

Who should prosecute the malpractice claims against Vacek?

Successor Independent Executor?

1. Dependent Administration

- Assets are held in a testamentary trust of the testator, administered and disposed of according to the instructions in the will.
- Executor/ administrator/Personal Representative requires probate court permission for any action related to partition, distribution or settlement of the estate including the paying of claims.

2. Independent Administration

- Under a Will
 - Assets are held in a testamentary trust of the testator, administered and disposed of according to the instructions in the will.
 - Independent executor acts free of probate court supervision and can do anything the decedent could have done if living subject only to the limitations prescribed by the will
- Under a Pour-over will
 - Assets are not held in a testamentary trust of the testator (estate) but instantly become part of the corpus of the trust. The purpose is unified administration according to the terms of the trust.

“the estate is an “indispensable party” to any proceeding in the probate court. The estate’s presence is required for the determination of any proceeding that is ancillary or pendent to an estate.” Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App. 1997) [Smith’s Inc. v. Sheffield](#) No. 03-02-00109-CV (Tex. App. Jan. 30, 2003), Goodman v. Summit at West Rim, Ltd., [952 S.W.2d 930, 934](#) (Tex.App.-Austin 1997, no pet.), [Johnson v. Johnson](#), No. 04-19-00500-CV (Tex. App. Jan. 15, 2020)

Independent administration is governed under Tex. Est. Code § 401-404. To appoint a successor to an independent executor the court must find that continued administration of the estate is necessary, Tex. Est. Code § 404.005(a).

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The first act required of the successor would be to produce an inventory, appraisal and list of claims, Tex. Est. Code § 404.0035(a)(2) and, as Carl Brunsting's individual claims in the 401 action have never been parsed or bifurcated from the claims brought by the independent executor and, as neither has standing in common with the other, it necessarily follows that Carl's individual claims in the 401 will need to be distinguished from the estates claims in the 401 before a successor can assume the office competent to proceed with the merits of the relevant claims and before this Court can proceed to resolve the estates issues as a court of competent jurisdiction.

Estate = tangible property

“Estate” means a decedents property (Tex. Est. Code §22.012)

Probate administration is an action in rem

Tex. Est. Code §32.001(d) The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

The Inventory, Appraisal and List of Claims

The inventories include only an abandoned car (1/2 each) and tort claims brought by the independent executor.

The abandoned car is the only tangible property subject to a proceeding in rem and thus, the abandoned car **is** the “estate”.

The tort claims are actions in personam alleged to be “incident” to the settlement, partition, or distribution of the abandoned car, a.k.a. “the estate”.

There are no claims or controversies involving the junk car. In fact, it was so invaluable that the independent executor didn't even bother to take possession as required by law. That junk car is now a liability.

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Pour-over will

A devise to trust is called a pour-over. The purpose for a pour over is unified administration according to the terms of the trust without having to reiterate those terms in the will.

If there is an estate to administer and a trust to administer there is no unification of administration. If there is a pour-over there is no estate to administer. If there is an estate to administer, there is no pour over.

The wills are pour-over wills that are no longer subject to challenge. The sole devisee is the family trust.

Independent Administration

Independent administration of a decedent's estate is governed under Title II, Subtitle I, Chapter's 401 – 405 and unless another provision of the code specifically included independent executors within their ambit, Title II, Subtitle I, Chapter's 401 – 405 and the statutes contained within those chapters, are the only provisions of the code applicable to independent administration.

Kanz v. Hood, 17 S.W.3d 311, 317 (Tex. App. 2000) (“[W]here the language of a will appointing an independent executor is clear and unambiguous, he becomes a creature of the will and not of the probate court. He is by the terms of the will vested with unbridled authority over the estate and is authorized to do any act respecting it which the court could authorize to be done if the entire estate were under its control, or whatever testator himself could have done in his lifetime, except as restrained by the terms of the will itself.”)

The independent executor had no business filing claims in the probate court after the inventory, appraisal and list of claims had been approved by the court.

The independent executor had no business filing claims in the probate court because doing so, asked the probate court to assume control over the settlement, partition and distribution of a junk car under independent administration.

Claiming the tort actions to be “incident” to the settlement, partition and distribution of the junk car is gross misconduct, gross mismanagement and

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not an action taken in good faith by the representative for the diminished capacity independent executor.

The independent executor had no business filing claims in the District Court and then filing related claims in the probate court.

Probate Court No. 4 failed to appoint a successor “independent executor” to prosecute the disloyal estate planning attorneys, sequestered in the District Court represented by Thompson Coe, while the Thompson Coe attorneys also represent the associate judge of Probate Court No. 4 in the SDTX in *Johnson v Dixel*, where in Probate Court No. 4’s judge was also a defendant. Meanwhile, the Thompson Coe attorneys are sucking up the malpractice coverage proceeds which will leave nothing for the injured victims.

Who should prosecute the malpractice claims and what court should make that determination?

Estates Code Section 404.005 (Tex. Est. Code § 404.005) governs the appointment of a successor personal representative when an independent executor has ceased to serve due to incapacity or other causes. In order for the probate court to appoint a successor to an independent executor or executrix, there must be a portion of the Will that remains unexecuted.

What portion of the Wills remain unexecuted?

What do the [Wills of Elmer and Nelva Brunsting](#) say?

“I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust;” ...

“All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration.” ...

“I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisal and list of claims as required by law.

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A devise to the trustees of a trust is called a pour-over.

The purpose for a pour-over is unified administration. If there is an estate to administer there is no pour-over. If there is a pour-over there is no estate to administer.

Sec. 32.001. GENERAL PROBATE COURT JURISDICTION

(d) The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

If this is an action in rem, where is the stuff? (estate)

If this is an independent administration what are we all doing strapped down in a probate court?

Both Settlor's wills are pour-over-wills and neither is subject to challenge at this juncture. THERE IS NO ESTATE TO ADMINISTER!

There is no estate to administer

Who should prosecute the malpractice claims?

As a pragmatic fact, by filing claims in separate courts and colluding with the other attorneys to foreclose remedy, Bayless has already guaranteed the malpractice funds will go to the malpractice insurance company attorneys and not the victims.

According to Carl's deposition testimony he and his wife Drina already paid Bayless \$250,000 and they don't even have a pending lawsuit. There will be no return on that investment.

What court should make that determination?

Without an indispensable party there could be no dispositive proceedings of any kind in the probate court.

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The malpractice case was filed in the District Court and that is where it should have stayed. If Carl the individual or Carl the executor had related claims, they should also have been filed in the district court, not the probate court.

What is important is that the trust not be bled to fund such folly. We are not looking at professional carelessness. We are looking at a callous and calculated fraud with a bait and switch front end and an exploitation bait and switch back end.

Mendel and Spielman Attorney Fee Demands

Brad Featherston (Mendel law firm) made his appearance in the probate court on behalf of Defendant Anita Brunsting November 14, 2014. Neal Spielman made his appearance on behalf Defendant Amy Brunsting December 12, 2014. The estate has been unrepresented since February 19, 2015.

At most, the Mendel law firm could have engaged in proceedings for the determination of matters ancillary or pendent to an estate for a period of three months, and Neal Spielman could have engaged in proceedings for the determination of matters ancillary or pendent to an estate for a period of two months, prior to the resignation of the independent executor.

This, of course, assumes that ancillary proceedings were actually had in the probate court to begin with.

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\$128,000 in excess taxes paid as a direct result of failure to administer the trust

During the two or three month period between, Stephen Mendel and Neal Spielmans' appearances and Carl's resignation, there were two hearings: one on a motion to amend the preliminary injunction [[December 9, 2014](#)]¹ filed by Bayless and one related to motions for distributions filed by Ostrom. [[February 15, 2015](#)]²

At the December 9, 2014 hearing on (Bayless) motion to amend the preliminary injunction, Defendants complained about the preliminary injunction issued against Anita and Amy Brunsting in their capacity as co-trustees, arguing that the expense of seeking the court's permission to pay the income taxes was unjustified.

Defendants were granted the privilege of paying the taxes on trust income without prior approval from the Court. However, while defendants took the liberty to pay the income taxes, they ignored their obligation to distribute the income and thus to avoid paying excesses taxes.

This is consistent with Plaintiff Curtis February 27, 2012 federal complaint alleging Defendants to have exercised all the powers of the office while refusing to perform any of the duties of the office. Nothing has changed in eight years and there is no excuse for this family being held hostage to an attorney fee ransom in a probate court where there have been no proceedings to resolve anything in seven years.

¹ Transcript [Hearing December 9, 2014](#)

² Transcript [Distribution Hearing February 15, 2015, \[P. 54\]](#)

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Probate?

- 1 The next eligible executor named in the Wills (Candy) Amy is disqualified due to conflicts of interest
- 2 The Heir that has pled and proved that there is no administration pending and none necessary (Candy)

Pour-Over? There is no estate under administration

- 3 The trustees (Anita and Amy) – (documents disputed) Candy and Carl are the de jure trustees
- 4 However, if the trustees fail to prosecute claims belonging to the trust due to their own malfeasance, the beneficiaries have the right to bring and maintain those claims.
 - a. Candy is the first beneficiary to file claims and the only party to have obtained findings of fact in any court
 - b. Carl lacks capacity
 - c. Carole doesn't have an attorney, is not named as a successor in the wills or the trust and doesn't fully understand the proceedings.
- 5 Given that Carl had the capacity to file when and how he did, Candy should be granted leave to substitute for the "estate/trust/both" in the District Court suit as she is the only party who meets every criterion under every standard.

What Court should make the appointment? (Both?)

- 6 If the probate court makes the appointment it should be a duality. (1) assuming the probate court to be the proper court to make the determination, (it is not) the appointment should be an Order and (2) in the event the district court is the proper court to make the determination, (which it is) the probate court Order of Appointment should be viewed by the district court as an advisory opinion. If the district court mirrors the probate court order/opinion it would avoid any question as to the validity of the substitution. (relation back)

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Serve Bill Citations to A & A /

Register Foreign Judgment in District Court / Mail to A & A and file proof of Mailing

Obtain certified Parties sheets for 412249, -401, -402, -403 – in prep for Rule 60 Motion Southern District of Texas

Set

June 15, 2020 Deadline for the fake co-trustees to cut a check for all five beneficiaries mediation fees

June 25, 2020 Mediation

Sitting on a limb

File Addendum / Set Hearing - Bill of Review

File Petitions for Enforcement of Foreign Judgment – Summary J 4 breach – writ of execution – Declaratory J – Distribute Passive trust as directed

Rule 60(b)(4) - Southern District of Texas – Fraud on the Court – Abuse of Process

Although a probate court may issue various probate orders on particular issues, the court does not completely lose jurisdiction until the entire estate is closed. Hawkins v. Estate of Volkmann, 898 S.W.2d 334, 343 (Tex.App.-San Antonio 1994, writ denied).

1. Orders admitting the Wills and issuing Letters Testamentary do not identify a devisee as required
2. Each inventory contains one half of a junk car.

Who should prosecute the malpractice claims against Vacek?

Statutory probate courts have jurisdiction over actions by or against a trustee and actions involving inter vivos trusts. See TEX. ESTATES CODE ANN. § 32.006 (West 2014). This jurisdiction is concurrent with the jurisdiction of the district courts. See TEX. ESTATES CODE ANN. § 32.007 (West 2014). Statutory probate courts also have jurisdiction over other matters, such as probate proceedings. *Stauffer v. Nicholson*, 438 S.W.3d 205, 215 (Tex. App.—Dallas 2014, no pet.).

The Court also determines that the sanctions orders at issue were entered in error and vacates those orders as well.

While the orders issuing letters establish an independent administration, they do not identify any particular devise or devisee.

The inventories both show one half of a 2000 Buick Le Sabre with an aggregate value of two thousand seven hundred and fifty dollars (\$2,750.00) and as any other assets it says “see list of claims”.

Ancillary matter 412249-402 was filed in the Southern District of Texas February 27, 2012 and received by the probate court on remand from the federal court June 6, 2014.

Ancillary matter 412249-403 was filed in Harris County District Court January 29, 2013 and transferred to Harris County Probate Court 4 by Order of this Court entered April 4, 2019.

The statutory bill of review under consideration, Cause No. 412249-404, was filed November 19, 2019 seeking review of the Orders dismissing Pleas in Abatement and to the Jurisdiction entered February 14, 2019 and other rulings entered in the two year period covered by the statutory bill of review under consideration.

Who should prosecute the malpractice claims against Vacek?

- (1) The estate is an indispensable party to any proceeding in the probate court. *Goodman v. Summit at West Rim, Ltd.* 952 S.W.2d 930 (Tex. App. 1997)

Petitioner argues:

- (1) The testators wills devise to an existing inter vivos trust. This is called a pour-over-will. Assets devised to a trust are not held under a testamentary trust of the testator but become part of the corpus of the trust to be administered according to the instruments creating the trust. (Tex. Est. code 254.001)
- (2) The estate is an indispensable party to any proceeding in the probate court. A pour-over-will avoids probate because no constructive trust estate is formed, thus depriving the probate court of an indispensable party to its proceedings.
- (3)
- (4) After approval of the inventory appraisement and list of claims, as long as the estate is in the hands of the independent executor no further action of any nature can be had in the probate court.

The estate is an "indispensable party" to any proceeding in the probate court. The estate's presence is required for the determination of any matter that is ancillary or pendent to an estate. Once the estate settles, the claim is "ancillary" or "pendent" to nothing and the court is without jurisdiction. *Goodman v. Summit at West Rim, Ltd.* 952 S.W.2d 929, 930 (Tex. App. 1997). *Davis v. Merriman*, No. 04-13-00518-CV, at *4-5 (Tex. App. Mar. 4, 2015)

When an independent administration has been created, a verified inventory has been filed by the independent executor and approved by the court, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.

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1. The estate is an indispensable party to any proceeding in the probate court. The estate's presence is required for the determination of any matter that is ancillary or pendent to an estate.
2. Because the Testators wills are pour-over-wills devising to an express inter vivos trust, no constructive testamentary trust estate is formed, thus depriving the probate court of an indispensable party to its proceedings.
3. The wills deprived the independent executor of standing to bring ancillary claims in the probate court after the inventory, appraisal and list of claims was approved and the estates code mirrors the testators right to do so.
4. There is no estate administration pending and none necessary. Without a pending estate the probate court lacks jurisdiction over matters ancillary or pendant thereto.

“*Helena Chem. Co.*, [47 S.W.3d at 493](#) (appellate court “must presume that the Legislature intends an entire statute to be effective and that a just and reasonable result is intended”” *King v. Deutsche Bank Nat'l Trust Co.*, 472 S.W.3d 848, 855-56 (Tex. App. 2015)

A statutory bill of review must be brought by an interested person within two years of the entry of the order challenged.

First is the pour-over-will.

and it should be noted here that the independent executor resigned due to lack of capacity February 19, 2015.

First, Petitioner argues that in an independent administration, as long as the estate is in the hands of the independent executor the probate court is prohibited from reaching to matters affecting partition, distribution or settlement of the estate.

Petitioner argues that the estate is an indispensable party to any proceeding in the probate court and that the probate court lacks subject matter jurisdiction over

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matters ancillary to the estate because there is no estate administration pending and none necessary.

, which are the very matters defined as incident to the estate over which a probate court generally has ancillary jurisdiction.

pour-over-will – assets are not held in a testamentary trust of the testator (estate) thus voiding probate because it deprives the court of an indispensable party to its proceedings.

Further, after the Inventory, Appraisement and List of Claims have been approved no further action can be had in the probate court unless the estates code specifically and explicitly provides for further action in the probate court.³

bars the independent executor and all interested parties from taking further action in this Court after the inventory, appraisement and list of claims have been approved. The claims filed five days after the estate was closed do not involve a dispute to title in property within the decedent's estate, all of which was devised to the trust. Neither will have been challenged nor has either order approving the inventory been challenged. No action seeking to reopen the estate was ever filed and all of these actions are now barred by the two years statute of limitations set out in Texas Estates Code § 55.251 (b).

³ Texas Estates Code § 402.001

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In regard to the Real Party in Interest Objection filed by Candace Curtis it is clear to the Court at this juncture that the estates of Elmer and Nelva Brunsting are not necessary parties to the prosecution of claims brought in their name as the pour over provisions in both wills assign the right to pursue those claims to the trustees for the devisee trust. Any controversy over who is or may be the trustees and what instruments may or may not be valid were never properly placed before this court and this court never acquired subject matter jurisdiction over those claims.

A pour-over-will avoids probate as a matter of law. How does it not avoid probate as a matter of fact? IMPUNITY

The filthy lucre soup line acolytes of the probate mafia don't care about the law because they don't have to. The filthy lucre soup line mobsters of the probate mafia have immunity: Judicial immunity, litigation immunity, official immunity, derivative immunity

QBD combines incompatible powers without distinguishing one from the other and claims a lone settlor made changes revoking an irrevocable A/B trust.

Independent executor files claims in the probate court individually and as executor without distinguishing the individual claims from the estates claims. Carl is not a devisee of the estate.

Generally, in an independent administration of an estate, the independent executor may proceed without involvement by the probate court "except where this title specifically and explicitly provides for some action in the court." [Tex. Estates Code Ann. § 402.001](#) (West 2014).

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BECAUSE THE LEGISLATED LAW HAS BEEN REMOVED FROM THE EQUATION AND SUPPLANTED

An independent administration also can be closed without filing an affidavit. Even in the absence of such an affidavit, an independent administration is considered closed when debts have been paid so far as the assets will permit and all property has been distributed. [Tex. Prob. Code Ann. § 151](#); *Hanau*, [806 S.W.2d at 903](#). This court has explained:

An independent administration of an estate is considered closed when the debts have been paid and the property has been distributed and there is no more need for administration. The filing of a verified final account with the probate court pursuant to [section 151](#) merely formally closes an independent administration. *Hanau*, [806 S.W.2d at 903](#); *see also McGarr*, [10 S.W.3d at 376](#). *Texas Comm. Bk. v. Correa*, 28 S.W.3d 723, 728 (Tex. App. 2000)

1. What remains unexecuted under the Wills is the determination of which instruments contain the “exact terms of the BRUNSTING FAMILY LIVING TRUST”. In other words... after more than seven years in Harris County Probate Court No. 4, the process of resolving the trust controversy among the real parties has not even begun!

Claims have never been parsed and distinguished

Carl, as an individual, is a separate juristic person from the legal representative of the estate. Neither have rights in common with the other.

Neither had standing to file claims in a probate court in an independent administration, under a pour over will, after the inventory, appraisal and list of claims had been approved.

Concepts need to be parsed and distinguished

The QBD is not the TPA and neither has any effect in common with the other.

Who should prosecute the malpractice claims against Vacek?

The corpus of the trust is not part of any probate estate.

A junk car that no one wants is the probate estate.

What part of what we are doing in a probate court is independent of probate court supervision and control?

There is much reference to *In re Aguilar* for the proposition that an order approving the inventory does not divest the probate court of jurisdiction over pending claims by or against the estate. The key terms there are “pending” and “divest”.⁴

What part of what we are doing in a probate court is in rem?

"Estate" means a decedent's property.⁵

Texas Estates Code § 32.001 (d) The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.

The breach of fiduciary duty claims are actions in personam against trustees and do not involve property belonging to an estate.

Professional Malpractice claims are actions in personam that cannot be considered actions in rem or even quasi in rem even if they produce damages; they do so for the sole devisee.

Who should prosecute the Malpractice Claims and what court should make that determination?

There is no estate to administer. There is only a trust.⁶

⁴ Aguilar also argues section 402.001 applies to the probate court's section 34.001 transfer order. The transfer of the 327th District Court case occurred on October 12, 2012, long before the probate court approved the *“Inventory, Appraisal, and List of Claims”* for the estate on December 26, 2012. Therefore, section 402.001 could not apply to the transfer order as it was entered prior to the probate court's approval of the inventory, appraisal, and list of claims, which is required to trigger the statute's independent administration protections. *See* [TEX. EST. CODE ANN. § 402.001](#).

⁵ Tex. Est. Code § 22.012

Who should prosecute the malpractice claims against Vacek?

The purpose for a pour over will is unified administration. If there is both a trust and an estate there is no unity of administration. Who should prosecute the malpractice claims? Generally, under a will, it would be the next eligible personal representative named in the will.

1. Amy is disqualified and that would leave Candace*.

However, under a pour over, the right of claims would be vested in the trustees for the devisee trust.

2. De facto trustee/beneficiaries Anita and Amy are conflicted
3. De jure trustee/beneficiaries Carl & Candace*

When, as here, the trustees are unable or unwilling to prosecute claims belonging to the trust due to their own malfeasance, the right to bring and maintain those claims falls to the beneficiaries⁷

4. The eligible beneficiaries are Carl, Candace* and Carole. Carl is disabled and Carole was never named as a representative of the trust or the estate.

Candace is the next eligible representative named in the Wills.

Candace is the only party to plead and prove that there is no estate administration pending and none necessary and is the only “heir” to have qualified.

Candace is the only beneficiary of the Devisee trust to have filed a valid claim in a court of competent jurisdiction with standing and the present capacity to proceed on her claims.⁸

⁶ In re Blount, 438 B.R. 98, 102 (Bankr. E.D. Tex. 2010) (emphasis added), See also Alan N. Polasky, “Pour-Over Wills”: Use with Inter Vivos Trusts, 17 Sw L.J. 410 (1963)

⁷ Texas courts have held that a trust beneficiary may enforce a cause of action that the trustee has against a third party “if the trustee cannot or will not do so.” See, e.g., In re Estate of Webb, 266 S.W.3d 544, 552 (Tex.App.—Fort Worth 2008, pet. denied); Interfirst Bank—Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864, 874 (Tex.App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.). Despite this broad language, a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so. To allow such an action would render the trustee’s authority to manage litigation on behalf of the trust illusory. Even Goebel concedes that the trustee’s refusal to bring suit must be wrongful for her to be allowed to step into the trustee’s shoes and maintain a suit on the Trust’s behalf. See Restatement (Second) of Trusts § 282 (Am. Law Inst. 1959) (if trustee improperly refuses or neglects to bring an action against a third person, beneficiary can maintain suit in equity against trustee and third person). What is less clear is the standard applied to determine whether the trustee’s action is wrongful. In re Xto Energy Inc. 471 S.W.3d 126 (Tex. App. 2015)

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Under the law of the irrevocable trust (2005 Restatement as amended in 2007) Candace is the de jure trustee and, as the current proclaimed trustees are conflicted and have failed to prosecute claims belonging to the trust due to their own malfeasance, Candace is the only beneficiary of the Brunsting trusts with a complete lawsuit pending in a court of competent jurisdiction and is probably the only choice other than Drina Brunsting, personal representative for Carl Brunsting individually, who already invested a substantial sum in the case without a return on that investment.

What Court should make the determination?

The estate is an "indispensable party" to any proceeding in the probate court. The estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate.

- (1) Claims were improperly filed in the probate court, in an independent administration, under a pour-over-will, after the verified inventory, appraisement and list of claims had been approved and the case had been ordered removed from the active docket.
- (2) The independent executor resigned February 19, 2015 due to want of capacity. Thus, without discussion of whether or not claims were properly filed in the probate court in the first instance, when the office became vacant, there could be no proceedings for the determination of any matter ancillary or pendant to an estate and there have not been any such proceedings since February 19, 2015, if ever.

⁸ The federal case was not transferred to the probate court because the involuntary plaintiff was not served with a citation as no citation was ever issued, thus, diversity was never polluted and the case was also never certified for transfer and the docket was never actually transferred.