

Case No. 20-20566

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**In the United States Court of Appeals  
For the Fifth Circuit**

CANDACE LOUISE CURTIS,

*Plaintiff - Appellant*

v.

ANITA KAY BRUNSTING; AMY RUTH BRUNSTING,

*Defendants - Appellees*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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APPELLANT'S REPLY BRIEF

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## **Appellant's Reply to Appellees' Answer**

The current record on appeal shows that this case is about settling an inter vivos trust and that after this Court found the trust controversy to be outside the probate exception on all three legs of the test and returned the matter to the Southern District of Texas for further proceedings, ROA.20-20566.529-534; Plaintiff/Appellant's brother Carl Brunsting initiated two separate state court actions. ROA.20-20566.610-611; The first, a malpractice suit filed in the Harris County District Court ROA.20-20566.559.fn1; and the second, ROA.20-20566.610; a tort action filed in Harris County Probate Court No. 4, ROA.20-20566.613-633;

After further proceedings in the Southern District of Texas, that included issuance of a preliminary injunction, ROA.20-20566.1038-1042; the pro se plaintiff was instructed to retain the assistance of counsel. In compliance with the order, Appellant retained the assistance of attorney Jason Bradley Ostrom. The record further shows that attorney Ostrom subsequently obtained an unopposed order ROA.20-20566.1000-1001; remanding the federal case to the state probate court.

On July 17, 2020, Appellant, represented by Counsel Candice Schwager, filed a Rule 60 Motion to Vacate the Order for Remand and set aside the bundle of

unopposed motions and pleadings filed by Appellant's former counsel, Jason Bradley Ostrom. ROA.20-20566.2672-2683;

### **The Law Applied to the Relevant Facts**

#### ***The remand order is void ab initio***

The Southern District of Texas could not remand Appellant's case to a state court in Harris County, Texas, because the case was not filed in, and removed from, state court in the first place. See Bruneau v. Fed. Deposit Ins. Corp., 785 F. Supp. 585, 590 (E.D. La. 1992) ("[T]he Court cannot remand a case that was not initially removed.")

No finding of abuse of discretion is necessary. The unopposed order remanding the case to Harris County Probate Court No. 4 ROA.20-20566.1000-1001; is void ab initio, as the Southern District Court was without the power to issue the order. This defect will not cure with the passing of time.

#### ***Diversity was not polluted***

The only remaining issue is whether the Southern District of Texas lost subject matter jurisdiction due to the destruction of complete diversity by the addition of a "necessary party" as an "involuntary plaintiff", as Ostrom's bundle of unopposed motions suggests. ROA.20-20566.976-999; This question was settled in the negative before Ostrom even entered the picture.

Diversity could not be polluted by the addition of Carl Brunsting under Rule 15(a) as Ostrom's bundle of unopposed motions claim, ROA.20-20566.976-999; because Carl was already in the record as having adverse interests.

As properly pointed out by Appellees' own counsel on April 10, 2013, ROA.20- ROA.20-20566.610¶1; state court Plaintiff Carl Brunsting named all of the federal litigants' including Plaintiff Candace Curtis' as "Defendants" in his state probate court action. Carl could not be added to the federal case as a co-plaintiff as a matter of law and if he was determined to be a necessary party under Rule 19 (a)(1) Fed. R. Civ. Proc., he should have been added as a defendant under Rule 19(a)(2) Fed. R. Civ. Proc.

### ***Fraud on the Court***

For want of an available answer Appellees' counsel asks the Circuit Court to assume a myriad of facts not in evidence and to dismiss this appeal a priori without examination of the facts that are in the record. The only evidence they offer is of their own efforts to deprive Appellant of remedy and they ask this Court to adopt their distorted view, without addressing the legal or factual issues that are actually relevant to this appeal.

The existence of subject-matter jurisdiction and standing are rigid questions of law that are not negotiable and cannot be waived. See Naylor, 466 S.W.3d at 792; Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444-45 (Tex.

1993). Both are essential to a court's power to decide a case. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553-54 (Tex.2000), Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)

*As a threshold matter, an order is void ab initio if the character of the order is such that the court had no power to render it, ... if the mode of procedure used by the court was one that the court could 'not lawfully adopt,' " id. at 51-52, 541 S.E.2d at 551 (quoting Evans v. Smyth-Wythe Airport Comm'n, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998) ), or if the order was obtained by extrinsic or collateral fraud. Rook v. Rook, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987)*

Appellees assert repeatedly that “litigation” is ongoing in the probate court, contrary to what Appellant has already shown to be the law in relation to the facts of this case. Appellees have not provided the record with any evidence to support such claims. They do not, because they cannot. Appellant cannot prove the non-existence of a fact but can ask for a negative inference. There are no fully litigated state court determinations and the absence of evidence to the contrary is what the record does show.

### ***Admissions, Confessions and the Solvent of Self-Contradiction***

What the current record on appeal does evince is that On April 9, 2013, Appellant’s brother Carl Brunsting, represented by Attorney Bobbie G. Bayless, (Bayless) ROA.20-20566.631; filed suit in Harris County Probate Court No. 4 under Chapter 37 of the Texas Civil Practice and Remedies Code and Chapter 115

of the Texas Property Code. ROA.20-20566.617; Those claims include Breach of Fiduciary Duty, Failure to Account, Conversion, Negligence, Tortious Interference with Inheritance, Civil Conspiracy, Fraudulent Concealment and requests for trust accounting, constructive trusts, disclosures and injunction, all of which seek to dispose of property already in the custody of a United States District Court for the Southern District of Texas and none of which invoke the jurisdiction of a probate court, see *In re Hannah*, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014)

***Attorney Bobbie G. Bayless for Relator Julie Hannah***

State court records show that Attorney Bobbie G. Bayless, author of Carl Brunsting’s “probate case”, filed a Petition for Writ of Mandamus on February 11, 2014, as attorney for Relator Julie Hannah, *In re Julie Hannah No. 14-14-00126-cv* in the 14th Court of Appeals Houston, Texas, pursuant to Section 15.0642 of the Texas Civil Practice and Remedies Code, presenting as her sole issue whether the trial court violated the mandatory venue provision in Section 15.017 of the Civil Practice and Remedies Code by transferring relator's suit to the County Court at Law of Aransas County (*sitting in probate*). Bayless’ argument was that Hannah’s claims were brought under the Jurisdiction of the Texas Civil Practice and Remedies Code and that tortious interference with inheritance, slander, and



conspiracy were general tort claims and not probate matters or matters relating to a probate proceeding.

On May 13, 2014 the Court of Appeals of Texas, Houston (14th Dist.) agreed that tortious interference with inheritance, slander, and conspiracy brought under the Jurisdiction of the Texas Civil Practice and Remedies Code were general tort claims and not probate proceedings. In re Hannah 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101),

*“For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. In re Hannah, 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101).*

*Finally, a probate court may also exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX. EST. CODE ANN. § 32.001(b). Yet for a probate court to have such authority to exercise jurisdiction over matters incident to an estate, it is axiomatic that there must necessarily be a probate proceeding then pending in such court. Frost Nat'l Bank, 315 S.W.3d at 506; Narvaez, 564 S.W.3d at 57.” Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)*

The present record on appeal, ROA.20-20566; shows that the Settlor’s wills are pour-over-wills, that they had been approved and admitted to probate unchallenged and that drop orders had been issued prior to Bayless’ tort suit filing in that court.

Attorney Bobbie G. Bayless has proven by her pleadings in Hannah and the agreement of the Texas 14<sup>th</sup> District Court of Appeals that she has been fully aware, for the past seven years, that her client Carl Brunsting has never had a lawsuit pending in Harris County Probate Court No. 4.

***Liberal Construction***

*"Liberal construction" of pro se pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure, and thus is consistent with the general principle of American jurisprudence that "the party who brings a suit is master to decide what law he will rely upon." The Fair v. Kohler Die Specialty Co., 228 U. S. 22, 25 (1913). Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. Castro v. U.S., 540 U.S. 375 (2003)*

The time required for this pro se plaintiff to unravel and coherently respond to the disingenuous and convoluted actions in the probate court forum, and her difficulty in obtaining trustworthy counsel to assist her, should cast no untoward blemish upon Appellant's right to due process. In order to effect substantial justice in our adversarial system, due process requires a level playing field, a meaningful opportunity to be heard and a timely disposition of the controversy based upon competently established facts and the law as properly applied to those facts.

Defendant/Appellees' efforts to silence Appellant and foreclose remedy should not be tolerated in any court. Appellant came to the Southern District of

Texas more than nine years ago in order to obtain possession and control of her 1/5<sup>th</sup> share of a family trust, that should have been distributed shortly after her Mother's passing on November 11, 2011. To date, Appellant has received nothing of her share from the alleged co-trustees, but has received more than her fair share of threats, defamations and other abuses.

*The third category of the probate exception actually comprises the prior exclusive jurisdiction doctrine. Goncalves By and Through Goncalves v. Rady Children's Hospital San Diego , 865 F.3d 1237, 1253 (9th Cir. 2017) (This aspect of Marshall v. Marshall, 547 U.S. at 311–12, 126 S.Ct. "has little to do with probate; rather, it is an application of the prior exclusive jurisdiction doctrine.") Reagin v. French 280 F. Supp. 3d 1298 (N.D. Ala. 2017)*

#### **Charles Alan Wright et al., Federal Practice Procedure**

*"It is well settled that "if two suits [are] pending, one in a state and the other in a federal court, [and they] are in rem or quasi in rem, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the, court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other." Mandeville v. Canterbury, 318 U.S. 47, 48-49, 63' S.Ct: 472, 87 L.Ed. 605 (1943). Accordingly; "an abundance of federal decisional law, including an impressive array of Supreme Court decisions, makes it clear that in all cases involving a specific piece of property, real or personal (including various forms of intangible property), the federal court's Jurisdiction is qualified by the ancient and oft-repeated rule — often called the doctrine of prior exclusive jurisdiction — that when a state or federal court of competent jurisdiction has obtained possession, custody, or control of particular property, that authority and power over the property may not be disturbed by any other court." 13F Charles Alan Wright et al., Federal Practice Procedure §*

3631, at 271-72 (3d ed. 2009) U.S. v. Sid-Mars Restaurant Lounge, Inc., 644 F.3d 270, 283 n.3 (5th Cir. 2011)<sup>1</sup>

For want of material facts in support of any defense or explanation, Appellees' counsel seek refuge in the dismissal of allegations of honest services fraud brought under the Racketeer Influenced Corrupt Organization statutes, dismissed for failure to state a claim, as if to paint the pro se as frivolous, irrational and vexatious, while avoiding the substance of Appellant's jurisdictional argument.

It should be noted, in light of the revelations in the present appeal, that each "Immunity Defendant", ROA.17-20360.3333; in the honest services fraud case, deliberately misrepresented material facts when they claimed the matter arose from a probate case<sup>2</sup>, probate matter<sup>3</sup> and probate proceeding<sup>4</sup> when, in fact, those

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<sup>1</sup> The Wright and Miller treatise cites 26 U.S. Supreme Court cases as supporting this proposition:

<sup>2</sup> Steven Mendel Doc 36 p.2, ROA.17-20360.2304¶2.4; p.6 ROA.17-20360.2308¶3.10, 3.12; Jason Ostrom Doc 78 p.1, ROA.17-20360.2869¶1; County Attorneys for Judges Butts & Comstock Doc 53 p.15, ROA.17-20360.2613¶2; p.29, ROA.17-20360.2627¶3;

Gregory Lester Doc 83 p.1, ROA.17-20360.2908¶2;

Darlene Payne Smith Doc 84 p.2¶1,2; p.3 ROA.17-20360.2949¶1,6; ROA.17-20360.2952¶1,3; p.7, ROA.17-20360.2953¶3; p.9, ROA.17-20360.2955¶3; p.10, ROA.17-20360.2956¶2;

<sup>3</sup> Jill Young Doc 25, ROA.17-20360.181; p.3

Neal Spielman Doc 39, ROA.17-20360.2328; p1, 2 - Doc 40, ROA.17-20360.2335; p.1, 2, 3 County Attorneys for Judges Butts & Comstock Doc 53, ROA.17-20360.2598; p.18 - Doc 79 ROA.17-20360.2894; Doc 63, p.1, ROA.17-20360.2286¶2;

<sup>4</sup> Vacek & Freed Doc 20, ROA.17-20360.153; p.4, 6, 7

Bobbie G. Bayless, Doc 23, p.2, ROA.17-20360.175¶1, fn.1; "The action in the Harris County Probate Court involves disputes concerning a trust created by the parents of the five Brunsting siblings." ROA.17-20360.176, ¶4, fn3;¶

Neal Spielman Doc 40, p.3, ROA.17-20360.2335;

allegations arose out of the fraud perpetrated on Appellant, Appellant's co-beneficiary siblings, and the state and federal courts, by Jason Bradley Ostrom and the other participants in the mock "probate proceedings".

## **CONCLUSION**

The remand order is void ab initio. This case involves a family trust and there is only one nucleus of operative facts. There are no related probate cases, probate matters or probate proceedings as a matter of law. Bayless proved by "In re Hannah" that the document she filed in the probate court on April 9, 2013, ROA.20-20566.623-633; naming Carl Henry Brunsting as plaintiff, both individually and as executor, did not invoke the jurisdiction of a probate court. There was no estate administration for those tort claims to be ancillary to. None-the-less, after In re Hannah, Attorney Bobbie G. Bayless has continued her conflict engineering scheme for seven years, with full scienter, as if Carl Brunsting and his wife Drina actually had a case pending in the probate court. They do not.

## **REMEDY**

Appellant is entitled to a meaningful opportunity to be heard in a court of competent jurisdiction and was, at the time of her initial filing, entitled to choose

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County Attorneys for Judges Butts & Comstock Doc 53 p.2, ROA.17-20360.2600¶2; p3, ROA.17-20360.2601¶2; p.6, ROA.17-20360.2604¶2; p.14 ROA.17-20360.2612¶3; p.28, ROA.17-20360.2626¶1;  
Darlene Payne Smith Doc 84, ROA.17-20360.2940; p.8, 10

the forum from among those available. Only the United States District Court for the Southern District of Texas, Houston Division, has constituted itself a court of competent jurisdiction, with quasi in rem authority over the trust corpus via personam jurisdiction over the alleged co-trustees in possession, and that jurisdiction is to the exclusion of all other courts.

Rule 60(d)(3) does not limit a court's jurisdiction to set aside orders and judgements for fraud on the court or for any other reason that serves the interest of justice. Setting aside the void and fraudulent acts contrived by attorney Jason Bradley Ostrom and curing the resulting deprivation of due process would serve the interests of justice in this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing brief for the Appellant Candace Louise Curtis and the Record Excerpts have been served via email on STEPHEN A. MENDEL and NEAL E. SPIELMAN, counsel for Appellee's, this 28<sup>th</sup> day of April 2021 and by the 5<sup>th</sup> Circuit electronic filing system as submitted.

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## CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7 (c), undersigned pro se Plaintiff-Appellant certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7 (b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7 (b)(3), this brief contains 2,607 of 3,221 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word 2010 software.
3. Upon request, undersigned will provide an electronic version of this brief and/or a copy of the word printout to the Court.
4. Undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and, imposing sanctions against the person who signed it.

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