UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

CANDACE LOUISE CURTIS, 　　　PLAINTIFF	§	
	§	
	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-00592
	§	JUDGE KENNETH M. HOYT
ANITA KAY BRUNSTING,	§	
AMY RUTH BRUNSTING,	§	
AND DOES 1-100,	§	
DEFENDANTS	§	JURY TRIAL DEMANDED

MOTION FOR LEAVE TO FILE FIRST AMENDED PETITION

TO THE HONORABLE COURT:

Comes Now, Plaintiff, Candice Louis Curtis and files this Motion for Leave to File First Amended Petition pursuant to Federal Rule of Civil Procedure 15(a), and in support thereof would respectfully show as follows:

I. INTRODUCTION

1.　　In light of recently discovered evidence in this case, Plaintiff moves this Court to permit her to file an amended complaint. The proposed amendment asserts an additional legal theory grounded in the same basic facts as the existing complaint, but that will ensure that all parties to be impacted by the ultimate judgment are participants. Moreover, because the claim to be asserted in the amendment appears to be meritorious, it would be in the interests of justice for this claim to be included in the case.

II. BACKGROUND

2.　　In her Original Petition, Plaintiff brought causes of action against Defendants Anita Brunsting and Amy Brunsting as Co-Trustees of the Brunsting Family Trust, stemming from

actions they took with regard to the Trust and Trust assets that harmed Plaintiff.

3.   Through reviewing the hundreds of documents produced, Plaintiff has discovered that the Qualified Beneficiary Designation and Exercise of Testamentary Power of Appointment ("Modification Documents") executed by Nelva Brunsting after her husband's death improperly attempted to change the terms of the then-irrevocable Trust. Plaintiff now seeks leave to file a Declaratory Judgment Action as to the validity of the Modification Documents.

III. ARGUMENTS AND AUTHORITY

4.   Leave to amend the pleadings "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). The United States Supreme Court has long instructed that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 183 (1962). The Ninth Circuit, moreover, has stated that the policy of permitting amendments "should be applied with 'extreme liberality.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

5.   Rule 15(a) reinforces one of the fundamental policies underlying the Federal Rules - that pleadings are not an end in themselves, but instead are only a means of helping ensure that each case is decided on its merits. *See* 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1473, at 521 (2nd ed. 1990). Thus, "if the underlying facts relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182; *see also Frost v. Perry*, 919 F. Supp. 1459, 1468 (D. Nev. 1996) (stating that Rule 15 should be interpreted "very liberally, in order to permit meritorious actions to go forward, despite inadequacies in the pleadings").

6.   Quite appropriately, "courts have not imposed any arbitrary timing restrictions on a party's request for leave to amend and permission has been granted under Rule 15(a) at various

stages of the litigation: following discovery; after a pretrial conference; . . . when the case is on the trial calendar and has been set for a hearing by the district court; at the beginning, during, and at the close of trial; after a judgment has been entered; and even on remand following an appeal." 6 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1488, at 652-57 (2d ed. 1990) (citations omitted). Thus, delay - either in seeking to amend or occasioned by an amendment - in itself cannot justify denial of leave to amend. *See, e.g., DCD Programs*, 833 F.2d at 186.

7.   Given the liberal policy toward amendments, the burden of demonstrating why leave to amend should not be granted falls squarely on the nonmoving party. *See id.* at 187; Frost, 919 F. Supp. at 1469. In deciding whether the nonmovant has carried this burden, courts commonly consider the following four factors: (1) bad faith or dilatory motive on the part of the movant; (2) undue delay in filing the motion; (3) prejudice to the opposing party; and (4) the futility of the proposed amendment. *See, e.g., Roth v. Marquez*, 942 F.2d 617, 628 (9th Cir. 1991).

8.   Plaintiff has not unduly delayed submitting the proposed amendment, as the evidence supporting the claim has only recently come to light. These facts warrant an amendment of the Plaintiff's pleadings.

9.   The Defendants would not be unfairly prejudiced by such an amendment, and their counsel has indicated that he is not opposed to our Motion for Leave.

10.   Plaintiff therefore seeks leave to file the First Amended Complaint attached hereto as Exhibit "A." Justice requires that Plaintiff be afforded an opportunity to test the merits of that claim.

IV. PRAYER

WHEREFORE, Plaintiff respectfully requests that the Court (a) grant leave to file the First

Amended Complaint attached hereto as Exhibit "A," and (b) grant such other and further relief that

the Court deems just and appropriate.

Respectfully Submitted,

OSTROM/Sain
A limited Liability Partnership

BY: /s/ Jason B. Ostrom
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Attorneys for Plaintiff

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has conferred with opposing counsel and they are unopposed to this motion to amend the complaint.

       /s/ Jason B. Ostrom
       Jason B. Ostrom

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service on known Filing Users will be automatically accomplished through the Notice of Electronic Filing. Additionally, this document will be served by copy to any attorney-of-record for those parties in state court litigation.

       /s/ Jason B. Ostrom
       Jason B. Ostrom