

# JURISDICTION IN PROBATE PRACTICE

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## I. THE EVOLUTION OF CURRENT PROBATE JURISDICTION

### A. DEFINITIONS

1. “**Statutory Court**” refers to any form of statutory county court, including statutory county courts at law and statutory probate courts.
2. “**Probate Court**” refers to county courts in the exercise of their probate jurisdiction, courts created by statute and authorized to exercise original probate jurisdiction and district courts exercising probate jurisdiction in contested matters.
3. “**Original probate jurisdiction**” refers to the probate of wills, appointment of guardians, grant of letters testamentary and of administration, settling of accounts of personal representatives, transaction of business appertaining to estates under administration, including the settlement, partition and distribution of such estates. Generally this term refers to actions that were within the exclusive jurisdiction of the probate court prior to the 1973 constitutional amendment allowing the legislature to alter district and county court jurisdiction in probate matters.
4. “**Group I Counties**” refers to counties without a statutory court.
5. “**Group II Counties**” refers to counties with a statutory court.

### B. CONSTITUTIONAL COUNTY COURTS

#### 1. Constitutional and Statutory Jurisdiction

Under the Texas Constitution, each county in Texas has a constitutional county court. Tex. Const. art. V, § 15.

Prior to November 5, 1985, article V, section 16 of the Texas Constitution provided that:

The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, person non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law. [Tex. Const. art. V, § 16 (prior to amendments)].

Also prior to November 5, 1985, article V, section 22 of the Texas Constitution provided:

The Legislature shall have power, by local or general law, to increase, diminish, or change the civil and criminal jurisdiction of County Courts. [Tex. Const. art. V, § 22 (repealed)].

After the 1985 amendments to the Constitution, the jurisdiction of the constitutional and statutory county courts is now governed by the new section 16:

The County Court has jurisdiction as provided by law. The County Judge is the presiding officer of the County Court and has judicial functions as provided by law. County court judges shall have the power to issue writs necessary to enforce their jurisdiction . . . (emphasis added) [Tex. Const. art. V, § 16].

The legislature has codified all laws dealing with constitutional county courts into Chapter 26 of the Government Code. The jurisdiction of specific constitutional county courts is delineated in Chapter 26 and varies from county to county throughout Texas.

Section 4 of the Texas Probate Code grants probate jurisdiction to all constitutional county courts, as follows:

The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors and incompetents, grant letters testamentary and of administration and guardianship, settle accounts of personal representatives, and transact all business appertaining to estates subject to administration or guardianship, including the settlement, partition, and distribution of such estates. It may also appoint guardians for other persons where it is necessary that a guardian be appointed to receive funds from any governmental source or agency. [Tex. Prob. Code Ann. §4 (Vernon 1980)].

2. Legal Qualifications of Judges of Constitutional County Courts

A county judge is not required to be a licensed attorney. Ex parte Craig, 150 Tex. Crim. 598, 193 S.W.2d 178 (1946), rev'd. on other grounds, 331 U.S. 367 67 S. Ct. 1249, 91 L. Ed. 1546, mandate conformed to, 151 Tex. Crim. 94, 204 S.W.2d 842 (1947).

C. STATUTORY COUNTY COURTS

1. Constitutional and Statutory Jurisdiction

In 1949, the Texas Legislature established a Probate Court of Harris County with concurrent jurisdiction with the county court over probate matters. Notwithstanding State v. Gillette's Estate, 10 S.W.2d 984 (Tex. Comm'n. App. 1928, opinion adopted), the constitutionality of this legislative action was challenged in State ex rel. Rector v. McClelland, 148 Tex. 372, 224 S.W.2d 706 (1949). The Supreme Court of Texas made no mention of the Gillette case, but went on to declare that this act of the legislature was constitutional as article V, section 1 of the Texas Constitution gave the legislature the power to establish such other courts as "it may deem necessary and prescribe the jurisdiction and

organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.” *Id.* at 709 (quoting Tex. Const. art. V, § 1).

In 1985, article V section 16 of the Texas Constitution was amended to give statutory county courts “jurisdiction as provided by law.” Tex. Const. art. V, § 16.

The legislature has codified all laws dealing with county courts into Chapter 25 of the Government Code.

## 2. Legal Qualifications of Judges of Statutory County Courts

The judge of a statutory county court is required by law to be a practicing attorney by the legislation creating the court. *See* Tex. Govt. Code Ann. § 25.001 *et seq.* (Vernon 1988 & Supp. 1990); *see also* 17 *M. Woodward & E. Smith, Probate and Decedents’ Estates* § 1 (Texas Practice 1971 & Supp. 1989).

## 3. Types of Jurisdiction of Statutory County Courts

The jurisdiction of specific statutory county courts is set forth in chapter 25 of the Government Code and varies from county to county throughout Texas. Many statutory county courts do not have probate jurisdiction at all, and some, by their enabling legislation, have probate jurisdiction that specifically overrides section 5 of the Probate Code.

# D. STATUTORY PROBATE COURTS

## 1. Constitutional and Statutory Jurisdiction

A statutory probate court is a hybrid form of statutory county court exercising the jurisdiction of a probate court. Section 3(ii) of the Probate Code defines “statutory probate court” as “any statutory court . . . the jurisdiction of which is limited by statute to the general jurisdiction of a probate court and such courts whose statutorily designated name contains the word ‘probate’.” Statutory county courts are not statutory probate courts unless their statutorily designated name includes the word “probate.” Tex. Prob. Code Ann. § 3(ii) (Vernon 1980). Section 25.0021 of the Government Code provides that, “A statutory probate court as that term is defined in Section 3(ii), Texas Probate Code, has the general jurisdiction of a probate court as provided by the Texas Probate Code.”

Statutory probate courts, like statutory county courts, exist under the auspices of article V section 16 of the Texas Constitution and chapter 25 of the Texas Government Code.

The jurisdiction of these courts varies according to the particularities of their enabling legislation. Some statutory probate courts (such as those in Harris and Travis Counties) have jurisdiction that is different than that set out in sections 5 and 5A of the Probate Code.

The counties having statutory probate courts are:

- a. Probate Courts 1 and 2 of **Bexar County** (see Tex. Govt. Code Ann. § 25.0173);
- b. The Brazoria County Court at Law No. 1 of **Brazoria County** (see Tex. Govt. Code Ann. § 25.0221);

- c. The Brazoria County Court at Law No. 2. of **Brazoria County** (see Tex. Govt. Code Ann. § 25.0221);
- d. The Brazoria County Court at Law No. 3. of **Brazoria County** (see Tex. Govt. Code Ann. § 25.0221);
- e. Probate Courts 1, 2, and 3 of **Dallas County** (see Tex. Govt. Code Ann. § 25.0595);
- f. The Probate Court of **Denton County** (see Tex. Govt. Code Ann. § 25.0632);
- g. The El Paso County Probate Court of **El Paso County** (see Tex. Govt. Code Ann. § 25.0733);
- h. The Galveston County Probate Court of **Galveston County** (see Tex. Govt. Code Ann. § 25.0861);
- i. Probate Courts 1, 2, 3, and 4 of **Harris County** (see Tex. Govt. Code Ann. § 25.1034);
- j. Probate Courts 1 and 2 of **Tarrant County** (see Tex. Govt. Code Ann. § 25.2224); and
- k. The Probate Court of **Travis County** (see Tex. Govt. Code Ann. § 25.2293).

**And then there is Nueces County!** While **not a statutory probate court**, Tex. Govt. Code Ann. § 25.1082 grants a Nueces County Court at Law the following jurisdiction:

(a) In addition to the jurisdiction provided by Section 25.0003 and other law, and except as limited by Subsection (d), a county court at law in Nueces County has:

(1) the jurisdiction provided by the constitution and by general law for district courts;

(2) the general jurisdiction provided by Section 25.0021 for a statutory probate court and the jurisdiction and authority of a probate court or a statutory probate court under Sections 4, 5, 5A, and 5B, Texas Probate Code. . .

(5) jurisdiction in mental health matters, original or appellate, provided by law for constitutional county courts, statutory county courts, statutory probate courts, or district

courts with mental health jurisdiction, including proceedings under:

- (A) Subtitle C, Title 7, Health and Safety Code;
- (B) Chapter 462, Health and Safety Code; and
- (C) Subtitle D, Title 7, Health and Safety Code;

(6) jurisdiction over the collection and management of estates of minors, mentally disabled persons, and deceased persons;

(7) concurrent jurisdiction with the district court in all actions by or against a personal representative, in all actions involving an inter vivos trust, in all actions involving a charitable trust, and in all actions involving a testamentary trust, whether the matter is appertaining to or incident to an estate;

(8) the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy. . .

The author has not reviewed the jurisdictional grants of all of the county courts in the State of Texas. Human imagination is apparently the only factor that limits the local jurisdictional grants contained in the Texas Government Code.

## 2. Legal Qualifications of Judges of Statutory Probate Courts

The judge of a statutory probate court is required by the legislation creating the court to be a licensed attorney. 17 *M. Woodward & E. Smith, Probate and Decedents' Estates* § 1 (Texas Practice 1971 & Supp. 1989); see the enabling legislation creating each court, *supra* § I. D. 1. a-k.

## 3. Organization of Statutory Probate Courts

Statutory probate court judges have their own internal organizational structure. Tex. Govt. Code Ann. § 25.0021-25.0024 (Vernon 1988 and Supp. 1996).

a. Presiding Judge: Statutory probate court judges elect from their number a presiding judge who serves a term of four years from the date of qualification as presiding judge. *Id.* at § 25.0022(b).

b. Assistant Presiding Judge: The presiding judge appoints an assistant presiding judge. *Id.* at § 25.0022(h). The assistant presiding judge acts on behalf of the presiding judge when the presiding judge fails or refuses to act. *Id.*

c. Assignment of Judges: Section 25.0022(I) of the Government Code provides that:

Judges may be assigned in the manner provided by this section to hold court in a county court or any statutory court exercising probate jurisdiction when:

- (1) the regular judge requests assignment of another judge to the judge's court;
- (2) the regular judge is absent, disabled, or disqualified for any reason;
- (3) the regular judge is present or is trying cases as authorized by the constitution and laws of this state;
- (4) the office of the regular judge is vacant;
- (5) a motion to recuse the regular judge of a statutory probate court has been filed.

Section 25.0022(n) provides that:

A judge assigned under this Section has the jurisdiction, powers, and duties given by Sections 5 and 5A, Texas Probate Code, to the regular judge of the court to which assigned<sup>1</sup>.

## E. DISTRICT COURTS

### 1. Constitutional and Statutory Jurisdiction

Article V, section 7 of the Texas Constitution provides that the State shall be divided into judicial districts, each of which will have one or more District Courts and District Judges.

Article V, section 8 of the Texas Constitution provides:

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body . . .

The legislature codified all laws dealing with district courts in chapter 24 of the Government Code.

Tex. Prob. Code Ann. § 5(a) provides that “[t]he district court shall have original control and jurisdiction over executors and administrators wards under such regulations as may be prescribed by law.”

Except for certain situations involving independent administration (see *e.g.* Tex. Prob. Code Ann. §§ 149A, 149B and 149C), the legislature has conferred original probate

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<sup>1</sup>Note that this section does not incorporate the 1993 codification of separate jurisdictional provisions relating to Guardianships (Tex. Prob. Code Ann. §§ 605 - 607).

jurisdiction on the district court only in counties where there are no probate courts created by statute, and then only when a contested matter has been transferred to it by the constitutional county court.

Tex. Prob. Code Ann. § 606(a) provides that “[t]he district court has original control and jurisdiction over guardians and wards under regulations as may be prescribed by law.”

2. Legal Qualifications of Judges of District Courts

Article V, section 7 of the Texas Constitution provides that each District Judge shall be licensed to practice law in the State of Texas and shall have been a practicing lawyer or Judge of the Court in the State of Texas, or both combined, for four years next preceding his election.

**II. HISTORY OF PROBATE JURISDICTION IN THE PROBATE AND DISTRICT COURTS**

F. PRE-1973 JURISDICTION

Prior to 1973, article V, section 8 of the Texas Constitution and section 4 of the Probate Code assigned original probate jurisdiction to county courts and appellate jurisdiction to the district courts.

The district courts’ jurisdiction prior to 1973 was exclusive of the probate court in many areas. The district court had exclusive jurisdiction to:

1. construe wills;
2. determine title to property, realty and personalty;
3. remove a cloud from title to property;
4. require an independent executor to render an accounting;
5. enforce liens on land when the liens had been rejected by the representative;
6. hear all claims by or against the estate within its jurisdictional limits;
7. entertain a suit against the decedent as guarantor of the principal debtors;
8. determine whether a will was executed in violation of a contract;
9. determine whether a beneficiary had forfeited his bequest for conduct prohibited by the will;
10. hear a suit upon the representative’s bond; and
11. exercise its equity jurisdiction when the probate court was inadequate to grant the necessary relief.

Stanley, *Section 5 of the Texas Probate Code: an Indirect Reduction of District Court Jurisdiction?* 30 Baylor L. Rev. 129 (1978).

G. 1973 AMENDMENTS

1. 1973 Constitutional Amendment

In 1973 the Texas legislature submitted to the voters a constitutional amendment authorizing legislative revision of probate jurisdiction and amended section 5 of the Texas Probate Code by redefining the jurisdiction of district courts over probate matters. The amendment to article V, section 8 of the Texas Constitution which was approved by the voters, provided:

The legislature, however, shall have the power, by local or general law, Section 16 of Article V of this constitution notwithstanding, to increase, diminish or eliminate the jurisdiction of either the district court or the county court **in probate** matters . . . and may provide that all appeals on such matters be to the courts of civil appeals. [emphasis supplied]

2. 1973 Legislation

In 1973 the legislature also amended section 8 of the Probate Code. Before 1973, the Probate Code made no distinction in the jurisdiction of courts exercising original probate jurisdiction. In all counties, whether original probate jurisdiction lay exclusively with the constitutional county courts or was shared with a statutory county court, the district court had jurisdiction to review by trial de novo, but had no original jurisdiction. The amendments eliminated trial de novo in the district court. Section 5 as amended in 1973 made a distinction between counties without a statutory court exercising probate jurisdiction (Group I counties) and counties with such a court (Group II counties).

In Group I counties district courts were given concurrent general probate jurisdiction with the constitutional county courts. The reason for this change was the belief that a contested probate proceeding should be presided over by a judge with legal training. Because the judges of the constitutional county courts were not required to be lawyers, the legislature provided that contested matters could be removed to and tried by the district court in which the judges were licensed attorneys.

In Group II counties where the judges were licensed attorneys, the district court's jurisdiction in probate matters was strictly limited. The jurisdiction of these statutory courts was granted into areas which previously were within the exclusive jurisdiction of the district courts.

a0 Legal References: An excellent discussion of the 1973 amendment is contained in Schwartzel and Wilshusen, *Texas Probate Jurisdiction -- There's a Will, Where's the Way?*, 53 Texas L. Rev. 323 (1975).

H0 1975 AMENDMENTS

In 1975 section 5 of the Probate Code was again amended by the Texas legislature.

Prior to 1975, a party to an action filed in the constitutional county court could not unilaterally cause the action to be transferred to the district court (removal required agreement of the parties). The 1975 amendment provided that a party to an action in the constitutional county court could unilaterally cause the action to be transferred to the district court.

The 1975 amendment also provided that if a matter was removed from the constitutional county court to the district court then upon resolution of all pending contested matters the action was to be transferred back to the county court for further proceedings not inconsistent with the orders of the district court. Act of June 21, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws 2195.

An excellent discussion of the 1975 amendments is contained in Schwartzel and Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 Texas L. Rev. 372 (1976).

#### I0 1977 AMENDMENT

This amendment provided that if a surety is called upon to perform in place of a personal representative, all courts possessing original jurisdiction may award judgment against the personal representative in favor of the surety in the same suit. Act of Aug. 29, 1977, Ch. 448, § 1, 1977 Tex. Gen. Laws 1170.

#### J0 1979 AMENDMENTS

Prior to 1979, contested cases could only be removed from the constitutional county court to the district court. The 1979 amendments provided that in Group I counties the judge of the constitutional county court could on his own motion and must on the motion of any party, transfer a contested proceeding to the statutory probate court, or statutory county court, which may then hear the proceeding as if originally filed in such court.

The 1979 amendments created a new section 5A of the Probate Code which defined the terms “appertaining to estates” and “incident to an estate.” This new section gave statutory probate courts concurrent jurisdiction with the district courts over actions involving the interpretation and administration of testamentary trusts and the applying of constructive trusts. The amendments further provided that statutory probate courts, in the exercise of their jurisdiction, hear all suits by or against any estate or guardianship; that the new section 5A shall be construed in harmony with Probate Code section 145 and all other sections dealing with independent executors; that statutory probate courts shall have the same powers over independent executors as the district courts; and that in situations where the jurisdiction of the statutory probate court is concurrent with that of the district court any cause of action appertaining to estates or incident to an estate shall be brought in the statutory probate court rather than the district court. Act of Aug. 27, 1979, ch. 713, § 2, 1979 Tex. Gen. Laws 1740.

#### K0 1983 AMENDMENTS

The 1983 amendments provided that if a contested action is transferred from the constitutional county court to the district court then the clerk of the district court may perform in relation to the transferred proceeding any function a county clerk may perform in that type of proceeding. These amendments also brought limited guardianships and the estates of incapacitated persons within the definition of “appertaining to estates” and “incident to an estate.” Act of Aug. 29, 1983, ch. 1015, § 1, 1983 Tex. Gen. Laws 5434.

L0 1985 AMENDMENTS

1 1985 Constitutional Amendment

In 1985, the Texas Legislature submitted constitutional amendments which delegated to the Legislature the power to establish the jurisdiction of both district and county courts. These amendments were approved and the constitutional amendments became law. The amendments repealed the then-existing sections 8 and 16 of article 5 of the Texas Constitution, substituting in lieu thereof the new sections which provided:

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, **except in cases where exclusive, appellate or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.** District Court judges shall have the power to issue writs necessary to enforce their jurisdiction. (emphasis supplied)

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

**The County Court has jurisdiction as provided by law.** The County Judge is the presiding officer of the County Court and has judicial functions as provided by law. County Court judges shall have the power to issue writs necessary to enforce their jurisdiction. (emphasis supplied)

County Courts in existence on the effective date of this amendment are continued unless otherwise provided by law.

When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law.

As a consequence of these amendments, the original specific constitutional grants of authority to the district courts have been changed to the present provisions, which permit limitation on probate jurisdiction by specific legislation. In addition, the constitutionally defined jurisdiction of the constitutional county court was changed from a very specific grant of authority to the present-day provision which is very broad. The Texas Constitution no longer affects the specific grant of jurisdiction between the district court, constitutional county court, statutory county court or statutory probate court. The authority to expand, change or diminish such jurisdiction is now vested in the legislature.

2 1985 Legislation

a0 The Government Code: The Texas legislature has recodified numerous laws relating to the Texas court system into the Government Code. Chapter 23 of the

Government Code contains the general provisions for trial courts. District courts are addressed in Chapter 24.

Chapter 25 of the Government Code addresses the statutory county courts, and contains the general provisions which govern statutory probate courts. Chapter 25 also contains the specific statutory designation of certain statutory county courts as statutory probate courts. It is critical to continually monitor Chapter 25 because provisions with respect to specific statutory county courts and statutory probate courts modify the jurisdictional provisions of the Texas Probate Code relating to court jurisdiction. A review of all of these provisions is outside the scope of this paper. The following, however, are some examples: Tex. Govt. Code Ann. § 25.1034(a) (Vernon Supp. 1990) (governing jurisdiction of the Harris County statutory probate court); Tex. Govt. Code Ann. § 25.2293(d) (Vernon Supp. 1990) (governing jurisdiction of the Travis County statutory probate court); and Tex. Govt. Code Ann. § 25.1863(b) (Vernon Supp. 1990) (governing jurisdiction of the Parker County statutory county court).

Chapter 26 of the Government Code addresses the constitutional county courts (a term which may no longer be appropriate following the 1985 Constitutional Amendment since the jurisdiction of those courts is now exclusively established by Chapter 26 of the Government Code rather than by the Constitution).

### 3 The Probate Code

In 1985, section 5(b) of the Probate Code, which governs transfer of contested probate matters from county court to district court, was amended to delete the specific “laundry list” language which delineated matters transferrable to district court, leaving the general language granting jurisdiction. Thus, the district court now has “the general jurisdiction of a probate court” with respect to matters transferred from county court. Act of May 24, 1985, ch. 159, § 3, 1985 Tex. Gen. Laws 745.

Another 1985 amendment added language to section 5A(b) of the Probate Code to provide that “in actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts.” Act of August 26, 1985, ch. 875, §1, 1985 Tex. Gen. Laws 6429. This was the first attempt by the Legislature to legislatively overrule the holding of the Texas Supreme Court in *Seay v. Hall*, 677 S.W.2d 19 (Tex. 1984). This was also the birth of the legislative movement to give statutory probate courts jurisdiction over matters regardless of whether the subject matter of the jurisdiction was appertaining to or incident to an estate under administration.

M0 1987 AMENDMENTS

In 1987, section 5(b) of the Probate Code was amended to clarify the procedures for removal of an action from Group I Counties. The amendment provided that only the contested portion of estate administration may be removed from the Group I County Courts and that such removal may be made to either a statutory probate court or to district court. The amendment provided that the Group I County Court shall continue to exercise jurisdiction over the management of the estate, with the exception of the contested matter which had been removed, until final disposition of the contested matter is made. At such time, the contested proceeding shall be transferred back to the Group I County Court for further proceedings not inconsistent with the orders of the assigned court. Act of June 17, 1987, ch. 459, §4, 1987 Tex. Gen. Laws 2043.

A second amendment promulgated in 1987 altered section 5A(b) of the Probate Code to provide that in actions by or against a personal representative, **or in matters involving an inter vivos trust**, the statutory probate courts have concurrent jurisdiction with district courts. Act of June 17, 1987, ch. 459, §1, 1987 Tex. Gen. Laws 2043. This amendment further expanded the jurisdiction of statutory probate courts beyond matters which are “appertaining to” or “incident to” an estate under administration.

N0 1989 AMENDMENTS

1 1989 Legislation

a0 Probate Code § 5: Section 5 of the Probate Code was amended in 1987 to add a new subsection (d) which provided that:

(d) A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person’s capacity as a personal representative, in all actions involving an inter vivos trust, in all actions involving a charitable trust, and in all actions involving a testamentary trust. Act of June 16, 1989, ch 1035, §2, 1989 Tex. Gen. Laws 4162.

This amendment was a response to the argument that a similar revision in 1985 to section 5A of the Probate Code was not intended to enlarge the jurisdiction of the statutory probate courts beyond the parameters set by the Texas Supreme Court in *Seay v. Hall*, 677 S.W.2d 19 (Tex. 1984). In *Qwest Microwave, Inc. v. Bedard*, 756 S.W.2d 426 (Tex. App. --Dallas, 1988, no writ), the Dallas Court of Appeals held that the 1985 amendment to section 5A(d) giving statutory probate courts concurrent jurisdiction with the district courts “in actions by or against a personal representative or in matters involving an inter vivos trust,” was not intended to expand statutory probate court jurisdiction to include all matters in which a personal representative is a party, unless the claim belongs to the representative in that capacity and in no other. *Id.* at 436.

b0 Probate Code § 5A: In 1989, section 5A was redrafted and expanded, and retitled “Matters Appertaining and Incident to an Estate and Other Probate Court Jurisdiction.” The last line of subsection (b) of the old statute (“in actions by or against a personal representative, or in matters involving an inter vivos trust, the

statutory probate courts have concurrent jurisdiction with the district court”), which was added in 1985, was moved to a new subsection “c” of 5A which provided:

A statutory probate court has concurrent jurisdiction with the district court in all actions;

- (1) by or against a person in the person’s capacity as a personal representative;
- (2) involving an inter vivos trust;
- (3) involving a charitable trust; and
- (4) involving a testamentary trust.

This amendment clarifies that a statutory probate court has jurisdiction over testamentary trusts after the administration of the decedent’s estate has been closed, an issue that was unclear prior to that amendment.

Finally, two new subsections were also added to section 5A of the Probate Code:

- (d) A statutory probate court may exercise the pendant and ancillary jurisdiction necessary to promote judicial efficiency and economy.
- (e) Subsections (c) and (d) apply **whether or not the matter is appertaining to or incident to an estate.** (Emphasis added)

Tex. Prob. Code Ann. § 5A (d) & (e) (Vernon Supp. 1990); see Act of June 16, 1989, ch. 1035, § 3, 1989 Tex. Gen. Laws 4162.

These amendments were designed to clarify the jurisdiction of statutory probate courts in matters that may not be appertaining to or incident to an estate under administration.

The 1989 amendments to the Probate Code should finally and conclusively resolve the jurisdictional problems of statutory probate courts raised by the Texas Supreme Court in *Seay v. Hall*. It should be remembered, however, that the *Seay* doctrine still applies to non-statutory probate courts. These amendments also embody the latest evolution of jurisdiction of statutory probate courts over matters not “appertaining to” or “incident to” estates under administration.

## 00 1993 AMENDMENTS

### 1 1993 Legislation:

In 1993, the Legislature codified all of the provisions of the Probate Code dealing with guardianships into a new Chapter XIII. This new chapter consisted of Probate Code sections 601 - 892. Prior sections of the Probate Code relating to guardianships were either amended or repealed to reflect this codification.

As a part of this codification special jurisdictional provisions (relating to a probate court's jurisdiction over guardianship proceedings) were enacted as Tex. Prob. Code Ann. §605 - 607. These sections were not intended to change the jurisdiction of Probate Courts in connection with guardianship matters.

P0 1995 AMENDMENTS

1 1995 Legislation

In 1995, the Legislature amended Tex. Prob. Code Ann. §606 (b) to reflect the concept of mental "health" rather than mental "illness."

In 1995, the Legislature amended Tex. Prob. Code Ann. §606 (e) to clarify that the court retains jurisdiction to hear matters when a surety is called on to perform in place of a guardian or former guardian, even if the ward has died, regained capacity or the ward's disabilities have been removed.

Q0 1997 AMENDMENTS

1 1997 Legislation

In 1997, the Legislature amended Tex. Prob. Code Ann. § 5A(b) at the instigation of Judge Guy Herman and other statutory probate court Judges. The definition of "appertaining to" or "incident to" an estate was expanded to include all actions "filed against or on behalf of" a personal representative. The purpose of this amendment was to expand the Tex. Prob. Code Ann. § 5B power of statutory probate courts to transfer (into the Statutory Probate Court) cases in other courts that were "appertaining to" or "incident to" to estates being administered in the Statutory Probate Court to situations where the personal representative of an estate was a party (regardless of whether the cause of action was otherwise "appertaining to" or "incident to" an estate).

This amendment had the unintended result of requiring that every cause of action filed in Texas, in which the personal representative of an estate being administered by a Statutory Probate Court is a party, must be brought in the Statutory Probate Court rather than a District Court. See the last sentence of Tex. Prob. Code Ann. §5 which provides that "In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, **any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.**" (Emphasis supplied)

It may take years for courts to work out the ramifications of this mistake. For example, may a plaintiff file a wrongful death case in a district court if there is a pending administration of the decedent's estate in a statutory probate court? If a plaintiff files a action against multiple defendants in a contract case (one of whom is the personal representative of

an estate being administered in a county where there is a statutory probate court) is the only court where the cause of action may be filed the statutory probate court?

The new language appears in bold:

...all statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions, and applications filed against or on behalf of any heirship proceeding or decedent's estate, including estates administered by an independent executor; **all such suits, actions, and applications are appertaining to and incident to an estate for purposes of this section.**

This act takes effect on September 1, 1997 and applies only to the estates of persons dying after that date. Note that there is no similar legislation for guardianships.

Also in 1997, the Legislature amended Tex. Prob. Code Ann. §3ii, the definition of Statutory Probate Courts (HB 1152). The county courts at law in Brazoria County were called "statutory probate courts" in their title but their jurisdictional description was that of a county court at law. The Nueces County courts at law have probate court jurisdiction in their enabling legislation.

The bill clarifies that statutory probate courts are only those designated as a statutory probate court under Chapter 25 of the Government Code, and took effect September 1, 1997. The bill passed and was signed by the governor on May 7, 1997. By May 16th Senator Truan (Nueces County) had passed a bill in the Senate reversing that statute (SB 1952).

A compromise was reached by amendment to HB 3086; Those courts in question retain their "statutory probate court jurisdiction" until 1999. The bill also established an interim study committee to look at this problem and the jurisdiction of probate courts generally.

U. 1999 AMENDMENTS

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III. CURRENT JURISDICTIONAL PROVISIONS OF THE PROBATE CODE:

A. ESTATE PROVISIONS:

1. Tex. Prob. Code Ann. § 4:

The county court shall have the general jurisdiction of a probate court. It shall probate wills, grant letters testamentary and of administration, settle accounts of personal representatives, and transact all business appertaining to estates subject to administration, including the settlement, partition, and distribution of such estates.

2. Tex. Prob. Code Ann. § 5:

(a) The district court shall have original control and jurisdiction over executors and administrators under such regulations as may be prescribed by law.

(b) In those counties where there is no statutory probate court, county court at law or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations shall be filed and heard in the county court, except that in contested probate matters, the judge of the county court may on his own motion (or shall on the motion of any party to the proceeding, according to the motion) request as provided by Section 25.0022, Government Code, the assignment of a statutory probate judge to hear the contested portion of the proceeding, or transfer the contested portion of the proceeding to the district court, which may then hear contested matter as if originally filed in district court. The county court shall continue to exercise jurisdiction over the management of the estate with the exception of the contested matter until final disposition of the contested matter is made by the assigned judge or the district court. In contested matters transferred to the district court in those counties, the district court, concurrently with the county court, shall have the general jurisdiction of a probate court. Upon resolution of all pending contested matters, the contested portion of the probate proceeding shall be transferred by the district court to the county court for further proceedings not inconsistent with the orders of the district court. If a contested portion of the proceeding is transferred to a district court under this subsection, the clerk of the district court may perform in relation to the transferred portion of the proceeding any function a county clerk may perform in that type of contested proceeding.

(c) In those counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations shall be filed and heard in such courts and the constitutional county court, rather than in the district courts, unless otherwise provided by the legislature, and the judges of such courts may hear any of such matters sitting for the judge of any of such courts. In contested probate matters, the judge of the constitutional county court may on his own motion, and shall on the motion of any party to the proceeding, transfer the proceeding to the statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, which may then hear the proceeding as if originally filed in such court.

(d) A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as a personal representative, in all actions involving an inter vivos trust, in all

actions involving a charitable trust, and in all actions involving a testamentary trust.

(e) All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate. When a surety is called on to perform in place of an administrator, all courts exercising original probate jurisdiction may award judgment against the personal representative in favor of his surety in the same suit.

(f) All final orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals.

3. Tex. Prob. Code Ann. § 5A:

(a) In proceedings in the constitutional county courts and statutory county courts at law, the phrases “appertaining to estates” and “incident to an estate” in this Code include the probate of wills, the issuance of letters testamentary and of administration, the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land incident to an estate and for the enforcement of liens thereon incident to an estate, all actions for trial of the right of property incident to an estate, and actions to construe wills, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.

(b) In proceedings in the statutory probate courts and district courts, the phrases “appertaining to estates” and “incident to an estate” in this Code include the probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also include, but are not limited to, all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons. All statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions, and applications filed against or on behalf of any heirship proceeding or decedent’s estate, including estates administered by an independent executor. This subsection shall be construed in conjunction with and in harmony with Section 145 and all other sections of this Code dealing with independent executors, but shall not be construed so as to increase permissible judicial control over independent executors. All statutory probate courts shall have the same powers over independent executors that are exercisable by the district courts. In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.

(c) A statutory probate court has concurrent jurisdiction with the district court in all actions:

- (1) by or against a person in the person's capacity as a personal representative;
- (2) involving an inter vivos trust;
- (3) involving a charitable trust; and
- (4) involving a testamentary trust.

(d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

(e) Subsections (c) and (d) apply whether or not the matter is appertaining to or incident to an estate.

4. Tex. Prob. Code Ann. § 5B:

A judge of a statutory probate court on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court **a cause of action appertaining to or incident to an estate pending in the statutory probate court** and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate. (emphasis supplied)

B. GUARDIANSHIP PROVISIONS:

1. Tex. Prob. Code Ann. § 605:

The county court has the general jurisdiction of a probate court. The county court shall appoint guardians of minors and other incapacitated persons, grant letters of guardianship, settle accounts of guardians, and transact all business appertaining to estates subject to guardianship, including the settlement, partition, and distribution of the estates. The county court may also enter other orders as may be authorized under this chapter.

2. Tex. Prob. Code Ann. § 606:

(a) The district court has original control and jurisdiction over guardians and wards under regulations as may be prescribed by law.

(b) In those counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships,

mental health matters, and other matters covered by this chapter shall be filed and heard in the county court, except that in contested guardianship matters, the judge of the county court may on the judge's own motion, or shall on the motion of any party to the proceeding, according to the motion, request as provided by Section 25.0022, Government Code, the assignment of a statutory probate judge to hear the contested portion of the proceeding, or transfer the contested portion of the proceeding to the district court, which may hear the transferred contested matters as if originally filed in the district court. The county court continues to exercise jurisdiction over the management of the guardianship with the exception of the contested matter until final disposition of the contested matter is made by the assigned judge or the district court. In contested matters transferred to the district court as provided by this subsection, the district court, concurrently with the county court, has the general jurisdiction of a probate court. On resolution of all pending contested matters, the district court shall transfer the contested portion of the guardianship proceeding to the county court for further proceedings not inconsistent with the orders of the district court. If a contested portion of the proceeding is transferred to a district court under this subsection, the clerk of the district court may perform in relation to the transferred portion of the proceeding any function a county clerk may perform in that type of contested proceeding.

(c) In those counties in which there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships, mental illness matters, or other matters addressed by this chapter shall be filed and heard in those courts and the constitutional county court, rather than in the district courts, unless otherwise provided by the legislature, and the judge of a county court may hear any of those matters sitting for the judge of any other county court. Except as provided by Section 608 of this code, in contested guardianship matters, the judge of the constitutional county court may on the judge's own motion, and shall on the motion of a party to the proceeding, transfer the proceeding to the statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court. The court to which the proceeding is transferred may hear the proceeding as if originally filed in the court.

(d) A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as guardian.

(e) A court that exercises original probate jurisdiction has the power to hear all matters incident to an estate. When a surety is called on to perform in place of a guardian or former guardian, a court exercising original probate jurisdiction may award judgment against the guardian or former guardian in favor of the surety of the guardian or former guardian in the same suit, even if the ward has died, regained capacity, or the ward's disabilities of minority have been removed.

(f) A final order of a court that exercises original probate jurisdiction is appealable to a court of appeals.

3. Tex. Prob. Code Ann. § 607:

(a) In a proceeding in a constitutional county court or a statutory county court at law, the phrases “appertaining to estates” and “incident to an estate” in this chapter include the appointment of guardians, the issuance of letters of guardianship, a claim by or against a guardianship estate, all actions for trial of title to land incident to a guardianship estate and for the enforcement of liens incident to a guardianship estate, all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate.

(b) In a proceeding in a statutory probate court or district court, the phrases “appertaining to estates” and “incident to an estate” in this chapter include the appointment of guardians, the issuance of letters of guardianship, all claims by or against a guardianship estate, all actions for trial of title to land and for the enforcement of liens on the land, all actions for trial of the right of property, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate. A statutory probate court, in the exercise of its jurisdiction and notwithstanding any other provision of this chapter, may hear all suits, actions, and applications filed against or on behalf of any guardianship. In a situation in which the jurisdiction of a statutory probate court is concurrent with that of a district court, a cause of action appertaining to or incident to a guardianship estate shall be brought in a statutory probate court rather than in the district court.

(c) In all actions by or against a person in the person’s capacity as a guardian, a statutory probate court has concurrent jurisdiction with a district court.

(d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

(e) Subsections (c) and (d) of this section apply whether or not the matter is appertaining to or incident to a guardianship estate.

4. Tex. Prob. Code Ann. § 608:

A judge of a statutory probate court on the motion of a party to the action or of a person interested in a guardianship, may transfer to the judge’s court from a district, county, or statutory court **a cause of action appertaining to or incident to a guardianship estate** that is pending in the statutory probate court and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate. (emphasis supplied)

#### IV. APPLICATION OF THE LAWS RELATING TO PROBATE JURISDICTION

A0 PURPOSE OF JURISDICTIONAL AMENDMENTS TO THE PROBATE CODE

1 Utilize Special Expertise of Judiciary

One purpose of the amendments was to insure that contested probate cases are tried by a judge who is licensed to practice law. The legislature also felt that probate judges possessed special expertise and were more qualified than district judges to handle estate matters. *Seay v. Hall*, 677 S.W.2d 19, 21 (Tex. 1984).

2 Prevent Duplication of Trials

Another purpose was to avoid the costly and time-consuming requirements of dual trials of the same matters in the county district courts. *Id.*

3 Facilitate the Administration of Estates

Another purpose was to avoid the delay in the administration of an estate that results from having probate issues tried in the district court while the administration of the estate is in progress in the probate court. *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).

B0 JURISDICTION IN GROUP I COUNTIES

In Group I counties, all probate related applications, petitions and motions are originally filed and heard in the constitutional county court rather than the district court. [Estates - Tex. Prob. Code Ann. § 5(b); Guardianships - Tex. Prob. Code Ann. §606 (b)] In these counties probate jurisdiction is in the constitutional county court rather than the district court unless the contested portion of a proceeding is removed to the district court.

1 Removal of Contested Probate Matters to District Court

In “contested probate matters” the judge of the constitutional county court, on his own motion or on the motion of any party, must either request a statutory probate judge to hear the contested portion of the proceeding or must transfer the contested portion of the proceeding to the district court which may hear such proceeding as if it were originally filed in that court. [Estates - Tex. Prob. Code Ann. § 5(b); Guardianships - Tex. Prob. Code Ann. §606 (b)]

The reason for this removal procedure is to insure, if necessary, that all contested actions are tried by a judge who is licensed to practice law.

A district court which has not received a transfer of the proceedings under Tex. Prob. Code Ann. § 5(b) [or Tex. Prob. Code Ann. § 606 (b)] cannot acquire jurisdiction by a transfer under section 5(c) [or §606 (c)] from a court in a different county which lacks venue priority. *In re Estate of Merrick*, 630 S.W.2d 500 (Tex. App. -- Amarillo, 1982, writ ref’d n.r.e.).

The constitutional county court shall continue to exercise jurisdiction over the management of the estate with the exception of the contested matter until final disposition of

the contested matter is made. [Estates - Tex. Prob. Code Ann. § 5(b): Guardianships - Tex. Prob. Code Ann. §606 (b)]

The clerk of the district court [and presumably the clerk of the statutory probate court (although this power was specifically granted by statute)] may perform any function relating to the transferred proceeding that the county clerk could have performed. Tex. Prob. Code Ann. § 5(b); Tex. Prob. Code Ann. § 606 (b).

If a district court is sitting as a probate court in a contested case, it has the jurisdiction of both a probate court and a district Court. Tex. Const. Art. V, § 8; 17 M. Woodward & E. Smith, *Probate And Decedents' Estates* § 7 (Texas Practice 1971 & Supp. 1989).

## 2 Return of Probate Matters from District Court to Constitutional County Court

Upon resolution of the “contested probate matter” the proceeding is transferred back to the constitutional county court by the district court consistent with the action taken by the district court. [Estates - Tex. Prob. Code Ann. §5(b): Guardianships - Tex. Prob. Code Ann. §606 (b)] While the statute is silent, this procedure would also presumably apply when the matter was assigned to a statutory probate court.

## C0 JURISDICTION IN GROUP II COUNTIES

In Group II counties, all probate related applications, petitions and motions are originally filed and heard in the statutory court and in the constitutional county court rather than in the district court. In these counties original probate jurisdiction is in the constitutional county court and the statutory court rather than the district court.

### 1 Removal of Contested Probate Matters to Statutory Court

In a contested proceeding which is originally filed in the constitutional county court, the judge of such court may on his own motion, or shall on the motion of any party, transfer **the proceeding** (not just the “**contested portion of the proceeding**” as is provided with respect to Group I counties by Section 5(b) of the Probate Code) to the statutory court. [Estates - Tex. Prob. Code Ann. §5 (c) : Guardianships - Tex. Prob. Code Ann. §606 (c)]

### 2 No Return to Constitutional County Court

After the transfer, the proceeding is heard as if originally filed in the statutory court but no provision is made for a transfer back to the constitutional county court after resolution of the contested matter.

### 3 Substitution of Judges

The judge of any statutory court may hear any matter sitting for the judge of any other statutory court. [Estates - Tex. Prob. Code Ann. §5 (c) : Guardianships - Tex. Prob. Code Ann. §606 (c)]

## D0 APPEALS

1        Bill of Review

A statutory bill of review may be filed any time within two years after the probate court enters the final order. [Estates - Tex. Prob. Code Ann. §31: Guardianships - Tex. Prob. Code Ann. §657] Either party may appeal the action of the probate courts in the application for bill of review.

To succeed on bill of review, a party must allege and prove substantial error at the initial hearing. *Eury v. Solis*, 303 S.W.2d 957 (Tex. Civ. App. - Eastland 1957, no writ).

2        Appeal

All final orders of courts exercising original probate jurisdiction are appealable to the courts of appeals. [Estates - Tex. Prob. Code Ann. §5 (f): Guardianships - Tex. Prob. Code Ann. §606 (f)]; *Stutts v. Stovall*, 531 S.W.2d 690 (Tex. Civ. App. - San Antonio 1975, writ ref'd. n.r.e.); *Christian v. Howeth*, 522 S.W.2d 700 (Tex. Civ. App. - Fort Worth 1975 writ ref'd. n.r.e.); *Butts v. Ailshie*, 521 S.W.2d 155 (Tex. Civ. App. - El Paso 1975, no writ); *Boyd v. Dean*, 515 S.W.2d 753 (Tex. Civ. App. - Beaumont 1974, no writ).

A recent supreme court decision has clarified when a probate or guardianship action may be appealed. In *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995) the court held that:

Because of the potential confusion, we adopt the following test for probate appeals. If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory. For appellate purposes, it may be made final by a severance order, if it meets the severance criteria, as did the order in the present case. In setting this standard, we are mindful of our policy to avoid constructions that defeat bona fide attempts to appeal. See *Mackie v. McKenzie*, 890 S.W.2d 807 (Tex.1994); *McRoberts v. Ryals*, 863 S.W.2d 450, 454-55 (Tex.1993). A severance order avoids ambiguities regarding whether the matter is appealable. Litigants can and should seek a severance order either with the judgment disposing of one party or group or parties, or seek severance as quickly as practicable after the judgment.

E0        MATTERS “APPERTAINING TO” OR “INCIDENT TO” A PROBATE ESTATE

1        The Statutory Definition (The “Laundry List Definition”)

In proceedings in the constitutional county courts and the statutory county courts, the phrases “appertaining to estates” and “incident to an estate” include:

- a0        actions to probate wills [Tex. Prob. Code Ann. § 5A (a)];

- b0 actions involving the issuance of letters testamentary and of administration [Tex. Prob. Code Ann. § 5A (a)];
- c0 actions to determine heirship [Tex. Prob. Code Ann. § 5A (a)];
- d0 claims by or against an estate [Tex. Prob. Code Ann. § 5A (a)];
- e0 actions for trial of title to land incident to an estate [Tex. Prob. Code Ann. § 5A (a)];
- f0 actions involving the enforcement of liens against property incident to an estate [Tex. Prob. Code Ann. § 5A (a)];
- g0 actions for trial of the right of property incident to an estate [Tex. Prob. Code Ann. § 5A (a)];
- h0 actions to construe wills [Tex. Prob. Code Ann. § 5A (a)];
- i0 generally all matters relating to the settlement, partition and distribution of estates of deceased persons [Tex. Prob. Code Ann. § 5A (a)]; and
- j0 when a surety is called on to perform in place of an administrator, the award of judgment against the personal representative in favor of his surety in the same suit [Tex. Prob. Code Ann. § 5 (e)].

In proceedings in the statutory probate courts and district courts the phrases have the same meaning [Tex. Prob. Code Ann. § 5A (b)] except that they also include:

- k0 the interpretation and administration of testamentary trusts [Tex. Prob. Code Ann. § 5A (b)], and
- l0 the applying of constructive trusts [Tex. Prob. Code Ann. § 5A (b)].

## 2 The Common Law Definition (The “Controlling Issue Test”)

Section 5(e) of the Probate Code provides that “All courts exercising original probate jurisdiction shall have the power to hear all matters **incident to an estate** . . .”

If an action clearly falls within the statutory definition of “incident to an estate” contained in Tex. Prob. Code Ann. §5A (outlined above) the probate court will usually have jurisdiction. If the action does not clearly fall with in this definition, then the matter may still be “incident to an estate” if it meets the “controlling issue test.”

The common law definition of “incident to an estate” is simple to state but very difficult to interpret. A matter is “incident to an estate” if the “controlling issue” is the settlement, partition or distribution of an estate. *Seay v. Hall*, 677 S.W.2d 19 (Tex. 1984). This is the so-called “controlling issue test.”

Generally the administration of an estate involves the collection of the assets of the estate, the preservation and protection of these assets during the period of administration, the payment of all claims, expenses of administration, the payment of all taxes owed by the estate and the partition and distribution of the estate. It would follow that any legal proceeding in which the “controlling issue” involves one or more of these elements would be “incident to an estate.” In order for a matter to be “incident to an estate” the matter must generally benefit the personal representative of the estate, acting in his representative capacity, rather a distributee, acting in his individual capacity.

If a matter meets the “controlling issue test” then the probate court will have jurisdiction to hear the matter. This is true regardless of whether the court is a constitutional county court, county court at law or statutory probate court.

The “controlling issue test” has been addressed in numerous court decisions. The most significant of these are:

a. *Zamora v. Gonzalez*, 128 S.W.2d 166, 168 (Tex. Civ. App. - San Antonio 1939, writ ref’d.): This is the case that first set forth the “controlling issue test.” The court held that:

It is true, of course, that the probate court has no jurisdiction to adjudicate title; that the district court has exclusive jurisdiction to make such adjudication. But that rule may not be invoked by appellees in this case to deprive the county court of its jurisdiction to determine heirship as an incident to the settlement of the estate by a decedent. **The question of title is purely incidental to the main proceedings in the probate court, which had already assumed and was in active exercise of its proper jurisdiction of determining the controlling issue of heirship for the purpose of settling, distributing and closing the estate, and appellees will not be permitted to lug in the fictitious issue of title and thereby deprive the probate court of its jurisdiction.** (emphasis supplied).

b. *Seay v. Hall*, 677 S.W.2d 19 (Tex. 1984): This was the first opinion by the Texas Supreme Court dealing with the “controlling issue test.” In this case the court held that a statutory probate court did not have jurisdiction to try wrongful death<sup>2</sup> or survival actions.<sup>3</sup> The opinion dealt with several aspects of probate jurisdiction:

(1) The court adopted the “controlling issue test”:

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<sup>2</sup> An action for wrongful death is statutorily conferred upon the surviving husband, wife, child, and parents of a decedent. *Piper Aircraft Company v. Yowell*, 674 S.W.2d 447 (Tex. App. 2 Dist. 1984) and *Yowell v. Piper Aircraft Corporation*, 703 SW2d 630 (Tex. 1986)

<sup>3</sup> A survival action is a common law action for damages sustained by the decedent and his estate as a result of injuries inflicted by the defendant. This cause of action survives to the heirs or legal representatives by statute. *Piper Aircraft Company v. Yowell*, 674 S.W.2d 447 (Tex. App. 2 Dist. 1984) and *Yowell v. Piper Aircraft Corporation*, 703 SW2d 630 (Tex. 1986)

Realizing that there was uncertainty among the bench and bar as to what were matters incident to probate, the Speaker of the Texas House, in 1977, charged the House Judiciary Committee to return to the 66th Legislature recommendations for changes in the probate code. That committee did report and made as its third recommendation that there be “clarification of the phrases ‘appertaining to estates’ and ‘incident to an estate’ in Probate Code Sections 4 and 5(d).” Interim Report, Tex. House Judiciary Comm.: Proposed Revision of the Texas Probate Code 13, 66th Leg. (1978). The committee report observed “the question of jurisdiction ‘incident to probate’ is still an unsettled one in the Texas legal community.” In making its recommendation the committee relied almost exclusively on two law review comments, written by the same authors, B. Schwartzel & D. Wilshusen. Comment, *Texas Probate Jurisdiction--There’s a Will, Where’s the Way*, 53 Texas L. Rev. 323 (1975) and Comment, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 Texas L. REV. 372 (1976). These authors advocated that probate jurisdiction be limited to actions in which the principal issue concerns validation of the testator’s will and the assimilation, management, and distribution of his property in accordance with his will. They further stated that issues not falling within this definition of probate jurisdiction should be determined independent of probate jurisdiction. 53 Texas L. REV. at 336. This language was set out verbatim in the committee report. In their second law review comment, Schwartzel and Wilshusen stated that while the statutory list of probate court powers was increased, the general scope of probate jurisdiction had not changed. They also observed that matters incident to an estate had been held to be those in which the “controlling issue” was the settlement, partition, or distribution of an estate. 54 Texas L. REV. at 383. This observation, likewise, was incorporated in the judiciary committee interim report. Indeed, the “controlling issue” definition has long been approved by this court. See *Zamora v. Gonzalez*, 128 S.W.2d 166, 168 (Tex.Civ.App.--San Antonio 1939, writ ref’d).

Following the committee report, the legislature, in 1979, adopted H.B. 329, which struck part of the language of Texas Probate Code section 5(d) and created a new section 5A. In addition to the old section 5(d) provisions of (1) claims by or against an estate; (2) actions for trial of title to land incident to an estate; (3) enforcement of liens thereon incident to an estate; (4) all actions for trial of the right of property incident to an estate; and (5) actions to

construe wills, new section 5A added to the probate court's original jurisdiction the following: (1) probate of wills, (2) issuance of letters testamentary and of administration, (3) determination of heirship, (4) the interpretation and administration of testamentary trusts and applying of constructive trusts, and (5) generally, all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons. The bill as it passed the House contained no authorization for constitutional county courts and statutory county courts at law to probate wills, issue letters testamentary and administration, determine heirship, or have jurisdiction of all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons. The Senate, however, added in committee an amendment, which ultimately became law, bestowing upon constitutional county courts and statutory county courts at law under section 5A(a) much of the same authority given statutory probate courts in section 5A(b).

If there is any legislative intent to be gleaned from the 1979 proceedings as to what appertains to an estate, it would seemingly be that the legislature did not intend to expand probate court jurisdiction to matters other than those in which the controlling issue was the settlement, partition, or distribution of an estate. It is of significance that the language "appertaining to estates" appeared previous to 1979 in only section 4, having to do with jurisdiction of county courts to hear probate matters. Previously, section 5 language granted authority to probate courts "to hear all matters incident to an estate . . ." The Judiciary Committee recommended the "appertaining to estates" language be added to section 5. This recommendation comes directly from Schwartzel and Wilshusen, who urged the "appertaining to an estate" language so that the phrase would be construed "as limiting probate jurisdiction to the probate of the will, the issuance of letters testamentary, and the settlement, partition, and distribution of estate assets." 53 Texas L. REV. at 358.

Further, in ascertaining legislative intent, one must look to the stated purpose of the committee report: "minimizing the possibility of overboard [sic] construction of the phrases 'appertaining to an estate' and 'incident to an estate' . . ." Interim Report at 15. The "appertaining to" and "incident to" language recommended and subsequently enacted was unquestionably designed to limit probate court jurisdiction to matters in which the controlling issue

(emphasis added) was the settlement, partition, or distribution of an estate . . .

- (2) The court held that wrongful death and survival actions do not constitute a “claim” as such term was used in the Tex. Prob. Code Ann. §5A “laundry list”:

Next, we consider whether Texas Prob.Code Ann. Sec. 5A language “Claims by or Against an Estate” can be construed so as to confer probate court jurisdiction over survival and wrongful death causes. Texas Prob.Code Ann. Sec. 3(c) defines “claims” in terms of certain enumerated liabilities of a decedent and debts due the estate. Obviously, the deceased’s liabilities language would not confer jurisdiction. Therefore, we must determine if wrongful death or survival actions constitute debts due the estate. A debt is a “specified sum of money owing to one person from another, including not only [an] obligation of [a] debtor to pay but [the] right of [a] creditor to receive and enforce payment.” Black’s Law Dictionary 363 (5th ed.1979). In survival and wrongful death actions we have no specified sums of money owed, because the damages are for the most part unliquidated. Moreover, at this time no one is obligated to pay anything.

Further justification for holding that “claims” are limited to those of a liquidated nature can be found throughout the probate code. Tex. Prob.Code Ann. Sec. 322 classifies and sets priorities for claims against a decedent’s estate. Claims specified include funeral expenses, expenses of administration and other claims significantly different from the unliquidated expectancy contemplated by wrongful death and survival personal injury claims. Although section 322 only addresses claims against an estate, there is no reason to believe that the legislature intended one definition for “claims by an estate” and a different definition for “claims against an estate.” A limited definition of the word “claims” is also suggested by the language in Tex. Prob.Code Ann. Sec. 233 which addresses responsibilities for collecting claims and recovering property on behalf of the estate. Therefore, we conclude these two causes of action do not constitute a claim by an estate.

- (3) The court held that neither wrongful death nor survivor actions were actions that fell within the Tex. Prob. Code Ann. §5A laundry list description of “all matters relating to the settlement partition and distribution of the estates of wards and deceased persons”:

The third statutory term in the trinity upon which Ms. Seay relies is the section 5A(b) language “and generally all matters relating to the settlement, partition, and distribution of estates of wards and deceased persons.” As noted, however, *Zamora v. Gonzalez* restricted these types of cases to those in which the controlling issue is the settlement, partition or distribution of an estate. More

recently, when called upon to interpret similar language in a predecessor statute to section 5A, the court in *Wolford v. Wolford*, 590 S.W.2d 769, 771 (Tex.Civ.App.--Houston [14th Dist.] 1979, writ ref'd. n.r.e.), held that a probate court lacked jurisdiction to try a personal injury case. The appeals court said that while it was apparent that the legislature intended to broaden the jurisdiction of probate courts, the phrase " 'all matters incident to an estate' applies only to those matters in which the controlling issue is the settlement, partition, or distribution of an estate . . ." *Accord Bell v. Hinkle*, 562 S.W.2d 35 (Tex.Civ.App.--Houston [14th Dist.] 1978, writ ref'd. n.r.e.), cert. denied, 454 U.S. 826 (1981); *Sumaruk v. Todd*, 560 S.W.2d 141 (Tex.Civ.App.--Tyler 1977, no writ). We approve interpretations that allow a probate court to exercise jurisdiction only if the controlling issue of the case is the settlement, partition or distribution of an estate. It is hornbook law that neither in a survival cause of action nor a wrongful death cause of action are the controlling issues, even arguably the settlement, partition, or distribution of an estate.

The Senate amendment to H.B. 329 also reveals the legislative intent. By adding to the definition of "matters appertaining and incident to an estate" for constitutional county courts and statutory county courts at law the legislature conferred on those courts the same authority which Mrs. Seay says is the basis of probate court jurisdiction over her two causes of action. It cannot be argued seriously that the legislature intended to confer upon county courts at law dominant jurisdiction over wrongful death and survival causes of action. Yet, the same statutory language which serves as a basis of Mrs. Seay's argument, would support the other proposition equally well.

(4) *Coble Wall Trust Company v. Palmer*, 859 S.W.2d 475 (Tex. 1993): In 1985, after the *Seay* decision, the Texas legislature adopted amendments to Tex. Prob. Code Ann. §5A giving statutory probate courts jurisdiction of certain matters regardless of whether or not they were "incident to an estate" (see paragraph H. below). The supreme court in *Coble Wall* reaffirmed the "controlling issue test" in situations where the 1985 amendments did not apply:

When the 1985 amendment is not implicated, the "controlling issue" test has useful application in determining whether a claim is "appertaining to" or "incident to" an estate. In 1989, the legislature again amended Sec. 5A and gave probate courts jurisdiction over claims by or against personal representatives "whether or not the matter is appertaining to or incident to an estate." Tex. Prob. Code Sec. 5A(e). This amendment dispensed with the need to make this inquiry in suits involving a personal representative. **However, the need for an ascertainable meaning of "appertaining to or incident to" an estate still exists in certain circumstances. Therefore, we confirm our reasoning in *Seay* that a suit is "appertaining to or incident to" an estate when the controlling**

**issue is the settlement, partition, or distribution of an estate insofar as it does not apply to suits by or against a personal representative. (emphasis supplied)**

(5) In *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581 (Tex. 1993) the Supreme Court held that if a matter is “incident to an estate” then exclusive jurisdiction is in the probate court rather than in the district court. The court held that:

Because the present action constitutes a claim against the estate filed after administration had begun in the county court at law sitting in probate, jurisdiction lies with the county court.

**In those counties where there are statutory courts exercising probate jurisdiction, such courts share original jurisdiction over probate proceedings with the constitutional county court, to the exclusion of the district court.** Tex Prob. Code Sec. 5(c). Accordingly, administration of the Bailey estate was properly initiated in the Cherokee County Court at Law. (emphasis supplied)

The Probate Code further provides that “[a]ll courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate.” Tex. Prob. Code Sec. 5(e). With regard to proceedings in statutory county courts, “matters incident to an estate” are defined to include “all claims by or against an estate” and “all actions for trial of title to land and for the enforcement of liens thereon incident to an estate.” Tex. Prob. Code Sec. 5A(a). The instant suit constitutes a “claim against the estate” rather than a claim for which the putative heirs may be held personally liable. The suit is, moreover, an action “for the enforcement of liens” on land which is “incident to the estate.” In sum, this suit pertains to matters incident to the estate and the county court at law is vested with jurisdiction over it. See *Blair v. State*, 640 S.W.2d 867, 869 (Tex. 1982) (“The scheme for administration of estates is that claims should be submitted to the probate court for classification and then paid through orders of the probate court.”).

In order for a matter to be “incident to an estate” an estate must be under administration at the time the matter is instituted. The *Bailey* court held that, “A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court. *Interfirst Bank-Houston v. Quintana Petroleum*, 699 S.W.2d 864, 873 (Tex. App.--Houston [1st Dist.] 1985, writ ref’d. n.r.e.).”

F. MATTERS “APPERTAINING TO” OR “INCIDENT TO” A GUARDIANSHIP

1. The Statutory Definition (The “Laundry List Definition”)

In proceedings in the constitutional county courts and the statutory county courts, the phrases “appertaining to estates” and “incident to an estate” include:

- (1) the appointment of guardians [Tex. Prob. Code Ann. § 607 (a)];
- (2) the issuance of letters of guardianship [Tex. Prob. Code Ann. § 607 (a)];
- (3) a claim by or against the guardianship estate [Tex. Prob. Code Ann. § 607 (a)];
- (4) actions for trial of title to land incident to a guardianship estate [Tex. Prob. Code Ann. § 607 (a)];
- (5) actions involving the enforcement of liens incident to a guardianship estate [Tex. Prob. Code Ann. § 607 (a)];
- (6) actions for trial of the right of property incident to a guardianship estate [Tex. Prob. Code Ann. § 607 (a)];
- (7) generally all matters relating to the settlement, partition and distribution of a guardianship estate [Tex. Prob. Code Ann. § 607 (a)]; and
- (8) when a surety is called on to perform in place of a guardian or former guardian, the award of judgment against the guardian or former guardian in favor of the surety of the guardian or former guardian in the same suit, even if the ward has died, regained capacity, or the ward’s disabilities of minority have been removed [Tex. Prob. Code Ann. § 606 (e)]

In proceedings in the statutory probate courts and district courts the phrases have the same meaning [Tex. Prob. Code Ann. § 607 (b)] except that laundry list item (6) above is different. In proceedings in such courts this laundry list item relates to:

- (9) all actions for the trial of the right of property (the phrase “incident to a guardianship estate” is omitted) [Tex. Prob. Code Ann. § 607 (b)].

2. The Common Law Definition (The “Controlling Issue Test”)

Most courts have not made a distinction between decedent’s estates and ward’s estates when applying the “controlling issue test.” This application may overlook a fundamental difference between the administration of decedent’s estates and the administration of guardianship estates.

The administration of a decedent’s estate involves a relatively short term process of winding down the decedent’s affairs and distributing his assets to his distributees. The “settlement, partition and distribution” of a ward’s estate is a much different process and arguably involves a much broader spectrum of activity. As a practical matter, the

administrations of most decedent's estates in Texas are independent of court control. This is not true with respect to the administration of ward's estates.

The settlement of any cause of action brought by or against a ward must be submitted to the probate court for approval. Any judgment obtained against a ward is probably a claim that must be processed by the probate court as part of the claims procedures set forth in the Probate Code. While many of these considerations are equally applicable to estates (especially dependent administrations), a good argument can be made that, in the administration of ward's estates, judicial economy is best served by allowing broader interpretation of the "controlling issue test" than in the administration of decedent's estates.

It remains to be seen if, now that the guardianship provisions of the Probate Code have been codified into a separate chapter, Texas appellate courts will apply a different "controlling issue test" to the administration of guardianship estates. At the present time, however, there is no Texas case recognizing this distinction.

#### G. DOMINANT JURISDICTION AND JUDICIAL SELF RESTRAINT

In construing §5A(b), appellate courts have applied the doctrines of Dominant Jurisdiction and judicial Self Restraint. Both of these doctrines deal with the situation where the jurisdiction of a probate court and the jurisdiction of a district court are concurrent.

As indicated by the cases cited below, appellate courts often interchange the concepts of "dominant jurisdiction" and "judicial self restraint." Regardless of what they are called, this author recognizes two different doctrines:

1. The doctrine that provides that, if a matter is not "incident to an estate" and a probate court has concurrent jurisdiction with a district court, then the proceeding should be tried in the court in which the suit is first filed; and
2. The doctrine that provides that, if a matter is "incident to an estate" and the probate court has concurrent jurisdiction (with respect to an estate that is under administration at the time that the suit is filed) with a district court, then the proceeding should be tried in the probate court.

While a determination of whether a district court and a probate court may be complex, there are situations where the jurisdiction of the probate court and the district court is concurrent. This usually arises in connection with the jurisdiction of statutory probate courts.

Tex. Prob. Code Ann. § 5(d) provides that:

A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as a personal representative, in all actions involving an inter vivos trust, in all actions involving a charitable trust, and in all actions involving a testamentary trust.

Tex. Prob. Code Ann. § 606 (d) provides, in part, that:

A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as guardian.

The Houston Court of Appeals, in *First State Bank of Bedias v. Bishop*, 685 S.W.2d 732 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd. n.r.e.), set forth the common law rule of dominant jurisdiction:

**The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts .**

. . . Any subsequent suit involving the same parties and the same controversy must be dismissed if a party to that suit calls the second court's attention to the pendency of the prior suit by a plea in abatement. If the second court refuses to sustain a proper plea in abatement, or attempts to interfere with the prior action, this court has the power to act by mandamus or other appropriate writ to settle the conflict of jurisdictions. (cites omitted: emphasis supplied). [*Bedias*, at 736, quoting *Curtis v. Gibbs*, 511 S.W.2d 263 (Tex. 1974)].

The *Bedias* court then went on to state:

Logic requires our holding that section 5A(b) only gives statutory probate courts **dominant** jurisdiction over claims 'appertaining to or incident to an estate,' rather than **exclusive** jurisdiction, once probate proceedings have been filed in the probate court. The latter interpretation would repeal, by implication, that part of section 313 allowing suits on rejected claims to be filed in the court of original probate jurisdiction or in any other court of proper jurisdiction. Id.

In arriving at its holding, the *Bedias* court expressed the practical concerns involved in divesting district courts of jurisdiction over matters incident to or appertaining to an estate. According to the Houston Court of Appeals, neither the courts nor the lawyers have agreed on what in fact constitutes matters incident to or appertaining to an estate. This confusion led to the necessity for filing suit in both courts pending a determination of whether the cause of action fit the "incident to" and "appertaining to" definitions. The second concern involved the situation where the parties, "acting in good faith but uncertain of the appropriate forum, could agree to try a suit in the district court, and the loser could cry 'no jurisdiction' and seek to have the appellate courts determine whether the claim was 'incident to or appertaining to an estate.'" Id.

In *English v. Gregory*, 714 S.W.2d 443 (Tex. App. - Houston [14th Dist.] 1986, no writ), a husband and wife sought a divorce in a district court of Harris County. Subsequent to that, a guardianship proceeding was initiated in Probate Court No. 2 of Harris County and the husband was then adjudicated non compos mentis and his son was appointed guardian of the husband's person and estate. The son then sought to transfer and consolidate all matters instant to and pertaining to the estate of his father from the district court to Probate Court No. 2. The judge of the probate court granted the motion but the judge of the district court refused to comply with that transfer order. Id. at 445.

The court in *English* classified this as a question of "dominant jurisdiction" because the district court had jurisdiction to determine the character of the marital property and to divide the estate of the parties. *Id.* Again, because the Probate Court had the authority to enter an order naming the son as guardian over his father's person and estate, the court found that both courts were properly

exercising jurisdiction over the same estate. Citing *Williams v. Scanlan*, the court held that the probate judge erred in granting the Motion to Transfer because the district court had first acquired jurisdiction over the estate and because the district court had the power to grant all requested relief where the probate court did not. *Id.* at 446.

In the case of *Gaynier v. Ginsberg*, 763 S.W.2d 461 (Tex. App. - Dallas 1988, no writ) suit was brought by the independent executrix of a husband's estate for the cancellation of two deeds. It was initially filed in the district court. The defendant filed a plea to the jurisdiction alleging that the district court did not have jurisdiction. The court noted that section 5A(b) provides that "in situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in a district court." However, the court held that this provision does not completely divest the district court of jurisdiction over a matter if the probate court cannot grant adequate relief. *Id.* at 463. The court stated that the district court should weigh several factors, including the convenience of the parties and the subject matter of the suit, when deciding whether to exercise its concurrent jurisdiction. The court held that "where it appeared from the pleadings that the suit involved issues for which the jurisdiction of the probate court was inadequate to grant the relief sought, the district court should have continued to exercise its jurisdiction." *Id.* The court also found that the probate court could not grant all of the relief sought, such as the removal of a person as trustee and the imposition of a constructive trust.

Finally, the Supreme Court in *Bailey v. Cherokee County Appraisal Dist.*, *supra* has held that:

Furthermore, **the court in which suit is first filed acquires dominant jurisdiction to the exclusion of coordinate courts.** *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex.1974). Because the administration was already pending in the county court when this suit was filed in the district court, the jurisdiction of the county court is dominant. See *Thomas v. Tollon*, 609 S.W.2d 859, 860 (Tex. App.--Houston [14th Dist.] 1981, writ ref'd. n.r.e.) (where county court originally exercised jurisdiction over the estate of decedent it was the proper court to determine matters incident to the estate) [emphasis supplied].

Tex. Prob. Code Ann. §5 (c) provides, in part, that:

In those counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, **all applications, petitions and motions regarding probate and administrations shall be filed and heard in such courts and the constitutional county court, rather than in the district courts**, unless otherwise provided by the legislature, and the judges of such courts may hear any of such matters sitting for the judge of any of such courts . . . (emphasis supplied).

Tex. Prob. Code Ann. §5A (b) provides, in part, that:

. . . . In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, **any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court.** (emphasis supplied).

Tex. Prob. Code Ann. §606 (c) provides, in part, that:

In those counties in which there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, **all applications, petitions and motions regarding guardianships, mental illness matters, or other matters addressed by this chapter shall be filed and heard in those courts and the constitutional county court, rather than in the district courts**, unless otherwise provided by the legislature, and the judge of a county court may hear any of those matters sitting for the judge of any other county court . . . (emphasis supplied)

Tex. Prob. Code Ann. §607 (b) provides, in part, that:

. . . In a situation in which the jurisdiction of a statutory probate court is concurrent with that of a district court, **a cause of action appertaining to or incident to a guardianship estate shall be brought in a statutory probate court rather than in the district court.** (emphasis supplied).

The Texas Supreme Court has held that if the action is “incident to an estate” under administration, the action must be filed in the probate court. *Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979); *Seay v. Hall*, 677 S.W.2d 19, 23 (Tex. 1984).

The reason that the action must be filed in the probate court is not because the district court does not have jurisdiction to hear the action but because of the policy of judicial self restraint (sometimes also called the principle of judicial noninterference) which provides that once the jurisdiction of the probate court has attached and that jurisdiction is adequate to grant the requested relief, the district court should refrain from exercising its concurrent jurisdiction. Comment, Schwartzel and Wilshusen, *Pullen v. Swanson*, 667 S.W.2d 359, 364 (Tex. App. -Houston [14th Dist.] 1984, writ ref’d n.r.e.); Comment, Stanley, *Section 5 of the Texas Probate Code: An Indirect Reduction of District Court Jurisdiction*, 30 Baylor L. Rev. 129 (1978); *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 Tex. L. Rev. 372 (1976); 17 *M. Woodward & E. Smith, Texas Practice, Probate and Decedents’ Estates* § 10 (1971 and Supp. 1989); See also, *Eisenhauer v. Williams*, 537 S.W.2d 336, 337 (Tex. Civ. App. - San Antonio 1976, no writ) holding that a district court properly abated an action when a statutory probate court had pending another action involving the same parties and issues).

Judicial restraint was addressed again in a more recent case, *Williams v. Scanlan*, 714 S.W.2d 38 (Tex. App. - Houston [14th Dist.] 1986, no writ). In this case, the husband petitioned for a divorce from his wife in the district court. The district court entered an order requiring the husband to pay \$7,250.00 per month for three consecutive months to his wife and to file a sworn inventory and sworn appraisal of all separate and community property owned by the parties. The husband was further enjoined from actions which would affect the property.

A question was then raised as to the husband’s competence, and an action was brought in Probate Court No. 3 in Harris County to appoint a guardian of both the husband and his estate. The Probate Court appointed separate guardians for the husband and for his estate. The wife challenged the authority of the probate court to do so, arguing that the action was beyond the court’s jurisdiction.

The Court of Appeals held that both the probate court and the district court had jurisdiction to enter their respective orders. *Id.* at 39. The probate court had jurisdiction pursuant to Probate Code sections 5 and 5A to appoint a guardian of the estate and the district court had the jurisdiction pursuant to Article 5, section 8 of the Constitution, Government Code section 24.007, 24.008 and 24.601 and Family Code sections 3.58 and 3.59 to order temporary support and to preserve the property of the parties. *Id.* Thus, the court surmised the probate court and the district court were exercising jurisdiction over the same estate. *Id.*

The Court of Appeals concluded that the Probate Court should have dismissed or abated the application for a guardianship of the estate because the district court first gained jurisdiction of the estate and the probate court did not have adequate jurisdiction to grant all requested relief. *Id.* at 40. The court stated:

. . . when, as in this case, the statutory scheme confers concurrent jurisdiction on more than one court, deference to the court first acquiring jurisdiction is a judicial imperative. Without judicial restraint, the system veers towards chaos or stalemate. *Id.*

Even though *Pullen* relied on Probate Code Section 5A(b) (which relates only to statutory probate courts) as the statutory embodiment of the doctrine of judicial self restraint, it is apparent that this doctrine will also be applied to courts other than statutory probate courts. *See Eisenhauer v. Williams*, 537 S.W.2d 336 (Tex. Civ. App. - San Antonio 1976, no writ). It remains to be seen whether this doctrine, when applied to courts other than statutory probate courts, will be based on the common law or on Probate Code sections 5(b) & (c).

The *Pullen* case found Tex. Prob. Code Ann. §5A (b) to be the “statutory expression of a policy of judicial self-restraint.” 667 S.W.2d at 364. This section does not deprive the district court of jurisdiction — it does direct that actions must be brought in the statutory probate court rather than the district court.

H. STATUTORY PROBATE COURT JURISDICTION OTHER THAN IN MATTERS INCIDENT TO AN ESTATE OR TO A GUARDIANSHIP

Statutory probate courts have jurisdiction over certain matters regardless of whether the matter is “appertaining to” or “incident to” an estate or guardianship.

1. Special Jurisdictional Provisions Relating To Estates:

Sections 5A (c), (d) and (e) of the Probate Code provide:

(c) A statutory probate court has concurrent jurisdiction with the district court in all actions:

- (1) by or against a person in the person’s capacity as a personal representative;

(2) involving an inter vivos trust<sup>4</sup>;

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<sup>4</sup> Statutory Probate Courts have jurisdiction over trusts pursuant to Texas Trust Code §115.001(d) which provides that “The jurisdiction of the district court over proceedings concerning trusts is exclusive **except for jurisdiction conferred by law on a statutory probate court.**” (emphasis supplied)

(3) involving a charitable trust<sup>4</sup>; and

(4) involving a testamentary trust<sup>4</sup>.

(d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

(e) Subsections (c) and (d) apply whether or not the matter is appertaining to or incident to an estate.

These special jurisdictional provisions were examined by the Texas Supreme Court in the case of *Coble Wall Trust Company, supra*:

The court of appeals held that the probate court lacked subject matter jurisdiction over the suit, because it was not a suit “appertaining to” or “incident to” the estate. 848 S.W.2d at 701-02. In making this determination, the court relied heavily on our decision in *Seay v. Hall*, 677 S.W.2d 19 (Tex.1984), in which this Court held that probate courts did not have jurisdiction over wrongful death and survival claims. In *Sea*, we stated that the “appertaining to an estate and incident to an estate” language was designed to limit probate court jurisdiction to matters in which the controlling issue was the settlement, partition, or distribution of an estate. Thus, the court of appeals reasoned that the outcome of Palmer’s claims failed to meet this test and was “not necessary to the resolution of the estate.” 848 S.W.2d at 703. In 1985, the legislature responded to *Seay* by amending the Texas Probate Code to broaden statutory probate court jurisdiction. The 1985 amendment added the last sentence to Sec. 5A which provided that “[i]n actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district court.”

Tex. Prob. Code Sec. 5A(b) (1985). We agree with the court of appeals’ assessment in *Pearson v. K-Mart*, 755 S.W.2d 217, 219 (Tex. App.--Houston [1st Dist.] 1988 no writ) that “it is readily apparent that the purpose of [House Bill 479] was to overrule *Seay v. Hall*.” Nevertheless, many courts of appeals have continued to apply the “controlling issue” test set out in *Seay* in their determination of whether a claim is “appertaining to” or “incident to” an estate. See, e.g., *Bruflat v. Rodeheaver*, 830 S.W.2d 821, 823 (Tex. App.--Houston [1st Dist.] 1992, no writ); *Carlisle v. Bennett*, 801 S.W.2d 589, 591 (Tex. App.--Corpus Christi 1990, no writ); *Crawford v. Williams*, 797 S.W.2d 184, 185 (Tex. App.--Corpus Christi 1990, no writ); *Qwest Microwave, Inc. v. Bedard*, 756 S.W.2d 426, 436 (Tex. App.--Dallas 1988, no writ). However, continued application of this test in the context of the 1985 amendment is inconsistent with that amendment’s purpose. The controlling issue in wrongful death and survival actions is not the settlement, partition, and distribution of the estate. A wrongful death recovery is a means of providing the statutory beneficiaries

a remedy for the loss of their loved one because of another's wrongful conduct; the estate does not benefit from this recovery. While a survival recovery may impact the assets of the estate to be distributed, this is obviously not the controlling issue. Therefore, to apply the "controlling issue" test in the context of the 1985 amendment would be to deny probate courts jurisdiction over wrongful death and survival actions, in direct contravention of the purpose of the amendment. The court of appeals, in denying the probate court jurisdiction over Palmer's claims, relied on *Qwest Microwave, Inc. v. Bedard*, supra. We agree with the holding in *Qwest* that the 1985 amendment to Sec. 5A(b) "conferred jurisdiction upon the probate courts to hear claims that might not be fully liquidated but that nonetheless are brought by a personal representative in his capacity of personal representative administering an estate." 756 S.W.2d at 436-37. However, as previously discussed, we disagree with *Qwest* insofar as it states that by amending the statute in 1985, "the legislature did not intend to expand probate jurisdiction to matters other than those in which the controlling issue was the settlement, partition, or distribution of an estate."

When the 1985 amendment is not implicated, the "controlling issue" test has useful application in determining whether a claim is "appertaining to" or "incident to" an estate. In 1989, the legislature again amended Sec. 5A and gave probate courts jurisdiction over claims by or against personal representatives "whether or not the matter is appertaining to or incident to an estate." Tex. Prob. Code Sec. 5A(e). This amendment dispensed with the need to make this inquiry in suits involving a personal representative . . .

While it is true that the 1985 amendment was enacted in order to give probate courts jurisdiction over wrongful death and survival actions, the wording of this amendment and the legislative history behind its enactment contemplates a broader application. In fact, as noted in the House Research Organization report on the amendment, the original HB 479 stated specifically that statutory probate courts would have jurisdiction over survival and wrongful death actions, but it was changed to the more expansive wording of "in actions by or against a personal representative." It is evident that this suit falls within the plain meaning of the 1985 amendment.

The Texas Probate Code Sec. 3(aa) defines "personal representative" as including "executor, independent executor, administrator, independent administrator, temporary administrator, guardian, and temporary guardian, together with their successors." Tex. Prob. Code Sec. 3(aa) (1980). As independent administrator of the estate, Palmer was Moore's personal representative. Further, as temporary administrator, Coble Wall acted as Moore's personal representative. Therefore, this suit filed by Palmer, the current independent administrator, against Coble Wall, the prior temporary administrator, was a suit filed by a personal representative against a personal representative. As such, under the 1985 Probate Code, the probate court had concurrent jurisdiction with the district court.

2. Special Jurisdictional Provisions Relating To Guardianships:

Tex. Prob. Code Ann. § 607 (c), (d) and (e) provide:

(c) In all actions by or against a person in the person's capacity as a guardian, a statutory probate court has concurrent jurisdiction with a district court.

(d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

(e) Subsections (c) and (d) of this section apply whether or not the matter is appertaining to or incident to a guardianship estate.

I. STATUTORY PROBATE COURT'S JURISDICTION TO TRANSFER PROCEEDINGS FROM OTHER COURTS - "REACH OUT AND TOUCH SOMEONE"

1. General Transfer Provisions:

(1) Estate Provisions:

Tex. Prob. Code Ann. § 5B provides:

A judge of a statutory probate court on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court **a cause of action appertaining to or incident to an estate** pending in the statutory probate court and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.(emphasis supplied)

(2) Guardianship Provisions:

Tex. Prob. Code Ann. § 608 provides:

A judge of a statutory probate court on the motion of a party to the action or of a person interested in a guardianship, may transfer to the judge's court from a district, county, or statutory court **a cause of action appertaining to or incident to a guardianship estate** that is pending in the statutory probate court and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate. (emphasis supplied)

2. Judicial Interpretation of the General Transfer Provisions:

The general transfer provisions apply only to Statutory Probate Courts. They only allow a Statutory Probate Judge to transfer a matter that is “appertaining to” or “incident to” an estate.

In the Author’s view, the doctrines of Dominant Jurisdiction and Judicial Self Restraint do not apply to transfers made pursuant to Tex. Prob. Code Ann. §5B and 608. Notwithstanding the dicta set forth below in the *Baby Dolls* case, these provisions should not be considered to be venue statutes. The purpose of these statutes is to facilitate judicial economy by allowing the judge of a statutory probate court to consolidate in one court all matters which are incident to the estate that he or she is administering.

There are few cases interpreting the general transfer provisions of the Probate Code. The rulings have not been consistent. The principal issue in these cases is whether the general transfer provisions are venue statutes.

a. *Henry v. Lagrone*, 842 S.W.2d 324 (Tex. App. - Amarillo, 1993, rehearing denied): The *Lagrone* case contained two important holdings.

The first holding set forth the criteria of application of the transfer provisions contained in Tex. Prob. Code Ann. § 5A (and now in Tex. Prob. Code Ann. §608). The court held that:

Section 5B authorizes the judge of a statutory probate court to transfer a cause of action to his court when the following four conditions exist:

1. The court exercising the power to transfer a cause of action under section 5B is a statutory probate court.
2. There is an estate pending in the statutory probate court.
3. There is a cause of action pending in a district, county or statutory court; and
4. That cause of action is appertaining to or incident to the estate pending in the statutory probate court.

The second holding was that these transfer provisions were not venue statutes. The court held that:

We are not persuaded by respondents’ argument. Section 5B of the probate code is not a venue statute. If the four conditions authorizing the judge of a statutory probate court

to transfer a cause of action to his court are met, then the judge has authority to transfer the case notwithstanding mandatory venue provisions and the like. The purpose of Section 5B is to allow a statutory probate court to consolidate all causes of action which are incident to an estate so that the estate can be efficiently administered. Judicial economy is thereby served. See Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, Texas Civil Procedure, 38 Sw. L.J. 421, 422 (1984). The aims of section 5B would be thwarted if that section did not authorize the statutory probate court to transfer to itself causes of action that were originally filed in proper venues.

b. *Lanier v. Stem*, \_\_\_ S.W.2d \_\_\_ (Tex. App.-Waco, 1996): The *Lanier* court, after quoting *Lagrone*, agreed that Tex. Prob. Code Ann. § 608 was not a venue statute. The court held that:

When applied literally, the statute allows the probate court of assume authority over cases pending in other courts, **notwithstanding the venue statutes.** (emphasis supplied)

c. *D.S. Entertainment, Inc., dba Baby Dolls Topless Saloon, Inc. v. Windle*, \_\_\_ S.W.2d \_\_\_ (Tex. App.-Fort Worth, 1996): The court in *Baby Dolls* made several holdings:

Citing *Seay v. Hall*, *supra*, the court first held that, because the cause of action involved was a wrongful death action, it was not “incident to an estate” and Tex. Prob. Code Ann. §608 did not apply:

Under section 608, a statutory probate court can transfer as case pending in another court to the statutory probate court *if the cause of action is appertaining to or incident to a guardianship estate* pending in the statutory probate court. For the following reasons, we hold that, despite a statutory probate court having concurrent jurisdiction with district courts over wrongful death and survival claims, a statutory probate court cannot *transfer* to itself a wrongful death cause of action pending in a district court to the statutory probate court under section 608:

- A wrongful death claim is not a cause of action appertaining to or incident to a guardianship estate pending in the statutory probate court.

- Section 608 lacks language giving a statutory probate court authority to transfer actions by or against a person in the person’s capacity as guardian.
- Section 608 lacks language giving a statutory probate court authority to transfer actions whether or not the matter is appertaining to or incident to a guardianship estate.

Accordingly, in transferring the underlying wrongful death suit . . . the Denton County statutory probate court lacked statutory authority, much less discretion, to do so. Section 608, commonly referred to as the “reach out and touch someone” section, is an inappropriate vehicle to “reach out to touch” the wrongful death case . . .

The most disturbing aspect of the *Baby Dolls* case is the dicta that follows the above quoted holding. The court, after citing both *Lagrone* and *Lanier* (which held that Tex. Prob. Code Ann. § 5A and § 608 were **not** venue statutes), concludes that a statutory probate court’s ability to make such transfers has been “changed” by the mandatory venue provisions contained in Texas Civil Practice & Remedy Code. More particularly, the court attributes this change to Tex. Civ. Prac. & Rem. Code § 15.007<sup>5</sup> (a provision that the court admitted was not in effect at the time of the filing of this case and “does not apply to this case”).

The court in *Baby Dolls* was obviously concerned about what it considered to be “the plaintiffs’ attempt — in a blatant act of forum shopping” to get this case back to Denton County despite venue not lying there.” The court’s interpretation of the particular facts of this case was obviously the catalyst for this dicta.

### 3. Special Transfer Provisions:

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<sup>5</sup> Tex. Civ. Prac. & Rem. Code § 15.007 provides that:

[T]o the extent that venue under this chapter for a suit by or against an executor, administrator, or guardian as such, for personal injury, death, or property damage conflicts with venue provisions under the Texas Probate Code, this chapter controls.

This provision obviously relates to the **original filing** of actions and is an attempt to override the provisions of Tex. Prob. Code Ann. §5A(c) and § 607 (c) which overruled the *Seay* opinion by granting statutory probate courts jurisdiction to hear actions “by or against” a personal representative of an decedent’s estate or a guardian.

In 1989, an attempt was made to amend section 5B of the Probate Code to allow a statutory probate court judge to remove a proceeding in which a personal representative was a party from another court into his court, regardless of whether or not the matter in controversy was “appertaining to” or “incident to” an estate. This attempt failed.

As a result of this failure to amend the general probate statutes, several statutory probate judges have obtained passage of special transfer provisions in the statutes creating their courts. While a comprehensive review of the statutes creating all probate courts in Texas is outside the scope of this paper, the following examples illustrate how this was done.

a. Harris County:

[a statutory probate judge] on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court a cause of action appertaining to or incident to an estate pending in the statutory probate court **or a cause of action in which a personal representative of an estate pending in a statutory probate court is a party** and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate. (emphasis supplied) [Tex. Govt. Code Ann. § 25.1034(a) (Vernon Supp. 1996)].

b. Travis County:

[the statutory probate court judge] on the motion of a party to the action or on the motion of a person interested in an estate may, **with the consent of the judge in whose court the case is pending**, transfer to the judge’s court from a district, county, or other statutory court a cause of action in which a personal representative, acting in the capacity of a personal representative of an estate pending in a statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate. (emphasis supplied) [Tex. Govt. Code Ann. § 25.2293(d) (Vernon Supp. 1996)]

J. ACTIONS WHERE THE AMOUNT IN CONTROVERSY EXCEEDS THE JURISDICTIONAL LIMIT OF THE COURT

The Texas Supreme Court held in *English v. Cobb*, 593 S.W.2d 674 (Tex. 1979), that the jurisdictional limits on the amount in controversy do not apply to a county court exercising proper probate jurisdiction. *English*, at 675.

K. AUTHOR'S OPINION REGARDING WHETHER TO FILE A CAUSE OF ACTION IN THE DISTRICT COURT OR THE PROBATE COURT

Rule 1: Subject to the removal provisions contained in Sections 5(b) and 606 (b) of the Probate Code with respect to Group I Counties, a probate court will have jurisdiction over a cause of action if the controlling issue is the settlement, partition or distribution of an estate under administration in such court. This should be true regardless of whether the court is a statutory probate court, statutory county court or constitutional county court. This is also true regardless of whether the cause of action is defined as being “appertaining to an estate” or “incident to an estate” by Tex. Prob. Code Ann. § 5A or § 607.

Rule 2: If the probate court is exercising its jurisdiction at the time an action is filed, an action “incident to an estate” must be brought in the probate court rather than the district court because of the doctrines of judicial noninterference and dominant jurisdiction. If the administration of an estate has either not been commenced or has been closed, the district court, or in some instances a statutory probate court, rather than the probate court, will have jurisdiction. The doctrine of judicial noninterference and dominant jurisdiction should apply regardless of whether the probate court involved is a constitutional county court, a statutory probate court, or a statutory county court. Moreover, application of the doctrine should not be discretionary with the district court.

Rule 3: If the action is clearly within the laundry list definition of “incident to an estate” contained in Tex. Prob. Code Ann. § 5A or § 607 the courts will be more inclined to hold the controlling issue is the settlement, partition and distribution of an estate than if the action is not on the laundry list and not within the original probate jurisdiction of the court.

Rule 4: If the action is on by or against a person in the person's capacity as a personal representative, involves an inter vivos trust, involves a charitable trust, involves a testamentary trust, the statutory probate court will have concurrent jurisdiction with the district court.

Rule 5: When in doubt, file in both the probate court and the district court and let your opponent worry about jurisdiction.