

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CANDACE LOUISE CURTIS AND RICK §  
WAYNE MUNSON, §

Plaintiffs, §

V. §

CIVIL ACTION NO. 4:16-CV-01969

CANDACE KUNZ-FREED, ALBERT §  
VACEK, JR., BERNARD LYLE §  
MATHEWS III, NEAL SPIELMAN, §  
BRADLEY FEATHERSTON, STEPHEN §  
A. MENDEL, DARLENE PAYNE SMITH, §  
JASON OSTROM, GREGORY LESTER, §  
JILL WILLARD YOUNG, CHRISTINE §  
RIDDLE BUTTS, CLARINDA §  
COMSTOCK, TONI BIAMONTE, BOBBY §  
BAYLESS, ANITA 'BRUNSTING, AND §  
AMY BRUNSTING, §

Defendants. §

**DEFENDANTS CANDACE KUNZ-FREED AND ALBERT VACEK JR.'S  
MOTION TO DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Candace Kuntz-Freed and Albert Vacek, Jr. (collectively referred to as "V&F") hereby file this Motion to Dismiss for Lack of Subject Matter Jurisdiction and would respectfully show the Court the following:

**I.  
SUMMARY OF MOTION**

1. This is the most recent lawsuit filed in the "Brunsting Sibling Saga" and Plaintiff Candace Louise Curtis second attempt to have a federal judge consider these issues. In addition, similar claims are currently pending against V&F in Harris County, Texas. This Court does not

have subject matter jurisdiction over this case because Plaintiffs do not have standing to assert the present claims. Simply, Plaintiffs do not have an actual case or controversy with V&F. Plaintiffs cannot articulate any action traceable to V&F, which has caused any injury under any of the theoretical approaches taken by Plaintiffs. Additionally, V&F cannot be held liable to Plaintiffs. Accordingly, V&F requests that this Court dismiss Plaintiffs' claim for lack of subject matter jurisdiction.

## **II.** **BACKGROUND**

### **A. V&F HANDLED ESTATE PLANNING FOR THE BRUNSTING FAMILY.**

2. Prior to their deaths, V&F had performed general estate planning legal services for Elmer and Nelva Brunsting beginning in 1997. On February 12, 1997, Elmer and Nelva created a living trust (the "Brunsting Family Living Trust") for their benefit and for the benefit of their five children. The stated co-successor beneficiary distribution was to be equal, 1/5 for each of the five Brunsting children<sup>1</sup>. Elmer and Nelva restated the Brunsting Family Living Trust in 2005, and amended it for the first time in 2007. The 2007 amendment replaced Amy with Curtis as co-successor trustee with Carl Brunsting (the only son of the family). After being diagnosed with Alzheimer's and Dementia, Elmer died in 2009. Thereafter, Nelva made all the decisions with respect to the Brunsting Family Living Trust until she resigned as trustee in December of 2010. She later died in November of 2011. **Since the death of Nelva there have been numerous lawsuits filed by Curtis and her brother Carl against the rest of the Brunsting siblings.**

### **B. CURTIS FIRST FEDERAL LAWSUIT ALLEGED SIMILAR ALLEGATIONS.**

3. On February 27, 2012 Curtis originally filed an Original Complaint and Application for Ex Parte Temporary Restraining Order, Asset Freeze, Temporary and Permanent

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<sup>1</sup> The beneficiary distribution has never been changed.

Injunction against Anita and Amy (“the Current Trustees”) in the United States District Court for the Southern District of Texas<sup>2</sup> alleging breach of fiduciary duty, fraud, and intentional infliction of emotional distress. Generally, Curtis argued that the Current Trustees failed to meet their obligations under the Brunsting Family Living Trust.

4. Specifically with regards to the breach of fiduciary duty claim, Curtis alleged that Anita and Amy were acting jointly as co-trustees for the Brunsting Family Living Trust, of which she is a beneficiary and named successor beneficiary. Curtis claimed as the Current Trustees, they owed a fiduciary duty to Curtis to provide all beneficiaries and successor beneficiaries of the Brunsting Family Living Trust with information concerning trust administration, copies of trust documents, and semi-annual accounting. Curtis further contended that as the Current Trustees, they owed a fiduciary duty to provide notice to all beneficiaries prior to any changes to the trust that would affect their beneficiary interest. Curtis also alleged that the Current Trustees exercised all of the powers of trustees while refusing or otherwise failing to meet their first obligations under that power.

5. As to Curtis’ fraud claim, she alleged that the Current Trustees refused or otherwise failed to meet their obligations to provide full, accurate, complete and timely accounting or provide copies of material documents or notification of material facts relating to trust administration which constitutes fraud. Curtis also alleged that there was a conflict of interest between the Current Trustees and the beneficiaries or successor beneficiaries of the Brunsting Family Living Trust. In particular, Anita held the general power of attorney for Nelva, but at some point required her to resign making Anita her successor trustee. Curtis contended that Anita transgressed the limitation placed upon her authority by the Brunsting Family Living

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<sup>2</sup> See Cause No. 4:-12-cv-00592; *Candace Louise Curtis v. Anita Kay Brunsting, et al*; In the United States District Court for the Southern District of Texas.

Trust by refusing or otherwise failing to meet her obligations to provide full, accurate, complete and timely accounting or provide copies of material documents and facts relating to trust administration, the concealing of which coupled with multiple conflicts of interest constitute manifests acts of fraud.

6. Curtis' intentional infliction of emotional distress claim stemmed from the Current Trustees failure to provide her with information related to the Brunsting Family Living Trust and the trust's administration.

**C. CURTIS ATTEMPTED TO SUE V&F IN THE ORIGINAL FEDERAL LAWSUIT FOR SIMILAR CLAIMS.**

7. On April 29, 2013 Curtis filed her First Amended Complaint attempting to add V&F as named Defendants to the Federal Court Suit<sup>3</sup>. As to Curtis specific allegations against V&F she had alleged conspiracy, fraud, elder abuse, undue influence, false instruments, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortuous interference with fiduciary obligations, conversion, and violations of the Deceptive Trade Practices Act. She claimed she was informed and believed V&F assisted the Current Trustees in "rupturing the Brunsting family trusts" by creating documents improperly disrupting the dispositive provisions of Elmer and Nelva's estate plan. Further, V&F provided substantial assistance in such conspiracy resulting in the transfer of assets for the benefit of one or more of the Current Trustees, and did so knowingly, willfully and with reckless indifference to the rights of Curtis and did receive compensation for their participation in said conspiracy.

8. Ultimately, on May 15, 2015, at Curtis' request the case was remanded to the pending probate proceeding in Harris County, Texas. That case is still pending before Judge

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<sup>3</sup> V&F was not added as a party to the lawsuit, because the Court denied Curtis' Motion for Leave to File the Amended Complaint.

Butts and most definitely involves similar questions of law and fact as the present lawsuit filed before this Court.

**D. SIMILAR CLAIMS ARE CURRENTLY PENDING IN A MALPRACTICE LAWSUIT.**

9. On March 9, 2012, Carl Henry Brunsting (“Carl”) filed a Verified Petition to take Depositions Before Suit in Cause No. 2012-14538; *In re Carl Brunsting*; In the 80th Judicial District Court of Harris County, Texas. In that proceeding Carl conducted extensive written discovery and deposed at least one individual. On August 24, 2012 Carl and V&F entered into a Tolling Agreement Regarding Statute of Limitations, which tolled the applicable statute of limitations until December 31, 2012<sup>4</sup>. On January 29, 2013 [almost a year after filing the presuit petition], arguably past the applicable statute of limitations, Carl Henry Brunsting as the Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting brought a legal malpractice case against V&F for negligence, negligent misrepresentation, breach of fiduciary duty, aiding and abetting the current trustees’ breaches of fiduciary duty, fraud, conversion, conspiracy, and violations of the Texas Deceptive Trade and Practices Act stemming from their representation of Elmer and Nelva, both individually and in their capacities as trustees of the Family Trust<sup>5</sup>.

10. Specifically, Carl alleged that V&F assisted the Current Trustees in implementing a scheme to change the terms of the Brunsting Family Living Trust, to ultimately remove Nelva from her position as trustee of the Brunsting Family Living Trust, and to improperly remove assets from Elmer and Nelva’s estates and from the Brunsting Family Living Trust. Carl contended because of the actions of V&F, the Current Trustees were able to alter Elmer and

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<sup>4</sup> The presuit litigation was dismissed for want of prosecution on October 23, 2012.

<sup>5</sup> See Cause No. 2013-05455; *Carl Henry Brunsting, et al v. Candace L. Kunz-Freed, et al*; In the 164th Judicial District Court of Harris County, Texas.

Nelva's wishes, resulting in an improper transfer of assets to Anita, Amy, and Carole, all to Carl and Curtis' detriment.

11. Carl further alleged that despite V&F's representations to Elmer and Nelva that the Brunsting Family Living Trust would preserve their plans for the estate, V&F took direction from the Current Trustees, with the result being just the opposite. Carl believed that V&F not only failed to inform Nelva that they had established a relationship with the Current Trustees, which put them in a conflict of interest with regard to their representation of Nelva's interest, but that V&F actually ignored the terms of the Brunsting Family Living Trust in ways which it is believed that Nelva did not have capacity to change and/or did not understand or want. In his petition, Carl pleaded that V&F took steps to undermine and even remove Nelva's control of her own assets, of the assets of Elmer's estate, and of the Family Trust assets, thereby placing those assets at risk of loss to Anita, Amy, and Carole and facilitating the loss which actually occurred.

12. Moreover, Carl alleged that V&F assisted the Current Trustees in various ways intended to prevent Nelva from even understanding that documents were being prepared by V&F at the Current Trustee's request, why those documents were being prepared, and what legal impact those documents had. Carl amended his petition three times.

13. On February 3, 2015, V&F took Carl's deposition in that proceeding. During the deposition, Carl could not provide any testimony to support the allegations he asserted against V&F. The next day, Carl's lawyer contacted V&F and said she thought Carl was acting strange during his deposition and she believed he might be incapacitated. Over one month later on March 5, 2015, Carl's counsel sent V&F a letter explaining that Carl's deposition testimony was without value because Carl lacked capacity during the deposition. On February 19, 2015, in the **Probate Proceeding**, Carl filed an application to resign as executor. The Probate Court granted

the application in March 2015. Until a successor executor is appointed, the malpractice lawsuit sits in limbo.

**E. THE PENDING PROBATE PROCEEDING.**

14. 70 days after filing the Malpractice Lawsuit and while the Federal Lawsuit was pending, on April 10, 2013, Carl filed suit against Anita, Amy, Carole Ann Brunsting, and Curtis<sup>6</sup> seeking a Declaratory Judgment, an Accounting, and for the Imposition of a Constructive Trust. See Cause No. 412.249-401; *Carl Henry Brunsting, et al v. Anita Kay Brunsting, et al*; In the Number Four Probate Court of Harris County, Texas. Similar to every lawsuit involving the Brunsting family, that lawsuit has drawn on with numerous filings, including motions for summary judgment (but no rulings).

15. On July 24, 2015 Judge Butts appointed Greg Lester (“Lester”), as a temporary administrator, to determine the merits of the claims asserted in the various lawsuits. On January 20, 2016 Lester provided a report, wherein he concluded:

- All of the legal actions taken by Nelva were within her authority;
- Any damages for unequal distribution can be resolved by equalizing the distributions to all siblings; and
- Recommended that the Probate Court should uphold the “No Contest” Clause.

16. On March 9, 2016 the parties were ordered to mediate the case with the Honorable Mark Davidson. The parties were scheduled to mediate on July 12, 2016, however the mediation was canceled at the last minute.

**III.  
BASIS FOR MOTION TO DISMISS AND STANDARD OF REVIEW**

17. Rule 12(b)(1) permits the dismissal of an action for lack of subject matter jurisdiction when the district court lacks authority to hear the dispute. See generally, *U.S. v.*

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<sup>6</sup> V&F is not a party to the Probate Proceeding.

*Morton*, 467 U.S. 822 (1984). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5<sup>th</sup> Cir. 2001). To establish subject matter jurisdiction, a party must show that an actual case or controversy exists between himself and the party from whom relief is sought. Standing is an essential element in the determination of whether a true case or controversy exists. A motion to dismiss for lack of subject matter jurisdiction should be granted if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Id.*

**IV.**  
**ARGUMENTS AND AUTHORITIES**

**A. PLAINTIFFS’ CLAIMS SHOULD BE DISMISSED BECAUSE THEY DO NOT MEET THE STANDING REQUIREMENTS.**

18. Under Article III, the Federal Judiciary is vested with the “power” to resolve not questions and issues, but “cases” or “controversies.” This language restricts the federal judicial power “to the traditional role of the Anglo-American courts.” *Summers v. Earth Island Institute*, 555 U.S. 488, 492 (2009). To state a case or controversy under Article III, a plaintiff must establish standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The minimum constitutional requirements for standing were explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992):

First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, nor “conjectural” or “hypothetical.”’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’

*Id.* at 560-61.

19. Plaintiffs in this case do not satisfy the requisite elements of standing. Plaintiffs have not suffered an injury in fact that was caused by V&F’s conduct. Plaintiffs’ Complaint fails



to identify or correlate the direct relationship between the injury asserted and the alleged injurious conduct. Plaintiffs' Complaint does not allege facts which show that, "but for" V&F's conduct, they would not have suffered the injuries claimed. *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989); *see Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 289 (5th Cir. 2007) (a plaintiff must also allege facts which show that its alleged injuries were a foreseeable consequence of the defendant's conduct).

20. In general, Curtis cannot demonstrate that she has been injured as a result of V&F's conduct. Curtis is still entitled to collect 1/5 of her inheritance under the Brunsting Family Living Trust. **To the extent she has incurred any expense or fees it is because she has filed numerous frivolous lawsuits and attempted to fight her other siblings at every turn.** Moreover, Munson is not a party to any of the prior lawsuits nor is he a beneficiary under to the Brunsting Family Living Trust. It is inconceivable that he could injured as a result of V&F's drafting of the estate planning documents. Plaintiffs' Original Complaint contains the following allegations regarding Plaintiffs' alleged injuries:

- Plaintiff Curtis is one of five beneficiaries of the Brunsting Family of Trusts, who has been deprived of the enjoyment of her beneficial interests, forced to incur expense and fees in effort to obtain the use of her property, and has suffered extortionist threats of injury to property rights and has suffered fraud upon both state and federal courts committed by corrupt court officers in furtherance of a pattern of racketeering, activity herein delineated with a particularity.
- As an actual consequence and proximate result Plaintiff Curtis has been injured in her business and property in an exact amount to be proven at trial.
- Plaintiff Munson is a multi-disciplinarian with skills that include but are not limited to information systems engineering and paralegal, among several other skilled crafts. Munson has worked diligently as a paralegal on the Curtis v. Brunsting lawsuit for more than four years, in effort to obtain justice for Ms. Curtis, only to be frustrated by a blatantly corrupt probate court and its officers herein named.
- As an actual consequence and proximate result of the racketeering conspiracy and the obstruction, intentional delay, refusal to administer justice and other means and methods

employed, Plaintiff Munson has been diverted away from other productive pursuits and has thus suffered tangible losses to his property and business interest in an amount to be proven at trial.

21. Clearly, these allegations are insufficient to demonstrate a “conclusive financial loss.” *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (per curiam); *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 (5th Cir. 2003) (a plaintiff does not have standing unless they can show concrete financial loss). Plaintiffs cannot demonstrate that they have been harmed by V&F. In this case, there is not a direct relation between the injury asserted and the injurious conduct alleged. Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court’s high standing standard, this case should be dismissed.

**B. PLAINTIFFS’ CLAIMS SHOULD BE DISMISSED BECAUSE V&F CANNOT BE LIABLE TO PLAINTIFFS.**

22. Plaintiffs do not have standing to bring the suit against V&F. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). While Plaintiffs attempt to cloak their claims against V&F as violations of the Racketeer Influenced Corruption Organization Act (amongst others), they are truly allegations of malpractice. *i.e.* V&F did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess.

23. Legal malpractice is a tort cause of action based on negligence. *See Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006). The elements of a claim for negligence by an attorney are: (1) the attorney owed the plaintiff a duty; (2) the attorney’s negligence act or omission breached that duty; (3) the breach proximately caused the plaintiff’s injury; and (4) the plaintiff suffered damages. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat’l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009).

24. In most lawsuits against an attorney, the existence of the attorney-client relationship is not in dispute. However, in this case the existence of the attorney-client

relationship is a principal defense. As a rule, an attorney owes a duty of care only to a person with whom the attorney has a professional attorney-client relationship. *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996).

25. It has long been the law that an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client. *See Savings Bank v. Ward*, 100 U.S. 195, 200 (1879); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *FinServ Cas. Corp. v. Settlement Funding, LLC*, 724 F. Supp. 2d 662, 671 (S.D. Tex. 2010); *Lewis v. Am. Expl. Co.*, 4 F. Supp. 2d 673, 676 (S.D. Tex. 1998); *F.D.I.C. v. Howse*, 802 F. Supp. 1554, 1563 (S.D. Tex. 1992); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 783 (Tex. 2006); *McCamish, Martin Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999); *Barcelo*, 923 S.W.2d at 577; *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see also Stancu v. Stalcup*, 127 S.W.3d 429, 432 (Tex. App.—Dallas 2004, no pet.) (an attorney only owes a duty of care to his clients and not to third parties, even if they may have been damaged by the attorney's representation of the client). Non-clients who are injured by the negligence of someone else's attorney are not permitted to sue the attorney. *See Swank v. Cunningham*, 258 S.W.3d 647, 666 (Tex. App.—Eastland 2008, pet. denied); *Gillespie v. Scherr*, 987 S.W.2d 129 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

26. Because an attorney does not represent a trust beneficiary they do not owe a professional duty to them. *Barcelo*, 923 S.W.2d at 576; *see Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (it would strain reality to hold that a trust beneficiary, who has no direct professional relationship with the trust's attorney, is the real client). Without this "privity barrier," the

rationale goes, clients would lose control over the attorney-client relationship, and attorneys would be subject to almost unlimited liability. *Barcelo*, 923 S.W.2d at 577. Courts have uniformly applied the privity barrier in the estate planning context. See *Brown v. Green*, 302 S.W.3d 1, 16 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621–22 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Thomas v. Pryor*, 847 S.W.2d 303, 304–05 (Tex. App.—Dallas 1992), writ *dism'd by agr.*, 863 S.W.2d 462 (Tex.1993); *Dickey v. Jansen*, 731 S.W.2d 581, 582–83 (Tex. App.—Houston [1st Dist.] 1987, writ *ref'd n.r.e.*); *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716, 718–19 (Tex. App.—San Antonio 1986), writ *dism'd by agr.*, 729 S.W.2d 690 (Tex.1987). A lawyer's professional duty should never extend to persons whom the lawyer never represented. *Barcelo*, 923 S.W.3d at 579.

27. In *Barcelo*, the court considered whether beneficiaries dissatisfied with the distribution of estate assets could sue an estate-planning attorney for legal malpractice after a client's death. *Id.* at 576. In that case, the intended beneficiaries of a trust, which was declared invalid after the client's death, sued the attorney who drafted the trust agreement. *Id.* The court concluded that the non-client beneficiaries could not maintain a suit against the decedent's estate planner because "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." *Id.* at 578.

28. Several policy considerations supported the *Barcelo* holding. First, the threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney's representation. *Id.* at 578. The court also noted that suits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove

how a decedent intended to distribute the estate, creating a “host of difficulties.” *Id.* The *Barcelo* court subsequently held that barring a cause of action for estate-planning malpractice by beneficiaries would help ensure that estate planners “zealously represent[ed]” their clients. *Id.* at 578–79.

29. Because Plaintiffs were not a client of V&F they do not have standing to assert the present claims. *See Brown*, 302 S.W.3d at 16. As such, this Court must grant V&F’s Motion to Dismiss.

**V.**  
**PRAYER**

WHEREFORE PREMISES CONSIDERED, Defendants Candace Kuntz-Freed and Albert Vacek, Jr. hereby request that their Motion to Dismiss for Failure to State a Claim on all claims alleged by Plaintiffs.

Respectfully Submitted,

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**ATTORNEYS FOR DEFENDANTS  
CANDACE KUNTZ-FREED AND  
ALBERT VACEK, JR.**

**CERTIFICATE OF SERVICE**

I certify that on the 7th day of September, 2016, a true and correct copy of the foregoing was served via the Court's ECF system upon the following counsel of record:

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/s/ Cory S. Reed

**Cory S. Reed**