

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

**RESPONSE TO CANDACE’S SECOND
MOTION FOR PARTIAL DISTRIBUTION
FOR ATTORNEYS FEES**


Defendant Anita Kay Brunsting files this response to Candace Louise Curtis’ February 5, 2015 Application for Partial Distribution¹ which is, in substance, a second motion for partial distribution for attorneys fees² after the Court’s December 9, 2014 denial of such motion, and would respectfully show the Court as follows:

I. Summary of the Argument

1. This Court previously denied Candace’s request on December 9, 2014. Candace simply now seeks \$40,000 in attorneys fees as opposed to the previously requested \$25,000.
2. Candace’s new motion states, without any substance, itemization, evidence, or support whatsoever, such request is for her maintenance and support. On these sparse allegations, no distribution can be granted. It is woefully apparent that such motion is purely an effort to pay a legal-fee creditor.
3. Distributions to pay legal-fee creditors are not authorized by the trust and, therefore, the motion must be denied.


¹ Candace’s filings in the base case and the two subdocketed 401 and 402 cases are erratic. The first motion was improperly filed in the base case (i.e., the Estate), and the Court’s order denying such motion is in the 401. Candace filed her second motion in the base case. As Candace’s sole pleadings are in the 402, all such motions should be brought in the 402. However, for the convenience of the Court, because Candace filed her motion in the base case, Anita Brunsting files her response in the base case.

² This response is substantially similar the response to Candace’s prior motion previously filed by Anita Brunsting on December 5, 2014 in the subdocket 401 case.


4. Distributions to pay legal-fee creditors are prohibited by the trust and, therefore, the motion must be denied.
5. The Court lacks jurisdiction to decide the distributions for legal-fee creditor issue because there are no allegations of fraud, misconduct, or clear abuse of discretion with respect to Candace's request that the trust pay her attorneys' fees. 
6. If the Court finds the *in terrorem* clause is enforceable, then Candace has no right to any distribution from the trust.

II. Argument & Authorities

Candace seeks distributions from the trusts to pay her creditor-attorneys under the guise of a claim for maintenance and support.

Candace does not cite any provision in the trust instruments that would allow for the requested distributions. Candace simply avers that she is entitled to funds from the Trust for her health, education, maintenance and support. Candace must identify which trust she claims  entitlement to and which provisions she relies upon. Assuming she is able to do so, then she must identify with some degree of specificity what she wants the money for so that it can be determined whether the request is compliant with the trust. Candace's failure to do so, coupled with the amount of the request and her prior motion, is a tacit admission that it is not for her maintenance and support but is, instead, to pay her legal-fee creditor.

Candace does not cite any legal authority that would allow for the requested distributions. This is a tacit admission that such distributions are not permitted by any legal authority.

Since there is nothing in the trust instruments or in any legal authority that allows the  requested distribution, the motion must be denied.

A. The Brunsting Family Living Trust.

With respect to distributions under the Brunsting Family Living Trust, the instrument

provides:

i. Distributions of Net Income

Our trustee, in its sole and absolute discretion, shall pay to or apply for the benefit of [the beneficiary] as much of the net income from [the beneficiary's] trust share as our Trustee deems advisable for the health, education, maintenance and support of [the beneficiary], for [the beneficiary's] lifetime.

ii. Distributions of Principal

Our trustee, in its sole and absolute discretion, shall pay to or apply for the benefit of [the beneficiary] as much of the principal from [the beneficiary's] trust share as our Trustee deems advisable for the health, education, maintenance and support of [the beneficiary], for [the beneficiary's] lifetime.³



Furthermore, the trust instrument prohibits the trust from being charged with a beneficiary's debt:

No beneficiary will have the power to anticipate, encumber or transfer any interest in the trust. No part of the trust will be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or subject to seizure or other process by any creditor of a beneficiary.⁴

Finally, the trust instrument provides: 

All trusts created under this agreement shall be administered free from the active supervision of any court.⁵

B. The Qualified Beneficiary Designation.

With respect to distributions under the Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement ("QBD"), the instrument

³ Exhibit 1, Restatement of the Brunsting Family Living Trust, pages 10-1 to 10-12.

⁴ Exhibit 1, Restatement of the Brunsting Family Living Trust, page 11-1.

⁵ Exhibit 1, Restatement of the Brunsting Family Living Trust, page 4-5.

provides:

The Trustee, shall have the power, in such Trustee's sole and absolute discretion, binding on all persons interested now or in the future in this trust, to distribute or apply for the benefit for whom the trust was created (hereinafter the "primary beneficiary") and the primary beneficiary's issue or to a trust for their benefit, so much of the income and/or principal of the Trust Estate, and at such time or times as Trustee shall deem appropriate for such distributees' health, support, maintenance, and education.⁶

Furthermore, the QBD contains spendthrift provisions that prohibit the requested distribution:

[N]either the principal of these trusts nor any income of these trusts shall be liable for any debt of any beneficiary.⁷

The QBD stated purpose includes:

- (1) To protect trust assets and income from claims of and interference from third parties; and
- (2) To protect the beneficiary against claims of third parties.⁸

Finally, the QBD states:

It is the Trustor's intent that the terms of the Trust Agreement be carried out free from outside interference. Therefore, the purported exercise of any power granted under the Trust Agreement, whether by a Trustee, Special Co-Trustee, Trust Protector or a beneficiary, including a power of appointment, withdrawal, substitution, or distribution, shall be of no force and effect if such purported exercise was the result of compulsion. The purported exercise of a power shall be deemed to be the result of compulsion if such exercise is (i) in response to or by reason of any order or other direction of any

⁶ Exhibit 2, Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement, pages 7-8.

⁷ Exhibit 2, Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement, page 25.

⁸ Exhibit 2, Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement, pages 5-6, ¶¶ 4 and 10.

court, tribunal or like authority having jurisdiction over the individual holding the power, the property subject to the power or the trust containing such property or (ii) the result of an individual not acting of his or her own free will.⁹

C. Attorneys Fees are not “Health, Education, Maintenance and Support.”

Under both the Brunsting Family Living Trust and the QBD, the distributions are: (1) subject to the sole and absolute discretion of the trustee; and (2) as the trustee deems advisable for the health, education, maintenance and support of a beneficiary. It appears Candace seeks attorneys’ fees, which is not for her health, education, maintenance and support.¹⁰ Accordingly, the requested distribution is not authorized by the trust.

D. The Requested Distribution Violates the Spendthrift Provisions.

The spendthrift provisions plainly state they are designed to prevent interference and claims of third parties. Candace’s attorneys are third parties. When the spendthrift provisions of the trust and the *in terrorem* provisions are analyzed together, it becomes abundantly clear that the trust was not intended to pay Candace’s attorneys fees in this case. Accordingly, the requested distributions are prohibited by the trust.

E. There is No Justiciable Case or Controversy with Respect to the Requested Distribution.

In the case of *Di Portanova v. Monroe*, the First District Court of Appeals explained:

Under a discretionary trust, the beneficiary is entitled only to the

⁹ Exhibit 2, Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement, page 25.

¹⁰ Although defendant was unable to find a case directly on point, the case of *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013) appears instructive. The Texas Supreme Court held that attorneys fees in a divorce proceeding were not “necessaries.” Defendant recognizes that there is a difference between “necessaries” and the HEMS standard, but nevertheless believes the HEMS standard would not include plaintiffs legal fees in the case at bar.

income or principal that the trustee, in his discretion, shall distribute to the beneficiary. The beneficiary of a discretionary trust cannot compel the trustee to pay him or to apply for his use any part of the trust property, nor can a creditor of the beneficiary reach any part of the trust property until it is distributed to the beneficiary. A court cannot substitute its discretion for that of a trustee, and can interfere with the exercise of discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion.

A court of equity has no right to interfere with and control, in any case, the exercise of a discretionary power, no matter in whom it may be vested; a corporate body or individuals, the aldermen of a city, the directors of a bank, a trustee, executor or guardian; and I add, that meaning and principle of the rule, and the limitations to which it is subject, are in all the cases to which it applies, exactly the same. The meaning and principle of the rule are, that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another[.]

In the absence of evidence of mala fides, the courts are disinclined to interfere where the trustee has been given discretionary powers The court will refuse to review his decision in the absence of a showing that he did not exercise his discretion in good faith or that his decision was unreasonable; for the trustee in such case stands in the position of an arbitrator.¹¹

The First District Court of Appeals ultimately held that the ultimate issue decided by the trial court did not present a justiciable controversy for the trial court to resolve because the issue should have been left to the Trustees' discretion.¹²


Here, Candace asks this Court to usurp the powers of the trustees and substitute the court's discretion for that of the trustees in violation of the trust. The Court has no jurisdiction to make such determination, because there is no justiciable controversy for the trial court to resolve. There is no

¹¹ *Di Portanova v. Monroe*, 229 S.W.3d 324, 330-331 (Tex. App.–Houston [1st Dist.] 2006, pet. denied)(internal citations omitted).

¹² *Id.* at 331.

allegations of fraud, misconduct, or clear abuse of discretion with respect to Candace's request that the trust pay her attorneys' fees or the request that the trust make a \$40,000 distribution.¹³ Even if Candace made such allegations, there is no evidence to support such allegations.

F. No Contest Clause - Candace May Not Have An Interest.

Candace appears to concede that she has violated the trust's *in terrorem* clause.  She filed a declaratory judgment action asking this Court to rule that the trust's *in terrorem* clause is overly broad, against public policy, and not capable of enforcement, but she does not challenge that her acts to date violated the *in terrorem* clause.

If it is determined that the trust's *in terrorem* clause is capable of enforcement, then Candace does not have an interest in the trust.

If Candace does not have an interest in the trust, then there is no right to a distribution. Thus, until the Court resolves the *in terrorem* clause issues, there cannot be distributions to Candace. Furthermore, even if the *in terrorem* clause issues are resolved in favor of Candace, the requested distributions cannot be made for the reasons discussed above.

III. Prayer

For these reasons, Defendant Anita Kay Brunsting prays that Candace's second motion for distribution of trust funds be denied and that Defendant Anita Kay Brunsting receive all other relief, general and special, legal and equitable, to which she or the trust may be entitled.

¹³ See Candace's Motion.

Respectfully submitted,

/s/ Brad Featherston

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Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served on the following:

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