

ESTATE OF	§	
	§	NO. 412249-404
NELVA E. BRUNSTING,	§	
	§	
DECEASED	§	

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Petitioner’s Reply to Carl Brunsting’s Answer to Statutory Bill of Review

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## **Background**

On October 19, 2018, Petitioner Candace Curtis filed a Plea to the Jurisdiction, which is the functional equivalent of a motion to dismiss for want of jurisdiction, Narvaez v. Powell, 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet.). On February 14, 2019, the probate court denied Curtis' Plea to the Jurisdiction:

*“finds that subject matter jurisdiction is proper in Harris County Probate Court No. 4 with regard to the Estates of Nelva and Elmer Brunsting as well as the assets contributed to Trusts related to those Estates. The Court also finds that no other court has dominant jurisdiction regarding claims related to these Estates. Therefore, the Pleas in Abatement, the Plea to the Jurisdiction and all other relief requested by the pleadings first enumerated in this Order, filed by Candace Curtis, lack merit and should be, in all things, DENIED.”*

On November 21, 2019, Petitioner Candace Curtis filed a statutory bill of review in the probate court pursuant to section 55.251 of the Texas Estates Code which reads:

*(a) An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.*

*(b) A bill of review to revise and correct an order or judgment may not be filed more than two years after the date of the order or judgment, as applicable.*

Submission of the statutory bill of review [No. 412,249-404] has been set for July 19, 2021. On June 29, 2021 Drina Brunsting, purported attorney in fact for Plaintiff Carl Brunsting individually, filed her answer to the statutory bill of review using the style “*Carl Brunsting et al., vs. Anita Brunsting et al*”, and demanding Petitioner Candace Curtis prove her claims by a preponderance of the evidence. Petitioner herein files the following reply.

### ***Request for Judicial Notice***

Petitioner Candace Curtis moves the probate Court to take judicial notice of the dockets, records and pleadings in Cause No.'s 412248, 412249, 412249-401, 412249-402, 412249-403 and 412249-404. Petitioner further requests the Court take judicial notice of the relevant rules, statutes

and opinions of the Courts of Appeal as cited and to move all of these things into evidence, so that the real parties in interest can pursue a more timely remedy in a court of competent jurisdiction.

### ***Bills of Review***

*“In general, there are two types of bills of review: equitable and statutory. See Valdez v. Hollenbeck, 465 S.W.3d 217, 226 (Tex. 2015). Equitable bills of review may apply to a variety of forms of action, but statutory bills of review are rare and are authorized primarily in probate and guardianship contexts. “A statutory bill of review [—as here—] need not conform to the rules and is not limited by the restrictions of an equitable bill of review.” Buck v. Estate of Buck, 291 S.W.3d 46, 53 (Tex. App.—Corpus Christi 2009, no pet.). In re X.L.S., No. 13-11-00287-CV, at \*5 n.3 (Tex. App. Oct. 18, 2012)”*

### ***The only question confronting the court is jurisdiction***

*“The failure of a jurisdictional requirement deprives a court of the power to act (other than to determine that it has no jurisdiction). Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351, 359 (Tex. 2004). And once a court determines that it has no jurisdiction, its only legitimate choice is to dismiss. State of Tex. v. Morales, 869 S.W.2d 941, 949 (Tex. 1994).”*

### ***Jurisdiction is a question of law***

*“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)”*

*“[a] party cannot confer or waive jurisdiction by consent or agreement”. Stine v. State, 908 S.W.2d 429 (Tex.Crim.App. 1995)*

### ***“Competent Jurisdiction”***

*“Competent jurisdiction” is defined as follows: “The term is susceptible of two meanings; it may signify that the court must acquire and exercise jurisdiction competent to grant an application, through and by reason of a strict conformity to the requirements of a statute, or it may signify jurisdiction over the subject matter, a sort of authority in the abstract, to hear and determine a case. In its usual signification, however, the term embraces the person as well as the cause. A court of competent jurisdiction is one having power and authority of law at the time of*

*acting to do the particular act." 12 C.J. p. 236. Lubbock Oil Ref. Co. v. Bourn, 96 S.W.2d 569, 571 (Tex. Civ. App. 1936)*

***Narvaez v. Powell, 564 S.W.3d 49, 56 (Tex. App. 2018)***

*"We agree with Hannah's conclusion that the nature of the claims and the relief sought must be examined when determining whether the probate court has jurisdiction of a non-probate claim," Narvaez v. Powell, 564 S.W.3d 49, 56.*

***Tex. Est. Code § 52.002 CLAIM DOCKET***

***(a) The county clerk shall maintain a record book titled "Claim Docket" and shall record in the book each claim that is presented against an estate for the court's approval.***

***(b) The county clerk shall assign one or more pages of the record book to each estate. (c) The claim docket must be ruled in 16 columns at proper intervals from top to bottom, with a short note of the contents at the top of each column. The county clerk shall record for each claim, in the order claims are filed, the following information in the respective columns, beginning with the first or marginal column:***

- (1) the name of the claimant;***
- (2) the amount of the claim;***
- (3) the date of the claim;***
- (4) the date the claim is filed;***
- (5) the date the claim is due;***
- (6) the date the claim begins bearing interest;***
- (7) the interest rate;***
- (8) the date the claim is allowed by the executor or administrator, if applicable;***
- (9) the amount allowed by the executor or administrator, if applicable;***
- (10) the date the claim is rejected, if applicable;***
- (11) the date the claim is approved, if applicable;***
- (12) the amount approved for the claim, if applicable;***
- (13) the date the claim is disapproved, if applicable;***
- (14) the class to which the claim belongs;***
- (15) the date the claim is established by a judgment of a court, if applicable; and***
- (16) the amount of the judgment established under Subdivision (15), if applicable.***

**The nature of the claims and the relief sought**

*"A pleading, by definition, determines the issues to be tried. Tex.R.Civ.P. 301; Erisman v. Thompson, 167 S.W.2d 731, 733 (Tex. 1943). Where there is no pleading invoking a probate court's jurisdiction, there can be no judgment. Parkdale Bank,*

660 S.W.2d at 813. ” *Ramsay v. Morris*, No. 13-02-045-CV, at \*1 (Tex. App. Apr. 24, 2003).

### **412,249-404 Statutory Bill of Review**

Filed under the authority of Texas Estates Code § 55.251

### **412249-404 Claims**

The Brunsting wills are pour-over wills, the sole devisee is the family living trust established in 1996.

Rights in estate property, if any, vested in the sole devisee, a living trust, at the death of the Testator. (Tex. Est. Code §101)

The Brunsting wills were admitted without challenge August 28, 2012 and all limitations periods have expired.

The inventory, appraisal and list of claims were approved without challenge April 5, 2013 and all limitations periods have expired.

The right of possession vested in the trustees for the devisee with the approval of the inventory, appraisal and list of claims.

The pour-over processes were complete and the “independent administrations” were closed by drop order April 5, 2013. All limitations periods have expired.

Carl filed non-probate claims in the probate court as an Independent Executor without a pending estate administration and in direct violation of the limited authority granted by wills that had already been held valid.

Carl filed non-probate claims in the probate court without a pending estate administration and was without individual standing. (*See Mortensen infra*)

There is no decedent’s “estate” (Tex. Est. Code § 22.012) to subject to “in rem” (Tex. Est. Code § 32.001) “claims” (Tex. Est. Code § 22.005)

None of the claims filed in the probate court seek damages that could possibly be satisfied from estate property. Thus, there are no “claims” seeking remedy that can be granted within the legislative delegation of authority of a statutory probate court.

Petitioner seeks dismissal of all trust related matters filed as ancillary to the closed estates of Elmer H. and Nelva E. Brunsting, without prejudice, along with findings of fact and conclusions of law that will aid the real parties in interest in pursuing a timely remedy.

Petitioner further requests findings of fact and conclusions of law in regard to the court’s decision to award attorney fees or impose sanctions upon any party or attorney.

***Cause No. 412248 is styled “Estate of Elmer H. Brunsting”***

This probate action was closed on April 5, 2013 and never reopened. There are no pending claims related to the settlement, partition, or distribution of this estate and all limitations periods for reopening the estates have expired.

***Cause No. 412249 is styled “Estate of Nelva E. Brunsting”***

This probate action was closed on April 5, 2013 and never reopened. There are no pending claims related to the settlement, partition, or distribution of this estate and all limitations periods for reopening the estates have expired.

***Cause No. 412249-401 is styled:***

*Carl Henry Brunsting, Individually and As Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting*

*Vs.*

*ANITA KAY BRUNSTING f/k/a ANITA KAY RILEY, individually, as attorney-in-fact for Nelva E. Brunsting, and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Anita Kay Brunsting Personal Asset Trust;*

*AMY RUTH BRUNSTING f/k/a AMY RUTH TSCHIRHART, individually and as Successor Trustee of the Brunsting Family Living Trust, the Elmer H. Brunsting Decedent's Trust, the Nelva E. Brunsting Survivor's Trust, the Carl Henry Brunsting Personal Asset Trust, and the Amy Ruth Tschirhart Personal Asset Trust;*

*CAROLE ANN BRUNSTING, Individually and as Trustee of the Carole Ann Brunsting Personal Asset Trust; and as a nominal defendant only, CANDACE LOUISE CURTIS*

***412,249-401 Claims***

*“A court's jurisdiction to render judgment is invoked by pleadings, and a judgment unsupported by pleadings is void.”* Douthit v. Anderson, 521 S.W.2d 127, 129 (Tex.Civ.App., Dallas 1975, no writ). Cause No. 412,249-401 was filed as ancillary to the Estate of Nelva Brunsting on April 9, 2013 under Tex. Civ. Prac. & Rem. Code §15.002(a)(1), and claims venue proper in Harris County while making no reference to forum statutes. While the complaint

mentions the “estates” of Elmer and Nelva Brunsting quite often, there is no mention of the Texas Estates Code. No amendment or supplement even mentions the Texas Estates Code.

- 1) Construction of Trust and Suit for Declaratory Judgement,
- 2) Demand for Trust Accounting,
- 3) Breach of Fiduciary Duties,
- 4) Conversion,
- 5) Negligence,
- 6) Tortious Interference with Inheritance,
- 7) Constructive Trust,
- 8) Civil Conspiracy,
- 9) Fraudulent Concealment
- 10) Prejudgment Interest
- 11) Attorney’s Fees pursuant to Chapters 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code.

Plainly, none of these acts or omissions fall within any of the eight categories recognized as comprising probate proceedings under Texas Estates Code section 31.001. Said differently, the prosecution of these claims fails to attack, alter, affect or otherwise impact the settlement, partition or distribution of a decedent’s estate. Because suit seeks damages that, if awarded, would be satisfied from defendant's individual assets and distribution of living trust assets rather than from

estate property, these non-probate claims are not related to a probate proceeding. (see Mortensen infra)

### ***412,249-401 Defendants Anita and Amy Brunsting's Counter Claims***

Filed November 4, 2019 making no reference to jurisdiction, venue or forum statutes.

*Styled: No. 412,249-401*

*Estate of Nelva E. Brunsting*

*Carl Henry Brunsting et al*

*Vs.*

*Anita Kay Brunsting et al*

Defendants' counter claims are of three types: (1) In Terrorem (2) Bad Faith and (3) entitlement to fees and costs.

### ***Counter Claims***

1. One or more of the causes of action asserted and/or declarations sought by Carl trigger forfeiture provisions.
2. One or more of the causes of action asserted and/or declarations sought by Candace trigger forfeiture provisions.
3. One or more of the motions, responses, and/or replies filed by Carl trigger forfeiture provisions;
4. One or more of the motions, responses, and/or replies filed by Curtis trigger the Forfeiture provisions;
5. Carl did not have just cause to bring the action, and it was not brought in good faith;
6. Curtis did not have just cause to bring the action, and it was not brought in good faith;
7. Carl has forfeited his interest, and thus his interest passes as if he has predeceased the Founders;
8. Curtis has forfeited her interest, and thus her interest passes as if she has predeceased the Founders;
9. If Carl has not forfeited his interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and Anita's expenses in defending against Carl's claims are to be charged against his interest dollar for-dollar;
10. If Curtis has not forfeited her interest via asserting any of the identified claims, and is or becomes entitled to receive any interest in the Founders' estate, then Amy's and

Anita's expenses in defending against Curtis' claims are to be charged against her interest dollar-for-dollar;

11. All expenses incurred by Amy and Anita to legally defend against or otherwise resist the contest or attack by Carl and/or Curtis are to be paid from the Trust as expenses of administration.

Defendants “Original Counter Claims”, filed November 4, 2019, are vague and overly broad. Defendants waived these compulsory counter claims under Texas Rule of Civil Procedure § 97(a)<sup>1</sup> when they were not included in Defendants’ original answers. The claims were filed in bath faith, without just cause, and for purposes of harassment, intimidation and delay.<sup>2</sup>

These “original counter claims” are not claims related to the settlement, partition, or distribution of a decedent’s estate. Damages, if awarded, would be satisfied from Carl and Candace’s individual assets and redistribution of living trust assets rather than from estate property.

*(because suit sought damages which would be satisfied from defendant's individual assets rather than from estate property, claims were not related to probate proceeding); Narvaez, 564 S.W.3d at 56 citing In re Hannah, 431 S.W.3d 801, 809-810 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) see Hawes v. Peden, No. 06-19-00053-CV (Tex. App. Dec. 16, 2019), and Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)*

***Cause No. 412249-402 is styled:***

Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100

Filed Southern District of Texas February 27, 2012 under diversity jurisdiction, 28 U.S.C. §1332 (a) (1) - 28 USC §1332 (b) and 28 USC §1332 (C) (2).

412249-402 was added to the Docket under a motion to enter a transfer order, May 28, 2014. The authority cited is Texas Estates Codes Sections 32.005, 32.006 and 32.007, covered

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<sup>1</sup> Where defendant has filed a counterclaim seeking affirmative relief, however, plaintiff shall not be permitted, by a discontinuance of its suit, to prejudice the right of defendant to be heard on such counterclaim. Spence v. State National Bank of El Paso, 294 S.W. 618 (Tex.Civ.App. El Paso 1927) Aff'd, 5 S.W.2d 754 (Tex.Com.App. 1928); Valdez v. Gill, 537 S.W.2d 477 (Tex.Civ.App. San Antonio 1976, writ ref'd n. r. e.).

<sup>2</sup> See Texas Civil Practices and Remedies Code 27.009 (c). If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

infra. There was no transfer order to enter (See Local Rule 4.1) and no evidence of hearings. Former counsel for Petitioner never even made an appearance. This lawsuit was never “refiled” in the probate court after dismissal in the federal court. The actions taken by Petitioner’s former counsel Jason Ostrom were taken ultra vires the office of attorney and were taken in bad faith, in

his own personal interests and without standing or any other lawful authority, in direct violation of the Texas disciplinary Rules of Professional Conduct. See Agreed Order to Consolidate Cases.<sup>3</sup>

***412,249-402 Claims (pro se Curtis federal claims)***

- 1) Breach of Fiduciary,
- 2) Constructive Fraud,
- 3) Extrinsic Fraud,
- 4) Intentional Infliction of Emotional Distress

Plainly, none of these acts or omissions falls within any of the eight categories recognized as comprising probate proceedings under Texas Estates Code section 31.001, *infra*.

***Cause No. 412,249-403 is styled:***

*Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting*

*Vs.*

*Candace L. Kunz-Freed and Vacek & Freed, PLLC F/K/A the Vacek Law Firm*

Filed January 29, 2013, in Harris County District Court No. 164. Claims Venue is proper pursuant to Tex. Civ. Prac. & Rem. Code§ 15.002(a)(1) and (3)” and does not cite to separate jurisdictional or forum selection statutes.

***412,249-403 Claims***

- 1) Professional negligence,
- 2) Negligence Per Se- Violation of Texas Penal Code§ 32.43; Commercial Bribery
- 3) Negligence *Per Se*- Violation of Texas Penal Code §7 .02(a)(2) & (3); Criminal Responsibility for Conduct of Another
- 4) Breach of Fiduciary Duty
- 5) Negligent Misrepresentation
- 6) Aiding & Abetting Current Trustees' Breaches of Fiduciary Duty
- 7) Assisting & Encouraging
- 8) Assisting & Participating
- 9) Concert of Action
- 10) Fraud

- 11) Conversion
- 12) Conspiracy
- 13) Deceptive Trade Practices
- 14) Fraudulent Concealment
- 15) Actual Damages
- 16) Forfeiture of Fees
- 17) Treble Damages
- 18) Punitive Damages
- 19) Attorney's Fees
- 20) Prejudgment Interest

*In re Hannah*, 431 S.W.3d 801, 809-810 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding); *Narvaez v Powell*, 564 S.W.3d at 56 (holding that nature of claims and relief sought are to be examined when determining probate court jurisdiction); *Hawes v. Peden*, No. 06-19-00053-CV (Tex. App. Dec. 16, 2019); *Mortensen v. Villegas*, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)

### **Judicial Notice of *Mortensen v. Villegas***

*Mortensen v. Villegas*, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021) A judicial analysis of *In re Hannah*:

#### *2. Applicable Law*

*The Probate Court No. 1 of El Paso County is a statutory probate court<sup>4</sup>. A statutory probate court has the general jurisdiction of a probate court as provided by the Texas Estates Code, and the jurisdiction provided by law for a county court to hear certain matters under the Health and Safety Code. See TEX. GOV'T CODE ANN. § 25.0021. It is a court of limited jurisdiction. Narvaez, 564 S.W.3d at 54.*

*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*

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<sup>4</sup> Harris County Probate Court No. 4 is a Statutory Probate Court

*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)*

*Section 31.001 of the Texas Estates Code provides:*

*The term "probate proceeding," as used in this code, includes:*

- (1) the probate of a will, with or without administration of the estate;*
- (2) the issuance of letters testamentary and of administration;*
- (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;*
- (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;*
- (5) a claim arising from an estate administration and any action brought on the claim;*
- (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;*
- (7) a will construction suit; and*
- (8) a will modification or reformation proceeding under Subchapter J, Chapter 255.*

**TEX. EST. CODE ANN. § 31.001.**

*"A matter related to a probate proceeding" is defined based on whether a county has a statutory probate court or county court at law exercising probate jurisdiction. Hannah, 431 S.W.3d at 809-10. As we have a statutory probate court in this case,*

*Section 31.002(c) governs the scope of matters considered "related to a probate proceeding . . . ." That provision states as follows:*

*(c) For purposes of this code, in a county in which there is a statutory probate court, a matter related to a probate proceeding includes:*

- (1) all matters and actions described in Subsections (a) and (b); and*
- (2) any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative.*

**TEX. EST. CODE ANN. § 31.002(c).**

*As referenced within that provision, subparts (a) and (b) provides as follows:*

*(a) For purposes of this code, in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:*

- (1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;*
- (2) an action against a surety of a personal representative or former personal representative;*
- (3) a claim brought by a personal representative on behalf of an estate;*
- (4) an action brought against a personal representative in the representative's capacity as personal representative;*
- (5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and*
- (6) an action for trial of the right of property that is estate property.*

*(b) For purposes of this code, in a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:*

- (1) all matters and actions described in Subsection (a);*
- (2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and*
- (2) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.*

**TEX. EST. CODE ANN. § 31.002(a), (b)**

*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.

### 3. Application

First, we observe that none of Mortensen's causes of action in his original petition qualify as a recognized "probate proceeding" pursuant to statutory terms. See TEX. EST. CODE ANN. § 31.001. Excluding the cause of action no longer pending against State Farm for its alleged failure to pay a bond claim, all remaining claims alleged in the petition were all based on the following acts or omissions: (1) failure of a notary public to afford access to her notary records; (2) slander based on a police complaint made against Mortensen; (3) libel for the same; and (4) a "Nuisance Tort[ ]" attributed to the cost for repair and maintenance of the property. Plainly, none of these acts or omissions fall within any of the eight categories recognized as comprising probate proceedings under Texas Estates Code section 31.001. See TEX. EST. CODE ANN. § 31.001. Said differently, the prosecution of these claims fail to attack, impact, or otherwise alter the heirship judgment. While these purported claims do implicate certain parties who had some relation to a probate proceeding, their identity alone or the role played by each cannot bring the claims within the jurisdiction of the probate court. See *Hannah*, 431 S.W.3d at 808-09 (holding that relator's suit—consisting of a claim for money damages against multiple parties based on defendants' alleged conduct in slandering relator and tortuously interfering with the bequests to her in a decedent's prior wills—was not a "probate proceeding," despite the gravamen of the suit being that she was disinherited as a result of the defendants' alleged actions, where: (1) the suit did not fall within any of the categories listed within Texas Estates Code section 31.001; (2) the prosecution of relator's suit would not attack, impact, or otherwise alter the probate judgment; and (3) whatever potential liability the defendants may face based on their alleged individual actions vis-à-vis relator was a distinct matter to be determined, not by application of probate law, but rather by the law pertaining to her specific claims).

Moreover, for like reasons, we note that none of Mortensen's causes of action brought by his original petition qualify as "matter[s] related to a probate proceeding," even though he asserts purported causes that implicate individuals who were involved in some manner with the prior probate proceeding. See TEX. EST. CODE ANN. § 31.002(a), (b), (c).

Finally, we further find that the probate court no longer had pendent and ancillary jurisdiction to exercise over Mortensen's newly raised causes of action because the probate proceeding had already concluded—having resulted in a judgment declaring heirship—and no longer remained pending in the probate court. See *Frost Nat'l Bank*, 315 S.W.3d at 506; *Narvaez*, 564 S.W.3d at 57. Thus, this third

*and last avenue through which Mortensen might have established jurisdiction was no longer viable to otherwise support the court's ancillary jurisdiction.*

*In sum, we conclude that Mortensen failed to raise a cause of action in which the probate court had subject-matter jurisdiction given his failure to allege a single claim that qualified as either a "probate proceeding," as a "matter related to a probate proceeding," or as one that triggered the probate court's pendent and ancillary jurisdiction. See Hannah, 431 S.W.3d at 807-08. Consequently, the statutory probate court here had no power nor constitutional authority to decide Mortensen's claims or any of the motions stemming therefrom. See Bland, 34 S.W.3d at 553-54 (instructing that subject-matter jurisdiction is essential to a court's power to decide a case). Accordingly, because we have concluded there is a want of subject-matter jurisdiction as to all claims asserted by Mortensen's petition, we will not address on their merits the arguments raised in Mortensen's Issues One, Two, Three, and Six, which challenge the probate court's order dismissing his petition, the order granting protective orders, and the order denying Mortensen's motion for alternative service of Ortiz, and we overrule these four issues.*

*Although we overrule these issues based on the probate court's lack of subject-matter jurisdiction to hear them, we nonetheless retain the ability to consider whether the awards of attorney's fees by that court was proper, and we proceed to address Mortensen's remaining issues contesting those fees. See Marcus v. Smith, 313 S.W.3d 408, 415 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that the court had jurisdiction to address Appellant's complaint about trial attorney fees even though the court did not have jurisdiction to address the merits of the underlying proceeding from which those fees arose).*

Mortensen filed tort claims in the probate court under the Texas Civil Practices and Remedies Code seeking damages that, if awarded, would be satisfied from the defendant's individual assets and not from a decedent's estate and the matter was properly dismissed for want of jurisdiction. The same reasoning applies to Carl Brunsting's 412249-401 action as already shown. The exact same reasoning was applied in Hawes v Peden in an equal and opposite direction. Hawes filed claims in the district court seeking remedy that, if awarded, would be paid from the assets of a pending probate estate and thus, the matter was properly dismissed for want of jurisdiction. Both cases cite to In re Hannah to explain the court's reasoning in deciding those cases. Like Mortensen, Carl Brunsting has no individual standing to raise non-probate claims in a probate court unrelated to a pending probate, seeking damages that, if awarded, would be paid from the defendant's individual assets and not from estate assets. No one that can read and

comprehend these three very clear and uncomplicated opinions<sup>5</sup> has ground to argue that the probate court has jurisdiction over any of the claims filed as ancillary to the closed “Estate of Nelva E. Brunsting No. 412,249”.

## **Judicial Notice of Hawes v. Peden**

*No. 06-19-00053-CV, at \*2 (Tex. App. Dec. 16, 2019)*

### *I. Factual and Procedural Background*

*Hawes filed a petition in a district court in Anderson County alleging that, in April 2016, he paid \$2,500.00 to Tammy Henderson Peden (Peden) and her law firm—Tammy E. Henderson Peden, PLLC (Peden, PLLC)—to represent his interests before the Texas Board of Pardons and Paroles (Parole Board). Hawes claimed that when Peden unexpectedly passed away in April 2017, Tanika J. Solomon and TJ Solomon Law Group, PLLC (Solomon), contracted with him to fulfill Peden's legal representation of Hawes and that that obligation was not fulfilled. In response to Hawes's petition for breach of contract, fraud, and misrepresentation, Solomon filed a plea to the jurisdiction alleging that the petition was subject to the jurisdiction of the probate court in which Peden's estate was then being probated. The trial court agreed, finding that the Harris County Probate Court had exclusive jurisdiction over Hawes's claims, and dismissed the suit without prejudice to refiling in the proper court.”)*

### *B. The Trial Court Did Not Err in Dismissing Hawes's Lawsuit*

#### *1. Probate Court Jurisdiction*

*At the time Hawes filed his petition in the trial court, the probate of the Peden Estate was pending in Probate Court No. 1 of Harris County. That is a statutory probate court. See [TEX. GOV'T CODE ANN. § 25.1031\(a\)](#). "In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of probate proceedings." [TEX. ESTATES CODE ANN. §32.002\(c\)](#). "In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all probate proceedings . . . ." [TEX. ESTATES CODE ANN. § 43.0059\(a\)](#). "A cause of action related to the probate proceeding must be brought in a statutory probate court unless the jurisdiction of the statutory probate court is*

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<sup>5</sup> In re Hannah, 431 S.W.3d 801, 809-810 (Tex. App.— Houston [14th Dist.] 2014, orig. proceeding) holding that nature of claims and relief sought are to be examined when determining probate court jurisdiction; Hawes v. Peden, No. 06-19-00053-CV (Tex. App. Dec. 16, 2019), and Mortensen v. Villegas, No. 08-19-00080-CV (Tex. App. Feb. 1, 2021)

*concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court." TEX. ESTATES CODE ANN. § 32.005(a)*

***In “Affirmative Defenses 1&2” Drina’s counsel argues:***

*“jurisdiction for the proceeding Carl filed is not dependent only on the jurisdiction conferred by the Texas Estates Code, but is also supported by Chapter 115 of the Texas Property Code and Chapter 37 of the Texas Civil Practice and Remedies Code.”*

However, Texas Property Code § 115.001 places “original and exclusive jurisdiction” over disputes involving the administration of a trust in the state District Court and the pleading initiating the 412,249-401 matter does not cite to the Texas Estates Code at all.

***Tex. Prop. Code § 115.001***

*(a) Except as provided by Subsection (d) of this section, a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to:*

- (1) construe a trust instrument;*
- (2) determine the law applicable to a trust instrument;*
- (3) appoint or remove a trustee;*
- (4) determine the powers, responsibilities, duties, and liability of a trustee;*
- (5) ascertain beneficiaries;*
- (6) make determinations of fact affecting the administration, distribution, or duration of a trust;*
- (7) determine a question arising in the administration or distribution of a trust;*
- (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;*
- (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and*
- (10) surcharge a trustee.*

*(a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a*

*proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).*

*(b) The district court may exercise the powers of a court of equity in matters pertaining to trusts.*

*(c) The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision.*

*(d) The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on:*

*(1) a statutory probate court;*

*(2) a court that creates a trust under Subchapter B, Chapter 1301, Estates Code;*

*(3) a court that creates a trust under Section 142.005;*

*(4) a justice court under Chapter 27, Government Code; or*

*(5) a county court at law.*

***The § 115.001 (d) Exception***

*The exception to the exclusive jurisdiction of the District Court provided by subsection § 115.001 (d) is limited to matters “incident to an estate” and apply only when a probate proceeding relating to such estate is actually “pending” in the probate court. See: Baker v. Baker NO. 02-18-00051-CV (Tex. App. Sep. 6, 2018).*

There are no Brunsting related probate proceedings actually “pending” in Probate Court No. 4 and that one fact is dispositive of any and all assertions of ancillary jurisdiction. Drina’s

counsel also cites Texas Estates Codes §32.002(c), 32.005, 32.006, and 32.007. Chapter 32 is a statement of general probate jurisdiction.

*Sec. 32.002. Original Jurisdiction for Probate Proceedings. (c) In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of **probate proceedings**.*

*Sec. 32.005. Exclusive Jurisdiction of Probate Proceeding In County with Statutory Probate Court. (a) In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all **probate proceedings**.*

Texas Estates Code Sections 32.005, 32.006, like the previous sections of chapter 32, assume that a probate administration is actively “pending” in the probate court and § 32.007 relates only to testamentary trusts.

*“In section 32.006 of the Texas Estates Code, the legislature expressly conferred on statutory probate courts the jurisdiction to hear actions involving **testamentary trusts** and actions in which a trustee is a party:” Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)*

A decedent’s stuff forms a testamentary trust (estate) by operation of law. (Tex. Est. Code § 101.003) The executor is trustee for a testamentary trust “estate”.

*Under Texas law, during the period of administration, the decedent's estate in the hands of the executor or administrator constitutes a trust estate. The executor or administrator is more than a stake-holder, or the mere agent as a donee of a naked power of the heirs, legatees, and devisees. He has exclusive possession and control of the entire estate. He is charged with active and positive duties. He is an active trustee of a trust estate. Jones v. Whittington, 194 F.2d 812, 817 (10th Cir. 1952); see also Morrell v. Hamlett, 24 S.W.2d 531, 534 (Tex.Civ.App. — Waco 1929, writ ref'd) (estate property under administration is held in trust), Bailey v. Cherokee County Appraisal Dist, 862 S.W.2d 581, 584 (Tex. 1993) Craig v. U.S. 89 F. Supp. 2d 858 (S.D. Tex. 1999), Dyer v. Eckols 808 S.W.2d 531 (Tex. App. 1991), National Bank v. Bell, Executrix 71 S.W. 570 (Tex. Civ. App. 1902).*

### ***Pour-over***

The Brunsting Family Living Trust was created inter vivos. Assets devised to an inter vivos trust are not held in a testamentary trust of the testator, but ‘immediately’ (Tex. Est. Code § 101.001) become part of the corpus of the trust to which they are devised (Tex. Est. Code §

254.001). There was never any standing to bring tort claims in the name of an estate when it is the cestui que of a living trust who are the injured parties in interest.

### ***“Independent Administration”***

Carl Henry Brunsting was appointed “independent executor”. Independent administration is governed under Texas Estates Code Title II, Subtitle I, sections 401.001-405.012.

The wills are very specific that no further action shall be required in the probate court other than the recording of the will and the filing of an inventory, appraisal and list of claims. This express directive was codified by the legislature in Texas Estates Code § 402.001, which reads:

#### ***Tex. Est. Code § 402.001***

*“When an independent administration has been created, and the order appointing an independent executor has been entered by the probate court, and the inventory, appraisal, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisal, and list of claims has been filed by the independent executor, 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.”*

The Will is controlling. The Independent Executor had no standing to bring any further action in the probate court after the inventory, appraisal, and list of claims had been filed and approved by the court and Carl Henry Brunsting had no individual standing after the wills had been admitted, the inventory had been approved and the estates had been closed.

The Texas Supreme Court has afforded "great weight" to the "strong public interest in according finality to probate proceedings." Valdez, 465 S.W.3d at 228 (quoting Little, 943 S.W.2d at 421). The August 28, 2012 orders admitting the Brunsting Wills were final judgements that were never challenged and the April 5, 2013 orders approving the unchallenged inventory, appraisal, and list of claims, dropping the probate from the active docket and closing the probate of the estates were final judgements. The existence of potential tort claims owing damages to the estates did not prevent these orders from becoming final and did not prevent the independent

administration from closing. There was no challenge to the wills, no challenge to the inventories and no motion to reopen the estates was ever presented.

The only beneficiary of potential tort claims owing to the estates would be the cestui que of the sole devisee trust. To argue that the independent executor of the estate is the real party in interest to claims against the estate planning attorneys, is the equivalent of arguing that a testamentary trust of the testator was formed. This theory is in direct contradiction to the express language of the statute prescribing the pour over procedures and defeats the main purposes for the pour over process, which is unified administration and the avoidance of probate. There are no estates!

***Tex. Est. Code § 254.001- Devises To Trustees***

*(c) Unless the testator's will provides otherwise, property devised to a trust described by Subsection (a) is not held under a testamentary trust of the testator. The property:*

- (1) becomes part of the trust to which the property is devised; and*
- (2) must be administered and disposed of according to the provisions of the instrument establishing the trust, including any amendment to the instrument made before or after the testator's death.*

**Judicial Notice of In re Hannah**

*In re Hannah, 431 S.W.3d 801, 807-09 (Tex. App. 2014)*

*For relator's suit to be subject to the jurisdiction and venue provisions of the Texas Estates Code, it must qualify either as a "probate proceeding" or a "matter related to a probate proceeding" as defined by the Estates Code. See, e.g., Tex. Est. Code §§ 32.001(a), 33.002, 33.052, 33.101; see also Tex. Est. Code § 21.006 (stating*

*procedure in Title 2 of the Estates Code “governs all probate proceedings”). Thus, we turn to the definitional provisions of the Estates Code.*

*Section 31.001 of the Texas Estates Code provides:*

*The term “probate proceeding,” as used in this code , includes:*

- (1) the probate of a will, with or without administration of the estate ;*
- (2) the issuance of letters testamentary and of administration ;*
- (3) an heirship determination or small estate affidavit, community property administration , and homestead and family allowances;*
- (4) an application, petition, motion, or action regarding the probate of a will or an estate administration , including a claim for money owed by the decedent;*
- (5) a claim arising from an estate administration and any action brought on the claim;*
- (6) the settling of a personal representative's account of an estate and other matter related to the settlement, partition, or distribution of an estate ; and*
- (7) a will construction suit.*

*See also Tex . Est.Code § 22.029 (“The terms ‘probate matter,’ ‘probate proceedings,’ ‘proceedings in probate ,’ and ‘proceedings for probate ’ are synonymous and include a matter or proceeding relating to a decedent's estate .”).*

*The real parties argue that relator's suit qualifies as a probate proceeding because it is related to the decedent's estate , see Tex . Est.Code § 22.029, it is a “petition ... or action regarding the probate of a will,” Tex . Est.Code § 31.001(4), it “a claim for money owed by the decedent,” *id.*, and it is a “matter related to the ... distribution of an estate ,” Tex . Est.Code § 31.001(6). We disagree. Relator's suit is a claim for money damages against Marjorie, David, and Robert based on the defendants' alleged conduct in slandering relator and tortiously interfering with the bequests to relator in the decedent's prior wills. Relator does not contest the validity or interpretation of the decedent's 2012 will, claim herself as a rightful heir of the decedent, assert a claim for money owed by the decedent or the decedent's estate, or challenge the distribution of the decedent's property pursuant to the terms of his will. In sum, none of the specific actions listed in Section 31.001 of the Estates Code matches the claims made by relator in her suit.*

*Although the gravamen of relator's suit is that relator was disinherited as a result of the defendants' alleged actions, that fact alone is insufficient to make her suit a probate proceeding. The decedent's will was admitted to probate as a muniment of title in proceedings in the County Court at Law of Aransas County. Absent a bill of review, those proceedings are concluded. The prosecution of relator's suit would not attack, impact, or otherwise alter the probate judgment of the Aransas County court . In other words, the decedent's testamentary wishes have been determined and fulfilled through the probate proceedings in Aransas County. Whatever potential liability the defendants may face subsequently based on their alleged*

*individual actions vis-à-vis relator is a distinct matter. Resolution of that matter will be determined, not by application of probate law, but rather by the law pertaining to the specific tort claims. Furthermore, any judgment against the defendants would be satisfied not from the decedent's estate, but from the individual assets of the defendants. The only connection between relator's suit and the decedent's estate is the measure of damages—i.e., what, if anything, relator would have received through probate proceedings were it not for the defendants' alleged actions. In re Hannah, 431 S.W.3d 801, 807-09 (Tex. App. 2014)*

**(Tex. Est. Code § 22.029)**

*The terms "probate matter," "probate proceedings," "proceeding in probate," and "proceedings for probate" are synonymous and include a matter or proceeding relating to a decedent's estate.*

“Estate” means a decedent’s property (Tex. Est. Code § 22.012). “Personal property” (Tex. Est. Code § 22.028) includes an interest in: (1) goods; (2) money; (3) a chose in action; (4) an evidence of debt; and (5) a real chattel.

*“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), Johnson v. Johnson, No. 04-19-00500-CV (Tex. App. Jan. 15, 2020)*

***Davis v. Merriman, No. 04-13-00518-CV, at \*7-8***

*In Goodman, the executor of a decedent's estate filed suit in the probate court to clear title to property owned by the estate. Id. at 932. In response, the defendant brought third-party claims against other entities. Id. Initially, the probate court exercised its ancillary jurisdiction over the third-party claims. Id. However, once matters concerning the estate were settled, the probate court dismissed all of the claims by and against the estate. Id. Thereafter, the third-party defendants moved to dismiss the claims against them on the ground that, once the claims involving the estate were settled, the probate court lacked subject matter jurisdiction to consider the ancillary claims. Id. The probate court agreed and dismissed the ancillary claims from the probate court. Id. The court of appeals upheld the dismissal, noting that the "probate court had discretion to resolve ancillary claims against third parties only to the extent that such claims were necessary to resolve claims within its original jurisdiction. . . . The court's discretion undoubtedly*

*vanished with the dismissal of the estate from the probate proceeding." Id. at 934.  
Davis v. Merriman, No. 04-13-00518-CV, at \*7-8 (Tex. App. Mar. 4, 2015)*

### ***Proceedings in rem***

“Probate proceedings” are in rem (Tex. Est. Code § 32.001) involving “claims” against a decedent’s property (Tex. Est. Code § 22.012). “Claims” are defined (Tex. Est. Code § 22.005) to include:

*“(1) liabilities of a decedent that survive the decedent's death, including taxes, regardless of whether the liabilities arise in contract or tort or otherwise; (2) funeral expenses; (3) the expense of a tombstone; (4) expenses of administration; (5) estate and inheritance taxes; and (6) debts due such estates.”*

“The expression “in rem” is a term applied to proceedings or actions instituted against the thing, that is, an action taken directly against property or brought to enforce a right in the thing itself.” Stephenson v. Walker, 593 S.W.2d 846, 849 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) In an action in rem the thing proceeded against is itself seized and impleaded as the defendant. No person is a defendant in such a suit. (Tex. Est. Code § 32.001(d)) and (Tex. Est. Code § 1022.002(d)); see also Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981).

Breach of fiduciary in the administration of an inter vivos trust is an action in tort and it was res judicata that the assets in the Brunsting family living trust were not property belonging to a decedent’s estate before any state court actions were even filed. See Curtis v Brunsting 704 F.3d 406 (5th Cir. Jan. 9, 2013).

### ***Pendency***

“The pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it.” Herring v. Welborn 27 S.W.3d 132 (Tex. App. 2000). “An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate.” English v. Cobb, 593 S.W.2d 674, 676 (Tex. 1979); Falderbaum v. Lowe, 964 S.W.2d 744, 747 (Tex.App.-Austin 1998, no writ). “In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court.” See Frost National Bank, 315 S.W.3d at 506 (Tex. 2010) (acknowledging that a court may exercise its probate jurisdiction over “matters incident to an estate” only when a

probate proceeding is already pending in that court.)” Valdez v. Hollenbeck 465 S.W.3d 217 (Tex. 2015).” Narvaez v. Powell 564 S.W.3d 49 (Tex. App. 2018)

Immediately after being served with these same authorities in the Federal Fifth Circuit, Defendants return to this court insisting on establishing a docket control order and setting a trial date.

What “property” (Tex. Est. Code § 22.028) forms the logical container object called an “estate” (Tex. Est. Code § 22.012) and what are the in rem “claims” (Tex. Est. Code § 22.005) pending against such property and who is the applicant for the probate of said estate and what are the reasons why the estate would fail to pour into the trust with the approval of the inventory? The answers are none, none, none and no reason at all, in that order.

### ***Want of Prosecution***

Despite enormous protestation over claims brought under the racketeer influenced corrupt organization statutes, no action in the federal court has ever interfered with the probate court’s ability to perform its lawful functions.

Without an estate, without an executor, without any probate claims to resolve, and after more than eight years, no findings of fact, conclusions of law or order after an evidentiary hearing have been entered in this court. Thus, no steps have been taken to resolve the very first substantive issue in the remedial process. The first trust inquiry necessary to remedy would be to establish the controlling instruments in order to define the powers and obligations of the trustee, the rights of the beneficiary, the distribution and accounting provisions, and all other matters thereunder.

The original tort claims in 412249-401 were filed in the probate court on April 9, 2013 and it is now July 2021. One is curious as to how such a case can be characterized as “litigation”?

### ***Local Rule 7.1 - Want of Prosecution***

*“All contested cases which are not set for trial and which have been on file for more than three (3) years are subject to dismissal. Upon request of the court, the court staff shall furnish notice to all parties and their counsel that any contested case will be dismissed for want of prosecution pursuant to the provisions of Rule*

*165a of the Texas Rules of Civil Procedure. The procedures for notice of dismissal and retention shall be in compliance with Rules 165a and 306a of the Tex.”*

**Tex. R. Civ. P. 165 - Abandonment<sup>6</sup>**

*“A party who abandons any part of his claim or defense, as contained in the pleadings, may have that fact entered of record, so as to show that the matters therein were not tried.”*

**Tex. R. Civ. P. 306 - Recitation of Judgment**

*“The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.” Tex. R. Civ. P. 306”*

How many three year periods have come and gone without a single disposition on a single material issue?

**Attorney Fees**

Reply to Drina Brunsting’s Affirmative Defense No. 7

The alleged co-trustee Defendants have tendered a proposal<sup>7</sup>, offering to give Petitioner approximately 77% of her property, if she will contract to give the other 23% to pay their personal attorney fee obligations. The amount of those fees total \$537,000. That “proposal” is being offered here, not to prove liability or the validity or invalidity of any “claims”, but to show bad faith, and other improper motives<sup>8</sup>. It appears, as pro se Defendant Carole Brunsting complained at the recent scheduling conference, any and all legitimate opportunities to resolve the trust settlement

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<sup>6</sup> The rules of civil procedure apply in probate matters to the extent they do not differ from the procedure established by the estates code . See Bank of Tex ., N.A., Trustee v. Mexia, 135 S.W.3d 356, 362 (Tex . App.—Dallas 2004, pet. denied); see also Thomas v. Whaley, 561 S.W.2d 526, 529 (Tex . Civ. App.—Texarkana 1977, writ ref’d n.r.e.) (applying Texas Rule of Civil procedure 45 to probate matter). Bloom v. Swango, No. 05-14-01237-CV, at \*7 n.4 (Tex. App. Oct. 5, 2015)

<sup>7</sup> Attached Exhibit 2 is offered into evidence under Tex. R. Evid. § 408(b) and the court is requested to take judicial notice

<sup>8</sup> Tex. R. Disc. Prof'l. Cond. 1.04(a) & 1.04 (b)1-7; Rule 8.03(a), 8.04 (a)1-4, 9, & 12; Tex. R. Disc. Prof'l. Cond. 1.01, 1.02(c), (d), (e), 1.06(b) 2, & 3.02, 3.03 (a)1-5, (b) & (c) etc.

controversy between the trust beneficiaries has been subordinated to the attorneys' personal interests, with demands that their fees be paid from the trust before any other consideration.

***Designated as Experts on fees in 412249-401***

2014-12-01 Bobbie G. Bayles self-designation as expert on fees  
2014-12-02 Darlene Payne-Smith self-designation as expert on fees  
2015-07-01 Stephen Mendel self-designation as expert on fees  
2015-07-01 Neal Spielman self-designation as expert on fees

***Tex. Est. Code § 52.00 PROBATE FEE BOOK.***

*(a) The county clerk shall maintain a record book titled "Probate Fee Book" and shall record in the book each item of cost that accrues to the officers of the court and any witness fees.*

*(b) Each record entry must include:*

- (1) the party to whom the cost or fee is due;*
- (2) the date the cost or fee accrued;*
- (3) the estate or party liable for the cost or fee; and*
- (4) the date the cost or fee is paid.*

***The American Rule – Statute or Contract***

*In Texas, as a general rule attorney's fees cannot be awarded to a litigant by a court unless either (1) a statute authorizes the award or (2) a contract between the parties authorized the recovery of attorney's fees in the event of a suit brought pursuant to the contract.*

Pleadings must be clear that attorney's fees are being sought as a result of reliance upon a statute or upon a contract between the parties. After the pleadings are properly filed, the party must introduce admissible evidence regarding the fees and must secure affirmative fact findings by the court or by the jury.

***Creditors***

*No specific Estates Code provision allows a creditor to collect attorney's fees in addition to the amount in controversy. Therefore, to collect attorney's fees, the creditor must be either relying on a pre-death contract with the Decedent or on a non-Estates Code statute which allows the recovery. There are no creditors of the*

*“estate” because there are no assets to form an estate for creditors to claim against.*

*Will Contests etc.*

*Section 352.052 of the Estates Code governs attorney’s fees in a Will contest case. Fees and expenses awarded under §352.052 are payable by the Estate and not by the litigants. Schindler v. Schindler, 119 S.W.3d 923, (Tex. App. – Dallas 2003, pet. denied).*

*Estates Code §51.055 [Probate Code §34A] - Fees to be awarded to an attorney ad litem are considered court costs after being set by the court.*

*Estates Code §124.018 [Probate Code §322A] – If a dispute arises as to the apportionment of estate taxes, the prevailing party can be awarded his or her attorney’s fees.*

*Estates Code §152.051 [Probate Code §113] - A litigant who files an emergency intervention motion to pay funeral and burial expenses is entitled to recover reasonable and necessary attorney’s fees.*

*Estates Code §351.003 [Probate Code §245] – A litigant who successfully sues a personal representative for neglect of duty, or to remove the personal representative, can recover attorney’s fees. Such fees are payable by the personal representative and not by the Estate.*

*Estates Code §351.152 [Probate Code §233] – An attorney can represent the personal representative on a contingent fee, but the fee must be approved by the*

*court if it exceeds 1/3 of the potential recovery. This section applies to both dependent and independent administrations.*

*Estates Code §352.051 [Probate Code §242] – On satisfactory proof to the court, a personal representative is entitled to reasonable attorney’s fees necessarily incurred in connection with the proceedings and management of the estate.*

*Estates Code §355.003 [Probate Code §307] – Claimants can include fees incurred in preparing, presenting and collecting their claim if the underlying instrument on which the claim is based provides for fees.*

*Estates Code §404.003(c) [Probate Code §149C(c)] – In an action to remove an executor, the executor shall be allowed reasonable and necessary attorney’s fees from the estate for a good-faith defense even if the defense is unsuccessful.*

*Estates Code §404.003(d) [Probate Code §149C(d)] – A person bringing an action to remove an executor may recover fees from the estate if the executor was serving without bond.*

*Estates Code §405.003 [Probate Code §149F] – An executor who seeks a judicial discharge is entitled to recover fees incurred in preparing the final account, but the fees must be approved by the court.*

### ***Property Code Section 114.064 Attorney fees in Trust disputes***

Litigation involving trusts can involve suits to modify, terminate or interpret the document. Suits can also be brought to appoint a successor trustee or to remove a trustee. Attorney’s fees for litigants in these actions are governed by one section of the Property Code. Property Code § 114.064 states “[i]n any proceeding under this code, the court **may** make such award of costs and reasonable and necessary attorney’s fees as may seem equitable and just.” Therefore, while this statutory language does not require a party to win in order to get fees, it is clear that the court has

discretion as to whether to make an award or not. Additionally, any fees awarded must be both “reasonable and necessary” and “equitable and just.”

### ***Tex. Civ. Prac. & Rem. Code § 27.009 Damages and Costs***

#### *Section 27.009 - Damages And Costs*

*(a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court:*

*(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action; and*

*(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.*

*(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.*

*(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.*

Tex. Civ. Prac. and Rem. Code § 27.009. Amended by Acts 2019, Texas Acts of the 86th Leg.-Regular Session, ch. 378, Sec. 8, eff. 9/1/2019. Added by Acts 2011, 82nd Leg., R.S., Ch. 341, Sec. 2, eff. June 17, 2011.

*A trial court's decision to impose sanctions will not be overruled on appeal unless an abuse of discretion is shown. Falk , 974 S.W.2d at 824. The test for abuse of discretion is "whether the court acted without reference to any guiding rules and principles," or "whether the act was arbitrary or unreasonable." Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985)*

### ***Attorney fees in Trust disputes***

*“It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. See duPont v . S. Nat'l Bank , 575 F.Supp. 849, 864 (S.D. Tex. 1983), modified, 771 F.2d 874 (5th Cir. 1985). ” Goughnour v. Patterson, No. 12-17-00234-CV, at \*25-26 (Tex. App. Mar. 5, 2019)*

Anita Brunsting, as sole trustee from December 21, 2010 until the passing of Nelva Brunsting November 11, 2011, failed to assemble books and records of accounts and was incapable of and thus failed to provide a mandatory trust accounting. This fault of the alleged trustee was

established as the cause for litigation brought to obtain accounting and disclosures that, once obtained, revealed further faults of the trustee in failing to perform the most basic acts fundamental to competent trust administration and, without notice to her co-beneficiary equals, Anita transgressed the demarcation lines between personal assets and those of the cestui que, as embodied in the findings of fact, conclusions of law and order for preliminary injunction<sup>9</sup>, issued by the Honorable Kenneth Hoyt Jr. on April 9, 2013, and further established by testimony at hearing on the Report of Special Master, appointed by the Southern District of Texas to establish an accounting of income and disbursements from December 21, 2010 to May 31, 2013.

### **Objections**

Petitioner objects to the Defendants and their “attorney fee experts” failure to submit their claims for attorney fees to the probate court for determination as to whether such fees were necessary and reasonable in the settlement, partition, or distribution of an estate, as required in a probate proceeding.

Petitioner objects to the co-trustee Defendants’ demand for attorney fees when they have failed to include any attorney fees as expenses paid or liabilities outstanding in any trust accounting.

Petitioner further objects to the failure of Defendants’ attorney fee experts to clearly state whether their fee demands are authorized by contract or statute and failure to provide billing statements segregating recoverable from non-recoverable fees; failing to segregate fees for trust administration from the trustee’s personal legal defense obligations; failure to itemize and detail the actions taken, the time spent, the qualifications of the person performing the tasks and the fees incurred for each, and failure to segregate the amount of fees claimed to be owed to separate

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<sup>9</sup> Attached as Exhibit 3

counsel for Defendants' joint motions and failure to distinguish the amount of fees owed to each counsel by the different parties.

Petitioner further objects to the failure of Defendants' attorney fee experts to state that their fee demands were "reasonable and necessary" and "equitable and just". Petitioner's requests for fees and sanctions are "reasonable and necessary" and the only question falling under the "equitable and just" standard is the amount.

### **Conclusion**

Attorneys knowingly maintaining a civil tort action in a statutory probate court that has no legislative delegation of authority to render the requested relief to the parties for the sole purpose of generating fees for services, perpetrates fraud upon the court, obstructs due process and the interests of justice, increases the injury and costs to the parties, places an undue burden on an already overburdened judicial system, embarrasses the veracity of the legal profession and denigrates public confidence in the integrity of the judicial process as a whole.

The court that provides a promiscuous forum countenancing such conduct betrays its oath of office, breaches its fiduciary duty to the public trust and wars against both state and federal constitutions. The party receiving a "free ride" under such zero-sum-game conditions<sup>10</sup> has little incentive to resolve the dispute economically and efficiently, while their counsel is emboldened and encouraged to deliberately protract the proceedings to enlarge their own gain, while threatening the beneficiary victims with larger and larger fee demands the longer they resist the designed extraction.

The party this "attrition strategy" is used against is unfairly hindered by the threat that at each step, whether it be trial, a hearing, a deposition, or the issuance of written discovery, the cestui

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<sup>10</sup> In economic or game theory, a zero sum game is a situation in which one person or group can gain something only by causing another person or group to lose it, <https://www.merriam-webster.com/dictionary>. See pyrrhic victory: a victory that is not worth winning because so much is lost to achieve it. (see Hannah Motion to Dismiss with Prejudice after Bayless mandamus win. If everything Bayless claimed was true the will would be invalid just as in Brunsting, but the will had already been held valid just as in Brunsting)

que trust must bear the growing fee obligations and expenses of both sides, as a prerequisite to the equitable enjoyment of property the beneficiary already owns and is entitled to possession of under the trust contract.

If the cestui que cannot enforce the trust contract, what is to lead them to believe they can enforce a “settlement contract”? Under what conditions, other than duress, would the cestui que willfully contract to legitimize attorney fees not otherwise authorized by law?

What we are looking at is a growing problem of interfering with family generational asset transfers as a variation on the common law torts of barratry, champerty and maintenance. In the case in point, the creators of the controversy, the estate planning attorneys, were sequestered in one court where their attorneys enjoyed fees paid from malpractice insurance funds, while the injured beneficiaries of the estate planning attorney generated controversy are held hostage in a separate court, where the beneficiaries are pressured to bear the litigation costs. No benefit to the injured cestui que can ever flow from poser litigation of any form.

The notion that the beneficiary of a living trust can be coerced into an unholy contract as a condition of receiving a promise of benefits already owned under the trust Settlor's contract, is an insult to common decency and an outrage against public justice. There is no acceptable excuse for this type of conduct and this family of living trust beneficiaries is entitled to due process and timely remedy, neither of which can be obtained in a probate court that does not have the indispensable

elements necessary to compose a court of competent jurisdiction over the subject matter of the stated tort claims and cannot provide the relief requested.

IF NOT FOR the acts and events complained of here, the members of this family would have each received the benefit their parents intended for them and this controversy would have been resolved long ago.

***Remedy***

Petitioner moves the court to enter findings of fact and conclusions of law explaining the judicial reasoning supporting any order dismissing for want of jurisdiction or declining to do so.

Petitioner moves the court to enter findings of fact and conclusions of law explaining the judicial reasoning supporting any order for the payment of attorney's fees or sanctions and for any order declining to award attorney's fees and/or impose sanctions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on the following parties by certified mail, facsimile and/or e-filing to all Counsel of Record in accordance with the Texas Rules of Civil Procedure on July 15, 2021.

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