

**DATA-ENTRY
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PROBATE COURT 4

NO. 412.249-401

11/02/14:1535:0006

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

CARL HENRY BRUNSTING, § IN PROBATE COURT
individually and as independent §
executor of the estates of Elmer H. §
Brunsting and Nelva E. Brunsting §

vs. §

ANITA KAY BRUNSTING f/k/a §
ANITA KAY RILEY, individually, §
as attorney-in-fact for Nelva E. Brunsting, §
and as Successor Trustee of the Brunsting §
Family Living Trust, the Elmer H. §
Brunsting Decedent's Trust, the §
Nelva E. Brunsting Survivor's Trust, §
the Carl Henry Brunsting Personal §
Asset Trust, and the Anita Kay Brunsting §
Personal Asset Trust; §

AMY RUTH BRUNSTING f/k/a §
AMY RUTH TSCHIRHART, §
individually and as Successor Trustee §
of the Brunsting Family Living Trust, §
the Elmer H. Brunsting Decedent's Trust, §
the Nelva E. Brunsting Survivor's Trust, §
the Carl Henry Brunsting Personal §
Asset Trust, and the Amy Ruth Tschirhart §
Personal Asset Trust; §

CAROLE ANN BRUNSTING, individually §
and as Trustee of the Carole Ann §
Brunsting Personal Asset Trust; and §
as a nominal defendant only, §
CANDACE LOUISE CURTIS §

NUMBER FOUR (4) OF

HARRIS COUNTY, TEXAS

CARL BRUNSTING'S MOTION TO MODIFY PRELIMINARY INJUNCTION

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TO THE HONORABLE PROBATE COURT:

COMES NOW Plaintiff, Carl Brunsting, individually and as Independent Executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting ("Plaintiff"), and files his Motion for Modification of Preliminary Injunction, and in support thereof would show the Court as follows:

1. A preliminary injunction which prevents Anita and Amy Brunsting ("Defendant Trustees"), the parties currently in control of the assets of the Brunsting Family Trust and its successor trusts (the "Trusts"), from making any distributions without prior court-order was originally signed in federal court on April 19, 2014. A copy of that order is attached hereto as Exhibit 1. That federal court action was transferred to this Court on May 15, 2014, subject to the continuation of the injunction. A copy of the Order transferring the case is attached hereto as Exhibit 2.

2. A copy of the order signed by this Court on June 3, 2014 receiving the case is attached hereto as Exhibit 3.

2. On September 4, 2014, at the request of the Defendant Trustees, the injunction was modified to allow tax payments and tax return preparation work to be paid without further order of this Court. At that time, however, Defendant Trustees were represented by counsel with whom communications and concerns could be easily addressed.

3. Surprisingly, a mere five days later, without any prior notice, Defendant Trustees' counsel filed a motion to withdraw alleging a conflict of interest had arisen. That counsel was allowed to withdraw pursuant to this Court's order dated September 18, 2014. Plaintiff's counsel was under the impression that new counsel was being obtained by the Defendant Trustees, but as of this filing almost two months later, that has not happened.

4. As a result, there is no counsel supervising the conduct of Defendant Trustees relating to the injunction and preservation of the substantial assets of the Trusts. Plaintiff, therefore, asks that

the injunction be modified to place control of the Trusts' assets under a different arrangement which removes Defendant Trustees' control over those assets and guarantees the security of those assets.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the temporary injunction be modified to secure the Trusts' assets, and for such other and further relief to which he may show himself entitled.

Respectfully submitted,

BAYLESS & STOKES

By: /s/ Bobbie G. Bayless

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individually and as independent executor of
the estates of Elmer H. Brunsting and Nelva
E. Brunsting*

11/02/14:15:35:P0009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded on the 7th day of November, 2014, as follows:

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Amy Ruth Brunsting
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/s/ Bobbie G. Bayless
BOBBIE G. BAYLESS

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Exhibit 1

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS,

Plaintiff,

VS.

ANITA KAY BRUNSTING, *et al*,

Defendants.

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CIVIL ACTION NO. 4:12-CV-592

MEMORANDUM AND ORDER
PRELIMINARY INJUNCTION

I. INTRODUCTION

Before the Court is the *pro se* plaintiff's, Candace Louise Curtis, renewed application for an *ex parte* temporary restraining order, asset freeze, and preliminary and permanent injunction [Dkt. No. 35]. Also before the Court is the defendants', Anita Kay Brunsting and Amy Ruth Brunsting, memorandum and response to the plaintiff's renewed motion [Dkt. No. 39]. The Court has reviewed the documents presented, including the pleadings, response and exhibits, received testimony and arguments, and determines that the plaintiff's motion for a temporary injunction should be granted.

II. BACKGROUND

A. Procedural Background

The plaintiff filed her original petition on February 27, 2012, alleging that the defendants had breached their fiduciary obligations under the Brunsting Family Living Trust ("the Trust"). Additionally, the plaintiff claimed extrinsic fraud, constructive fraud, intentional infliction of emotional distress, and sought an accounting, as well as a

recovery of legal fees and damages. The Court denied the plaintiff's request for a temporary restraining order and for injunctive relief. However, concurrent with the Court's order denying the relief sought by the plaintiff, the defendants filed an emergency motion for the removal of a *lis pendens* notice that had been filed by the plaintiff on February 11, 2012, prior to filing her suit.

The defendants sought, by their motion, to have the *lis pendens* notice removed in order that they, as the Trustees of the Trust might sell the family residence and invest the sale proceeds in accordance with Trust instructions. After a telephone conference and consideration of the defendants' argument that the Court lacked jurisdiction, the Court concluded that it lacked jurisdiction, cancelled the *lis pendens* notice, and dismissed the plaintiff's case.

The plaintiff gave notice and appealed the Court's dismissal order. The United States Court of Appeals for the Fifth Circuit determined that the Court's dismissal constituted error. Therefore, the Fifth Circuit reversed the dismissal and remanded the case to this Court for further proceedings. This reversal gave rise to the plaintiff's renewed motion for injunctive relief that is now before the Court.

B. Contentions of the Parties

The plaintiff contends that she is a beneficiary of the Trust that the defendants, her sisters, serve as co-trustees. She asserts that, as co-trustees, the defendants owe a fiduciary duty to her to "provide [her] with information concerning trust administration, copies of trust documents and [a] semi-annual accounting." According to the plaintiff,

the defendants have failed to meet their obligation and have wrongfully rebuffed her efforts to obtain the information requested and that she is entitled.

The defendants deny any wrongdoing and assert that the plaintiff's request for injunctive relief should be denied. The defendants admit that a preliminary injunction may be entered by the Court to protect the plaintiff from irreparable harm and to preserve the Court's power to render a meaningful decision after a trial on the merits. *See Canal Auth. of State of Fla. V. Calloway*, 489, F.2d 567, 572 (5th Cir. 1974). Rather, the defendants argue that the plaintiff had not met her burden.

III. STANDARD OF REVIEW

The prerequisites for the granting of a preliminary injunction require a plaintiff to establish that: (a) a substantial likelihood exists that the plaintiff will prevail on the merits; (b) a substantial threat exists that the plaintiff will suffer irreparable injury if the injunction is not granted; (c) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may do to the defendants; and, (d) granting the injunction will not disserve the public interest. *See Calloway*, 489 F.2d at 572-73.

IV. DISCUSSION AND ANALYSIS

The evidence and pleadings before the Court establish that Elmer Henry Brunsting and Nelva Erleen Brunsting created the Brunsting Family Living Trust on October 10, 1996. The copy of the Trust presented to the Court as Exhibit 1, however, reflects an effective date of January 12, 2005. As well, the Trust reveals a total of 14 articles, yet Articles 13 and part of Article 14 are missing from the Trust document. Nevertheless, the Court will assume, for purposes of this Memorandum and Order, that the document

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presented as the Trust is, in fact, part of the original Trust created by the Brunstings in 1996.

The Trust states that the Brunstings are parents of five children, all of whom are now adults: Candace Louise Curtis, Carol Ann Brunsting; Carl Henry Brunsting; Amy Ruth Tschirhart; and Anita Kay Brunsting Riley. The Trust reflects that Anita Kay Brunsting Riley was appointed as the initial Trustee and that she was so designated on February 12, 1997, when the Trust was amended. The record does not reflect that any change has since been made.

The plaintiff complains that the Trustee has failed to fulfill the duties of Trustee since her appointment. Moreover, the Court finds that there are unexplained conflicts in the Trust document presented by the defendants. For example, The Trust document [Exhibit 1] shows an execution date of January 12, 2005.¹ At that time, the defendants claim that Anita Kay served as the Trustee. Yet, other records also reflect that Anita Kay accepted the duties of Trustee on December 21, 2010, when her mother, Nelva Erleen resigned as Trustee. Nelva Erleen claimed in her resignation in December that she, not Anita Kay, was the original Trustee.

The record also reflects that the defendants have failed to provide the records requested by the plaintiff as required by Article IX-(E) of the Trust. Nor is there evidence that the Trustee has established separate trusts for each beneficiary, as required under the Trust, even though more than two years has expired since her appointment.

¹ It appears that Nelva Erleen Brunsting was the original Trustee and on January 12, 2005, she resigned and appointed Anita Brunsting as the sole Trustee.

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In light of what appears to be irregularities in the documents and the failure of the Trustee to act in accordance with the duties required by the Trust, 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.

The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.

It is so Ordered

SIGNED on this 19th day of April, 2013.



Kenneth M. Hoyt
United States District Judge

1102014:1525:PO016

Exhibit 2

copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS, *et al*,

Plaintiffs,

VS.

ANITA KAY BRUNSTING, *et al*,

Defendants.

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CIVIL ACTION NO. 4:12-CV-592

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

The matter before the Court is the Plaintiff's Motion to Remand. Plaintiff seeks remand of the case to state court on substantive and procedural grounds including a lack of complete diversity between the parties and the existence of similar questions of law and fact currently pending before Harris County Probate Court Number Four under Cause Number 412,249. The Court finds that the remand should be GRANTED.

The Court finds that Plaintiff originally filed her Petition against Defendants Anita Brunsting and Amy Brunsting as Co-Trustees of the Brunsting Family Trust and that diversity jurisdiction existed between Plaintiff and Defendants. Plaintiff has sought and been granted leave to file her First Amended Petition, in which she has named additional necessary parties including Carl Brunsting, individually and as Executor of the Estate of Nelva Brunsting and Carole Ann Brunsting, which has destroyed diversity jurisdiction. Plaintiff's First Amended Petition also alleges questions of law and fact similar to those currently pending in Harris County Probate Court Number Four under Cause Number 412,249, and that the possibility of inconsistent judgments exists if these questions of law and fact are not decided simultaneously. The Court further finds that no parties are opposed to this remand and that no parties have filed any objection thereto.

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It is, therefore, ORDERED that this case shall be and hereby is remanded to Harris County Probate Court Number Four, to be consolidated with the cause pending under Cause Number 412,429.

It is further, ORDERED that all Orders rendered by this Court shall carry the same force and effect through the remand that they would have had if a remand had not been ordered.

SIGNED on this 15th day of May, 2014.



Kenneth M. Hoyt
United States District Judge

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Exhibit 3

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PROBATE COURT 4

CAUSE NO. 412,249-401

IN RE: ESTATE OF

NELVA E. BRUNSTING,

DECEASED

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IN THE PROBATE COURT

NUMBER FOUR (4) OF

HARRIS COUNTY, TEXAS

ORDER OF TRANSFER

On this day came to be considered the Motion to Enter Transfer Order filed by Plaintiff Candace Curtis, seeking to have this Court accept the Order to Remand entered by the Federal Court for the Southern District of Texas and transfer to itself the pleadings and orders filed and entered in Federal Cause Number 4:12-CV-00592, *Candace Louise Curtis v. Anita Kay Brunsting et al.* The Court is of the opinion that it has jurisdiction over the parties and claims pending under Cause Number 4:12-CV-00592 finds that the Motion to Enter Transfer Order should be granted. It is, therefore,

ORDERED that the Order of Remand entered by the Federal Court for the Southern District of Texas in Federal Cause Number 4:12-CV-00592, *Candace Louise Curtis v. Anita Kay Brunsting et al.*, is hereby accepted. It is further,

ORDERED that the pleadings and orders filed and entered in Federal Cause Number 4:12-CV-00592, *Candace Louise Curtis v. Anita Kay Brunsting et al.*, be and hereby are transferred to this Court to be held under Cause Number 412,249.-401.

SIGNED on this 3 day of June, 2014.

Christine Boudreau
JUDGE PRESIDING

FILED
2014 JUN -4 AM 10:35
COURTY CLERK
HARRIS COUNTY, TEXAS

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APPROVED AS TO FORM:

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A limited Liability Partnership

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