[ROA.17.20360.411] Report of Temporary Administrator [1434-1448]

## Doc 128 Rule 60 Motion to Vacate [2672-2689]

Doc 128-1 Ostrom’s Motion to enter “Transfer Order” in probate 5/28/2014 [2684-2690] [ROA.17-20360.3128]

Doc 128-2 Probate Court Docket in 412249 showing Candace Curtis as Respondent [2691-2692]

Doc 128-3 Agreed Order to Consolidate Cases

Doc 128-4 Amy and Anita’s Nov. 4, 2019 Counter Claims (in Terrorem clause 8/25/2010 QBD)

Doc 128-5 Amy Brunstings motion for sanctions and contempt [2706-2712]

Doc 128-6 Order regarding Amy Brunstings Motion for Sanctions [2713-2715]

Doc 128-7 Transcript of hearing on Spielmans’ Motion for sanctions [2716-2752]

Doc 129 Main – Proposed Order

Doc 130 – Appearance of Candice Schwager

## Doc 131 Co-trustees response to Dkt 128 Rule 60 Motion to Vacate [2758-2782]

Doc 131-1 Curtis motion for contempt in 4:12-cv-592 denied because the Court thought the case had been transferred to probate.[2783-2784]

Doc 131-2 [Dkt 127] Order following telephone Conference re contempt: the Court thought the case had been transferred to probate [2785]

Doc 131-3 Federal Docket Sheet 4:12-cv-592 [2786-2797]

Doc 131-4 Order Granting REMAND to Probate Court [2798-2799]

Doc 131-5 Curtis Substitution for Ostrom who never made an appearance in a probate court where there is neither an estate nor a representative of an estate (see 2020-08-13.412249-401.ORD.Abating Mtn for PR.pdf) [2800-2801]

Doc 131-6 Candace April 16, 2016 letter to Amy and Anita [2802-2803]

Doc 131-7 [Doc 1] in 4:16-cv-1969, the RICO claims [2804-2811]

Doc 131-8 Plaintiff Answer to Ostrom Rule 12(b)(6) Motion to Dismiss [Dkt 85 4:16-cv-1969] [2812-2824]

Doc 131-9 Order dismissing the RICO [Dkt 91 in 4:16-cv-1969] [2825-2831]

Doc 131-10 Fifth Circuit Court of Appeals in 17-20360 (adverse to 12-20164 - this case) [2832-2835]

Doc 131-11 Probate Court Order denying Curtis pleas in abatement and pleas to the jurisdiction. It should be noted here that Curtis first filing in that Court was in reaction to Defendants June 26, 2015 “No-evidence Motion” , one of six dispositive motions that remain pending. (Dkt 115 [1006-1032] see [1034-2460] [2834-2835]

Doc 131-12 Probate Court Order regarding Amy Brunstings motion for Contempt [2836-2839]

Doc 131-13 Probate Court Order regarding Amy Brunstings second motion for Contempt

Doc 131-14 The preliminary Injunction [Dkt 45] issued to prevent wasting the assets

**Doc 132** Proposed Order denying Rule 60 Motion for relief

## Doc 133 Plaintiff Curtis Motion to Reopen the Docket [Dkt 133]

Doc 133-1 Plaintiff Candace Curtis Affidavit in Support of Motion to Reopen

Doc 133-2 Docket sheet in 412249-402 showing 412249-402 opened February 9, 2015, ten days before Carl’s resignation as juristic person #2 even though the “transfer occurred June 2014

Doc 133-3 Agreed Order to Consolidate also [also Exhibit 128-3]

Doc 133-4 Carole and Comstock emails re-consolidation Order missing from Docket

Doc 133-5 Bayless response to Carole and Comstock emails re-consolidation Order missing from Docket

Doc 133-6 email Mendel telling Carole her request for a distribution is denied

Doc 133-7 Defendants Motion to Transfer, Original Answer and Motion for Sanctions filed by Defendants in response to the registration of the preliminary federal injunction with the state District Court as notice of a foreign judgment.

Doc 133-8 Order regarding Amy Brunstings Motion for Sanctions

## Doc 134 Notice of Hearing September 10, 2020 9:00 a.m.

ANY LIMIT ON THE ISSUES?

## The only issue raised by Document 128 **is whether or not Plaintiff/Appellants’ originally filed federal lawsuit ever left the Southern District of Texas. This is a question of law.**

## **Each issue subsumed within this question relate to jurisdiction. The facts are indisputable as they are entirely derived from the record and when applied to the statutory schema, the conclusions are inarguable.**

## **The questions of whether or not an involuntary Plaintiff was properly joined, whether or not diversity was properly polluted, whether or not a case originally filed in the federal court could have been “remanded” to a state court from which it had never been removed, or whether or not a case (originally filed in the federal court) could be transferred from a federal district court to a state probate court with no proceedings in rem, are all questions of law.**

**Whether or not the Involuntary Plaintiff was in fact a cross-plaintiff, whether or not the Involuntary Plaintiff had been served,**

This opinion has been positively cited by 32 other courts.

**whether or not the federal record had been certified for transfer and whether or not the record had been transferred to a state court are questions of fact. Only the first two are relevant to whether or not diversity had been polluted as a matter of law.**

**Plaintiff Objects to Defendants opposition, Docket numbers 131 through 131-14, as irrelevant, unresponsive, prejudicial and non-probative.**

## Substance and Procedure

1. Is there any authority for an originally filed federal case to be remanded to a state court from which it had not been removed?[[1]](#footnote-1)

Here, Plaintiff removed this action to the Eastern District of Louisiana, despite having submitted herself to the jurisdiction of the State court. Because "[o]nly a defendant, never a plaintiff, may remove a civil action from state to federal court," the Court finds that Plaintiff had no right of removal and that the case must be remanded to the Texas state court. Webb v. Horwitz, CIVIL ACTION No. 16-1790 SECTION: "G"(1), at \*7-6 (E.D. La. Dec. 2, 2016)[[2]](#footnote-2)

1. Does 28 U.S.C. § 1447(d) a trial court from reviewing its order remanding a case to a state court from which it had **not** been removed?

Under § 1447(d) the federal court may not review and order remanding a case to a state court “from which it had been removed”. Nothing in § 1447(d) prohibits review of an order remanding a cause to state court from which it had not been removed.

1. Is there any authority for an originally filed federal case to be transferred to a state court?[[3]](#footnote-3)
2. Does the addition of a cross-plaintiff pollute federal diversity jurisdiction?[[4]](#footnote-4)
3. Can an involuntary party be joined to a lawsuit without service, or waiver of service of process?[[5]](#footnote-5)
4. When cases are consolidated under Rule 42 do the consolidated cases lose their separate and distinct identities?

The governing principles with regard to consolidations under Rule 42(a) are summarized at 5 Moore's Federal Practice, ¶ 42.02[3] at 42-27-29 (2d ed. 1984) (footnotes omitted):

Subdivision (a) speaks both of joint hearings or trials and of consolidation. This wording should not serve to give renewed life to a mistaken notion that there is some inherent distinction between a joint hearing (or trial) of particular issues, and consolidation. The rule is worded as it is to reflect the prior practice to merge the hearing or trial of separate actions so far as is necessary for their expeditious handling. Thus, one or many or all of the phases of the several actions may be merged. But merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately. The actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action.

See also, to generally similar but somewhat differing effect. 9 Wright Miller, Federal Practice and Procedure, § 2382 (1971).

The parties may not by consolidation, of course, be deprived of some substantive right available to them in an individual suit now consolidated. "The actions [do] not lose their separate identities for purposes of consolidation." Alfred Dunhill of London v. Republic of China, [425 U.S. 682, 735](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba#p735), [96 S.Ct. 1854, 1880](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba#p1880), [48 L.Ed.2d 301](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba) (1976). A substantive advantage sought by reason of the consolidation was rejected by Dunhill, the Court observing that the consolidated actions "were not merged; they were simply consolidated for trial in the interest of economy." Id., [425 U.S. at 726](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba#p726), [96 S.Ct. at 1880](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba#p1880). To similar effect, and for similar reasons to reject a substantive advantage sought by one party because of the consolidation, we ourselves have stated that "**consolidation does cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other." McKenzie v. United States,** [**678 F.2d 571, 574**](https://casetext.com/case/mckenzie-v-united-states-2#p574) **(5th Cir. 1982). Harcon Barge Co. v. D G Boat Rentals Inc.,** [**746 F.2d 278, 287**](https://casetext.com/case/harcon-barge-co-v-d-g-boat-rentals-inc?q=When%20cases%20are%20consolidated%20under%20Rule%2042%20do%20the%20cases%20or%20the%20parties%20consolidated%20lose%20their%20separate%20and%20distinct%20identities%3F&p=1&tab=keyword&jxs=5cir&sort=relevance&type=case) **(5th Cir. 1984)**

*Hall v. Hall*, 138 S. Ct. 1118, 1130-31 (2018) (“In *Butler v. Dexter,* [425 U.S. 262, 266–267](https://casetext.com/case/butler-v-dexter#p266), [96 S.Ct. 1527](https://casetext.com/case/butler-v-dexter), [47 L.Ed.2d 774](https://casetext.com/case/butler-v-dexter) (1976) (*per curiam* ), we dismissed an appeal because the constitutional question that supplied our jurisdiction had been raised not in the case before us, but instead only in other cases with which it had been consolidated. We explained that "[e]ach case ... must be considered separately to determine whether or not this Court has jurisdiction to consider its merits". *Id.,* at 267, n. 12, [96 S.Ct. 1527](https://casetext.com/case/butler-v-dexter) ; see *Rich,* 12 How., at 352–353. And in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* [425 U.S. 682, 735](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba#p735), and n. 22, [96 S.Ct. 1854](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba), [48 L.Ed.2d 301](https://casetext.com/case/alfred-dunhill-of-london-inc-v-cuba) (1976) (Marshall, J., dissenting), four dissenting Justices—reaching an issue not addressed by the majority—cited *Johnson* for the proposition that actions are "not merged" and do "not lose their separate identities because of ... consolidation" under Rule 42(a).”)

Carl Brunsting, was not served and did not waive service of summons and thus, was not joined to the federal Plaintiffs cause in any capacity and did not pollute federal diversity jurisdiction.

<http://www.probatemafia.com/reprobates-hall-of-shame/texas/harris-county/grift-of-the-brunstings/>

The Fifth Circuit has recently adopted "improper joinder" as the more appropriate moniker for the concept formerly identified as "fraudulent joinder." *Smallwood v. Illinois Central Railroad Company,*[385 F.3d 568, 571](https://casetext.com/case/smallwood-v-illinois-cent-r-co-2" \l "p571) n. 1 (5th Cir. 2004). Although the terms substantively carry the same meaning, improper joinder is more consistent with the statutory language and thus preferred. *Id.Rodriguez v. Casa Chapa S.A*, 394 F. Supp. 2d 901, 906 n.6 (W.D. Tex. 2005)

No one has the right to take possession of the property of an estate as executor without the authority of a court. An executor de son tort does not exist under Texas law. *Warne v. Jackson*, 230 S.W. 242, 244 (Tex. Civ. App. 1921)

Even if there was an estate, the absence of an executor removes capacity.

Without subject matter jurisdiction there is no court.

“the estate is an "indispensable party" to any proceeding in the probate court.

***Administrations upon the estates of deceased persons, whether under letters testamentary or otherwise, are controlled and regulated by the provisions of our statutes on that subject. Such provisions are very comprehensive. The rights of creditors, heirs, and devisees as declared therein and the procedure prescribed for the enforcement of such rights are materially different from the rights declared and the procedure prescribed for the enforcement thereof by the common law. Thompson v. Duncan, 1 Tex. 485, 488, 489. Article 3314 of our Revised Statutes provides, in substance, that when a person dies leaving a lawful will, all his estate devised or bequeathed thereby shall vest immediately in the devisees or legatees, subject, however, to the payment of the debts of the testator, except such as may be exempted by law; and that upon the issuance of letters testamentary upon any such estate, the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator with the exception aforesaid, and that he shall recover possession of and hold such estate in trust, to be disposed of in accordance with law. No distinction is made in such article between solvent and insolvent estates, or between specific and residuary devises.*** *Appellants, in taking possession of the entire estate of the testator, rightfully exercised the authority specifically conferred upon them by the terms of said article. Becknal v. Becknal (Tex.Civ.App.)* [*296 S.W. 917, 919*](https://casetext.com/case/becknal-v-becknal#p919)*, par. 7; Roberts v. Stuart,* [*80 Tex. 379, 387*](https://casetext.com/case/roberts-v-stuart-executor#p387)*,* [*15 S.W. 1108*](https://casetext.com/case/roberts-v-stuart-executor)*; Laas v. Seidel,* [*28 Tex. Civ. App. 140*](https://casetext.com/case/laas-v-seidel)*,* [*66 S.W. 871, 872-873*](https://casetext.com/case/laas-v-seidel#p872)*,* [*68 S.W. 724*](https://casetext.com/case/laas-v-seidel)*; Id.,* [*95 Tex. 442*](https://casetext.com/case/laas-v-seidel-1)*,* [*67 S.W. 1015*](https://casetext.com/case/laas-v-seidel-1)*-1018; Ansley v. Baker, 14 Tex. 607, 613, 65 Am.Dec. 136; Anderson v. Stewart, 15 Tex. 285, 288; Howard v. Republic, 2 Tex. 311, 313. According to the undisputed testimony, they purported to be so acting at the time and continuously thereafter until they finally surrendered possession of said land. The nature of their possession taken in pursuance of the authority conferred by said article is defined by the terms thereof and declared to be in trust, to be disposed of in accordance with law. The fiduciary character of an executor's holding is generally recognized. Japhet v. Pullen,* [*63 Tex. Civ. App. 157*](https://casetext.com/case/japhet-v-pullen-1)*,* [*133 S.W. 441, 445*](https://casetext.com/case/japhet-v-pullen-1#p445)*, par. 4 (writ refused); 24 C.J. p. 944, § 2336. While the title to said lands vested in appellee and his codevisees, the same was still subject to the payment of the debts of the testator. Such debts constituted a lien upon all the property of the estate subject to the payment thereof. While no creditor had a lien for his debt upon any particular piece of property belonging to said estate, it was none the less true that all lawful debts of such estate constituted a lien upon all the property thereof until distributed, and it was the duty of the executors to provide for the satisfaction thereof out of the same. Moore v. Moore,* [*89 Tex. 29, 33*](https://casetext.com/case/moore-son-v-moore#p33)*,* [*33 S.W. 217*](https://casetext.com/case/moore-son-v-moore)*; Gibson v. Oppenheimer (Tex.Civ.App.)* [*154 S.W. 694, 699*](https://casetext.com/case/gibson-v-oppenheimer#p699)*, pars. 9 and 10; Albert v. Bascom (D.C.) 245 F. 149, 153, par. 7. Morrell v. Hamlett, 24 S.W.2d 531, 534 (Tex. Civ. App. 1930)*

1. (28 U.S.C. § 1441 - Removal of Civil Actions) (28 U.S.C. § 1447 [- Procedure after removal generally](https://casetext.com/statute/united-states-code/title-28-judiciary-and-judicial-procedure/part-iv-jurisdiction-and-venue/chapter-89-district-courts-removal-of-cases-from-state-courts/section-1447-procedure-after-removal-generally?q=remand&tab=keyword&type=statute&listingIndexId=united-states-code.title-28-judiciary-and-judicial-procedure&sort=relevance&p=1)) [↑](#footnote-ref-1)
2. *Shamrock Oil & Gas Corp*. *v*. *Sheets*, [313 U.S. 100, 107-108](https://casetext.com/case/shamrock-oil-corp-v-sheets#p107) (1941) (holding that a plaintiff may not remove an action even when a counterclaim is filed). *See also Chicago*, *R*.*I*. *& P*.*R*. *Co*. *v*. *Stude*, [346 U.S. 574, 580](https://casetext.com/case/chicago-co-v-stude#p580) (1954) (affirming remand of case to state court because the removing party was a plaintiff under federal law and as a result, could not remove a case under [28 U.S.C. § 1441(a)](https://casetext.com/statute/united-states-code/title-28-judiciary-and-judicial-procedure/part-iv-jurisdiction-and-venue/chapter-89-district-courts-removal-of-cases-from-state-courts/section-1441-removal-of-civil-actions)). [↑](#footnote-ref-2)
3. (28 U.S.C. § 1407 - Multi District Litigation - transfers between federal districts), (28 U.S.C. § 1404 - Change of venue - transfers between federal districts), (28 U.S.C. § 1631 - Transfer to cure want of jurisdiction - Mandating transfer of a civil action to the appropriate federal jurisdiction if the transfer "is in the interest of justice") [↑](#footnote-ref-3)
4. 28 U.S.C. § 1332 Diversity, amount in controversy [↑](#footnote-ref-4)
5. Service of Summons F.R.C.P. Rule 4(c)(1),(2), & (3) [↑](#footnote-ref-5)