

# **AVOIDING THE DEATH OR AT LEAST INCAPACITY OF YOUR LAWSUIT IN PROBATE COURT**

**DEALING WITH PROBATE:  
RECOGNIZING AND AVOIDING THE TRAPS<sup>1</sup>**

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**DEALING WITH PROBATE:  
RECOGNIZING AND AVOIDING  
THE TRAPS**

**I. SCOPE OF ARTICLE**

This article addresses some of the more common probate and guardianship related issues and traps encountered by attorneys handling tort claims. Tort claims often involve issues related to the incapacity, death, status, or standing of the parties to the litigation. Attorneys prosecuting or defending these claims should be aware of the numerous probate and guardianship issues which can arise during litigation and settlement. The ability to recognize and address these issues is essential to both plaintiff and defense counsel in order to achieve a binding resolution of such claims. Furthermore, tort claims are now regularly tried in statutory probate courts. Attorneys representing plaintiffs and defendants should be aware of the jurisdiction conferred on various probate courts and related venue issues.

By recognizing these issues and traps, an attorney can avoid sudden death (or, at a minimum, temporary or permanent incapacitation) both in and out of Texas Probate Courts.

**II. TRAP NO. 1: DEALING WITH THE  
JURISDICTION AND VENUE OF A  
STATUTORY PROBATE COURT**

**A. Statutory Probate Courts**

A *statutory probate court* has *concurrent* jurisdiction with the district and county court in several situations. Effective September 1, 1997, the current definition of a statutory probate court provides that a statutory probate court is:

[A] statutory court designated as a statutory probate court under Chapter 25, Government Code. A county court at law exercising probate jurisdiction is not a statutory probate court under this Code unless the court is designated a statutory probate court under Chapter 25, Government Code.

TEX. PROB. CODE ANN. §§ 3(ii), 601(29) (Vernon Supp. 2000).

Currently, the probate courts in Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant and Travis Counties are “statutory” probate courts. Brazoria County had “statutory” probate court status but lost this designation after September 1, 1999, due to a 1999 legislative amendment.

**B. Jurisdiction**

The expanded jurisdiction of statutory probate courts is set forth in the Texas Probate Code. Generally, the applicable sections of the Probate Code<sup>2</sup> depend upon whether the lawsuit involves a decedent’s estate or a guardianship estate.<sup>3</sup> While the sections are similar, there are differences. Sections 5, 5A and 5B of the Texas Probate Code are generally applicable to jurisdiction in a decedent’s estate. *See* TEX. PROB. CODE ANN. §§ 5, 5A, 5B (Vernon Supp. 2000). Sections 605, 606, 607 and 608 deal specifically with guardianship estates. *See Id.* §§ 605, 606, 607, 608.

1. Decedent’s Estate

a. Generally

District and probate courts have concurrent jurisdiction in all actions (i) by or against a person in a person’s capacity as a personal representative, or (ii) which involve an inter vivos, charitable or testamentary trust. *See* TEX. PROB. CODE ANN. § 5(d) (Vernon Supp. 2000). If, however, the court presiding over the decedent’s estate is a “statutory” probate court, all motions regarding probate and administrations should be filed and heard in this court. Specifically, Section 5A of the Texas Probate Code provides that “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.” *Id.* § 5A(b) (emphasis added). Matters *appertaining* or

<sup>2</sup> References to Probate Code or Section refer to the Texas Probate Code unless otherwise noted.

<sup>3</sup> *See* Tex. H.B. 1152, 75th Leg., R.S. (1997).

incident to an estate are defined by Section 5A, in part, to include:

- (1) 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.
- (2) 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; all such suits,

actions, and applications are appertaining to and incident to an estate. 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.

*Id.* (emphasis on amendment effective September 1, 1997).<sup>4</sup> For a general discussion of jurisdiction over matters incident to an estate, see Green v. Watson, 860 SW2d 238 (Tex.App.--Austin 1993, no writ).

b. Jurisdiction to Hear Wrongful Death and Survivorship Actions

For a number of years, the question whether a statutory probate court has jurisdiction to hear wrongful death and survivor’s actions has been an issue of controversy. The controversy began with the Texas Supreme Court decision of Seay v. Hall, 677 SW2d 19 (Tex. 1984). Reasoning that wrongful death and survivorship actions were not matters appertaining or incident to a decedent’s estate, the Texas Supreme Court held these were to be under the exclusive jurisdiction of the district courts. *See Id.* at 23-25. (emphasis added)

Consequently, in 1985, a legislative amendment was passed which was intended to legislatively overrule the Seay decision. Despite the continued attempts of the Texas Legislature to clarify the statute and the law, Texas appellate courts continued to recognize the validity of the Seay decision by applying its

<sup>4</sup> *See* Tex. S.B. 506, 75th Leg., R.S. (1997).

“controlling issue” test when determining whether a claim is appertaining or incident to an estate. See Palmer v. Coble Wall Trust Co., 851 SW2d 178, 181 (Tex. 1992); Quest Microwave, Inc. v. Bedard, 756 SW2d 426, 436 (Tex.App.--Dallas 1988, no writ).

For example, in Quest Microwave, Inc. v. Bedard, the Dallas Court of Appeals held that the probate court’s jurisdiction was limited to the settlement, partition, and distribution of an estate and that the Seay opinion was still good law. See 756 SW2d at 436. After the Quest decision, the Legislature was once again prompted to amend Section 5A. The 1989 amendment was intended to remove any doubt that statutory probate courts have concurrent jurisdiction with district courts as to virtually all matters relating to the probate estate by authorizing statutory probate courts to hear any matter brought by or against a personal representative. See TEX. PROB. CODE ANN. § 5A (c)(1) (Vernon Supp. 2000); TEX. GOV’T CODE ANN. § 25.1034(a) (Vernon Supp. 2000). Both Dallas and Travis County have similar provisions. See *Id.* §§ 25.0595, 25.2293 (Vernon Supp. 2000).

However, the scope of a probate court’s jurisdiction remained an issue even after the 1989 amendment. See, e.g., Bruflat v. Rodeheaver, 830 SW2d 821, 823 (Tex.App.--Houston [1st Dist.] 1992, no writ); Carlisle v. Bennett, 801 SW2d 589, 591 (Tex.App.--Corpus Christi 1990, no writ); Crawford v. Williams, 797 SW2d 184, 185 (Tex.App.--Corpus Christi 1990, writ denied).

Finally, the 1992 Texas Supreme Court decision of Palmer v. Coble Wall Trust Co. answered this jurisdictional question once and for all. See 851 SW2d 178 (Tex. 1992). In Coble Wall, the Texas Supreme Court held that a statutory probate court had subject matter jurisdiction over a suit filed by an estate’s independent administrator against that estate’s former administrator. In short, the Court stated that suits involving personal representatives are clearly within the probate court’s jurisdiction under Section 5A(c)(1) of the Texas Probate Code, and the application of Seay’s “controlling issue” was limited to suits which were “appertaining to or incident to” an estate but no personal representative was involved. See

Coble Wall, 851 SW2d at 182. In short, if a wrongful death or survivorship cause of action is brought by the personal representative in the estate proceeding, a statutory probate court clearly has jurisdiction over the suit. See *Id.*; see also TEX. PROB. CODE ANN. § 5A (Vernon Supp. 2000).

## 2. Guardianship Estate

### a. Generally

Similar to decedents’ estates, district and statutory probate courts have concurrent jurisdiction in all actions by or against a person in the person’s capacity as guardian. See TEX. PROB. CODE ANN. § 606(d) (Vernon Supp. 2000). Generally, a court that exercises original probate jurisdiction has the power to hear all matters incident to an estate. See *Id.* § 606(e).

When the jurisdiction of a *statutory* probate court is concurrent with that of a district court, Section 607(b) of the Texas Probate Code provides that a cause of action “appertaining or incident to” a guardianship estate *shall* be brought in the statutory probate court. See *Id.* § 606(b). Matters appertaining or incident to an estate include the following:

[T]he 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.

*Id.* § 607(b). Note that Section 607 does not include the new language added to Section 5A (b) of the Texas Probate Code. See discussion *supra*.

### b. Jurisdiction to Hear Wrongful Death, Survivorship Actions, and Other Tort Claims

Effective September 1, 1993, Section 606 controls the jurisdictional issues pertaining to guardianships. Section 606 essentially mirrors the jurisdictional requirements for decedent’s estates set out in Sections 5 and 5A. See TEX. PROB. CODE ANN. § 606(d) (Vernon Supp. 2000). Therefore, provided the guardian is a party to

the wrongful death and survivorship actions and it was initially filed in the probate court, then the probate court has jurisdiction over the suit.

As to other tort claims, it seems clear that litigation pertaining to a ward's injuries is a matter which can be heard by a statutory probate judge. A typical fact situation is illustrated in Pearson v. K-Mart Corp., where the court of appeals held that the guardian of an incapacitated person could bring a suit in the probate court for damages arising out of the accident causing the incapacity. *See* 755 SW2d 217, 220 (Tex.App.--Houston [1st Dist.] 1988, no writ).

Note, however, that when litigation involving an incapacitated individual is pending in a probate court, and the ward dies, a decedent's estate must be opened or the heirs must bring of the survivor's action. If the Ward is restored or emancipated, the tort claim must be transferred to district court. The litigation should not continue in the guardianship cause. *See* Carroll v. Carroll, 893 SW2d 62, 68 (Tex.App.--Corpus Christi 1994, no writ) (the court held that guardianship terminates upon death of ward).

c. When to Open a Guardianship.

A guardianship may be required when your client is a minor or incapacitated person without a guardian and the status of the next friend is questioned, or if a contract has been signed by a person who may or may not have the capacity to contract. Additionally, as lawsuits progress, the person who had capacity may decline to the point that they can no longer adequately prosecute or defend the lawsuit.

Section 601 of the Texas Probate Code provides the definition of incapacity. Section 601(14) reads as follows:

(14) "Incapacitated person" means:

- (A) a minor;
- (B) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs; or

- (C) a person who must have a guardian appointed to receive funds due the person from any governmental source.

TEX. PROB. CODE § 601 (Vernon Supp. 2000). (emphasis added).

In order to institute a guardianship, you must meet the definition of an interested person. A defendant is not an interested person by definition and by case law. *See* Allison v. Walvoord, 819 SW2d 624 (Tex.App.--El Paso, 1991, no writ).

Section 601(15) defines who is an interested person.

(15) "Interested persons" or "persons interested" means an heir, devisee, spouse, creditor, or any other person having a property right in, or claim against, the estate being administered or a person interested in the welfare of an incapacitated person, including a minor.

Further Section 601(16) defines a minor as follows:

(16) "Minor" means a person who is younger than 18 years of age and who has never been married or who has not had the person's disabilities of minority removed for general purposes.

**C. VENUE**

1. Where to Open the Estate

If it is required that an estate be opened as discussed supra, Section 6 of the Texas Probate Code governs where venue lies for the Estate. Texas Probate Code § 6 provides, in pertinent part:

"Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:

- (a) In the **county where the deceased resided**, if he had a domicile or fixed place of residence in this State.
- (b) If the deceased had no domicile or fixed place of residence in this

State but died in this State, then either in the **county where his principal property was** at the time of his death, **or in the county where he died.**

- (c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in **any county in this State where his nearest of kin reside.**
- (d) But if he had no kindred in this State, then the county where his principal estate was situated at the time of his death.”

TEX. PROB. CODE ANN. § 6 (Vernon Supp. 2000)  
(emphasis added)

Once you decide where your estate should be filed, you must be cognizant of the impact that venue of the decedent’s estate may have or where the correct jurisdiction lies for the tort claim. It is also suggested that you analyze your jurisdictional issues in advance of filing your lawsuit as a plaintiff or in advance of filing your answer as a defendant.

## 2. Where to Open a Guardianship

It is important to know where venue lies for opening a guardianship. Section 610 of the Texas Probate Code governs venue. It reads:

### **§ 610. Venue for Appointment of Guardian**

- (a) Except as otherwise authorized by this section, a proceeding for the appointment of a guardian for the person or estate, or both, of an incapacitated person shall be brought in the county in which the proposed ward resides or is located on the date the application is filed or in the county in which the principal estate of the proposed ward is located.
- (b) A proceeding for the appointment of a guardian for the person or estate, or both, of a minor may be brought:
  - (1) in the county in which both the minor’s parents reside;

- (2) if the parents do not reside in the same county, in the county in which the parent who is the sole managing conservator of the minor resides, or in the county in which the parent who is the joint managing conservator with the greater period of physical possession of and access to the minor resides;
- (3) if only one parent is living and the parent has custody of the minor, in the county in which that parent resides;
- (4) if both parents are dead but the minor was in the custody of a deceased parent, in the county in which the last surviving parent having custody resided; or
- (5) if both parents of a minor child have died in a common disaster and there is no evidence that the parents died other than simultaneously, in the county in which both deceased parents resided at the time of their simultaneous deaths if they resided in the same county.

- (c) A proceeding for the appointment of a guardian who was appointed by will may be brought in the county in which the will was admitted to probate or in the county of the appointee’s residence if the appointee resides in this estate.

Note that for an incapacitated person or minor, venue has no residency requirement lengths. As to an incapacitated person, guardianship can be obtained where the incapacitated is located. While that may seem odd at first blush, but one purpose of the statute was to allow persons injured far from their residence to have a person appointed to handle their care. It is often referred to as “rolling venue.” A person can literally arrive in the county where the guardianship is filed on the day it is filed.

### **D. Amount in Controversy**

The amount in controversy does not affect the jurisdiction of a constitutional or statutory

county court when it is exercising probate jurisdiction. See Womble v. Atkins, 160 Tex. 365, 331 SW2d 294, 298-99 (1960).

### **III. TRAP NO. 2: TRANSFERS TO STATUTORY PROBATE COURTS**

#### **A. Generally**

If an action is pending in district court that relates to an estate in the statutory probate court, any party may seek to transfer the action to a statutory probate court. Once again, the applicable sections of the Probate Code depend upon whether the lawsuit involves a decedent's estate or a guardianship estate. While the sections are similar, there are some notable differences due to recent amendments. Sections 5, 5A and 5B of the Texas Probate Code are generally applicable to decedent's estate. See TEX. PROB. CODE ANN. §§ 5, 5A, 5B (Vernon Supp. 2000). Sections 605, 606, 607 and 608 apply to guardianship estates. See *Id.* §§ 605, 606, 607, 608.

#### **B. Decedent's Estate**

Section 5B grants statutory probate judges the discretion to transfer a lawsuit pending in another court to their court. Section 5B provides that:

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 or a cause of action in which a personal representative of an estate pending in the 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.

TEX. PROB. CODE ANN. § 5B (Vernon Supp. 2000).

While Section 5B is not mandatory on its face, case law has held that the transfer is mandatory. In First State Bank of Bedias v. Bishop, the appellate court held that upon the timely filing of a plea in abatement or other appropriate motion, the district court or any

other court having concurrent jurisdiction with the probate court must immediately relinquish its jurisdiction to the statutory probate court. See 685 SW2d 732, 736 (Tex.App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Further, in Henry v. LaGrone, the Amarillo Court of Appeals held that provided the Section 5B conditions for transferring a cause of action to probate court are met, the probate judge has the authority to transfer the case notwithstanding mandatory venue provisions. See 842 SW2d 324, 327 (Tex.App.--Amarillo 1993, no writ). Therefore, the appellate court held that the district court abused its discretion by refusing to transfer the case to probate court. See *Id.* at 328. This was an original mandamus proceeding, thus indicating mandamus is the proper remedy.

Notwithstanding the Henry and Bishop decisions, attorneys commonly encounter opposition to transfers pursuant to Section 5B because it appeared to limit transfers to causes of action "appertaining to or incident to an estate." See TEX. PROB. CODE ANN. § 5B (Vernon Supp. 2000). Parties, attempting to block the transfer, filed writs of prohibition and mandamuses arguing that, by ordering that the lawsuit be transferred to it, the statutory probate court exceeded its statutorily conferred jurisdiction.

Between 1995 and 1997, Texas appellate courts were frequently asked to review the authority of statutory probate judges to transfer related litigation to their statutory probate courts. For example, in deciding In re Ford, 965 SW2d 571 (Tex.App.--Houston [14<sup>th</sup> Dist.] 1997, orig. proceeding), the Fourteenth Court of Appeals held that a statutory probate court lacked authority to transfer a wrongful death and survival action from a district court to itself because "(1) wrongful death and survival actions are not causes of action appertaining to an estate; and (2) Section 5B does not give a statutory probate court authority to transfer actions by or against a personal representative, regardless of whether the action is appertaining to or incident to an estate." *Id.* (citing D.B. Entertainment, 927 SW2d 283 (Tex.App.--Fort Worth 1996, mand. Motion dism.)). However, in Greathouse, Houston's First Court of Appeals expressly disagreed with the holdings in D.B.

Entertainment and Ford and held that “a statutory probate court may properly transfer to itself any case brought by or against a personal representative of an estate, regardless of whether the claim meets the definition of ‘appertaining to or incident to’ an estate.” *See Greathouse v. McConnell*, 982 SW2d 165 (Tex.App.--Houston [1<sup>st</sup> Dist.], pet. denied); *see also In re Graham*, 971 SW2d 56 (Tex. 1998) (statutory probate court authorized to transfer divorce proceeding to itself when ward is party).

Due to the conflicting decisions, Section 5A(b) was recently amended again to resolve this issue. Section 5A(b), as amended, provides that:

“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 the purposes of this section.”

*Id.*; *see also* Tex. S.B. 506, 75th Leg., R.S. (1997). This amendment applies to all estates of persons dying on or after September 1, 1997. Thus, Section 5A(b), as amended in 1997, should leave no doubt that a statutory probate court has the power to transfer the cause of action into its court. Attorneys should therefore be prepared to respond to objections based on the legislatively overruled rationale of *Ford* and *D.B. Entertainment*, or object to the transfer on the basis of *Ford* and *D.B. Entertainment*.

### **C. Guardianships**

Similar to a decedent’s estate, if an action is pending in district court that relates to a guardianship estate in a statutory probate court, any party may seek to transfer the action to the probate court. Section 608 of the Texas Probate Code provides as follows:

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 or a cause of action in which a personal representative of an estate pending in the 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 the guardianship estate.

TEX. PROB. CODE ANN. § 608 (Vernon Supp. 2000).

In *Lanier v. Stem*, the Waco Court of Appeals, citing the *Henry v. LaGrone* decision, agreed that if the four conditions authorizing the judge of a statutory probate court to transfer a cause of action to his court are met, the judge has authority to transfer the case notwithstanding mandatory venue provisions and the like. *See* 931 SW2d 1, 3 (Tex.App.--Waco 1996, no writ). However, the Fort Worth Court of Appeals has held that Section 608 of the Texas Probate Code does not grant the probate court authority to transfer to itself a wrongful death suit brought by a guardian on behalf of a ward pending in a district court in another county because it is not appertaining or incident to the guardianship estate. *See DB Entertainment, Inc. v. Windle*, 927 SW2d 283, 287-88 (Tex.App.--Fort Worth 1996, Mand. Motion Dism.).

In *DB Entertainment*, the decedent’s wife, individually and as next friend of her minor children, brought suit for wrongful death of her husband in district court in Denton County. *See Id.* at 284. A defendant filed a motion to transfer the case to Tarrant County and, upon agreement by all parties, the case was transferred to the district court in Tarrant County. *See Id.* Subsequently, the wife was appointed guardian of her minor children by order of the Denton County Probate Court and filed a motion to transfer the wrongful death suit now in Tarrant County, to the Denton County Probate Court pursuant to Section 608 of the Texas Probate Code. *See Id.* at 284-85. The probate court granted the motion. Defendants

appealed seeking a writ of mandamus or, alternatively, a writ of prohibition. *See Id.*

On appeal, the Fort Worth Court of Appeals recognized that the probate court had concurrent jurisdiction with the district court over wrongful death causes of action. *See Id.* at 286. Nevertheless, the court of appeals held that a statutory probate court could not transfer to itself a case for wrongful death pending in district court pursuant to Section 608 of the Texas Probate Code because, among other reasons, it was not a cause of action “appertaining or incident” to the guardianship estate. *See Id.* at 287. Therefore, the court of appeals held that the probate court’s transfer order was void and granted the writ of mandamus. *See Id.* at 288-89; *see also Ford* at 575.

To date, the Texas Supreme Court has not addressed this issue. However, its recent decision *Graham* supports the argument that a statutory probate court is authorized to transfer tort claims to itself. *See In re: Graham*, 971 SW2d at 59. In *Graham*, the Texas Supreme Court held that a statutory probate court was authorized to transfer a divorce proceeding involving the ward from a family district court to a statutory probate court. In reaching its holding, the Court recognized the Legislature’s constant expansion of statutory probate court jurisdiction over the years. *See Id.*

This issue needs to be ultimately resolved by either the Texas Supreme Court or the Legislature (by yet another statutory amendment). Until then, it is unclear how each court will interpret these recent decisions and whether they will or will not authorize or uphold the transfer. While the recent amendment to Section 5A(b) of the Texas Probate Code has somewhat alleviated this problem as to a decedent’s estate, a similar amendment was not made to Section 608 applying to guardianship estates. It is important to remember the statutory wording differences when dealing with a transfer in guardianship.

#### **IV. TRAP NO. 3: CONSTANT CONFLICT OF VENUE VERSUS JURISDICTION OF A STATUTORY PROBATE COURT**

##### **A. Generally**

Current case law in Texas dictates that the jurisdictional sections discussed *supra* override other seemingly mandatory venue provisions. For example, in *Henry v. LaGrone*, the Amarillo Court of Appeals held that a statutory probate court has jurisdiction to hear a matter notwithstanding other mandatory venue provisions if (i) an estate is pending in a statutory probate court, and (ii) the cause of action is appertaining or incident to an estate pending in a statutory probate court. *See* 842 SW2d 324, 327 (Tex.App.--Amarillo 1992, no writ). The court in *Henry* specifically stated that “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 an estate can be efficiently administered.” *Id.* As a result, judicial economy was served. *See Id.*

The Waco Court of Appeals reached the same determination when applying Section 608 of the Texas Probate Code dealing with transfers to guardianship proceedings. *See Lanier v. Stem*, 931 SW2d 1, 3 (Tex.App.--Waco 1996, no writ). Specifically, the court stated that Section 608 “allows the probate court to assume authority over cases pending in other courts, notwithstanding the venue statutes.” *See Id.* at 3.

##### **B. Texas Civil Practice & Remedies Code Section 15.007**

In 1996, the legislature addressed the probate court’s jurisdiction by enacting Section 15.007 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon Supp. 2000). This statute provides that:

Notwithstanding Sections 15.004, 15.005, and 15.031, to 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.

*Id.* (emphasis added).

Section 15.007 does not, however, prevent Section 5B and 608 transfers because these sections of the Texas Probate Code deal with jurisdiction, not venue. See In re J7S, Inc., 979 SW2d 374, 378 (Tex.App.—Houston [14<sup>th</sup> Dist] 1998, writ dismissed agr.). In J7S, the Houston appellate court held that Section 15.007 refers “solely to a conflict between venue provisions under the Texas Civil Practice and Remedies Code and venue provisions under the Probate Code.” *Id.* at 378. It does not override the probate jurisdiction statutes. *Id.*

### **C. Texas Courts are Still Split on Jurisdiction Versus Venue**

There is still a split as to how to reconcile § 5B and § 608 of the Texas Probate Code, with § 15.007 of the Texas Civil Practice and Remedies Code. Recent case law has not decided venue as it relates to jurisdiction, but rather has widened the split of authority. In Houston Northwest Partners, Ltd., 98 SW3d 777 (Tex.App.—Austin, 2003), the court held that a malpractice suit relating to a guardianship estate should be transferred from Harris County district court to Travis County statutory probate court. (A copy of this case is attached to this article and marked attachment 1.) In this case, a malpractice suit was originally filed in Harris County District Court by the mother of the injured child. Over a year later, the mother moved with her daughter to Travis County, where she initiated a guardianship proceeding for the daughter in Travis County’s Probate Court No. 1. The mother then filed a motion to have the malpractice suit transferred to the Travis County statutory probate court. Judge Guy Herman ordered that the case should be transferred.

The court of appeals agreed, and after reviewing the relevant statutes and case law, noted: “We agree that forum shopping is against public policy and that courts should guard against allowing transfer statutes to be abused to promote or reward forum shopping. . . . However, the public policy against forum shopping must be weighed against the intended

purpose of transfer statutes—to promote judicial economy and the efficient administration of probate estates.” *Id.*

In exact opposition to this decision, in Reliant Energy, Inc. v. Jannette Gonzalez, as Dependent Administrator of the Estate of Guadalupe Gonzalez, Jr., Deceased, 2003 WL 1961839 (Tex.App.—Houston [1st Dist.] 2003), the Court relied on CPRC 15.007 and reversed the transfer. In Reliant, the decedent was killed in a power plant accident in Harris County, Texas. (A copy of this case is attached to this article and marked Attachment 2.) The decedent lived in Hidalgo County, and the probate of his estate was instituted in Hidalgo County’s statutory probate court. The decedent’s wife was appointed as the dependent administrator of his estate. Wrongful death and survival claims were filed in Hidalgo County’s statutory probate court and in Harris County District Court at a later date. The appeals court was faced with the issue of whether the wrongful death and survival claims should be heard in the statutory probate court in Hidalgo County or in Harris County District Court.

The appellate court reasoned that venue is the first inquiry. In this particular case, venue was proper only in Harris County because CPRC § 15.007 provides that venue for suits involving personal injury, death, or property damage is proper only where Reliant does business and where the injury occurred. The court noted that the express language of Section 15.007 states that “to 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.”

The plaintiff argued that the jurisdiction statutes under the Texas Probate Code establish “dominant jurisdiction” (not venue) in the Hidalgo County statutory probate court. The court, however, rejected the plaintiff’s argument finding that there can be no “dominant jurisdiction” if there is not proper venue. Looking to the legislative history, the court noted:

“Our holdings are consistent with the underlying purpose of section 15.007,

which was enacted by the Texas legislature in 1995:

The 1995 Texas Legislature made substantial amendments and additions to the venue provisions of the CPRC. The most important of these changes, for estate administration purposes, is that the determination of *proper venue* for an action by or against a personal representative for personal injury, death, or personal property damage is *no longer made under the Probate Code*, but rather under § 15.007 of the CPRC. 17 TEXAS PRACTICE, PROBATE, AND DECEDENTS' ESTATES, § 11 (1971 & Supp. 2003) (emphasis added). This legislation changed the ability of statutory probate courts to make ... transfers in personal injury, death, or property damage suits and whether such suits can be filed in probate courts originally. DB Entertainment, Inc. v. Windle, 927 SW2d 283, 288 (Tex.App.--Fort Worth 1996, orig. proceeding). The legislative intent behind section 15.007 was to prevent forum shopping:

'Forum shopping is against public policy, as reflected by the changes in venue law as part of last year's [1995] tort reform legislation. Particularly, section 15.007, which appears to be a legislative attempt to clarify and reiterate probate court jurisdiction over tort suits, prevents plaintiffs from ... transferring such suits (forum shopping) to probate court in contravention of the venue statutes. *Id.*

To hold otherwise would render section 15.007 meaningless, and, under established rules of statutory construction, we should not adopt a construction that would render a law absurd or meaningless."

The two dissenting opinions are worth noting. Justice Jackson B. Smith's position is as follows:

"To hold that the statutory probate court in Hidalgo County in this case does not have

venue, as the majority states, would, in effect, mean that such court could only transfer to itself cases from other courts located in Hidalgo County. This, I believe, defeats the intent of the legislature. . . . The legislature has made it clear that it wants all matters pertaining to and incidental to an estate placed under the 'umbrella' and authority of statutory probate courts. So be it."

He further stated that the venue provisions under 15.007 of the CPRC do not conflict with the Probate Code's venue provisions for the simple reason that as far as the personal injury litigation in that case is concerned, there are no venue provisions in the Texas Probate Code which apply.

Justice Margaret Maribal presents a fairly compelling argument that statutory probate courts should be able to hear all personal injury suits, no matter where they are located, citing the fact that the County Courts and County Courts at Law do not have a similar authority:

"There are only 10 counties in Texas that have statutory probate courts, those 10 being among the most populous Texas counties. The legislature, in its apparent wisdom, has decided that those courts have *dominant jurisdiction* in cases such as this. . . . As for the remaining 244 counties (out of 254 counties total), section 15.007 is effective." (Makes you wonder who counted those counties)

As a result of this split, it seems likely that the Texas Supreme Court will have to address this issue. Of course, the confusion could be solved by legislative changes, but as the discussion below reflects the bills before the legislature during the current legislative session do not resolve the problem. They conflict as much or more than the current case law split.

#### **D. Proposed Legislation**

##### **1. HB4**

House Bill 4 encompasses the huge tort reform bill. As expected, as of the update of this article it continues to be hotly debated.

When HB4 reached the Senate, proposed revisions were added to the Senate Committee Report version of HB4. They included legislative changes to Texas Probate Code §§ 5B and 608, which read as follows:

“Notwithstanding any other provision of this chapter, the proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code.”

Should such legislative change pass, it still does not address jurisdiction. It merely adds a venue provision matching CPRC 15.007 to two jurisdictional sections of the Texas Probate Code.

2. House Bill 2432

There is one other bill pending which relates to probate jurisdiction, HB 2432, but it will also not resolve the venue/jurisdiction debate. In HB 2432, Section 5(e) would be amended to read as follows (the amended language is underlined):

“(e) A statutory probate court has concurrent jurisdiction with the district court in all personal injury, survival, or wrongful death 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.”

Then a new subsection (h) to Section 5 would provide:

“(h) A statutory probate court has jurisdiction over any matter appertaining to an estate or incident to an estate and has jurisdiction over any cause of action in which a personal representative of an estate pending in the statutory probate court is a party.”

The last sentence of Texas Probate Code § 5A (b) would also be modified to read as follows:

~~“Except for [All statutory probate courts shall have the same powers over independent executors that are exercisable by the district courts. In] situations in which [where] the jurisdiction of a statutory probate court is concurrent with that of a district court as provided by Section 5(e) of this code or any other 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].”~~

As can be seen, the debate between venue and jurisdiction in probate court is not likely to be resolved this legislative session.

**V. TRAP NO. 4: SETTLING WITH THE ESTATE AND LOSING JURISDICTION OVER THE REMAINING DEFENDANTS.**

A statutory probate court is a specialized court and its primary purpose is the administration of decedent’s and ward’s estates. As such, a decedent’s or ward’s estate is generally held to be an indispensable party. On point is Goodman v. Summit at West Rim, Ltd., 952 SW2d 930 (Tex.App.--Austin 1997, no writ). In Goodman, the personal representative of a decedent’s estate filed suit in the statutory probate court where the estate was pending. The defendant countersued the estate and also brought a third party action. The probate court subsequently dismissed the estate and attempted to transfer the remaining litigation to the district court. On appeal, the Austin Court of Appeals held that a statutory probate court’s jurisdiction is based on an estate being a party to the litigation. When the estate is no longer a party, the court loses the requisite jurisdictional nexus and, thus, loses jurisdiction over the remaining claims which were at one time pendant or ancillary to the estate’s claims. *See Id.* at 933. The probate court’s only course of action is to dismiss the remaining claims. *See Id.* at 935. Further, the loss of jurisdiction could not be cured even with the agreement of the remaining parties. *See Id.* at 933 (citing Texas Ass’n of Bus v. Texas Air Control Bd., 852 SW2d 440, 445 (Tex. 1993)); but *see* Sabine Gas Transmission Co. v. Winnie Pipeline Co., 15 SW3d 1999(Tex.App.—Houston [14<sup>th</sup> Dist.]

2000, no pet. history). Jurisdiction cannot be inferred on a court by agreement where none exists. Even if they agreed, the losing party could still raise jurisdiction for the first time on appeal.

In the recent decision of Sabine v. Winnie, *supra*, the appellate court held that the probate court did not lose jurisdiction over the remaining defendant when the estate settled. The co-executors were defendants in Probate Court Number 2 of Harris County. The executors settled and moved to have Sabine's remaining claims dismissed for want of jurisdiction. While the appellate court disagreed with the dismissal, it also held that the dismissal was harmless error. Thus, practitioners should rely on Sabine with caution. *Id.* Based on current case law, the remaining parties should strongly consider seeking a transfer of the remaining claims to a court of proper jurisdiction. *See* Trap 5, *infra*.

#### **VI. TRAP NO. 5: TRANSFERS FROM STATUTORY PROBATE COURTS.**

Often times a party finds itself in statutory probate court and attempts to transfer out of the probate court into either a district or county court. The transfer may be requested to avoid trying the case in the probate court or because the estate is no longer a party, due to settlement or otherwise. *See* Trap 4, *supra*. Transfers from county courts or constitutional county courts, exercising probate jurisdiction, are authorized by the Texas Probate Code and the Texas Government Code. *See* TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 2000); TEX. GOV'T CODE ANN. § 74.121 (Vernon Supp. 2000).

Historically, a statutory probate court had no statutory authority to transfer the lawsuit to another court. *See* Goodman, 952 SW2d at 934. Until recently, neither the Texas Probate Code nor the Texas Government Code authorized a statutory probate judge to transfer a suit pending in its court to a district court. *See* *Id.* Therefore, the probate court's only action was to dismiss the remaining claims. This could have harmful effects on a case in which the statute of limitations has run on the claim, cross-claim and/or counterclaim.

This issue was resolved with the enactment of Section 25.00221 of the Texas Government

Code in 1999. Effective September 1, 1999, Section 25.00221 provides as follows:

(a) The judge of a statutory probate court may transfer a cause of action pending in that court to another statutory probate court in the same county that has jurisdiction over the cause of action that is transferred.

(b) If the judge of a statutory probate court that has jurisdiction over a cause of action appertaining to or incident to an estate pending in the statutory probate court determines that the court no longer has jurisdiction over the cause of action, the judge may transfer that cause of action to a district court, county court, statutory county court, or justice court located in the same county that has jurisdiction over the cause of action that is transferred.

(c) When a cause of action is transferred from a statutory probate court to another court as provided by Subsection (a) or (b), all processes, writs, bonds, recognizances, or other obligations issued from the statutory probate court are returnable to the court to which the cause of action is transferred as if originally issued by that court. The obligees in all bonds and recognizances taken in and for the statutory probate court, and all witnesses summoned to appear in the statutory probate court, are required to appear before the court to which the cause of action is transferred as if originally required to appear before the court to which the transfer is made.

TEX. GOV'T CODE ANN. § 25.00221. (Vernon Supp. 2000).

Pursuant to Section 25.00221, remaining parties should file a motion to transfer the lawsuit to another court of competent jurisdiction and venue.

#### **VII. TRAP NO. 6: NOT KNOWING WHICH SET OF RULES TO PLAY BY.**

Statutory probate courts are generally governed by the practices and procedures

governing county courts rather than district courts. See TEX. GOV'T CODE ANN. §§ 25.00261, 25.0027 (Vernon Supp. 2000). However, when the probate court's jurisdiction is concurrent with that of the district court, the probate court must generally follow the rules and law pertaining to district courts. Specifically, Section 25.00261 of the Texas Government Code provides that:

The drawing of jury panels, selection of jurors, and practice in the statutory probate courts must conform to that prescribed by law for county courts, except that practice, procedure, rules of evidence, issuance of process and writs, juries, including the number of jurors, and all other matters pertaining to the conduct of trials and hearings in the statutory probate courts involving those matters of concurrent jurisdiction with district courts are governed by the laws and rules pertaining to district courts.

*Compare Id.* § 25.00261 (Vernon Supp. 2000) with TEX. GOV'T CODE ANN. § 25.0027 (Vernon Supp. 2000)(identical provision).

Of particular importance is the required number of jurors. County courts have six member juries while district courts have twelve member juries unless the parties agree to try the case with fewer jurors. See Thomas v. O'Donnell, 811 SW2d 757, 759 (Tex.App.--Amarillo 1990, no writ); see also Rabson v. Rabson, 906 SW2d 561 (Tex.App.--Houston [14<sup>th</sup> Dist.] 1995, writ denied). (Section 25.00261 applies to statutory probate courts exercising concurrent jurisdiction with district courts.) In a tort case, the jury will be a twelve panel jury in a statutory probate court just as if the tort claim was tried in district court.

Some special rules still, however, apply to statutory probate courts. For example, litigants cannot object to the assignment of a statutory probate judge notwithstanding the general statute mandating the removal of assigned judges on the objection of either party. See In Re: Living Centers of America, Inc., 10 SW3d 1 (Tex.App.—Houston, [14<sup>th</sup> Dist.] 1999), *mandamus denied* 43 Tex. Sup. Ct. J. 628 (August 24, 2000).

Therefore, litigants in statutory probate courts must carefully determine whether the statutes applicable to county or district courts apply and all statutory exceptions.

## **VIII. TRAP NO. 7: ILLEGITIMATE CHILDREN, COMMON LAW SPOUSES AND OTHER STANDING ISSUES.**

### **A. Generally**

A defense counsel's worst nightmare is to pay a claimant and believe his or her case is closed, only to find out that the decedent had more children or more wives. Defendants have also faced putative spouse issues, where Decedent had two spouses, only one legally, and find they paid to the wrong spouse. Thus, defendants and their insurers must carefully consider whether the alleged common law spouses and children have established their standing and whether all these potential parties have been properly joined. Some degree of investigation and/or discovery on these issues is warranted.

### **B. Children**

Illegitimate children, regardless whether they were recognized as such, have standing to sue for their parent's wrongful death and have inheritance rights. The leading case is Garza v. Maverick Market, Inc., 768 SW2d 273 (Tex. 1989). In Garza, the Texas Supreme Court held that the fourteenth amendment of the United States Constitution prohibits a state from barring illegitimate children from recovery for their parent's wrongful death if the state allows recovery for legitimate children; however, the illegitimate child may be subjected to a greater burden of proof to establish their right to sue and recover. Following its prior holding in Brown v. Edwards Transfer Co., 764 SW2d 220 (Tex. 1988), the Court held that when paternity of an alleged child is questioned, the child is required to prove their paternity by clear and convincing evidence. See *Id.* at 275 (*citing Brown*, 764 SW2d at 220).

Evidence seeking to establish paternity may include any of the following:

- Blood and DNA Tests. See Tex. Fam. Code Ann. §§ 160.109, 160.110

(Vernon Supp. 2000)(formerly Section 13.06).

- Evidence of physical resemblance of the alleged child to the alleged parent. *See In re B.M.N.*, 570 SW2d 493 (Tex.Civ.App.--Texarkana 1978, no writ); *Napier v. Napier*, 555 SW2d 186 (Tex.Civ.App.--El Paso 1977, no writ).
- Prior statements or admissions by the alleged father. *See D.W.L. v. M.J.B.C.*, 601 SW2d 475 (Tex.Civ.App.--Houston [14<sup>th</sup> Dist.] 1980, writ ref'd n.r.e.); *Napier*, 555 SW2d 186. (Name on birth certificate, affidavit of paternity, insurance beneficiary designations, etc.)
- Evidence relating to periods of conception and gestation. *See In re M.G.*, 625 SW2d 747 (Tex.Civ.App.--San Antonio 1981, writ ref'd n.r.e.), *cert. denied*, 457 U.S. 1119, 102 S.Ct. 2932, 73 L. Ed.2d 1331 (1982).

Similarly, children born into a putative marriage are legitimate, have standing to sue for their parent's wrongful death, and have a right of inheritance based upon the strong presumption that a duly contracted marriage is valid. *See Boudreaux v. Taylor*, 353 SW2d 901, 904-05 (Tex.Civ.App.--Waco 1962, no writ).

A recent example of a party failing to settle with an illegitimate child is *Avila v. St. Luke's Lutheran Hospital*, 948 SW2d 841 (Tex.App.--San Antonio 1997, writ denied.). In *Avila*, an unmarried woman was two months pregnant when the child's father was killed. *See Id.* at 845. A wrongful death cause of action was brought by the man's adult children. The minor child was not joined as a party. *See Id.* at 844. The defendants settled with the adult children, requiring them to execute a release and indemnity agreement and an agreed judgment was entered. *See Id.* at 852. Subsequent to the settlement, the woman filed suit against the same defendants as next friend for the minor child. *See Id.* at 845. A motion for summary judgment was granted in favor of the defendants on the basis of collateral estoppel. *See Id.* at 845-46. The San Antonio Court of Appeals

reversed, finding that the minor child was not bound by the former judgment, and remanded for a trial on the merits. *See Id.* at 855.

In another recent case, *Wilson ex. rel. c.m.v. v. Estate of Williams*, 99 SW3d 640 (Tex.App.--Waco 2003, no pet. h), the mother was married to husband when she had a child with another man. The other man, who died intestate, acknowledged the boy as his son, was named on his birth certificate as the father, and signed an acknowledgment of paternity form. Decedent died in an industrial accident giving rise to significant wrongful death and survival claims. The trial court found the boy was Decedent's son and therefore entitled to inherit from Intestate.

The appellate court agreed basing its analysis on the law as it existed on the date of Decedent's death. Accordingly, husband was the boy's presumed father. The court examined Decedent's actions of acknowledging the boy, being named on his birth certificate, and the signing of the paternity form. In addition, the mother testified that she did not have sexual relations with husband for at least one year before the boy's birth. The court determined that this was clear and convincing evidence which was sufficient to rebut the presumption that husband was the father. The trial court was within its discretion to give little weight to the possibility that someone else was the father even though the other testified that about nine months before the child's birth she had sex with a man whose name she could not recall. The court did not examine a DNA report which may have shown Decedent was not the father because the report was not properly offered and thus was not before the court. Proof of biological paternity is not necessary for a child to inherit from his or her father if the father's paternity is otherwise established, so be wary.

Note also that it is important to discovery if a live-in girlfriend or spouse is pregnant. This is especially true if the female was injured in the same incident in which the decedent died. As long as a fetus is born alive, a survival action is permitted, even if the death of the child was caused by an event which occurred *in utero*. *Yandell v. Delgado*, 472 SW2d 569 (Tex. 1971). A survival action and/or wrongful death action can also be filed when the child is

stillborn. See *Pietila v. Crites*, 851 SW2d 185 (Tex. 1993).

Thus, when representing defendants in a wrongful death case, the safest means to protect the defendant from additional liability is to insist on the plaintiffs establishing their paternity in an heirship proceeding and providing the settling parties a certified copy of the Judgment Declaring Heirship.

### **C. Common Law Spouses**

As to common law spouses, the cardinal rule to remember is Section 2.401 (formerly Section 1.91) of the Texas Family Code.<sup>5</sup> Prior to the 1995 amendment, former Family Code Section 1.91 mandated that a claim of common law marriage be made within *one year* of the end of the marriage relationship. Former Section 1.91 specifically provided as follows:

A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later.

TEX. FAM. CODE ANN. § 1.91(b)(Vernon 1995).

Effective September 1, 1995, however, Section 2.401 (formerly Section 1.91), was amended to read as follows:

If a proceeding in which a marriage is to be proved under Subsection (a)(2) is not commenced before the *second* anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

TEX. FAM. CODE ANN. § 2.401(b) (Vernon Supp. 2000) (emphasis added).

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<sup>5</sup> The Texas Legislature has recodified the Texas Family Code. See Act effective April 17, 1997, S.B. 334, § 1, 75th Leg. (to be codified at TEX. FAM. CODE ANN.). All cites to the Texas Family Code will be as recodified unless specifically noted.

Because the strict statute of limitations has been removed by the legislature, it is advisable now more than ever for counsel to proceed with an heirship proceeding.

In *Wilson, supra*, the mother and father were never formally married. However, the mother asserted that they had an informal or “common law” marriage. She testified that they agreed to marry, lived together, and held each other out as husband and wife. Before the death of one partner, however, the other moved out and married another man in a ceremonial marriage without first getting divorced from Decedent. Approximately four years later, the partner died in an industrial accident giving rise to significant wrongful death and survival claims. The trial court found that the female partner was the surviving spouse and therefore entitled to inherit from Intestate.

The appellate court agreed. The court refused to apply the Family Code provision which was in effect when the two separated requiring an action to establish a common law marriage to be commenced not later than one year after the date on which the relationship ended. Instead, the court applied current Family Code § 2.401(b), which was in effect at the time of the male partner’s death, which merely provides a rebuttable presumption that no common law marriage exists if no action to prove the common law marriage is commenced within two years after the parties separate and cease living together. The court refused to examine the sufficiency of the facts establishing the common law marriage because they had not been challenged.

The *Wilson* case stands for the proposition that a common law marriage may still be established by a partner even after many years have elapsed since the parties lived together. The marriage may even be established by the partner who, without first obtaining a divorce, marries another person. Accordingly, a party challenging the existence of a common law marriage should challenge the factual sufficiency of the evidence.

Note that defendants in a wrongful death case are not always bound by the heirship judgment declaring an alleged common law spouse as such. Typically, the defendants are not parties and are not defined as interested

persons. In Buster v. Metropolitan Transit Auth., the Fourteenth District Court of Appeals held that a probate court's heirship judgment regarding a common law husband was not binding on the district court case in which the wrongful death claim was instituted by the decedent's mother. See 835 SW2d 236, 237 (Tex.App.--Houston [14th Dist.] 1992, no writ). The elements for collateral estoppel were not present in Buster. Since the wrongful death claims were not assets of the estate, subject to settlement, partition, or distribution, the probate court's determination and declaration of heirship had no bearing on them.

#### **D. Putative Spouse**

Beware of the issue of a putative spouse. This situation occurs most often when (1) a person remarries without divorcing; or (2) a person marries and a prior partner successfully proves a common law marriage which was not terminated by divorce. The putative spouse has very limited claims.

##### **1. Definition**

A putative marriage, although null, is recognized as a contractual relationship, based on good faith. See Mathews v. Mathews, 292 SW2d 662 (Tex.App.--Galveston 1956, no writ). The marriage is not valid but the parties have certain property rights. Consolidated Underwriters v. Kelly, 15 SW2d 729 (Tex. Comm'n. App. 1929, judgment adopted).

##### **2. Property Rights**

If the tort award is separate property, Texas law is clear that the putative spouse has no interest in decedent's separate property. See Hamond v. Hamond, 108 SW 1024 (Tex.Civ.App. 1908, writ denied). If there is a survival action, it is held by the estate or heirs. The lawful wife would be entitled to be appointed personal representative and hold the claim. See Foix v. Jordan, 421 SW2d 481 (Tex.App.--El Paso 1967, writ denied). While the wrongful death causes of action are statutorily defined, Texas law has held that a putative spouse receives no Workmen's Compensation benefits. See Texas Employers' Ins. Ass'n. v. Grimes, 269 SW2d 332 (Tex. 1954).

#### **E. Guardianship Standing Issues**

In some cases involving minors, the natural parent may be joined as a counter-defendant in the personal injury claim of the minor. An immediate conflict arises between the parent and the child. One potential solution is to have another relative or a third party appointed as guardian of the estate, and step into the shoes of the plaintiff.

Caution should be used when this decision is made. In Sax v. Votteler, 648 SW2d 661 (Tex. 1983), the Supreme Court held that since the services and earnings of a minor belong to the parents, a minor cannot recover for diminution of his earning capacity between the injury and majority. Additionally, the right to recover for medical costs incurred on behalf of the minor belongs to the parent. So, if a third party is appointed guardian, there may be the gap of ability to recover on lost earnings and medical prior to majority. The exception would be if the costs are a liability to the estate such as Medicaid, and the creditor is looking to the estate of the minor for payment.

For example, in Farley v. M. M. Cattle Co., 549 SW2d 453 (Tex.Civ.App.--Waco 1977) rev'd on other grounds, 529 SW2d 751 (Tex. 1975), the Court held that the guardian of the person and estate has a duty to provide medical care under Section 767, and thus held the cause of action for the minor. Keep these cases in mind when prosecuting a claim or defending a claim against a guardian of a minor other than the parent.

### **IX. TRAP NO. 8: OPENING AN ESTATE WHEN NOT NECESSARY.**

#### **A. Generally**

As a general rule, the personal representative of a decedent's estate is the only person entitled to sue and recover estate property. See Shepard v. Ledford, 962 SW2d 28 (Tex. 1998) (citing Frazier v. Wynn, 472 SW2d 750 (Tex. 1971)). However, heirs may bring a survival action during the four year period in which an administration could be instituted if they properly allege and prove that no administration is pending and no administration is necessary. See *Id.* (citing Frazier, 472 SW2d 750); Johnson v. Holly

Farms, Inc., 731 SW2d 641, 647 (Tex.App.--Amarillo 1987, no writ) (citing Frazier, 472 SW2d 750). (emphasis added). They have the burden and their standing as heirs is subject to challenge.

When heirs bring a wrongful death claims, the decedent's heirs are not required to plead and prove that no administration was pending and none was necessary. See City of San Antonio v. Rodriguez, 856 SW2d 552, 554 (Tex.App.--San Antonio 1993, writ denied) (emphasis added). In City of San Antonio, the parents brought suit individually and as personal representatives of their daughter's estate for damages as a result of her death. Appellant complained that the appellees failed to plead and prove their status to sue. See *Id.* at 552. The San Antonio Court of Appeals held that the cases applicable to heirs, who sue on behalf of themselves, are distinguishable from the cases where an heir sues as a personal representative. The inconsistency in City of San Antonio is that the court went on to incorporate the pleading requirements of heirs suing as heirs at law to determine whether the plaintiffs had alleged sufficient facts supporting their standing to sue. As the plaintiffs did state in their pleadings that (i) they were the decedent's parents, (ii) no administration of the estate was pending, and (iii) no administration of her estate was necessary, the court held that the plaintiffs adequately set out facts supporting their authority to sue. It appears, however, that even if the plaintiffs had not pled that an administration was not pending and one was not necessary, the court would have gone on to review the body of the record to determine whether plaintiffs had standing to sue. See *Id.* at 564-65.

If the sole reason to open an estate is to bring a survivor's action under Section 71.021 of the Texas Civil Practice and Remedies Code, you may want to proceed **without** opening an estate. The decision to do so will depend on the level of comfort sought. In order for a plaintiff or a defendant to protect himself or herself and to bind all of the heirs in a survival action, he or she has four options:

- (i) open an estate administration;

- (ii) obtain a judicial determination of heirship without an administration;
- (iii) plead and prove there is no estate administration necessary and none is pending; or
- (iv) enter a family settlement agreement.

Each alternative is discussed *infra*.

## **B. Open an Estate Administration**

The safest method for a binding outcome for both plaintiff and defendant is to open an estate administration and have the qualified personal representative bring suit on behalf of the estate. When a defendant challenges the standing to bring an action, the plaintiff must prove their capacity. TEX. PROB. CODE § 186. When a personal representative brings the tort suit, he or she should obtain authority from the probate judge to hire counsel to bring suit on the estate's behalf. See discussion *infra*.

### **1. Kinds of Estates**

Once it has been decided that an estate will be opened, you must decide which kind of estate is appropriate and the steps necessary to open, administer, and conclude the estate. Below is a short list of estates and a summary of potential scenarios for their use.

#### **a. Dependant Estates**

A dependant estate is Court monitored and almost all actions require prior Court approval. The dependent nature protects the creditors; and heirs.

(1) A Temporary Administration – This is pursuant to §131A and the duration is 180 days. An example of use is if the case settled before a lawsuit was filed and there is an urgency such as the possibility of insolvency of the tortfeasor if action is not taken quickly. An inventory and final account is usually required.

(2) Dependent Administration – This type of administration requires the posting of a bond and the almost total supervision of the Court. The duration is until the lawsuit(s) end(s), the heirs are determined and a final account is filed.

These are used most often when Decedent had children by different marriages, left no will, and all heirs need protection.

**b. Independent Estates**

Independent estate types are numerous, are almost free of court supervision and are less expensive. The contract with the plaintiff's lawyer does not usually require court approval if it is 33-1/3 percent and the lawsuits and settlements usually do not require the personal representative to get prior Court approval.

(1) Probate the Will and Qualify an Independent Executor – If Decedent had a will naming an independent executor, probate it under Section 145(b).

(2) Probate a Will That is Wholly in the Handwriting of Decedent – Texas is one of the few remaining states which allows a holographic will.

(3) Probate a Will as a Muniment of Title – If you do not need a personal representative in your lawsuit, probate the will under Section 89 (c) if there are no debts and no need for administration.

(4) Administration combined with Heirship – Where there is no will, all the heirs may agree on the advisability of an independent administration, and designate a person to serve. The heirship and appointment are done around the same time, heirship first. The estate is filed pursuant to Section 145(e).

(5) Small Estate Affidavit – This is pursuant to Section 137 and can be done with an administration and sometimes, even without the Court. It can be done where there is no will, thirty days have passed, the estate is solvent, the value of the estate is \$50,000 or less, and there is no real estate other than the homestead.

(6) Affidavit of Heirship – If a title company will accept this pursuant to §§ 52 and 52A, two disinterested witnesses can prove up the heirs and there is no administration. If recorded for 5, they are admissible in real estate records.

**C. Heirship Proceeding**

The next safest, and certainly cheaper course of action, is to have a judicial determination of heirship in the probate court

and include in the order determining and declaring heirs that no administration is pending and none is necessary. *See* TEX. PROB. CODE ANN. § 55 (Vernon 1980). This option is generally available if the decedent has less than two non-secured debts or the family has satisfied the debts prior to the heirship hearing. Additionally, you may seek and heirship if the surviving spouse is obligated on all unsecured debts. Most probate courts will require the appointment of an attorney ad litem in an heirship proceeding. The ad litem's role is to represent any and all minors and unknown heirs. On a straightforward heirship, the ad litem's fee will run between \$300 and \$600. Once the heirs have been determined by the probate court, the plaintiff should plead in the district court that the heirs have been determined by the probate court, that there is no necessity to open an administration, and that no administration is pending. It is also advisable to seek to admit a copy of the heirship judgment as evidence at trial. In considering an heirship, you should opt for an estate administration instead if counsel for plaintiff does not represent all heirs. If all heirs are not jointed for trial and especially in settlement, no one has authority to bind the non-party heirs. If you opt for heirship or accept an heirship, make sure all heirs are joined or represented.

The Texas Survivor Statute provides that a personal injury action survives to and in favor of the heirs, legal representatives, and estate of an injured person. CPRC 71.021(b). This statute allows the injured's cause of action to survive death. At trial, however, a plaintiff must establish his or her right to represent the decedent's estate. *See Shepherd v. Ledford, supra* at 34.

**D. Properly Plead and Prove No Administration is Necessary**

There is a presumption that a decedent's estate requires administration. *David v. Clayton*, 214 SW2d 801 (Tex.App.--Amarillo 1948, no writ). If the heirs choose not to open an estate or seek a judicial determination of the heirs, the authors suggest that the plaintiffs do all of the following (i) plead plaintiff's relationship to the decedent; (ii) plead no administration is necessary (i.e., there are fewer

than two debts) and none is pending; (iii) allege sufficient facts to establish that all heirs are before the court in the present action; and (iv) establish by the evidence at trial who the decedent's heirs are and that no administration is pending and none is necessary. *See City of San Antonio*, 856 SW2d 552; *see also Garcia v. Caremark Inc.*, 921 SW2d 417 (Tex.App.--Corpus Christi 1996, no writ) (holding that the Court of Appeals will assume on appeal that the heir had standing to assert the survival claim on behalf of the estate if (i) an heir sues in a representative capacity on behalf of the estate, (ii) the evidence shows that no administration is pending, and (iii) there is no indication that administration is necessary).

#### **E. Family Settlement Agreement**

The recent Texas Supreme Court decision of *Shepard v. Ledford* has sanctioned the use of family settlement agreements to establish that a formal administration is not necessary. 962 SW2d at 28. In *Shepard*, decedent's wife brought the survival claim on behalf of decedent's estate. On appeal, defendants claimed that the wife lacked standing to sue because she did not plead and prove that no administration was pending and none was necessary. *See Id.* at 33. Defendants further argued that more than the minimum two debts were due and, thus, an administration was in fact necessary. However, the Court reviewed the evidence submitted to the trial court which showed that the wife had entered a family settlement agreement with the other heirs which provided that she was entitled to the assets of the estate and that at the time of trial she had paid off the remaining debts. Relying on the Fifth Circuit's rationale in *Pitner v. United States*, 388 F.2d 651, 656 (5<sup>th</sup> Cir. 1967), the Court found that no administration is necessary when the heirs of an intestate decedent enter into an agreement to distribute the estate and pay any debts and expenses in order to avoid a formal administration of the estate. As such, the wife had standing to bring the survival claims. *See Shepard*, 962 SW2d at 34.

#### **F. Challenging Capacity**

When a person sues as the *personal representative* of a decedent's estate, he or she

is not required to prove their authority unless challenged by a plea in abatement or verified denial. *See Id.* at 647 (citing *Theobald v. Pate*, 542 SW2d 460, 464-65 (Tex.Civ.App.--Tyler 1976, writ dism'd)). A defendant can waive the right to complain of plaintiff's capacity to sue as personal representative and recover on behalf of a decedent's estate if he or she fails to timely challenge the plaintiff's capacity. *See Johnson*, 731 SW2d 641. For example, in *Johnson*, the parents of a seventeen year old brought suit for damages as a result of the daughter's death. The parents sued individually and as the representatives of the decedent's estate. On appeal, appellant alleged that damages were not recoverable because the plaintiffs had not offered any evidence to prove that an administration was not pending and that an administration was not necessary. The defendants, however, had made no challenge to the plaintiffs' capacity to sue by making either a verified denial or plea in abatement to the trial court. *See Id.* at 647. Accordingly, the court of appeals held that appellants waived their right to challenge plaintiffs' capacity.

### **X. TRAP NO. 9: THINKING THE CASE IS SETTLED WHEN THERE IS NO AUTHORITY FOR THE PERSONAL REPRESENTATIVE TO SETTLE.**

#### **A. Generally**

Whether court approval is needed for the estate representative to settle depends upon what type of estate is involved. From the defendant or their insured's standpoint, obtaining the probate court's blessing may be necessary, or the representative's release is at a minimum voidable if not void.

#### **B. Guardianship or Dependent Administration**

A dependent personal representative is required to obtain probate court approval to perform most acts under Sections 234 (for decedent's estate) and 774 (for guardianship estate) of the Texas Probate Code. A dependent representative may include a guardian or dependent executor or administrator. When a dependent representative of an estate deems it to be in the estate's best interest, he may compromise or settle the estate's litigation *after*

making written application to the probate court and obtaining an order granting such authority. See *Catlett v. Catlett*, 630 SW2d 478, 482-83 (Tex.App.--Fort Worth 1982, writ ref'd n.r.e.) (holding an administrator's unauthorized compromise and settlement of litigation in open court is an act that is voidable, but not void). One can see that if the settlement was voidable when done in open court, it could easily be void if no court approval was sought at all.

For both plaintiff and defendant, a quick checklist is important when setting any case, but particularly a dependent administration. Consider the following points:

1. All parties joined and determined by heirship
2. Authority to employ counsel
3. Fee contract approved
4. Standing and approval to settle
5. Where funds go for minor or incapacitated
6. Release
7. Indemnity allowed or not
8. Effective date
9. Further documents
10. Confidentiality

### **C. Independent Executor**

Generally, "independent" representatives may settle and bind the estates, without prior court approval. It is, however, advisable to confirm an independent representative's authority to bind the estate. Parties dealing or settling with an independent executor or administrator should (i) request a copy of the probated will and letters testamentary showing the executor has authority to act on behalf of the estate; (ii) call the probate clerk and verify the executor's letters have never been revoked; (iii) review the will and determine if the executor is given the power to settle and/or compromise the estate claims; and (iv) if the will does not give the executor the power to settle or compromise, you should require the beneficiaries under the will to sign the release in addition to the independent executor.

## **XI. TRAP NO. 10: FAILING TO GET HIRED AS ATTORNEY OF RECORD AND ENTERING FEE AGREEMENTS WHICH MAY BE SET ASIDE.**

### **A. Generally**

Again, whether court approval is needed for the representative to hire counsel will depend upon the type of estate involved. Prior to September 1, 1993, the Texas Probate Code prohibited a personal representative of the estate from conveying more than a one-third (1/3) contingent fee plus costs to an attorney. There was no authority for exceeding the percentage, no matter how difficult the case or inequitable the fee.

As amended, Sections 233 (for decedent's estate) and 665C (for guardianship estate) allows a representative to convey out more than a one-third contingent fee if court approval is obtained. See TEX. PROB. CODE ANN. §§ 233, 665C (Vernon Supp. 2000). A court will consider the following factors in approving a contingency fee of more than one-third:

- The time and labor that will be required, the novelty and difficulty of the questions to be involved, and the skill that will be required to perform the legal services properly;
- The fee customarily charged in the locality for similar legal services;
- The value of the property recovered or sought to be recovered by the personal representative under this section;
- The benefits to the estate that the attorney will be responsible for securing; and
- The experience and ability of the attorney who will be performing the services.

*See Id.* §§ 233, 665C.

### **B. Independent Administrations**

An independent administrator or executor can hire an attorney without court approval as long as he or she does not enter into a contingency fee arrangement which conveys out more than a one-third interest in the property sought to be recovered. See TEX. PROB. CODE

ANN. § 233 (Vernon Supp. 2000). However, an independent administrator must obtain court approval if they wish to enter into a contingent fee arrangement which grants an interest in the property to be recovered that is greater than one-third. *See Id.* A settling defendant should consider requiring court approval in settling when it is discovered that a fee greater than 33-1/3 is to be paid by the defendant.

### **C. Dependent Administrations**

The attorney seeking to bring suit on behalf of a decedent's estate should obtain court authority for the dependent administrator or executor to retain the attorney to prosecute the suit. *See* TEX. PROB. CODE ANN. § 233 (Vernon Supp. 2000) (discussed *supra*). The court will require that an order appointing your client as personal representative and that the oath and bond be on file before an application to engage counsel is approved.

Generally, the court will not require a hearing to obtain approval of the fee contract. If approved, the order can also validate the contract against third parties who claim they have previously signed up with a plaintiff, as a client, or who subsequently claim to have signed up the client. Note, it is generally "first come, first served." The court's order also prevents the personal representative from discharging the attorney without court approval.

### **D. Guardianships**

Similar to a dependent administration, the attorney seeking to represent a person under a guardianship should seek court authority for the guardian to retain the attorney to prosecute any tort or other injuries. *See* TEX. PROB. CODE ANN. §§ 665C, 772 (Vernon Supp. 2000).

The process of having the contract approved in a guardianship is the same as that for a dependent administration discussed previously.

## **XII. TRAP NO. 11: SECTION 142 AND 867 TRUSTS, SECTION 887 DEPOSITORY PROVISION, AND SPECIAL NEEDS TRUST.**

### **A. Overview**

When dealing with the payment of a judgment award or settlement for a minor or

incapacitated person, it is not always necessary to open a guardianship estate. The Texas Probate and Property Codes provide several alternatives that can save both time and money.

Prior to September 1, 1993, when a final judgment was rendered in a proceeding in favor of a minor or an incapacitated person, the court, on proper motion by next friend, could create a trust for the individual provided there was no appointed guardian. *See* TEX. PROB. CODE ANN. §§ 142.001-142.007 (Vernon 1995). Effective September 1, 1993, this is true even if a guardian has been appointed. *See* TEX. PROB. CODE ANN. § 867 (Vernon Supp. 2000). (emphasis added).

Under both Texas Property Code Section 142 and Texas Probate Code Sections 867 through 873, there must be a showing that the trust is in the best interest of the minor or incapacitated person, and the trustee of the trust must be a trust company that is located in Texas or a state or national bank located in Texas having trust powers. *See* TEX. PROB. CODE ANN. § 142.005(a) (Vernon 1995); TEX. PROB. CODE ANN. § 867 (Vernon Supp. 2000).

#### **1. Advantage**

Both Section 142 and 867 trusts provide the following advantages:

##### **a. Cost**

The expense and cumbersome procedures of a guardianship are mostly eliminated.

##### **b. Increased Investment Authority**

The trust assets are managed and continuously invested without the necessity of any court proceedings. Note, however, that the court authorizing the creation of a Section 142 Trust may not limit or otherwise direct investments. *See* McGough v. First Court of Appeals, 842 SW2d 637, 639-40 (Tex. 1992). In McGough, the Texas Supreme Court held that a judge should not be involved in investment decisions because the judge is judicially immune from the liability and the minor or ward would have no recourse against the judge for an improper investment decision.

c. Flexibility

The trustee may make discretionary distributions to the beneficiary or persons beneficiary is legally obligated to support promptly and without a court order.

d. Corporate Management

The trust assets are managed and supervised by a bank or trust company under the banking and trust laws of Texas. If the guardian would have difficulty obtaining a large bond, the trust eliminates the bonding obligation.

**B. Texas Property Code Section 142 Trusts**

A Section 142 Trust may be created for a minor or incapacitated person who does not have a court appointed guardian at the time of the creation of the trust. The appointment of a guardian after the creation of the trust will not cause the termination of the trust because the statute specifically provides that the trust shall continue in full force and effect until terminated or revoked, notwithstanding the appointment of a guardian of the estate. Some courts, however, require the conversion of a Section 142 Trust to a Section 867 Trust to provide more protection.

Section 142 Trusts are typically used in personal injury actions; however, there appears to be no prohibition against utilizing this procedure in other kinds of litigation, including certain probate matters. The statute only requires that there be a judgment in a suit in which an award of damages or property is made in favor of a minor or an incapacitated person who has no legal guardian. This would include any litigation, including litigation before a statutory probate court under the expanded jurisdictional rules of Sections 5 and 5A of the Texas Probate Code.

1. Establishing the Trust

Under Chapter 142 of the Texas Property Code, the “next friend” or representative of the minor or incapacitated person may make application to the judge of the court in which a money judgment has been recovered for the creation of a trust to handle the money so recovered. It is within the discretion of the court to create a Section 142 Trust if it is in the “best interests” of the beneficiary. *See* TEX. PROP. CODE ANN. § 142.005(a) (Vernon 1995).

Remember, however, the person applying for the trust must either be the next friend or ad litem for the minor or incapacitated person. The court may not *sua sponte* order the ad litem (or presumably anyone else) to apply to the court for a 142 trust, nor can the court require one on its own motion. *See McGough v. First Court of Appeals*, 842 SW2d 637, 639-40 (Tex. 1992). Also, in the case of an incapacitated person, the court must make a finding that the person is incapacitated.

2. Best Interests

The factors or circumstances that the court will consider in making its determination that a Section 142 Trust would be in the best interests of a particular individual are not stated in the statute, but some of the more obvious considerations would include the beneficiary’s (i) physical condition and needs, (ii) beneficiary’s age, (iii) emotional maturity, and (iv) family situation. Additional considerations include the (i) amount and kind of judgment, (ii) desirability of providing more flexible investment powers over the judgment proceeds, and (iii) relative safety of the trust versus other available methods.

3. Mandatory Provisions

Because it is a trust authorized by statute, it must contain the basic terms required by Section 142.001, et seq., of the Texas Property Code. *See* TEX. PROP. CODE ANN. § 142.005(b) (1)-(6) (Vernon 1995). The basic mandatory provisions are discussed below.

a. Sole Beneficiary

The sole beneficiary must be the minor or incapacitated person. If the lawsuit involves two or more minors or incapacitated persons, a separate trust must be created for each of plaintiff. *See Id.* § 142.005(b)(1).

b. Distribution Standard

The trustee must have **sole** discretion to use and expend the income and principal of the trust as is reasonably necessary for the beneficiary’s health, education, support, and maintenance. *See* TEX. PROP. CODE ANN. § 142.005(b)(2) (Vernon 1995).

c. Undistributed Income

Undistributed income of the trust must be added to the principal. *See* TEX. PROP. CODE ANN. § 142.005(b)(3) (Vernon 1995).

d. Termination Date

When the beneficiary is a minor, the trust will terminate on the earlier of his or her (i) death, (ii) reaching the age stated in the instrument, or (iii) 25th birthday. In the case of an incapacitated person, the trust will terminate on his or her (i) death, or (ii) regaining capacity. *See Id.* § 142.005(b)(4). Upon termination of the trust, the trust principal and any undistributed income must be paid to the beneficiary if living; otherwise, it must be paid to the representative of the beneficiary's estate. *See Id.* § 142.005(e).

e. Bond

The trustee will serve without bond. *See* TEX. PROP. CODE ANN. § 142.005(b)(5) (Vernon 1995).

f. Compensation

The trustee will receive reasonable compensation paid from the trust's income, principal, or both, upon application to, and approval of, the court. *See* TEX. PROP. CODE ANN. § 142.005(b)(6) (Vernon 1995). It is possible for the court to approve prospectively the trustee's fees at the time of the creation of the trust and to authorize the trustee to pay itself, without further court approval, compensation no greater than that provided by the trustee's then published fee schedule. It is beneficial for the trustee to discuss compensation with the court at the time that the trust is created. *See Id.* § 142.003.

4. Permissive Provisions

A Section 142 Trust may also contain certain "permissive" provisions in the trust instrument. The trust may contain any other terms, provisions, conditions, or limitations which are not inconsistent with the mandatory provisions. *See* TEX. PROP. CODE ANN. § 142.005(b) (Vernon 1995). Some of the more commonly used provisions are discussed below.

a. Distribution of Income

The trust may also provide for distributions to be made either directly to the beneficiary or by the trustee for the beneficiary's benefit without the intervention of the beneficiary's legal or natural guardian. *See* TEX. PROP. CODE ANN. 142.005(c)(2) (Vernon 1995). Distributions may also be made directly to the legal or natural guardian if the trustee so desires. *See Id.*

b. Staged Distribution of Principal

The beneficiary may receive an intermediate distribution of a portion of the trust corpus when he or she attains a designated age. *See Id.* § 142.005(c)(1). For example, the trust may provide that the beneficiary can receive one-half of the corpus at age twenty-one and the balance at age twenty-five.

c. Special Needs

Effective September 1, 1997, the court can create a Section 142 Trust that qualifies as a special needs trust under 42 USC 1396p(d)(4)(A). *See Id.* § 142.005(g) (Vernon Supp. 2000). Special Needs Trusts are briefly discussed *supra*.

5. Revocation and Amendment

The trust must remain subject to revocation or amendment by the court at any time prior to its termination. However, neither the beneficiary nor the beneficiary's guardian (if one is later appointed) may revoke or amend the trust. *See* TEX. PROP. CODE ANN. § 142.005(d) (Vernon 1995). Should the court revoke the trust after its creation, the court must provide for protection of the funds if the beneficiary is still under the age of 18. If the trust is terminated and the beneficiary is over 18 and has mental capacity, the trust fund must be delivered to the beneficiary. *See Id.*

**C. Section 867 Trusts**

Enacted in 1995, Sections 867 through 873 of the Texas Probate Code introduced the concept of the management trust within the context of the formal guardianship. If a guardianship is in existence, the trustee will have an annual reporting requirement to the probate court. Because the Section 867

management trusts are relatively new, there is little case law through which to evaluate its operation; however, many of the same issues discussed above as to Section 142 trusts will no doubt also apply to Section 867 trusts as well. If the minor or incapacitated person has a guardian, a Section 142 trust will not work and a Section 867 management trust should be considered.

1. Establishing the Trust

Effective September 1, 2001, either a guardian, the proposed ward's attorney ad litem, or the proposed ward's guardian ad litem can seek to create an 867 Trust. *See* TEX. PROB. CODE ANN. § 867 (Vernon Supp. 2001). Regardless of who brings the application, the court must find that such trust is in the "best interests" of the person alleged to be incapacitated, and the order creating the trust shall order the person's assets to the trustee and shall set out the terms, conditions, and limitations placed on the trust. *See Id.*

2. Mandatory Provisions

Generally, a Section 867 Trust must contain the same provisions as a Section 142 Trust. *See* discussion *supra*; TEX. PROB. CODE ANN. § 868 (Vernon Supp. 2000). However, unlike a Section 142 trust, the trustee of a Section 867 trust must prepare and file an annual accounting with the probate court. These accountings are similar to the annual accountings filed by a guardian of an estate. A copy of the trustee's accountings must be provided to the ward's guardian and reviewed and approved by the probate court. *See Id.* § 871.

3. Permissive Provisions

Section 867 trusts may contain certain permissive provisions. Of significance is Section 868(b) which provides that:

(b) The trust may provide that a trustee make a distribution, payment, use, or application of trust funds, as necessary and without the intervention of a guardian or other representative of the ward, to the ward's guardian or to a person who has physical custody of the ward for:

(1) the benefit, support, or maintenance of the ward if the ward is a minor; or

(2) the support of the ward, and the support, maintenance, and education of the ward's children if the ward is an incapacitated person other than a minor.

TEX. PROB. CODE ANN. § 868(b) (Vernon Supp. 2000).

4. Trustee Compensation

The trustee is entitled to "reasonable compensation" for his services and his compensation is determined in the same manner as compensation of a guardian of an estate under Section 665. *See* TEX. PROB. CODE ANN. § 868 (a)(5) (Vernon Supp. 2000). The court can order the trustee's compensation to be approved prospectively, yet reviewed on the filing of the annual account.

5. Revocation and Amendment

The court may revoke or amend the trust any time prior to its termination. *See* TEX. PROB. CODE ANN. § 869 (Vernon Supp. 2000).

6. Termination

When the beneficiary is a minor, the trust will terminate on the earlier of his or her (i) death, (ii) reaching the age stated in the instrument, or (iii) 25th birthday. In the case of an incapacitated person, the trust will terminate on his or her (i) death, or (ii) regaining capacity. *See* TEX. PROB. CODE ANN. § 870 (Vernon Supp. 2000).

**D. Section 887 Depository Provision**

Alternatively, a person owing a minor or incapacitated person money can deposit the amount due with the county clerk in the county of the incapacitated person's residence without the appointment of a guardian. As of September 1, 2001, up to \$100,000.00 can be deposited without the appointment of a guardian. *See* TEX. PROB. CODE ANN. § 887 (Vernon Supp. 2000).

**E. Special Needs Trusts**

In deciding to create a trust with proceeds of tort litigation, the party responsible for the minor or incapacitated person should keep in mind the current governmental benefits to which that person is entitled or may be entitled. The elation of the settlement or judgment award can quickly fade once it is determined that all benefits are gone.

1. The eligibility for many governmental benefit programs is restricted to persons with limited resources and income. Therefore, when a disabled or incapacitated individual directly receives assets or income from a personal injury settlement, the person may become ineligible for many benefit programs. That is why the handling and transfer of the assets becomes so important.

2. A Special Needs Trust, is a planning device that may be used to hold assets which otherwise would belong to the disabled or incapacitated individual, and thereby permit the individual to remain eligible for various benefit programs. When a Special Needs Trust is established, maintained, and administered in a proper manner, the assets in the trust are not treated as disqualifying resources for the beneficiary. In that way, the disabled or incapacitated individual still qualifies for public benefits.

3. Once a special needs trust is established for an individual, any distributions from the trust must be made in a manner which will permit the beneficiary to continue to remain eligible for public benefits. It is imperative that individuals and institutions who act as fiduciaries educate themselves on the proper way to make distributions from special needs trusts and comply with the rules for government benefit programs. This is true whether we are involved with a person who is serving as guardian of an estate, or the trustee of a trust created under § 142 of the Texas Property Code, or 867 of the Texas Probate Code, for the benefit of a minor or incapacitated person.

4. When considering the need for a special needs trust, factors to consider include:

whether the person (a) currently receives SSI/Medicaid; (b) is qualified for any kind of “waiver” program; or (c) the parent’s award could disqualify the child now from those benefits. If so, consider the alternatives for health care and any special needs they will have, particularly between now and age 18, if they are minors, when they could, perhaps, qualify for benefits on their own.

5. Finally, if you have a special needs situation, but less money than a corporate trustee will consider, call the ARC OF TEXAS MASTER POOLED TRUST FUND in Austin. They have an initial set up fee and a yearly fee schedule based on how distributions will likely be handled. For further information call: 1-800-252-9729 or 512-454-6694 (fax: 512-454-4956). The Texas Risk Pool insurance is for otherwise uninsurable people and is underwritten by Blue Cross/Blue Shield. There is a 1 million cap and various deductible plans from which to choose. Their website is [www.txhealthpool.org](http://www.txhealthpool.org) or [www.texasriskpool@bcbstx.com](mailto:www.texasriskpool@bcbstx.com). The toll free number is: 888-398-3927. The Children’s Health Insurance Program (“CHIP”) program seeks to provide low cost health insurance to low and medium income families so that children may be insured from birth to age 19 for a reasonable cost. Call either: TexCare Partnership 800-647-6558 or in Houston, Texas Children’s Member Services 800-990-8247. Website is [www.texaschildrenshospital.org/healthplan](http://www.texaschildrenshospital.org/healthplan).

**XIII. TRAP NO. 12:  
CHARACTERIZATION OF THE  
RECOVERY AS SEPARATE OR  
COMMUNITY PROPERTY.**

From a probate or family law perspective, it is both useful and necessary to classify the character of the recovery of any judgment. The characterization becomes significant on divorce or death. Recovery for mental pain and anguish, loss of consortium, and personal injury are separate property. See TEX. FAM. CODE ANN. § 3.001 (Vernon Supp. 2000); Moreno v. Alejandro, 775 SW2d 735 (Tex.App.--San Antonio 1989, writ denied). Recovery for medical expenses as well as loss of earning

capacity during marriage are community property. *See Id.* All too often, the judgments are silent and lead to further litigation.

In the 1993 legislative session, the intestacy law regarding community property was changed. Under the old Section 45 of the Texas Probate Code, if the deceased had a child, children or descendants who survived him, the surviving spouse was entitled to one-half of his community property; the other one-half passed to the child, children or descendants of the deceased. *See TEX. PROB. CODE ANN.* § 45 (Vernon 1980). If a decedent died after September 1, 1993, and all surviving children or descendants of the deceased spouse are also children or descendants of the surviving spouse, the entire community property estate of the deceased spouse passes to the surviving spouse. *See TEX. PROB. CODE ANN.* § 45 (Vernon Supp. 2000). However, if the deceased spouse had a child, children or descendants from a prior relationship or marriage, the surviving spouse receives his or her one-half of the community property and the decedent's one-half passes to the child, children or descendants of the deceased. *See Id.*

The law regarding separate property has not changed. The surviving spouse receives one-third of the personal separate property of the intestate and the remaining two-thirds passes to the child or children of the deceased and their descendants. *See TEX. PROB. CODE ANN.* § 38(b) (Vernon 1980). The surviving spouse is also entitled to an estate for life in one-third of the separate land of the intestate, with the remainder passing to the child, children or descendants of the intestate. *See Id.* If the recovery of a survivorship action goes to the estate and/or the heirs, it will be subject to division in the probate court and such division depends on proper characterization of the settlement proceeds. The division, however, is sometimes modified by family settlement agreements.

**XIV. TRAP NO. 13: OPENING A DECEDENT'S ESTATE TO FILE SUIT AGAINST THE ESTATE AND/OR GET COVERAGE UNDER A DECEDENT'S INSURANCE POLICY.**

**A. To Sue For Coverage**

Generally, an estate is opened by a decedent's heirs so that the estate may sue as a plaintiff. It is possible, however, for a potential creditor to seek the appointment of an administrator so that the creditor may sue the estate.

1. Authority

Section 76 of the Texas Probate Code provides that any "interested person" may make an application for the appointment of an administrator. *See TEX. PROB. CODE ANN.* § 76 (Vernon Supp. 2000). Section 3(r) of the Texas Probate Code defines interested persons to include not only heirs, devisees, and spouses, but also creditors, or any others having a property right in, or claim against, the estate being administered. *See Id.* § 3(r). Thus, a potential creditor seeking to sue the estate has standing to seek the appointment of an administrator.

On point is the Texas Supreme Court decision of Nelson v. Neal, 787 SW2d 343, 344 (Tex. 1990). In Nelson, Nelson and Neal were killed as a result of a plane crash in Bowie County, Texas. Neal's widow filed a wrongful death claim against the Nelson's estate in federal court. Nelson's estate took no action to open an administration in Texas; therefore, Neal's widow sought the appointment of a temporary administrator of Nelson's estate pursuant to Section 131A of the Texas Probate Code. *See Id.* Nelson's estate contested the opening of the estate in a Texas court by arguing that an administration is only necessary when at least two debts are to be satisfied out of the assets of the estate. *See TEX. PROB. CODE ANN.* § 178 (Vernon 1980). The Supreme Court of Texas held that the two debt requirement of Section 178 was satisfied by one wrongful death action on behalf of the widow and one wrongful death action on behalf of her children. *See Nelson*, 787 SW2d at 344. Thus, the creditor successfully obtained the appointment of a temporary administrator and was able to secure

an agent for service of process before the statute of limitations on her wrongful death claims had run. *See Id.*

## 2. Pitfalls

As a practical matter, the creditor or potential claimant will not want to be appointed administrator. First, you would be suing yourself. Second, you would have fiduciary duty to the heirs at law. Third, you would have to deal with all other creditors and potential creditors of the estate. In summary, you would be responsible for the entire estate administration.

An alternative is to ask for a third party. The best scenario would be that a family member would step in and take over the administration and/or offer the decedent's Last Will and Testament for probate. The only drawback with a third party is that the court may want some assurance that, regardless of the success of the cause of action against the estate, the third party is going to be paid for defending and administering the estate. When seeking an estate as a potential creditor or claimant, you should examine the upside and downside.

## **B. Opening an Estate to Sue for Assets**

An estate can be opened when it is believed that the estate is large and liability is strong on the claim against the Decedent's estate. There may be little insurance coverage but information that assets are available to cover the tort. This plan can be thwarted by secured creditors and non-probate assets.

### 1. Secured Creditors

A secured creditor is one who holds a first lien against the property. Typically, the lien would be superior to all other liens. Also, once the tort claim is filed, the creditor may opt to elect a preferred debt and lien status, looking only to the property secured.

### 2. Non-Probate Assets

Typically, the tort claim will not reach to non-probate assets. These assets pass outside the estate to the person or entity designated. An entire estate can be rendered insolvent by the discovery that the majority of the assets are non-probate. Some non-probate assets include:

- a. Life insurance
- b. Annuities
- c. Retirement benefits.
- d. Joint tenancy with right of survivorship accounts
- e. Payable on death or transferable at death accounts
- f. Social Security
- g. United States Savings Bonds
- h. Property held in trust for another by Decedent
- i. Uniform gift to minor accounts

A quick discovery process should be undertaken to determine if there is a viable estate from which to recover.

## **XV. TRAP NO. 14: GUARDIAN AD LITEM ISSUES.**

Frequently a guardian ad litem is appointed in a personal injury matter to represent the interests of a minor or incapacitated individual when there is an adverse interest among the litigants.

The role of the guardian ad litem is not the same as that of the personal injury attorney. *See Dawson v. Garcia*, 666 SW2d 254, 265 (Tex.App.--Dallas 1984, no writ)(guardian ad litem not attorney for minor). It is the guardian ad litem's responsibility to determine if the settlement is fair and reasonable to his client. *See Friends For All Children, Inc. v. Lockheed Aircraft, Corp.*, 725 F.2d 1392, 1400 (D.C. Cir. 1984) (guardian ad litem's role is to protect best interests of minor and ensure dispute will be resolved fairly and expeditiously); *Texas Employers Ins. Corp. v. Keenom*, 716 SW2d 59, 67 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). It is not to play second chair to or act as co-counsel with the personal injury attorney.

The amount of detail with which the guardian ad litem should perform the case evaluation depends on the guardian ad litem's experience, the identity of other counsel, and the facts of the case. Every case does not require independent questioning of physicians and other fact or expert witnesses. Generally, the guardian ad litem should rely on the plaintiff and defense counsel's work provided

the counsel prove themselves to be reliable. For example, in Roark v. Mother Francis Hosp., a guardian ad litem spent over 400 hours working on a medical malpractice case on behalf of a minor child. See 862 SW2d 643, 645 (Tex.App.--Tyler 1993, no writ). The plaintiff's attorney admitted that the ad litem had "significantly assisted the [p]laintiff in preparation for trial, settlement negotiation," and final settlement. See *Id.* During the hearing on the ad litem's fees, the trial judge was stunned at the time the ad litem had devoted to the case and, therefore, reduced the requested fee in excess of \$100,000.00 to \$20,000.00. See *Id.* at 646. The Court of Appeals in reviewing what the role of a guardian ad litem should be in a personal injury case stated the following:

The guardian ad litem is required to participate in the case to the extent necessary to protect the ward. Pleasant Hills Children's Home v. Nida, 596 SW2d 947, 951 (Tex.Civ.App.--Fort Worth 1980, no writ); Coastal States Gas Producing Co. v. Locker, 436 SW2d 592, 596 (Tex.Civ.App.--Houston [14th Dist.] 1968, no writ). Obviously, the guardian ad litem should be allowed considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary to that effort. Phillips Petroleum v. Welch, 702 SW2d 672, 675 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). However, the guardian ad litem is appointed by the court to assist it in properly protecting an infant's interest against an apparent adverse interest of its parents or next friend. A guardian ad litem who goes beyond his role and assumes the duties of plaintiff's attorney is not entitled to compensation for work done assisting or acting for plaintiff's counsel. Dawson v. Garcia, 666 SW2d 254, 265 (Tex.App.--Dallas 1984, no writ).

Roark, 862 SW2d at 647.

Therefore, unless the personal injury attorney is doing an inadequate job, the guardian ad litem should not attend pre-trial

discovery or hearings unless requested. It is not unusual for a guardian ad litem to attend the deposition of the minor or incapacitated person. At a minimum, however, the guardian ad litem should discuss pre-trial involvement with all defense counsel. They will usually be the ones whose clients will be paying the fee, and this will avoid problems by keeping them informed of the guardian ad litem's actions. Note, however, once the tort reform bill is enacted, the rules as to who pays the guardian ad litem in certain cases may turn on who prevails in the lawsuit. Unless the guardian ad litem can justify extensive work in advance, he or she may have a serious dispute later about the necessity of attending the personal injury attorney's depositions and other pre-trial matters.

Further, as to future fees, the Texas Supreme Court has held that a guardian ad litem is not entitled to an award for services performed after the resolution of the conflict of interest giving rise to his or her appointment. See Brownsville-Valley Reg. Medical v. Gamez, 894 SW2d 753, 755 (Tex. 1995). In Brownsville-Valley Reg. Medical, a guardian ad litem was appointed to represent a minor's interest in a medical malpractice lawsuit arising from an incident which resulted in the minor's remaining in a vegetative condition for the rest of her life. All parties reached a settlement which, in part, provided that \$409,359.50 would be placed in a 142 Trust for the minor's use and benefit and the defendants would pay the guardian ad litem's fee. At the settlement hearing, the guardian ad litem requested an award of \$46,000.00. The guardian ad litem testified that he had spent between 15 to 20 hours on the suit and expected to spend approximately 15 to 20 hours per year for the next twenty-two years, the duration of the trust, reviewing matters related to the trust. Based on this testimony, the court awarded the guardian ad litem a fee of \$40,000.00. Defendants appealed the award of all amounts relating to post-judgment services.

In reversing both the trial court's award and the court of appeals' affirmation, the Texas Supreme Court stated the following:

[Guardian ad litem's future] services are neither authorized by Rule 173, nor are

they necessary to protect [the minor's] interests. The Family Code charges the parents with the duty to support the child, which specifically includes providing clothing, food, shelter, medical care, and education. TEX. FAM. CODE ANN. § 12.04 (3). Thus, according to the statute, it is the [parents] who have the responsibility to ensure [the minor's] needs are met, not [the guardian ad litem]. The trial court's order requiring [the guardian ad litem] to oversee the trust is unnecessary because if the trustee fails to administer the trust according to its terms, or if it does so in a negligent manner, it will be liable to [the minor] for breach of fiduciary duty. See *Jewett v. Capital Nat'l Bank*, 618 SW2d 109, 112 (Tex.Civ.App.--Waco 1981, writ ref'd n.r.e.). In sum, the post-litigation services [the guardian ad litem] was to provide are duplicative of the duties imposed on the [minor's parents] and the trustee to ensure [the minor's] well-being.

*See Id.* at 756. Thus, the Texas Supreme Court appears to leave no question that a guardian ad litem is not entitled to compensation for services rendered post-judgment.

The guardian ad litem should keep time on a file to which he or she is appointed. Lawsuits can extend over a period of years, and the memory of counsel and the person appointed will fade. A guardian ad litem should always be prepared to prove up his or her hours and expenses. As a practical matter, it is also advisable to check on the status of the case with both plaintiff and defense counsel if the case has had no activity for several months.

## **XVI. TRAP NO. 15: TAX ISSUES.**

### **A. Overview**

On August 20, 1996, President Clinton signed into law the Small Business Job Protection Act of 1996 ("the 1996 Act"). Included in the 1996 Act was a provision that substantially amends Section 104 of the Internal Revenue Code which addresses the taxation of compensation for injuries and sickness. See I.R.C. 11 U.S.C. § 104(a).

Prior to the enactment of the 1996 Act, Section 104(a) of the Internal Revenue Code

provided a global exclusion for any damages received (whether by suit or agreement) on account of personal injury or sickness. See I.R.C. 11 U.S.C. § 104(a)(1)-(2). The exclusion from income was interpreted to include personal injuries whether or not the injury related to actual physical sickness or injury. Thus, certain courts have held that damage awards relating to injury to reputation or employment discrimination were excluded from the recipient's gross income. Additionally, the courts were split on the issue whether the exclusion applied to punitive damages awarded in a case involving personal injury related to actual physical injury or sickness. See *O'Gilvie v. U.S.*, 66 F.3d 1550 (10th Cir. 1995), cert. granted, 64 U.S.L.W. 3639 (U.S. March 25, 1996)(No. 95-966) (Supreme Court granted writ to decide whether exclusion applies to punitive damages awarded in personal injury lawsuits).

Section 104(a), as amended to modify a blanket exclusion from income and currently in effect, now provides:

- (1) Amounts received under workmen's compensation acts as compensation for personal injuries or sickness;
- (2) The amounts of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of *personal physical injuries or physical sickness*;  
...

For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraphs (A) and (B) of Section 213 (d)(1)) attributable to emotional distress.

I.R.C. § 104(a)(1)-(2) (emphasis added).

Section 104(a), as amended, applies to amounts received after the date of enactment (August 20, 1996) in taxable years ending after such date. H.R. 3448 § 1605(d)(1). The

amendment does not apply to amounts received under a written binding agreement, court decree or mediation award in effect on (or issued on or before) September 13, 1995. H.R. 3448 § 1605 (d)(2). Thus, any amounts received subsequent to August 20, 1996, including those resulting from a structured settlement, etc., which relate to an agreement or judgment in existence on September 13, 1995, would continue to be taxed in accordance with prior law.

### **B. Damages Relating to Non-Physical Injury or Sickness**

Damages received on account of non-physical injuries or sickness are includible in a claimant's income and subject to income taxes. These include damage recoveries based on a claim of employment discrimination or injury to reputation. Further, Section 104(a) now clearly provides that an emotional distress claim made in conjunction with a claim for non-physical injuries will not be treated as a physical injury or sickness. In fact, the legislative history indicates that the amendment was predicated on the belief that these recoveries compensate the claimant for lost wages or profits and, as such, should be includible in the claimant's taxable income.

Therefore, if a plaintiff files a lawsuit based primarily on employment discrimination, wrongful termination, injury to reputation, etc., any recovery, whether by settlement or judgment, will generally constitute taxable income to the claimant. *See* I.R.C. 11 U.S.C. § 104(a). If such claimant also successfully recovers damages relating to a claim of emotional distress made in conjunction with his or her non-physical injury or sickness, any damages awarded would also be subject to taxation because the underlying action was not a claim for personal "physical" injury or sickness.

### **C. Damages Relating to Physical Injury or Sickness**

Section 104(a), as amended, now limits the income tax exclusion to recoveries "on account of" personal physical injury or sickness. The pivotal language being "on account of." The Conference Committee Report provides the following explanation:

The bill provides that the exclusion from gross income only applies to damages received on account of a personal physical injury or physical sickness. If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness whether or not the recipient of the damages is the injured party. For example, damages (other than punitive damages) received by an individual on account of a claim for loss of consortium due to physical injury or physical sickness of such individual's spouse are excludible from gross income. In addition, damages (other than punitive damages) received on account of a claim for wrongful death continue to be excludible from taxable income as under present law.

House Conference Committee Report 104-586, REVENUE OFFSETS (5) (May 20, 1996). (emphasis added).

Note that Section 104(a), as amended, now states that for the purposes of Section 104(a)(2) (relating to the exclusion of personal physical injuries or sickness), emotional distress shall not be treated as a physical injury or physical sickness. This language appears to provide that damages recovered for a claimant's emotional distress may be taxable income to the claimant. However, the legislative history indicates that a recovery for emotional distress "on account of" a physical injury is still excluded from gross income. Specifically, the Conference Committee Report provides that:

Because all of the damages received on account of physical injury or physical sickness are excludible from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.

House Conference Committee Report 104-586, REVENUE OFFSETS (5) (May 20, 1996).

Thus, based on the legislative history, it appears that all damages (except punitive damages) recovered in a lawsuit which arise from a physical injury or sickness will continue to be excluded from a claimant's gross income. This would include a damage recovery by a claimant who actually suffered physical injury or sickness and any person (such as a spouse, parent, child, etc.) who may recover damages "on account of" the injured claimant's physical injury or sickness. The exclusion extends to recoveries for physical injury or sickness pursuant to Texas' wrongful death and survival statutes. *See* TEX. CIV. PRAC. & REM. CODE § 71.002, -.004 (cause of action for actual injury arising from an injury that causes an individual's death) (Vernon 1997); *See Id.* § 71.021 (cause of action for personal injury to health).

#### **D. Punitive Damages**

As a general rule, any future punitive damage recovery will constitute taxable income to the claimant. The legislative history evidences Congress' belief that punitive damages are intended to punish and do not compensate a claimant and are, thus, a windfall to the claimant. This includes punitive damages whether or not they arise from a claim involving physical injury or sickness. An exception is provided for punitive damages recovered in states in which the applicable law provides that only punitive damages may be awarded in wrongful death actions. *See* I.R.C. 11 U.S.C. § 104(a).

#### **E. Prejudgment and Post-Judgment Issues**

Prejudgment and post-judgment interest is taxable as gross income. *Rice v. United States*, 834 F.Supp. 1241 (D.C. 1993). It is considered a delay in receiving monetary damages, but it is the lost time value of money. *See Delaney v. Commissioner*, 99 F.3d 20 (1<sup>st</sup> Cir. 1996).

#### **F. Estate Tax Consequences**

The general rule followed by the Internal Revenue Service is that wrongful death proceeds are not included in the gross estate of the deceased for federal estate tax purposes. The reason is that the decedent had no right to the proceeds at the time of his death because the

cause of action did not accrue until immediately after his death. *See* Rev. Rul. 83-44, 1983-1 CB 228; Rev. Rul. 75-127, 1975-1 CB 297.

In contrast, damage proceeds which represent damages to which the decedent had become entitled during his lifetime, rather than damages for his premature death, are includible in his estate for federal estate tax purposes. *See* Rev. Rul. 83-44, 1983-1 CB 228; Rev. Rul. 75-127, 1975-1 CB 297. The reason for the inclusion is that the damages represent a property right to which the decedent had an interest at the date of his death. In most instances, the persons who could have the right to bring a wrongful death action (the proceeds of which are excludible) are identical to the persons who would benefit from the recovery of proceeds in a survival action. Accordingly, attorneys should use great care in their preparation of settlement agreements to maximize the after-tax benefit to those persons.

In 2003, if the gross estate exceeds \$1,000,000, a federal estate tax return (and Texas inheritance tax return) is required to be filed. The gross estate amount for 2004 is \$1,500,000 and for 2005 is the same. For 2006-2008, the gross estate is \$2 million. In 2009, it is \$3.5 million and no estate tax in 2010. The million dollars is reinstated in 2011. Keep in mind that all of these gross values could change.

It is important to understand that estate tax is applied only to the "taxable estate" and that certain deductions are allowed. For example, certain decedent's debts are deductible. Anything passing to the surviving spouse is deductible.

#### **XVII. CONCLUSION.**

Litigating wrongful death and survivor actions in the probate courts is becoming more common. Thus, you should always be conscious of the numerous rules and procedures applicable to probate court. You should also be aware of general responsibilities that a personal representative has toward an estate. Most important, both plaintiff and defendant should be cognizant of their rights, duties, and liabilities. This will protect both you and your client from future liability, and insure a binding settlement or judgment.

