

Candace Louise Curtis	§	
	§	412249-401
v.	§	Feb 27, 2012
	§	
Anita Brunsting et al.,	§	
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IN RE: THE ESTATE OF	§	PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS
	§	412,249 April 2, 2012
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Carl Henry Brunsting	§	
Individually	§	
	§	412,249-401
v.	§	April 9, 2013
	§	
Anita Brunsting et al.,	§	
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RESPONSE TO THE FIDUCIARY’S APPLICATION FOR THE BENEFICIARY TO BE HELD IN CONTEMPT FOR SEEKING TO ENFORCE THE INJUNCTION COMMANDING THE TRUSTEE TO PERFORM A FIDUCIARY DUTY OWED TO THE BENEFICIARY WITH PETITION FOR PARTIAL SUMMARY OR DECLARATORY JUDGMENT

The Nature of the Controversy

The Plaintiff Beneficiary requests this Court take judicial and constructive notice of the record and the law as it applies to the substance of the dispute between the real parties in interest. The controversy is between fiduciaries and beneficiaries involving an inter vivos trust. No other relationship between the parties is relevant. This is business and we are talking about rights in property.

Texas Estate Code §254.001 Pour Over Procedures

When there is an inter vivos trust and the settlors will contains pour over provisions, there is no probate. Nelva Brunsting’s will is a pour over will. The only devisee is the Brunsting trust. None of the Brunsting trust beneficiaries are heirs, devisees, legatees or beneficiaries of the estate of Nelva Brunsting and none have standing in any of those capacities. The only relevant Estates Code is §254.001. All other statute references herein are to the property code unless

explicitly stated otherwise. The sole devisee of the will is the Brunsting Trust. Estate Code §254.001(a) & (c) prescribes the pour over procedure with particularity.

A testator may validly devise property in a will to the trustee of a trust and, unless the testator's will provides otherwise, property devised to a trust is not held under a testamentary trust of the testator, but becomes part of the trust to which the property is devised, and must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendment to the instrument made before or after the testator's death.

The Order admitting Nelva Brunsting's Will for probate was signed in August 2012. Among the aspects of this case that can be considered novel is the fact that breach of fiduciary involving administration of an inter vivos trust has been held in stasis in Harris County Probate Court (4) for six years, without a single finding of fact or conclusion of law after hearing. In fact, nothing having to do with the substance of the controversy between the real parties in interest has been addressed or resolved, beginning with the first stage of the inquiry:

What instruments are we talking about when we say "the trust"?

In order for the trustee to perform the duties of the office they must consider the nature and purpose of the trust, the settlors' intentions, the identities and circumstances of the beneficiaries, the who, what, when and how of distributions, specific provisions on accounting, if any, for delegations allowed and acts forbidden, for ministerial and discretionary duties such as when and how mandatory and discretionary distributions are made, for trust termination and other such considerations. These are also matters the beneficiary must consider when examining the conduct of the trustee. The alleged trustees' answer to Curtis' federal breach of fiduciary action included the following admission:

Defendants admit the duty of the trustees is the general duty to administer the trust in good faith according to its terms and the Texas Trust Code, and that in the absence of any contrary terms in the trust instrument or contrary provisions of the Texas Trust Code, when administering the trust the trustees shall perform all of the duties imposed on trustees by the common law.

What happened to all of that?

Injury

In the injunctive Order¹, published April 19, 2013, the court found (1) anomalies with the instruments submitted by the defendants (2) the existence of a fiduciary relationship with the defendants owing fiduciary obligations to Plaintiff (3) failure to disclose non-protected trust instruments (4) failure to establish and maintain books and records of accounts and (5) failure to establish individual trust share accounts “*as required by the trust*”, even though more than two years had passed since Defendant Anita Brunsting first occupied the office of trustee.

Along with the injunctive orders issued by the Honorable Kenneth Hoyt, a Special Master was appointed to do an accounting of the income and disbursements, beginning when Anita took over the office of trustee. The Report of Special Master revealed failure to establish and maintain books and records of accounts and other financial improprieties that have yet to be redressed.

Trustee/beneficiary self-dealing violates public policy because it merges legal and equitable title and violates the fiduciary duties of loyalty, impartiality and good faith the trustee owes to the other beneficiaries.² The fiduciary duty to account to the beneficiary cannot be waived by the settlor and unlike ordinary civil litigation, the fiduciary, having an affirmative duty to account, also has the burden of proof and of bringing forth evidence.

Anita Brunsting originally sent bank and brokerage statements and tax returns on a regular basis without being asked. When the Mendel law firm became involved the beneficiaries had to ask for them to be sent every time they came due. Apparently, Bates stamping is one of Mr. Mendel’s schemes to claim entitlement to fees from the trust. This type of behavior is only compounding the injuries.

On June 8, 2019 Mr. Mendel transmitted the second half of 2018 and each month’s cover letter was dated January 20, 2019. He sent these statements only after Anita was contacted directly.

BREACH OF TRUST

¹ Feb. 6, 2015 Notice of filing of Injunction and Report of Master PBT-2015-42743

² §111.004 (25) Breach of Trust - "Breach of trust" means a violation by a trustee of a duty the trustee owes to a beneficiary.”

Breach of fiduciary is a tortious act contrary to public policy for which the trustee is liable in their individual capacity. There are three elements to a breach of trust cause of action and only three.

- The defendant was acting as a fiduciary of the plaintiff;
- The defendant breached a fiduciary duty owed to the plaintiff;
- The plaintiff suffered damages as a direct or proximate result of the defendant's breach of fiduciary duty.

All three of these elements have been established as a matter of law and the only things necessary to fashion an appropriate remedy are to determine which instruments are controlling and the amount of injury suffered.

The Trust

The Brunsting trust was created in 1996 and restated in 2005. The 2005 Restatement (Exhibit 1) superseded and replaced the 1996 trust in its entirety. The 2005 Restatement was amended in 2007. The 2007 Amendment (Exhibit 2) was the last trust instrument signed by both settlors as Elmer was declared NCM in June 2008 (Exhibit 3) and under the private law of the trust³ and the public law of the state,⁴ these are the only valid trust instruments.

Under the terms of the 2005 Restatement as amended in 2007, changes to the trust required the signature of both settlors or the approval of a court of competent jurisdiction. This is not differential calculus, it is simple math stated in plain English. Neither of those conditions was ever met and there is no room for arguendo or interpretation. The trust is contained in the 2005 Restatement as amended in 2007. Anita and Amy Brunsting are not trustees and their attorneys do not represent the trust, but are a threat to the res. The financial health of the trust has taken a steady beating for six years, while the alleged trustees' attorneys stonewall.

³ See Article III, p. 3-1 Exhibit 2

⁴ Texas Property Code §112.051

The Statute of Uses⁵

Obligations of the fiduciary must be legally enforceable by the Cestui que. The alleged trustees either owe specific performance to the beneficiary or they do not. If there are no enforceable fiduciary duties owed to the beneficiary, legal title vests in the beneficiary.

This trust beneficiary apologizes to the Court for misunderstanding the authorities indicating the Court that entered the injunction was the proper court to enforce it. The trust beneficiary plaintiff intended no disrespect to the dignity and authority of the court but six years have passed since that order was issued. During this time the Defendants have ignored the affirmative command of the order and the obligations compelled. All the while the defendants' attorneys have continued making disinheritance threats and obstructing.

The mere suggestion by the fiduciary in breach that the beneficiary victim be sanctioned, is an additional breach of fiduciary in and of itself. It is absurd that after all this procedural malingering and substantive absenteeism, plaintiff cannot find one instance where these alleged trustees performed an affirmative act solely in the interests of the beneficiaries.

Plaintiff did not violate any prohibitions, does not owe fiduciary duties to the interloper trustees and, as it is a matter of comity within the province of this Court, Plaintiff now moves this Court to enforce the affirmative commands of the injunction, which would also be enforcing an affirmative duty of the trustee.

The claim that Curtis has engaged in conduct that has no proper purpose is the equivalent of claiming a defrauded beneficiary has no rights to enforce fiduciary obligations, which is the equivalent of a declaration that there are no fiduciary obligations. If that is the case, legal title vests in the beneficiary and is being unlawfully withheld. Plaintiff has nothing but well-earned disrespect for the officers of this court, beginning with the Vacek & Freed attorneys who changed what could not be changed.

⁵ Texas Property Code §112.032

Fiduciary obligation is a one way street flowing from the fiduciary to the beneficiary, not the other way around. A trust that becomes irrevocable by its own terms cannot be changed by the settlor. The trust became irrevocable at the incapacity of our father Elmer Brunsting.

Texas Board of Legal Specialization

At the deposition on March 20, 2019, estate planning attorney Candace Kunz-Freed testified that she took the estate planning and probate law certification exam. She also testified that she is not board certified. A review of the list of board certified estate planning and probate law attorneys in Harris County does not include Bobbie G. Bayless, Stephen Mendel, or Neal Spielman. The list does include Albert Vacek Jr., Maureen McCutcheon, and former Judge Christine Butts. These facts would appear to explain why the attorneys currently involved in this controversy do not know a forfeiture clause does not apply to beneficiaries suing for breach of fiduciary or that fees to defend trustees for breach of fiduciary are personal liabilities of the trustee, not liabilities of the trust.⁶

Conclusion and Prayer

Plaintiff cannot and will not incur further financial injury traveling to Houston again, only to suffer countless negative and non-productive experiences of insignificant and irrelevant quibbling intended solely for the purpose of attrition. This level of fiduciary devotion and undivided loyalty is impressive.

Plaintiff beneficiary and de jure trustee Candace Curtis, herein respectfully moves this Honorable Court to enter a declaratory judgment that the Brunsting trust is comprised of the 2005 Restatement as amended in 2007, so that this case can move forward towards a meaningful resolution for the real parties.

Respectfully Submitted,

//s//

Candace Louise Curtis

⁶ §101.002 LIABILITY OF TRUST PROPERTY - Although trust property is held by the trustee without identifying the trust or its beneficiaries, the trust property is not liable to satisfy the personal obligations of the trustee.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was forwarded to all known counsel of record and unrepresented parties in the manner required by the Rules on this 11th day of June 2019.

//s//

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Proposed Order

The Court has reviewed the record and has determined that the changes made to the Brunsting trust after the incapacity of Elmer Brunsting on June 9, 2008 have been shown to have been improperly drafted and fail to meet the requirements for making changes that are prescribed by the instruments creating the trust.

IT IS THEREFORE ADJUDGED AND DECREED that the 2005 Restatement of the trust and the 2007 Amendment thereto, are the core instruments that govern administration of the trust.

It is so Declared this _____ day of _____ 2019

James Horwitz, Judge
Harris County Probate Court 4