Motion are incorporated by reference in all other sections of this Motion as necessary, and as additional support for the totality of the relief sought in this Motion. To the extent considered "unfiled discovery," notice of intent to use

such unfiled discovery is hereby provided. Where appropriate, the Court is asked to take judicial notice of the case file generally, and the exhibits and evidence presented herein, specifically.

III. SUMMARY JUDGMENT IS PROPER AND NECESSARY AT THIS TIME

The Trust was created on or about October 10, 1996 and restated on or about January 12, 2005 by Elmer Henry Brunsting ("Elmer") and Nelva Erleen Brunsting ("Nelva") (together, the "Founders" or "Trustors" and each a "Founder" or "Trustor").[1]

Elmer died on **April 1, 2009**. Nelva died on **November 11, 2011**. Three months after Nelva's death, in **February 2012**, Curtis filed suit in the United States District Court for the Southern District of Texas.[2] Carl initiated a pre-suit deposition proceeding one month later, in **March 2012**.[3] In **January 2013**, Carl filed suit against The Vacek Law Firm[4], and in **April 2013**, Carl filed suit against Amy, Anita, Curtis, and the fifth Brunsting sibling, Carole Ann Brunsting ("Carole").[5]

Certain parties have exchanged written discovery with others, and all parties participated in the deposition of Candace Kunz-Freed, one of the attorneys involved in the drafting of the Trust

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[1] Exhibit A

[2] Civil Action No. 4:12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting and Does 1-100*; In the United States District Court for the Southern District of Texas of February 27, 2012.

[3] Cause No. 2012-14538; *In Re: Carl Henry Brunsting*; In the 80th Judicial District Court of Harris County, Texas.

[4] Cause No. 2013-05455; *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting vs. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC;* In the 164th Judicial District Court of Harris County, Texas.

[5] Cause No. 412,249-401; *Carl Henry Brunsting,* ***individually and as Independent Executor*** *of the Estates of Elmer H. Brunsting and Nelva E. Brunsting vs. Anita Kay Brunsting [in various capacities], Amy Ruth Brunsting [in various capacities], Carole Ann Brunsting [in various capacities] and as a nominal defendant only, Candace Louise Curtis*; In Probate Court No. Four (4) of Harris County, Texas [Emphasis Added].

and its related documents. Further, the Co-Trustees sought to depose Curtis, but Curtis refused to appear for deposition despite a Court Order compelling her to do so.[6]

Although additional discovery will be conducted by the Co-Trustees if summary judgment is denied, Curtis and Carl have had ample time to develop their claims and defenses. Curtis has had over nine (9) years and Carl has had over eight (8) years to develop their claims and defenses.

Over time, the parties have mediated this dispute with three different mediators. Additionally, there have been direct settlement negotiations between and among the parties. Absent a paradigm shift by one party or another, there is no reasonable expectation of settlement. Accordingly, this matter is ripe for resolution by summary judgment and/or by trial.

The Co-Trustees implore this Court to consider the summary judgment arguments presented herein, and grant this Motion. Alternatively, if the Court will not grant this Motion in its totality, the Co-Trustees request that the Court grant partial summary judgment and sever those claims as appropriate to at least narrow the issues in advance of trial.

IV. BACKGROUND FACTS

As stated, the Trust was created on or about October 10, 1996, and restated on or about January 12, 2005. Over time, additional documents pertaining to Trust were executed by one or both of the Founders. Two such documents executed by Nelva after Elmer's death include:

1. The Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about June 15, 2010 (the "June 2010 QBD")[7]; and

2. The Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about August 25, 2010 (the "August 2010 QBD").[8]

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[6] The Court is asked to take judicial notice of the Order Regarding Deposition of Plaintiff, Candace L. Curtis (signed 8/13/20).
[7] Exhibit B - June 2010 QBD
[8] Exhibit C - Copy of August 2010 QBD

Through the Trust, the June 2010 QBD and the August 2010 QBD, the Founders individually or collectively set out a number of different terms, conditions and instructions to be implemented and followed by the trustees and beneficiaries. The Founders specifically included rules intended for the "protection of beneficial interests," including and without limitation rules dictating that **the Founders' instructions were not to be contested.**[9]

Over time, Curtis's claims were transferred to this Court and consolidated with Carl's claims.[10] Via their respective filings, Curtis and Carl have asserted the following claims/causes of action and/or sought various declarations:

Carl's Claims[11]	**Curtis's Claims**[12]
(1) Construction of Trust and Suit for Declaratory Judgment; (2) Demand for Trust Accounting; (3) Breach of Fiduciary Duties; (4) Conversion; (5) Negligence; (6) Tortious Interference with Inheritance; (7) Constructive Trust; (8) Civil Conspiracy; (9) Fraudulent Concealment; (10) Liability of Beneficiaries; (11) Removal of Trustees; (12) Receivership Over Trust; (13) Self-Dealing; (14) Criminal Wiretap Claim; (15) Civil Wiretap Act; (16) Invasion of Privacy and Intrusion on Seclusion; and (17) Request for Injunctive Relief.	(1) Breach of Fiduciary Obligation; (2) Extrinsic Fraud; (3) Constructive Fraud; (4) Intentional Infliction of Emotional Distress; (5) Breach of Fiduciary Duty; (6) Fraud; (7) Money Had and Received; (8) Conversion; (9) Tortious Interference with Inheritance Rights; (10) Declaratory Judgment Action; (11) Demand for Accounting; (12) Unjust Enrichment; and (13) Conspiracy.

[9] See generally, Exhibit A - Trust at Article XI.
[10] The Court is asked to take judicial notice of the Agreed Order to Consolidate Cases (signed March 16, 2015).
[11] See, Carl's First Amended through Third Supplement to First Amended Petitions for Declaratory Judgement, for an Accounting, for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief.
[12] See Curtis's Second Amended Petition.

Declarations Sought by Carl:	Declarations Sought by Curtis:
• 8/25/10 QBD *in terrorem* clause void. • Construe validity, terms, responsibilities and obligations of documents signed by Elmer and Nelva. • That Carl's actions do not violate *in terrorem* clause (if valid). • That Carl's actions are done in good faith, so *in terrorem* not triggered.	• "Modification Documents" (June 2010 QBD, August 2010 QBD and Exercise of Testamentary Power of Appointment) are not valid. • *In terrorem* clause not capable of enforcement.

Filtering these causes of action and requested declarations through the lens of the four (4) key issues identified above confirms that summary judgment is proper on traditional and/or no-evidence grounds.

V. ARGUMENT AND ANALYSIS

A. Summary judgment is proper on no-evidence and traditional grounds.

To date, the only witness deposed in this case is Candace Kunz-Freed of Vacek & Freed. Vacek & Freed, and in some instances Ms. Kunz-Freed herself, drafted each of the documents at issue in this litigation and oversaw Nelva's execution of them. Her deposition testimony considered in light of applicable law and other summary judgment evidence confirms that the Co-Trustees are entitled to summary judgment. None of the factual allegations or claims made by Carl and/or Curtis are supported by Ms. Kunz-Freed's deposition testimony.[13] As a result, the Co-Trustees are entitled to summary judgment, whether based on their affirmative claims, or their general denial and affirmative defenses, to Carl and/or Curtis's various affirmative pleadings.

A traditional summary judgment is proper under Texas Rule of Civil Procedure 166a when, as here, the movant establishes that there exists no genuine issue of material fact and that it is

[13] See generally, Exhibit D - Kunz-Freed Deposition of March 2019 – Page 8, Line 1 to Page 105, Line 17; **and** Exhibit E - Kunz-Freed Deposition of June 2019 – Page 111, Line 12 to Page 157, Line 7.

entitled to judgment as a matter of law. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (citing Tex. R. Civ. P. 166a(c)); *see also Dallas Cty Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 872 (Tex. 2005) (holding that the movant had the burden to establish that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law). A defendant who conclusively negates at least one of the essential elements a plaintiff's cause(s) of action or who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment. *Alpert v. Riley*, 274 S.W.3d 277, 285 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (citing *Cathey v. Booth*, 900 S.W.2d at 341).

Texas Rule of Civil Procedure 166a(i) requires a no-evidence summary judgment for a defendant when, after an "adequate time for discovery . . . 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." Tex. R. Civ. P. 166a(i). Once a party moves for summary judgment based upon the no-evidence standard, the non-movant bears the burden of providing summary judgment evidence on the points at issue. *Id.*; *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). As detailed herein, Carl and Curtis have had adequate time to conduct discovery into the no-evidence issues addressed herein, making a no-evidence motion for summary judgment appropriate.

B. Issue No. 1 - By pursuing their claims, Carl and Curtis have each triggered the Trust's forfeiture provisions.

By pursuing their claims, Carl and Curtis have each triggered the forfeiture provisions set forth in the Trust and/or the August 2010 QBD. There is "no contest" language in both documents. Based on the language in either document, or both, the Co-Trustees are entitled to summary judgment on this issue. The Court may grant summary judgment by awarding the Co-Trustees a

judgment consistent with their counterclaims and/or by denying Carl and Curtis's respective claims for affirmative relief under the Declaratory Judgments Act.

1. Forfeiture via the Trust

The "no contest" language in the Trust is clear and definitive. It reads:

> **Section C. No Contest of Our Trust**
>
> The Founders vest in the Trustee the authority to construe this trust instrument and to resolve all matters pertaining to disputed issues or controverted claims. 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 instrument, or any will which requires distribution of property to this trust, or to resolve any claim or controversy in the nature of reimbursement, 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 or in the Founders' estates, 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 any such litigant or contestant shall pass as if he or she or it had predeceased us, regardless of whether or not such contestant is a named beneficiary.
>
> These directions shall apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause and even though the proceedings may seek nothing more than to construe the application of this no contest provision.
>
> This requirement is to be limited, even to the exclusion thereof, in the event it operates to deny the benefits of the federal estate tax or federal gift tax marital deduction.

2. Forfeiture via the August 2010 QBD

The "no contest" language in the August 2010 QBD expands upon that in the Trust. Pertinent excerpts include:

A. Prohibition Against Contest: If any devisee, legatee or beneficiary under the Trust Agreement or any amendment to it, no matter how remote or contingent such beneficiary's interest appears, or any legal heir of the Trustor, or either of them, or any legal heir of any prior or future spouse of the Trustor (whether or not married to the Trustor at the time of the Trustor's death), or any person claiming under any of them, directly or indirectly does any of the following, then in that event the Trustor specifically disinherits each such person, and all such legacies, bequests, devises and interests given to that person under the Trust Agreement or any amendment to it shall be forfeited and shall be distributed as provided elsewhere herein as though he or she had predeceased the Trustor without issue:

1. unsuccessfully challenges the appointment of any person named as a Trustee, Special Co-Trustee or Trust Protector pursuant to the Trust Agreement or any amendment to it, or unsuccessfully seeks the removal of any person acting as a Trustee, Special Co-Trustee or Trust Protector;

3. objects to any construction or interpretation of the Trust Agreement or any amendment to it, or the provisions of either, that is adopted or proposed in good faith by the Trustee, Special Co-Trustee or Trust Protector, and said objection is later adjudicated by a court of competent jurisdiction to be an invalid objection;

7. in any other manner contests this Trust or any amendment to it executed by the Trustor (including its legality or the legality of any provision thereof, on the basis of incapacity, undue influence, or otherwise), or in any other manner, attacks or seeks to impair or invalidate this Trust, any such amendment or any of their provisions;

To enforce the August 2010 QBD's no contest provision, the Court must first confirm that the August 2010 QBD is itself valid and enforceable. As a matter of law, the August 2010 QBD is valid and enforceable. Carl and Curtis's attacks on its enforceability must be rebuffed by this Court.

a. The August 2010 QBD is valid upon application of the "four corners rule."

Both federal law and Texas law recognize the validity and exercise of powers of appointment. In short, a power of appointment means that one party (the grantor or power creator) confers or grants upon another (the "donee" or "powerholder"), the "authority to appoint or designate the recipient of property, to invade or consume property, to alter, amend, or revoke an instrument under which an estate or trust is created or held, and to terminate a right or interest under an estate or trust, and any authority remaining after a partial release of a power." TEX. PROP.

CODE § 181.001(2). *See also* Internal Rev. Code §§ 2041(b) and 2514(c) (a power of appointment generally means a power that is exercisable in favor of the powerholder, the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate).

Carl and/or Curtis argue that Article III, § A of the 2005 Restated Trust precludes the exercise of a power of appointment simply because of a provision that provides "this trust will become irrevocable upon the death of either of us." It is worth noting that, unlike Curtis, Carl admits that the QBD is an exercise of the power of appointment,[14] and does not dispute that the QBD was properly executed. Rather, Carl's sole complaint is that there was supposedly no right to exercise a power of appointment to create the August 2010 QBD. Plaintiff's reliance on Article III, § A is misplaced, as it fails to account for provisions applicable to the Survivor's Trust and Decedent's Trust and ignores the established Texas doctrine known as the "four corners rule."

Under Texas law, the courts must "interpret trust instruments the same way as wills, contracts, and other legal documents." *Lesikar v. Moon,* 237 S.W.3d 361, 366 (Tex. App.-Houston [1st Dist.] 2007, pet. denied). In interpreting a trust instrument to determine the powers of the trustee, the courts must look to the "four corners of the trust instrument to ascertain the settlor's intent." *Hurley v. Moody Nat'l Bank of Galv.,* 98 S.W.3d 307, 310-11 (Tex.App.-Houston [1st Dist.] 2003, no pet.). The courts are to construe the instrument to give effect to all its provisions so that no provision is rendered meaningless. *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983).

The plaintiff's view violates these well-established standards, and the reasons are two-fold. First, under a revocable trust, which was the state of the 2005 Restated Trust before Elmer died,[15]

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[14] *See* Carl Henry Brunsting's Motion for Partial Summary Judgment, Pg. 6.

[15] *See* Exhibit A - Trust, Art. I, § A (this joint revocable living trust); *see also* Art. III, A (while we are both living, either of us may revoke our trust).

a power of appointment is not necessary because either trustor/founder/spouse had the right to modify the trust provisions related to his or her contributive share of the trust assets. In other words, a power of appointment is unnecessary when the applicable instrument is subject to modification or revocation without invoking the power of appointment.

Second, the very use of the term "surviving Founder" (in this case, Nelva) contemplates the death of a co-trustor/co-founder (in this case, Elmer). If there was no intent that a surviving Founder have a power of appointment post-death of the first spouse to die, or any other power for that matter, then the 2005 Restated Trust would have either deleted all references to the power of appointment provisions, or would have specifically mandated no right of a power of appointment after the death of the first spouse.

There are multiple tax and nontax reasons to provide a surviving spouse with a power of appointment. A review of the literature on this issue suggests one of the more common reasons to grant a power of appointment is to permit an amendment to an instrument that would not otherwise be subject to amendment due to a change in circumstances that did not exist or could not otherwise be anticipated when the testamentary instrument was created. Such is the case here.

In this case, Nelva found it necessary to modify the trustees for the personal asset trusts of Candace Curtis and Carl Brunsting. The concern for Curtis was Curtis' inability "to manage the financial stuff and deal with the financial part."[16] As for Carl, the concern was that his health conditions impaired his ability to manage his financial affairs.[17]

Under the four corners rule, if the term "surviving Founder" is to have any effect whatsoever, and any rights whatsoever, then the Probate Court must find the QBD to be a valid exercise of power of appointment. Otherwise, the term "surviving Founder" and the power of

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[16] *See* Exhibit E, June 27, 2019, Deposition of Candace Kunz-Freed, pg. 126, lines 9-10.
[17] *See* Exhibit E, June 27, 2019, Deposition of Candace Kunz-Freed, pg. 127, lines 7-12.

appointment provisions are rendered meaningless, a result that is contrary to Texas law and the four corners doctrine.

b. Candace Kunz-Freed, the drafting attorney, confirms the 2010 QBD is a valid exercise of the survivor's powers of appointment.

Candace Kunz-Freed confirms that the August 2010 QBD is a valid, enforceable document. Contrary from the position(s) taken by Carl and/or Curtis, the fact that it was executed after Elmer died is of no import to its enforceability. Ms. Kunz-Freed explains that after Elmer's death the Restated Trust results in a survivor's trust and a decedent's trust. The former is fully amendable, while the latter may be amended via a qualified beneficiary designation.[18]

c. The Lester Report (Court Ordered Temporary Administrator's Report).

Prior to the Hon. James Horowitz becoming the presiding judge of Probate Court No. 4, the Hon. Christine Butts, on July 23, 2015, and by agreement of the parties, appointed Greg Lester as a Temporary Administrator to report to the Probate Court, *inter alia*, on the validity of the QBD.[19]

In January 2016, the Temporary Administrator issued two reports, which are a part of the Probate Court's file, and of which the defendants/co-trustees urge the Probate Court to take judicial notice.

In the interest of judicial economy as to the Probate Court's time regarding a determination of the validity of the QBD, the Probate Court need not look any further than the Temporary Administrator's conclusions, wherein he found:

> While the [2005 Restated Trust] provided that the Trust could not be amended after the death of Nelva or Elmer Brunsting, this did not preclude Nelva Brunsting from exercising her general and limited power of appointments over the Survivor's Trust and Decedent's Trust. Specifically, it appears that Nelva Brunsting appropriately exercised her

[18] Exhibit E - Kunz-Freed Deposition of June 2019 – Page 132, Line 5 to Page 134, Line 14.
[19] *See* Exhibit F, Order Appointing Temporary Administrator Pending Contest, dated July 23, 2015.

> general power of appointment over the Survivor's Trust and her limited power of appointment over Decedent's Trust by appointing the assets to her five (5) children in trust by and through the August 25, 2010 Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment under Living Trust Agreement. . . .[20]
>
> * * *
>
> ***<u>All of the legal actions taken by Nelva were within her authority under the broad provisions of the Restatement</u>*. **(Emphasis added).[21]

Based on this conclusion, the Temporary Administration, as a "neutral" participant, recognized Nelva's right and authority to make use of the power of appointment conferred upon her.

d. Nelva properly, fairly, and competently executed the August 2010 QBD.

Carl and/or Curtis appear to attack the August 2010 QBD by attacking Nelva herself. More specifically, one or both appear to suggest that (1) Nelva lacked the capacity to execute the August 2010 QBD; (2) did not actually execute the document; or (3) was coerced into executing it. Neither Carl nor Curtis can meet their burden of proof on these issues. Summary judgment is proper on each such issue on traditional and/or no-evidence grounds.

i. <u>The Capacity/Competency Issue</u>.

Carl and/or Curtis appear to challenge Nelva's execution of certain Trust Documents, including and without limitation, the August 2010 QBD, by suggesting that Nelva lacked capacity at the time of their respective execution. Summary judgment evidence, in the form of Candace Kunz-Freed's deposition testimony confirms that Nelva **did not** lack capacity.

Ms. Kunz-Freed explained her process for seeking "red flags" on the issue of capacity and indicated that she saw none on the dates Nelva executed the documents at issue in this litigation.[22]

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[20] *See* Exhibit G, Temporary Administrator Report, dated January 14, 2014, Pgs. 6-7.
[21] *See* Exhibit G, Temporary Administrator Report, dated January 14, 2014, Pg. 10, Conclusions, 1ST Sentence.
[22] Exhibit E - Kunz-Freed Deposition of June 2019 – Page 114, Line 14 to Page 117, Line 2; Page 142, Line 8 to Page 153, Line 9.

She testified that Nelva did not exhibit any irrational behavior, had a general understanding of the nature of her assets, and understood who her family members, the "objects of her bounty," were.[23]

Based on this evidence, summary judgment is proper on **traditional** grounds. The burden of proving incapacity is upon the party asserting its existence.[24] Neither Carl nor Candy can meet this burden. Any claims stemming from or related to allegations of capacity must be dismissed as a matter of law.

Additionally, summary judgment may also be granted on **no-evidence grounds**. The proper inquiry on the issue of capacity is whether the testator had capacity at the time the contested document was executed.[25] In limited instances, evidence of incapacity at times other than when the document was executed can be considered if that evidence "demonstrates that the condition persists and 'has some probability of being the same condition'" present at the time of execution.[26]

A testator has testamentary capacity when he possesses sufficient mental ability at the time of execution of the will to (1) understand the effect of making the will and the general nature and extent of his property; (2) know his next of kin and the natural objects of his bounty; and (3) have sufficient memory to assimilate the elements of executing a will, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them. The inquiry is focused on the testator's capacity on the day the will was signed.[27]

Considering the elements of incapacity claims such as those asserted by Carl and/or Curtis, summary judgment is proper on no-evidence grounds because:

- There is no evidence that Nelva lacked capacity at the time each contested document was executed;

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[23] Exhibit D - Kunz-Freed Deposition of March 2019 – Page 34, Line 19 to Page 37, Line 23.
[24] *Lee v. Lee,* 424 S.W. 2d 609, 610 n.1 (Tex 1968)(citing *Chambers v. Winn*, 154 S.W.2d 454(1941))
[25] *Lee*, 424 S.W.2d at 609.
[26] *Croucher v Croucher*, 660 S.W.2d 55, 57 (Tex.1983)(quoting *Lee*, 424 S.W.2d at 611).
[27] *Estate of Danford*, 2018 WL 2012401, at *3 (citing *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890); *See also, In the Estate of J. Richard Harrell, Deceased,* No. 01-17-00803 CV (Tex.App-Houston [1st Dist.] 2017, pet. denied).

- There is no evidence of incapacity at times other than when any contested document was executed;
- There is no evidence demonstrating that any indications of incapacity at times other than when any contested document was executed persisted or existed at the time any contested document was executed; and/or
- There is no evidence that at the time of execution of any contested document Nelva was operating under a state of supposed facts that did not exist and would not be believed by any rational person.[28]

ii. *<u>The Execution/Forgery Issue</u>*.

Carl and/or Curtis appear to challenge the signature(s) appearing on the August 2010 QBD suggesting that the signature(s) are not genuine. As best as can be determined, this allegation stems from Nelva's signature appearing to be different on different copies of the August 2010 QBD that have been reviewed or produced prior to, or in connection with, this litigation. Summary judgment evidence, in the form of Candace Kunz-Freed's deposition testimony, confirms Nelva's signatures as genuine. Summary judgment is proper on traditional and no-evidence grounds.

During her deposition, Ms. Kunz-Freed explained that she witnessed Nelva's execution of the August 2010 QBD, and that Nelva was asked to sign three separate originals as per Vacek & Freed's ordinary and customary practice.[29] She also testified that she recognized the signatures in question as Nelva's, there being no indication to Ms. Kuntz-Freed that the signatures were forged.[30] Summary judgment evidence confirms that Nelva executed the August 2010 QBD and that any variances in her signature are attributable to her signing three separate originals. Based on this evidence, summary judgment is proper on **traditional** grounds.

[28] *See Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964).
[29] Exhibit E - Kunz-Freed Deposition of March 2019 – Page 38, Line 3 to Page 39, Line 23.
[30] Exhibit F - Kunz-Freed Deposition of June 2019 – Page 112, Line 2 to Page 114, Line 3; Page 127, Line 21 to Page 129 Line 16.

Additionally, summary judgment may also be granted on **no-evidence grounds**. The act of forgery is defined as altering, making, completing, executing, or authenticating a writing so that it purports to be the act of another who did not authorize the act.[31] Summary judgment is proper on no-evidence grounds because:

- There is no evidence that the signatures on the August 2010 QBD are not Nelva's; and
- There is no evidence that the signatures on the August 2010 QBD were altered, made, completed, executed, or authenticated by someone other than Nelva.

iii. *The Coercion/Undue Influence Issue.*

Carl and/or Curtis appear to challenge the August 2010 QBD by suggesting that Nelva was coerced/unduly influenced into signing it. Summary judgment evidence, in the form of Candace Kunz-Freed's deposition testimony, confirms an absence of coercion/undue influence.

Ms. Kunz-Freed has stated that there was no indication of undue influence. She explained that the mere "lobbying" of a parent to make changes to an estate plan does not equal undue influence. She also explained that Nelva took her time to consider changes to her estate plan, making some changes but deciding not to make others. She also testified that Nelva never expressed regret about executing challenged documents like the August 2010 QBD, even on those occasions when they were discussed post-execution.[32]

Ms. Kunz-Freed also testified that one typical "hallmark" of undue influence is when beneficiaries "take" in unequal amounts. She testified that Nelva treated all of the children equally from a distribution standpoint, indicating an absence of undue influence.[33] Additionally, she

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[31] *See In re Estate of Flores*, 76 S.W.3d 624, 630 (Tex.App – Corpus Christi 2002, no pet.).
[32] Exhibit F - Kunz-Freed Deposition of June 2019 – Page 117, Line 3 to Page 124, Line 20.
[33] Exhibit D - Kunz-Freed Deposition of March 2019 – Page 40, Line 4 to Page 44, Line 17; **and** Exhibit F - Kunz-Freed Deposition of June 2019 – Page 153, Line 18 to Page 155, Line 11.

verified that Nelva drove herself to their meetings, and executed documents like the August 2010 QBD outside the presence of her children.[34]

Carl and/or Curtis have alleged that their respective removal as trustees of the Trust and/or of their respective personal asset trusts is indicative of undue influence. However, in describing Nelva's decision to make these particular changes, Ms. Kunz-Freed's testimony confirms that Nelva's decisions were well-reasoned and free from undue influence. Carl's removal was motivated by his poor health, while Curtis's removal was motivated by both Curtis's out-of-state residency and Nelva's concerns over Curtis's ability to manage her own finances.[35]

Based on this evidence, summary judgment is proper on **traditional** grounds. The burden of proving undue influence is upon the party asserting its existence.[36] Any claims stemming from or related to allegations of coercion/undue influence must be dismissed as a matter of law.

Additionally, summary judgment may also be granted on **no-evidence grounds**. To show undue influence, Carl and/or Curtis must show (1) the existence and exertion of influence over Nelva by Amy and/or Anita; (2) that the influence subverted or overpowered Nelva's mind at the time any contested document(s) was executed; and (3) that Nelva would not have executed the challenged document(s) but for that influence.[37] As explained in *Rothermel*, there are a number of factors a Court may consider when weighing whether there is proof of undue influence.[38] Considering the elements of undue influence and the *Rothermel* factors, summary judgment is proper on no-evidence grounds because:

- There is no evidence of the existence and exertion of influence over Nelva by Amy and/or Anita;

[34] Exhibit D - Kunz-Freed Deposition of March 2019 – Page 36, Line 23 to Page 37, Line 23.
[35] Exhibit E - Kunz-Freed Deposition of June 2019 – Page 124, Line 21 to Page 127, Line 20 **and** Exhibit D - Kunz-Freed Deposition of March 2019 – Page 31, Line 19 to Page 32, Line 23.
[36] *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).
[37] *Id.* at 923.
[38] *Id.* at 923.

- There is no evidence that Amy or Anita acted in any way that subverted or overpowered Nelva's mind at the time any contested document was executed;

- There is no evidence that Nelva would not have executed the challenged document but for any alleged influence by Amy or Anita;

- There is no evidence that the nature and type of relationships between Nelva, Amy, Anita, Carole, Carl, or Curtis were any different than relative to the alleged exertion of undue influence;

- There is no evidence that Amy or Anita deceived Nelva relative to any contested document;

- There is no evidence that Amy or Anita had the opportunity to exert undue influence over Nelva;

- There is no evidence of circumstances surrounding the drafting and execution of the contested documents that would support any allegations of undue influence;

- There is no evidence of a fraudulent motive relative to any contested document;

- There is no evidence of a habitual subjection of Nelva by Amy, Anita, or anyone;

- There is no evidence that Nelva's state of mind at the time of the execution of any contested document subjected her to being unduly influenced, or that she was unduly influenced;

- There is no evidence that Nelva was physically or mentally unable to resist or be susceptible to undue influence, generally or with respect to any alleged act of influence supposedly perpetuated by Amy or Anita;

- There is no evidence of words or deed by Nelva that would indicate she was subject to undue influence at the time any contested document was executed;

- There is no evidence of weakness of mind and body that would indicate Nelva was subject to undue influence at the time any contested document was executed; and/or

- There is no evidence that the content of any contested document is unnatural in regard to its dispositions of property.

3. Carl and Curtis have forfeited their beneficiary status by pursuing their claims.

Via the Trust, Elmer and Nelva identified certain specific acts which, if taken, would trigger a forfeiture. By engaging in one or more prohibited acts, a beneficiary would "forfeit any

amount to which [he/she] is or may be entitled and the interest of any such litigant or contestant shall pass as if [he/she] had predeceased [Elmer and Nelva]."[39] Prohibited acts include, but are not limited to, originating (or causing to be instituted) a judicial proceeding:

- To construe or contest the trust(s);
- To resolve any claim or controversy in the nature of reimbursement;
- Seeking to impress a constructive or resulting trust;
- Alleging any theory which, if assumed as true, would enlarge (or originate) a claimant's interest in the Trust or the Founder's Estates. [40]

Via the Trust, Elmer and Nelva expressed their intent that a forfeiture occur even if:

- It is determined that the judicial proceeding was initiated in good faith, with probable cause; and/or
- It is determined that the judicial proceeding was initiated to do nothing more than construe the application of the no-contest provision.[41]

Through her execution of the August 2010 QBD, Nelva further expressed herself regarding the issue of forfeiture. Nelva identified certain acts, which if taken, would not only further the forfeiture plan established in the Trust, but also cause that beneficiary to be specifically disinherited.[42] Per Nelva, the August 2010 QBD's forfeiture-triggering provisions were to apply to any beneficiary who:

- Unsuccessfully challenged the appointment of any person named as a Trustee or unsuccessfully sought the removal of any person acting as a Trustee;
- Objected to any action taken, or proposed to be taken, in good faith by the Trustee, if such action is determined to have been taken in good faith;
- Objected to any construction or interpretation of the trust, or any amendment to it, and such objection is later adjudicated to be an invalid objection; and/or

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[39] Exhibit A - Trust at Article XI; Section C
[40] Id
[41] Id.
[42] Exhibit C - August 2010 QBD (Miscellaneous Provisions; Item A, Page 22)

- In any other manner contested the trust or any amendment to it, including its legality or the legality of any provision thereof, on the basis of incapacity, undue influence or otherwise, or in any other manner attacking or seeking to impair or invalidate the trust or any amendment, or any of their provisions. [43]

Moreover, with respect to all such prohibited acts, Nelva "spoke" directly to her trustees and the Court by:

- Cautioning a trustee against settling any contest, attack, or attempt to interfere with the Founders' estate plan; and

- Requesting that the Court take into account the Trustor's firm belief that no person contesting or attacking the Trustor's estate plan should take or receive any benefit from the estate. [44]

Beginning with the filing of their respective original petitions/complaints, both Curtis and Carl have asserted (and/or continue to assert) claims and causes of action, or otherwise taken action through the filing of various motions, objections, and/or responses/replies which violate the established restrictions, thereby triggering the forfeiture provisions.

a. Examples of actions taken by Curtis in violation of the forfeiture provisions.

Through her filings, Curtis has violated the established restrictions, triggering the forfeiture provisions on multiple occasions, and in various ways. Examples include, but are not limited to:

- Seeking a declaration that the August 2010 QBD is invalid; and
- Seeking to have the Trust's *in terrorem* clause declared unenforceable.[45]

b. Examples of actions taken by Carl in violation of the forfeiture provisions.

Through his filings, Carl has violated the established restrictions, triggering the forfeiture provisions on multiple occasions, in various ways. Examples include, but are not limited to:

- Seeking to Impose a Constructive Trust;
- Seeking to Invalidate the August 2010 QBD;

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[43] Exhibit C - August 2010 QBD (Miscellaneous Provisions; Item A, Page 23)
[44] Exhibit C - August 2010 QBD (Miscellaneous Provisions; Item A, Page 24)
[45] The Court is specifically asked to take notice of various Motions, Pleas, or other filings submitted by Curtis, too numerous to specifically identify herein, in which she has further triggered the forfeiture provisions.

- Seeking to have the Trust's *in terrorem* clause declared void;
- Seeking to have the Co-Trustees removed; and
- Seeking reimbursement of gifts made (see also, Section C – ISSUE 2, below).

4. As a matter of law, the no contest provisions are valid and enforceable.

An *in terrorem* clause in a will or a trust typically makes the gifts in the instrument conditional on the beneficiary not challenging or disputing the validity of the instrument." *Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *see* ***633** *In re Estate of Hamill*, 866 S.W.2d 339, 341 n.1 (Tex. App.—Amarillo 1993, no writ) ("The term, *in terrorem*, as applied to wills, refers to a legacy given upon condition that the beneficiary will not dispute the validity or disposition of the will."). *In terrorem* clauses are intended to dissuade beneficiaries under a will or trust from filing vexatious litigation, particularly as among family members, that might thwart the intent of the testator. *See Di Portanova*, 402 S.W.3d at 715 (citing *Gunter v. Pogue*, 672 S.W.2d 840, 842–43 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)); *Ferguson v. Ferguson*, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, pet. denied).

If the intention of a suit is to thwart the testator's intention, the *in terrorem* clause should be enforced. *See id.* (citing *Ferguson*, 111 S.W.3d at 599.); *see also Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531, at *2 (Tex. App.—Fort Worth Feb. 12, 2015, no pet.) ("Courts have enforced *in terrorem* clauses only when the intention of a suit is to thwart the grantor's intention").

In considering an *in terrorem* clause the "standard," the Court should seek to meet is one that strikes a proper balance between avoiding forfeiture, while also fulfilling the testator's intent. *Di Portanova*, 402 S.W.3d at 716 (citing *McLendon v. McLendon*, 862 S.W.2d 662, 678 (Tex. App.—Dallas 1993, writ denied)). However, a violation of an *in terrorem* clause is found when the acts of the parties clearly fall within the clause's express terms. *Hamill*, 866 S.W.2d at 342-343.

Through their filings, Carl and Curtis both act in a manner expressly prohibited by the *in terrorem* clause(s). Both Carl and Curtis seek relief that would thwart Elmer and Nelva's and/or Nelva's intent. Consider, for example, that by seeking a constructive trust, by attempting to declare the *in terrorem* clause void, and by contesting the entirety of the August 2010 QBD, Carl and Curtis each seek to champion their positions to the exclusion of Nelva and Elmer's intent.

If their positions are adopted by this Court, the August 2010 QBD would be ignored in its entirety, giving no effect to Nelva's intent. Likewise, if the *in terrorem* clause(s) are invalidated, it would be as if Elmer and Nelva never expressed a desire to see the Trust remain unburdened by the expense of litigation. The tragic irony is that, by disregarding their parents' intentions and instructions, Carl and Curtis have brought on the very expense their parents wished to see avoided.

Because Carl and Curtis have acted contrary to the instructions of their parents, each has forfeited their interest in the Trust. The Trust is to be administered as if each of them had predeceased Elmer and Nelva. Upon application of the *in terrorem* clause(s), the sole remaining beneficiaries of the Trust will be Carole, Amy, and Anita.[46]

C. ISSUE TWO - Carl and Curtis' claims against Amy and Anita can be dismissed via summary judgment because no unauthorized distributions were made by Anita.

1. Additional Facts Regarding Carl and Curtis' claims about alleged unauthorized distributions.

Both Carl and Curtis base portions of their claims on the belief that unauthorized distributions of trust funds were made. By way of example, but not limitation, Curtis alleges that "*Anita made numerous transfers that far exceeded the scope of her powers*" and that "*Anita also*

[46] The Co-Trustees acknowledge that if Curtis triggered the *in terrorem* clause(s) but Carl did not, then Carl would also be a remaining beneficiary. The same is true if Carl triggered the clause(s) but Curtis did not.

paid herself thousands of dollars in the form of gifts, fees and reimbursements, and did the same for both Amy and Carole."[47] Carl has made similar allegations.[48]

In effect, both Carl and Curtis allege that a combination of one or more of their other four siblings received gifts from the Trust that they did not receive (at all, or in like amounts), and that such transactions were unauthorized. It is, or should be, undisputed that the gifts in question were made while Nelva was alive, during a period in which Anita served as sole Trustee. It is, or should also be, undisputed that recipients of these funds/assets included Anita, Amy, Carole, and Curtis.

Notwithstanding that all five (5) siblings received gifts while Nelva and Elmer were alive, as an underlying basis for their claims against Amy and Anita, Carl and Curtis each complain that they should have received the same amount as other siblings. None of the Trust Documents require that gifts be made to all siblings, or that gifts must be made in equal amounts.

The emphasis of Carl and Curtis's complaints is placed on (1) Carole's alleged personal use of $150,000.00 of trust funds from an account established by Anita for Nelva's benefit on or around December 31, 2010; (2) a series of stock transfers made by Anita from the Trust to Carole, Curtis and Amy between approximately March 24, 2011 and June 14, 2011; and (3) whether the stock transfers were made from the wrong Trust.[49]

Anita acknowledges that from approximately December 21, 2010 to November 11, 2011 she was the sole Trustee of the Trust (defined during this period of time to include Nelva's Survivor's Trust and Elmer's Decedent's Family Trust). From the Trust, based on Nelva's instructions, she made the following, approximate amounts of monetary gifts to her siblings:

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[47] Curtis's Second Amended Petition of February 11, 2015 at Section III.
[48] See generally, Carl's First Amended Petition for Declaratory Judgment, for an Accounting, for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief of June 7, 2013 ("Carl's First Amended Petition") at Section V.
[49] See Carl's First Amended Petition at Paragraphs 13-15 and Carl's Second Supplement to First Amended Petition, as well as Curtis's Second Amended Petition at Section III.

- $ 4,2630.31(+/-) to Carl Brunsting (these were cash payments and not any distributions of stock).
- $ 23,585.60 (+/-) to Candace Curtis (stock and cash).
- $104,224.50 (+/-) to Carole Brunsting (stock only).
- $ 90,854.40 (+/-) to Amy Brunsting (stock only).
- $37,360.33 (+/-) to Anita Brunsting (stock and cash).[50]

2. No unauthorized or improper distributions were made by Anita, or received by Amy.

Summary judgment evidence and/or the absence of summary judgment evidence serve to confirm that no unauthorized or improper distributions were made by Anita, or received by Amy.

a. <u>Anita was authorized to open an account for Nelva's benefit.</u>

Pursuant to the Trust, and trust principles in general, a Trustee has great flexibility and discretion when it comes to making distributions to or for a Founder's benefit. By way of example, and not as a limitation, Article VIII, § B(3) of the 2005 Restated Trust provides that the Trustee may:

> . . . also distribute ***<u>to or for the surviving Founder's benefit</u>*** as much of the ***<u>principal</u>*** of Survivor's [Trust] as our Trustee, in its sole and absolute discretion, shall consider necessary or advisable for the education, health, maintenance, and support of the surviving Founder. (Emphasis added).

Article XII of the 2005 Restated Trust provides:

> The Trustee is authorized to establish and maintain bank accounts of all types in one or more banking institutions that the Trustee may choose.

The act of opening a bank account to be used for Nelva's benefit, and funding it with monies from the Trust does not violate the terms of the Trust, and by extension does not support any claim or cause of action asserted against the Co-Trustees for doing so. Further to the point, the summary judgment evidence proves that Amy was not serving as a trustee/co-trustee during

[50] *See* Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020.

the time period at issue. Likewise, while it may be true that gifts were made in unequal amounts, summary judgment evidence, in the form of the Trust Documents, confirms that doing so was both authorized and proper.

Thus, summary judgment is proper on traditional grounds in relation to any claim or cause of action asserted against Amy and Anita individually or as Trustees/Co-Trustees stemming from allegations that unauthorized or unequal gifts were made or received by them.

The allegation that Carole misused the funds deposited into the bank account is between Carl, Curtis, and Carole. However, the Co-Trustees have no information suggesting that Carole misused any funds. Nevertheless, if Carole did misuse funds, any such misuse speaks to Carole's individual liability to the Trust, not to Carl or Curtis. At best, any allegedly misused funds would have to be "reimbursed" to the Trust, and no such alleged misuse, if proven, would support Carl or Curtis' misuse claims against Amy and Anita, whether as individuals or Trustee/Co-Trustees.

In the absence of evidence that funds were misused, or that the Co-Trustees had knowledge of same and/or a duty to act with respect to same, summary judgment is proper on no-evidence grounds. More specifically:

1. There is no evidence that Carole misused any funds deposited into the bank account.

2. If funds were misused, there is no evidence that Anita had knowledge of their misuse during the time period in which she served as sole trustee of the Trust.

3. If funds were misused, there is no evidence that Anita or Amy had knowledge of their misuse during the time period during which they have served as co-trustees of the Trust.

b. <u>The Trust allows for unequal distributions to be made.</u>

Through their pleadings, Carl and Curtis also appear to complain that Anita acted improperly by not making distributions to all siblings in equal amounts. They each further appear

to allege that they are entitled to a greater share of the remaining trust assets in order to "equalize" the distributions and/or that any sibling who received more than another (which would include Amy) must return those amounts to the Trust.

The issue here is not whether certain siblings received a greater distribution of assets than others during Anita's tenure as sole trustee. That issue is not in dispute. Rather, the issue is whether the distribution/receipt of assets in unequal amounts is/was improper. It was not.

i. The Trust allows for unequal distributions to be made.

While Nelva was alive and Anita was serving as sole trustee, the Trust came to include a Survivor's Trust and a Decedent's Trust.[51]

(1) The Survivor's Trust allows for unequal distributions.

As sole trustee of the Trust, Anita was afforded a great deal of flexibility and discretion. By way of example, and not as a limitation, Article VIII, § B(3) of the 2005 Restated Trust provides that the Trustee may:

> . . . also distribute ***to or for the surviving Founder's benefit*** as much of the ***principal*** of Survivor's [Trust] as our Trustee, in its sole and absolute discretion, shall consider necessary or advisable for the education, health, maintenance, and support of the surviving Founder. (Emphasis added).

The 2005 Restated Trust does not define the term "benefit." However, under Article XII, § A, the Trust does provide that:

> Notwithstanding anything to the contrary in this agreement, the Trustee shall not exercise any power in a manner inconsistent with the ***beneficiaries' right to the beneficial enjoyment of the trust property*** in accordance with the general principles of the law of trusts. (Emphasis added).

[51] Exhibit A - Trust at Articles VII – IX.

Nor does the Trust define the terms "maintenance" and "support." Nevertheless, the words "maintenance" and/or "support" are synonymous with, but not limited to, the bare necessities of life. *See* 26 CFR 25.2514-1(c) (2).

Likewise, a power to use trust property for the beneficial enjoyment of the recipient (Nelva), logically includes comfort, welfare, and/or happiness of the recipient (Nelva) and is not limited by the aforementioned standards. *Id.* Thus, the term "beneficial enjoyment" includes the joy or happiness derived from having distributions made to one's (Nelva's) children.[52]

Furthermore, the Restatement (Third) of Trusts, § 50 provides in relevant part:

> The [support] standard ordinarily entitles a beneficiary to distributions sufficient for accustomed living expenses, extending to such items as . . . ***continuation of family giving***. (Emphasis added).

Given the history of familial giving known to date, by Elmer and Nelva together, and then Nelva individually after Elmer died,[53] it is clear that whatever distributions the Trustee performed, either in her discretion or pursuant to Nelva's request and/or instruction,[54] the distributions qualify as maintenance and/or support and, therefore, constitute a benefit to the surviving Founder, Nelva. Accordingly, the distributions complained of by Carl and Curtis were lawful and proper transfers.

Additionally, how the transfers occurred or the manner in which the distributions could be made should be considered from a common sense perspective. It is superfluous and inefficient for Nelva to make a request or issue an instruction, whether oral or written, that stock shares be distributed to her, so that she could then distribute those same shares to her children.

In terms of efficiency, the common sense approach is to skip the interim step of a distribution to Nelva, and simply complete the transaction by a direct transfer to the intended

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[52] *See* Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 1, ¶ 4.
[53] *See* Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.2, ¶ 6-7
[54] *See* Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 3, ¶ 8.

recipient. To conclude otherwise elevates form over substance. In other words, the alleged error/breach (if truly there was one, and which is denied) is harmless/non-material, as the end result (*i.e.*, the distributions in question) would have remained the same.

Although not expressly stated in their respective live pleadings, throughout the course of this litigation, Carl and/or Curtis have questioned why no "paper trail" confirming Nelva's instructions exists. The question is irrelevant and contrary to fact.

First, a written request is not required if the Trustee makes the distributions under Article VIII, § B(3) (Trustee's discretion).

Second, Anita was advised by counsel that a writing was not required.[55] Anita relied on the advice of counsel as to how, when, and where to make distributions, including requests or instructions issued by Nelva.[56]

Third, a writing would have resulted in the transfers being construed as advances on a beneficiary's inheritance, not gifts.[57] Even though Carl and Curtis may challenge the enforceability of this term, their legal arguments do not change the facts. After Nelva executed the June 2010 QBD, the terms of the Trust as she (and Anita) understood them would render any transfer confirmed in writing to be considered an advance. For transfers to count as "gifts," written confirmation should be avoided.

(2) The Decedent's Trust allows for unequal distributions.

The Decedent's Trust allows for unequal distributions via its guidelines for discretionary distributions. In relevant part, the Decedent's Trust states:

> Distributions need not be made to all Decedent's Trust beneficiaries and may be to the complete exclusion of some beneficiaries. Distributions may be made in equal or unequal

[55] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.4 ¶ 17.
[56] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.4, ¶ 17.
[57] Exhibit B - June 2010 QBD.

amounts according to the respective needs of the Decedent's Trust beneficiaries and shall be not charged against a beneficiary's ultimate share of the trust property.[58]

Examples of specific unequal but permitted distributions include:

Apr. 2009 – Dec. 20, 2010	Before she resigned as the trustee of the Survivor's Trust and Decedent's Trust, Nelva made the following, approximate, amounts of monetary gifts to her children: • $42,630.31 (+/-) to Carl Brunsting, and which sum included a single payment of $25,000.00. • $38,250.00 (+/-) to Candace Curtis. • $30,000.00 (+/-) to Carole Brunsting. • $ 9,000.00 (+/-) to Amy Brunsting. • $ 9,250.00 (+/-) to Anita Brunsting.
December 21, 2010	Nelva resigns as the trustee of her Survivor's Trust and Elmer's Decedent's Trust. Defendant Anita Brunsting agrees to serve as the trustee of Nelva's Survivor's Trust and Elmer's Decedent's Trust.[59]

The foregoing distributions are not improper because the term "beneficial enjoyment" includes the joy or happiness derived from having distributions made to one's (Nelva's) children.[60]

Furthermore, the Restatement (Third) of Trusts, § 50 provides in relevant part:

> The [support] standard ordinarily entitles a beneficiary to distributions sufficient for accustomed living expenses, extending to such items as . . . ***continuation of family giving***. (Emphasis added).

Given the history of familial giving, known to date, by Elmer and Nelva together, and then Nelva individually after Elmer died,[61] it is clear that whatever distributions the Trustee performed, either in her discretion or pursuant to Nelva's request and/or instruction, [62] the distributions qualify

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[58] Exhibit A - Trust at Article IX, Section C.
[59] Exhibit I, Resignation of Original Trustee, dated December 21, 2010.
[60] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 1, ¶ 4.
[61] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.2, ¶ 6-7
[62] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 3, ¶ 8.

as maintenance and/or support and, therefore, constitute a benefit to the surviving Founder, Nelva. Accordingly, the stock transfers to Nelva's children and grandchildren were lawful and proper transfers. Thus, the motion for summary judgment on this issue must be denied.

Furthermore, how the transfers occurred or the manner in which the distributions could be made should be considered from a common sense perspective. It is superfluous and inefficient for Nelva to make a request or issue an instruction, whether oral or written, that stock shares be distributed to her, so that she could then distribute those same shares to her children.

In terms of efficiency, the common sense approach is to skip the interim step of a distribution to Nelva, and simply complete the transaction by a direct transfer to the intended recipient. To conclude otherwise elevates form over substance. In other words, the alleged error/breach (if truly there was one, and which is denied) is harmless/non-material, as the end result (*i.e.*, the distributions in question) would have remained the same.

As for the writing issue, a written request is not required if the Trustee makes the distributions under Article VIII, § B(3) (Trustee's discretion). Nor is a writing required because legal counsel for the Trustee so stated.[63] Likewise, there can be no breach of duty if there is reliance on the advice of counsel, which is the case here. More specifically, as set forth in her Declaration, the Trustee relied on the advice of counsel as to how, when, and where to make distributions, including requests or instructions issued by Nelva.[64]

c. The distributions at issue were not made from the wrong trust.

Plaintiff argues that Anita Brunsting, during the period that she was the sole Trustee, had no authority to transfer 1,325 shares of Exxon stock from the Decedent's Trust to her sister, Carole

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[63] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.4 ¶ 17.
[64] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.4, ¶ 17.

Brunsting. Plaintiff's reasons are: (a) principal from the Survivor's Trust were required to be exhausted before a distribution of any principal from the Decedent's Trust; (b) distributions should be limited to what is for the surviving Founders "benefit;" and (c) plaintiff contends that he had a greater need for a distribution than his sister, Carole Brunsting. Once again, plaintiff ignores the flexibility and discretion accorded the Trustee under the 2005 Restated Trust.

The 2005 Restated Trust, Article IX deals with the administration of the Decedent's Trust. Under Article IX, § A, the Trustee shall "pay to or apply for the ***benefit*** of the surviving Founder all net income and ***such portions of principal*** . . . . (Emphasis added). Thus, distributions of principal, like shares of Exxon stock, is a permitted distribution.

As to what constitutes ***for the benefit***, the 2005 Restated Trust does not define the term "benefit." However, under Article XII, § A, the Trust does provide that:

> Notwithstanding anything to the contrary in this agreement, the Trustee shall not exercise any power in a manner inconsistent with the ***beneficiaries' right to the beneficial enjoyment of the trust property*** in accordance with the general principles of the law of trusts. (Emphasis added).

As previously discussed in, a power to use trust property for the beneficial enjoyment of the recipient (Nelva), logically includes comfort, welfare, and/or happiness of the recipient (Nelva) and is not limited by the aforementioned standards. *See* 26 CFR 25.2514-1(c) (2). Thus, the term "beneficial enjoyment" includes the joy or happiness derived from having distributions made to one's (Nelva's) children.[65]

Furthermore, the Restatement (Third) of Trusts, § 50 provides in relevant part:

> The [support] standard ordinarily entitles a beneficiary to distributions sufficient for accustomed living expenses, extending to such items as . . . ***continuation of family giving***. (Emphasis added).

[65] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 1, ¶ 4.

Given the history of familial giving, known to date, by Elmer and Nelva together, and then Nelva individually after Elmer died,[66] it is clear that whatever distributions the Trustee performed, either in her discretion or pursuant to Nelva's request and/or instruction,[67] the distributions constitute a benefit to the surviving Founder, Nelva. Accordingly, the stock transfers to Nelva's children and grandchildren were lawful and proper transfers. Thus, the motion for summary judgment on this issue must be denied.

Furthermore, exhaustion of the Survivor's Trust is not required. Article IX, § A provides that before "making discretionary distributions of principal from the Decedent's Trust to the surviving Founder, our Trustee shall ***preferably*** exhaust the Survivor's Trust."[68] (Emphasis added). The term "preferably" means the Trustee has a choice. The Trustee can choose from which of the two trusts (the Decedent's Trust or the Survivor's Trust) the Trustee ***prefers*** to make a distribution.

Plaintiff further objects to the Exxon stock distributions from the Decedent's Trust on the grounds that, after Nelva, he was the beneficiary in most need of assistance, and it was improper to exclude him from a distribution. The plaintiff is wrong.

Article IX, § C of the 2005 Restated Trust provides that "[b]efore making discretionary distributions pursuant to this Article, our Trustee shall ***consider*** income or other resources which are available outside of the Decedent's Trust to any beneficiary." (Emphasis added).

The obligation to "consider" income and other resources available to a beneficiary is not a mandate to make a distribution to a beneficiary with needs allegedly greater than those of Nelva or any other beneficiary. The only requirement which could arguably be imposed on the Trustee

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[66] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg.2, ¶ 6-7.
[67] Exhibit H, Unsworn Declaration of Anita Brunsting, dated September 10, 2020, pg. 3, ¶ 8.
[68] Exhibit A - Trust, Article IX, § A.

by this language is to "think about" or "give thought" to a beneficiary's resources as one of many factors in deciding how, when, and to whom to make a distribution.

Further, the term "consider" is not a command. It is guidance regarding the Trustee's power to make distributions in the Trustee's "sole and absolute discretion" to determine what is "necessary or advisable" for the party to whom the particular distribution is to be made.

Plaintiff also ignores the plain language of Article IX, § A(2)(c) which states:

> "[The] Trustee may also distribute any amount of principal deemed necessary, in [the] Trustee's sole and absolute discretion, for the education, maintenance, and support of the surviving Founder ***and [her] descendants***." (Emphasis added).

Granting summary judgment on this issue serves to resolve all claims for reimbursement asserted by Carl or Curtis against all recipients of the distributed funds.

C. ISSUE 3 - During their tenure as co-trustees, the Co-Trustees have not materially breached any duties.

Based on advice and counsel received from The Vacek Law Firm, Amy accepted a role as co-trustee after Nelva died. While Carl and Candy appear to allege that the Co-Trustees breached certain fiduciary duties allegedly owed by them as co-trustees during this period, neither actually presents any facts to support their respective conclusory allegations.[69]

At best, Carl and/or Curtis appear to allege that the Co-Trustees have failed to divide or properly share and distribute Trust assets between and among the Beneficiaries.[70] Based on summary judgment evidence obtained from The Honorable Kenneth M. Hoyt, from deponent, Candace Kunz-Freed, and taken from the Trust Documents, summary judgment is proper on traditional grounds. The summary judgment evidence reveals that Trust Assets have not been

[69] See generally, Carl's First Amended through his Third Supplement to First Amended Petition, as well as Curtis's Second Amended Petition.
[70] See Carl's First Amended Petition at Paragraphs 16 and 18.

shared and distributed because of Carl and Curtis's respective filings. Each of them, in their own way, have caused the very situation about which they complain.

As established, Nelva died on November 11, 2011. Three months later, in February 2012, Curtis filed suit in the United States District Court for the Southern District of Texas, presided over by the Honorable Kenneth M. Hoyt.[71] In January 2013, Carl filed suit against The Vacek Law Firm, and in April 2013, Carl filed suit Amy, Anita, Curtis, and Carole.

In April 2013, **at Curtis' request**, Judge Hoyt signed a Preliminary Injunction into effect. In pertinent part, the Injunction states:

> …the Court ENJOINS the Trustee(s) and all assigns from disbursing any funds from any Trust accounts without prior permission of the Court. However, any income received for the benefit of the Trust beneficiary is to be deposited appropriately in an account. However, the Trustee shall not borrow funds, engage in new business ventures, or sell real property or other assets without the prior approval of the Court. In essence, all transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in this case.[72]

At Curtis's request, the Injunction was adopted by this Court, where it remains pending and in effect.[73] Years later, in September 2020, Judge Hoyt addressed the Injunction, explaining its intent and scope. In relevant part, Judge Hoyt advised:

> …the preliminary injunction issued by this Court [Doc. 45] is to be enforced in Probate Court Number Four of Harris County, Texas, as determined in the sole and absolute discretion of Probate Court Number Four of Harris County, Texas and which determination may include modification or termination as determined in the sole and absolute discretion of Probate Court Number Four of Harris County, Texas. **It is not a "final judgment" of this Court, and did not require or contemplate the distribution of trust income to beneficiaries prior to the final resolution of the disputes between the parties.**[74]

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[71] Civil Action No. 4:12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting and Does 1-100*; In the United States District Court for the Southern District of Texas of February 27, 2012.
[72] Exhibit J - Memorandum and Order, Preliminary Injunction.
[73] The Court is asked to take judicial notice of the Order of Transfer signed on June 3, 2014.
[74] Exhibit K – Order [Emphasis Added].

By obtaining the Injunction, having it adopted by this Court, and continuing to promote its effectiveness and enforceability, Curtis created a set of rules that actually prevent distributions from being made until this litigation has concluded. By engaging in the various actions addressed throughout the pendency of this litigation, Curtis has stymied a timely resolution of this litigation.[75]

Through their respective lawsuits, in this and other courts, Carl and Curtis have rendered performance impossible. As Ms. Kunz-Freed explains, litigation is a very time-consuming process.[76] Likewise, she explains that a post-death administration such as Nelva's involves numerous steps, many of which can take upwards of 15 months, at a minimum, to complete. Litigation, such as the lawsuits initiated by Carl and Curtis, can cause an administration to grind to a halt.[77]

Further to the point, as addressed herein (See Section B – ISSUE 1, above), Nelva "spoke" directly to her trustees and the Court by (1) cautioning a trustee against settling any contest, attack or attempt to interfere with the Founders' estate plan; and (2) requesting that the Court take into account the Trustor's firm belief that no person contesting or attacking the Trustor's estate plan should take or receive any benefit from the estate.

Until and unless otherwise determined, the will of the Testator must be followed. Accordingly, the Co-Trustees have the duty and the obligation to honor Elmer and Nelva's wishes and seek enforcement of the forfeiture provisions. Failure to do so subjects them to potential

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[75] The Court is reminded of and asked to take judicial notice of its file, including all materials contained therein that refer to actions taken by Curtis (including without limitation: her challenges to this Court's jurisdiction; her unsuccessful lawsuit against Judge Butts, Judge Comstock and all attorneys connected to this matter in Federal District Court, and her unsuccessful appeal thereof; her unsuccessful "fraud on the court" allegations in Federal District Court, and her unsuccessful appeal thereof; her wrongful filing of the Injunction in Harris County District Court; her actionable conduct and acts of contempt in this Court; and her refusal to appear for her properly noticed, ordered and compelled deposition).

[76] Exhibit D - Kunz-Freed Deposition of March 2019 – Page 28, Lines 2-13.

[77] Exhibit D - Kunz-Freed Deposition of March 2019 – Page 51, Line 13 to Page 54, Line 9 **and** Exhibit E - Kunz-Freed Deposition of June 2019 – Page 137, Line 20 to Page 141, Line 12.

liability to any Beneficiary whose share of Trust Assets would increase if the forfeiture provisions are enforced against Carl and/or Curtis. By ignoring the forfeiture provisions and filing suit, both Carl and Curtis have prevented the Co-Trustees from distributing Trust Assets.

The Co-Trustees have not materially breached any duties owed. Summary judgment evidence confirms that performance has been delayed/rendered impossible to date due to the actions of Carl and/or Curtis. The Co-Trustees are entitled to summary judgment.

E. ISSUE 4 - Via the terms of the Trust and/or the Declaratory Judgment Act, attorney's fees and expenses incurred by the Co-Trustees are the obligation of the Trust, Carl, and/or Candy.

Since Nelva's death in November 2011, attorney's fees, costs and expenses have been incurred by the Trust (i.e, by Amy and Anita as Co-Trustees)(collectively, the Fees). While there is some overlap, these Fees can generally, but not exclusively, be associated with one of four categories:

(1) Fees incurred during the routine, customary administration of the Trust;

(2) Fees directly attributable to Carl's claims, action and conduct;

(3) Fees directly attributable to Curtis's claims, action and conduct; and/or

(4) Fees not directly attributable to Carl or Curtis's claims, action or conduct.

Even if categorized differently, payment/reimbursement of Fees incurred by the Co-Trustees are the obligation of the Trust, Carl and/or Candy. Academically, there are three primary options available to the Court upon which it may base its award of these Fees. Because of these options, and based on how the Court resolves other aspects of this Motion, the Court is able to order that all Fees be paid/reimbursed from the Trust, or allocate the Fees between and among the Trust, Carl and/or Curtis in various amounts.

1. Attorney's Fees via the Trust

The Co-Trustees have a very clear and undisputable right to recover the Fees from the Trust. Consider this excerpt from Article IV, Section G of the Trust:

> A Trustee will be entitled to full reimbursement for expenses, costs or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Amy and Anita have incurred Fees as a result of their service to the Trust. That service not only includes the normal, customary discharge of their responsibilities relative to the day-to-day administration of the trust and the discharge of their duties, but also in connection with their efforts to protect and defend the Trust against Carl and Curtis' respective attacks on the Trust generally, and in violation of Article XI; Section C of the Trust (No Contest of our Trust) and/or the August 2010 QBD (Miscellaneous Provisions; Item A).

Pursuant to its own terms, the Trust is responsible to pay/reimburse Amy and Anita for all Fees incurred. As a matter of law, a declaration to this effect, via summary judgment, is warranted and proper.

2. Attorney's Fees via the August 2010 QBD

The second option for awarding Fees is admittedly dependent upon the resolution of Carl and Curtis's attacks on the effectiveness and enforceability of the August 2010 QBD, as well as other issues addressed in this Motion, such as the question of whether either or both have forfeited their interests in the Trust.

One advantage of awarding Fees pursuant to the August 2010 QBD is that doing so could serve to partially reduce the Trust's burden/obligation to pay/reimburse all Fees. This is significant because it protects Amy, Anita, Carol (and potentially Carl or Curtis) from effectively financing Carl and Curtis' attacks on the Trust if those attacks prove successful. An "off-the-top" award of

Fees, such as that required under Article IV, Section G of the Trust penalizes those siblings who have not attacked the Trust (i.e., Amy, Anita and Carole) by reducing the total amount of assets available for distribution at the conclusion of this litigation. Consider the following excerpt from the August 2010 QBD (Miscellaneous Provisions: Item A):

> Expenses to legally defend against or otherwise resist any above contest or attack of any nature shall be paid from the Trust Estate as expenses of administration. If, however, a person taking any of the above actions is or becomes entitled to receive any property or property interests included in the Trustor's estate (whether passing through the Trustor's probate estate, or by way of operation of law or through the Trustor's Living Trust, IRA Inheritance Trust, if any, or otherwise), then all such expenses shall be charged dollar-for-dollar against and paid from the property or property interests that said person would be entitled to receive under the Trust Agreement or the Trustor's Will, whether or not the Trustee (or Executor under the Trustor's Will) was successful in the defense against such person's actions.

This language clarifies that payment/reimbursement of Fees is required regardless of the outcome of this litigation, while also indicating that an award of Fees is proper even if Carl or Curtis prevail in their attacks upon the Trust. Said another way, if Carl or Curtis's attacks on the Trust fail, then the Trust is obligated to pay/reimburse the Fees; but, if Carl or Curtis prevail, then each is required to have their interest in the Trust reduced by the amount of Fees associated with their respective attacks. As a matter of law, a declaration to this effect, via summary judgment, is warranted and proper.

3. Attorney's Fees via the Declaratory Judgment Act.

The Uniform Declaratory Judgments Act (the "DJA") is set forth in Chapter 37 of the Texas Civil Practice and Remedies Code. As a matter of law, the DJA allows a court to make declarations relating to a trust or estate. See §37.005. The DJA also allows a court to award costs and reasonable and necessary attorney's fees as are equitable and just. See §37.009. Pursuant to §37.009, an award of fees and expenses under the DJA is discretionary. The discretion afforded

to a Court allow for fees and expenses to be allocated between and among parties in varying amounts, or not at all. *Bocquet v. Herring,* 972 S.W.2d 19, 20 (Tex.1998).

One advantage to awarding Fees via the DJA is that it provides the Court with the opportunity to allocate or apportion the Fees between and among some, or all of the parties in equal or unequal amounts. For this reason, awarding the Fees under the DJA may be the "most equitable" of the three options available to the Court because it allows the Court to consider concepts such as "accountability" and "consequence" relative to the Fees incurred.

Rather than "burden" the entire Trust with an "off the top" award of fees, as would be required based on Article IV; Section G of the Trust, the DJA allows the Court to consider whether one litigant, such as Curtis for example, should be held accountable for the consequences of her actions, if the Court were to subsequently determine that she is/was responsible for a disproportionate amount of the costs and fees being incurred. The same logic would allow other beneficiaries to be held accountable for fees and expenses in disproportionate amounts, should their respective actions be determined to have created a "cause and effect" connection to the fees and costs incurred.

Awarding fees through the DJA could serve to eliminate, or at least reduce, the Trust's overall burden under Article IV; Section G of the Trust. Additionally, it provides a mechanism for awarding Fees without reliance upon the August 2010 QBD.

4. Scope of Relief Limited to Method(s) of Award, Not Amount

At this time, Amy and Anita only seek declarations from the Court confirming that an award of Fees is warranted by one or more of the three options addressed above. Once the Court has declared which of the options applies, Amy and Anita will submit an Application for Fees with necessary detail and support for the amount of fees and expenses incurred, as such fees and expenses continue to accrue.

VI. CONCLUSION AND PRAYER

Summary judgment is proper under traditional and no-evidence grounds. The Co-Trustees have established all elements of their counter-claims/affirmative defenses and/or have negated at least one element of Carl and Curtis's claims. Through this Motion, the Co-Trustees have established that

1. By pursuing their claims, Carl and Candy have each triggered the Trust's forfeiture provisions (or other similar provisions in other trust documents);
2. No unauthorized distributions were made by Anita;
3. During their tenure, the Co-Trustees have not materially breached any duties; and
4. Attorney's fees and expenses incurred by the Co-Trustees are the obligation of the Trust, Carl, and/or Candy.

WHEREFORE, PREMISES CONSIDERED, Defendants, AMY RUTH BRUNSTING and ANITA KAY BRUNSTING request that

1. That this Court grant the relief requested in the Motion by granting summary judgment consistent with the four issues identified herein, and reflecting that both Carl and Curtis take nothing by way of their respective claims and causes of action;
2. That if and as necessary, this Court grant partial summary judgment; and
3. That this Court grant/award the Co-Trustees such other and further relief at law and in equity to which either or both may be justly entitled, and/or as needed to effectuate the issues identified in this Motion.

Respectfully submitted,

GRIFFIN & MATTHEWS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 5th day of November 2021, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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