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## The Scope of Texas Probate Jurisdiction over Matters Incident and Appertaining to an Estate.

Paula C. Tredeau

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## The Scope of Texas Probate Jurisdiction Over Matters Incident and Appertaining to an Estate

Paula C. Tredeau

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### I. INTRODUCTION

Probate was originally defined as the process of proving a will, but it has continually developed to include a broad range of functions relating to decedents’ estates and guardianships.<sup>1</sup> For example, the administration of an estate involves collecting assets, ascertaining and satisfying creditors, and distributing the balance of the estate to proper persons.<sup>2</sup> Providing for probate court jurisdiction to accommodate all types of probate issues would lead to a more efficient probate system in terms of cost, time, and judicial economy;<sup>3</sup> however, constitutional and statutory constraints estab-

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1. See Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 33, 35 (C. Saunders ed. 1975) (usage of probate broader than proving will); see also BLACK’S LAW DICTIONARY 1081 (rev. 5th ed. 1979) (“court procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally include all matters and proceedings pertaining to administration of estates, guardianships, etc.”).

2. See Bayse, *Streamlining Administration Under the New Texas Probate Code*, 35 TEXAS L. REV. 165, 187 (1956) (“primary functions” of administration of estates).

3. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Gregory drafted the major probate jurisdiction re-

lish limits on probate jurisdiction.<sup>4</sup> Considering the direct impact that probate jurisdiction has on the estate, the attorney, and the judicial system, it becomes a concern to both laymen and practitioners to develop an efficient, understandable probate jurisdiction system.

Initially, original probate jurisdiction was established primarily in constitutional county courts.<sup>5</sup> Since 1973, however, statutory amendments have resulted in a complex probate court system with four courts exercising original probate jurisdiction.<sup>6</sup> These changes have left confusion regarding the authority of each court.<sup>7</sup> The ambiguity in the field is most evident in areas that are not considered traditional probate matters. This comment will examine the development of probate jurisdiction from the early Texas constitutions in order to understand the current Probate Code and its recent amendments. In addition, a specific inquiry into the phrases "appertaining to an estate" and "incident to an estate" will be made in an attempt to reconcile their definitions of the non-traditional probate matters. Finally, this comment will examine recent case law to determine how the courts have treated the two terms.

## II. DEVELOPMENT OF PROBATE JURISDICTION

### A. *Constitutional Background*

In 1845, the Texas Constitution established probate jurisdiction in "inferior tribunals,"<sup>8</sup> which were later known as county courts.<sup>9</sup> Their pro-

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form in 1973. He explained that since probate jurisdiction was too limited in Texas and that the system of appeal was repetitive, the result was an increase in cost to the estate and to the courts, undue delay in closing estates, and inefficient use of the judicial system. *Id.*

4. *See* TEX. CONST. art. V, § 16 (probate jurisdiction of constitutional county court specifically stated); TEX. PROB. CODE ANN. § 4 (Vernon 1980) (jurisdiction of constitutional county court regarding probate).

5. *See* TEX. CONST. art. IV, § 16 (1866) (county court probate jurisdiction). The district court exercised concurrent original jurisdiction over executors, administrators, guardians, and minors, as well as appellate jurisdiction over the county court. *See id.* § 6. *See generally* W. SIMKINS, ADMINISTRATION OF ESTATES IN TEXAS § 1 (B. Holt 3d ed. 1934) (Texas probate law under Mexican rule followed Louisiana law; repealed 1840).

6. *See* TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984). The constitutional county court has been assigned original probate jurisdiction in both §§ 4 and 5 of the Probate Code. *See id.* §§ 4, 5. The statutory probate court is assigned jurisdiction in § 5. *See id.* § 5. Statutory probate courts exercise solely probate jurisdiction. *See id.* § 3(ii) (defining statutory probate courts). Statutory county courts exercise original probate jurisdiction. *See id.* § 5(c). The district court exercises original probate jurisdiction only upon transfer from constitutional county courts. *See id.* § 5(b).

7. *See* Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 372 (1976) (uncertainty in choice of forum for probate causes of action).

8. *See* TEX. CONST. art. IV, § 15 (1845). "Inferior tribunals shall be established in each county for appointing guardians, granting letters testamentary and of administration; for

bate jurisdiction was restricted, however, to appointing guardians, granting letters testamentary and of administration, settling accounts, and transacting business appertaining to estates<sup>10</sup> because the judge often was not legally trained.<sup>11</sup> The constitutional county court's probate jurisdiction was later expanded to include the authority to probate wills,<sup>12</sup> but there have been no other significant constitutional revisions in the court's probate jurisdiction.<sup>13</sup> The district court probate jurisdiction also originated in the

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settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates. . . ." *Id.* The county court and the district court had concurrent jurisdiction over certain probate matters. *See id.* "[T]he District Courts shall have . . . original jurisdiction and control over executors, administrators, guardians, and minors. . . ." *Id.* *See generally* W. SIMKINS, ADMINISTRATION OF ESTATES IN TEXAS § 1 (B. Holt 3d ed. 1934) (review of probate jurisdiction under Mexican rule and Texas republic); Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 33, 36 (C. Saunders ed. 1975 & Supp. 1980) (discussion of constitutional and statutory development of probate jurisdiction).

9. *See* TEX. CONST. art. IV, § 15 (1866) ("an inferior tribunal, styled the County Court"); *see also* Act of June 16, 1876, ch. 27, § 4, 1875 Tex. Gen. Laws 17, 8 H. GAMMEL, LAWS OF TEXAS 855 (1898) (statute describing county court organization and jurisdiction). The county court was originally assigned probate jurisdiction because it met more frequently than the district court and was more accessible to the people. *See* G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 438 (1978) (jurisdiction of probate matters in county court because of availability and accessibility).

10. *See* TEX. CONST. art. IV, § 15 (1845) (authority to appoint guardians, grant letters testamentary and of administration, settle accounts, transact business appertaining to estates).

11. *See* G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 438 (1978) ("jurisdiction had to be rather limited because the judge usually had no legal training"). The factor of the legal training of constitutional county court judges is still addressed today. *See* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (Supp. 1981) (jurisdiction determined by whether judge licensed to practice law in Texas); *see also* Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 382 n.62 (1976) (discussing benefit of attorney-judge at trial court level).

12. *See* TEX. CONST. art. IV, § 16 (1866) (added authority to probate wills; listed specific estates; included authority over settlement, distribution, and partition of estates).

13. *Compare* TEX. CONST. art. IV, § 16 (1866) (setting out probate jurisdiction over estates of deceased persons, minors, idiots, lunatics, and persons non compos mentis) with TEX. CONST. art. V, § 16 (changes from 1866 constitution limits settlement, distribution, and partition to estates of deceased persons rather than all estates listed; adds authority over common drunkards; deletes authority to settle accounts of administrators and guardians). During the period from 1869 to 1891 the constitutional county courts were abolished. *See* G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 431 (1978). The author asserts that the elimination of the county court in 1869 was due to a trend in government toward centralization. *See id.* at 431. Until reinstatement in 1876, the county court jurisdiction was placed in the district court. *See id.* at 437.

1845 constitution.<sup>14</sup> The district court had appellate jurisdiction over constitutional county courts and concurrent original jurisdiction with the county court over executors, administrators, guardians, and minors.<sup>15</sup> After a period of expanding district court probate jurisdiction,<sup>16</sup> the 1876 constitution returned the scope of the jurisdiction essentially to that established in 1866.<sup>17</sup> The constitutional provisions were incorporated into the Texas Probate Code,<sup>18</sup> but the statutory provisions on probate jurisdiction were also a part of the Probate Code's development and will be examined in order to fully understand the Probate Code's origins.

### B. *Statutory Background*

The first statute referring to constitutional county court probate jurisdiction adopted the language of the 1866 constitutional provision.<sup>19</sup> Subsequently, the legislature divided the probate jurisdiction of county courts into two statutes: the first defines authority over the estates of decedents,

14. See TEX. CONST. art. IV, § 15 (1845) (set out district court probate jurisdiction).

15. See *id.* ("District Courts shall have original and appellate jurisdiction, and general control over the said inferior tribunals, . . . original jurisdiction and control over executors, administrators, guardians, and minors. . . ."). See generally 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 21 (1971 & Supp. 1981) (discussion of district court probate jurisdiction).

16. Compare TEX. CONST. art. IV, § 15 (1845) ("original jurisdiction and control over executors, administrators, guardians, and minors") with TEX. CONST. art. IV, § 6 (1866) (increased authority included granting letters testamentary and of administration, settling accounts, transacting business appertaining to estates). By 1869, the probate jurisdiction of district courts also included original and exclusive jurisdiction over probating wills and the authority over settlement, partition, and distribution of estates. See TEX. CONST. art. V, § 7 (1869).

17. Compare TEX. CONST. art. IV, § 6 (1866) (control over executors, administrators, guardians and minors, granting letters testamentary and of administration, settling accounts, transacting business appertaining to estates) with TEX. CONST. art. V, § 8 (1876, amended 1891) (powers additional to those of 1866 included authority to probate wills).

18. Compare TEX. PROB. CODE ANN. § 5(b) (Vernon 1980 & Supp. 1984) (on transfer from constitutional county court, district court exercises probate jurisdiction) with TEX. CONST. art. V, § 8 (1876, amended 1891) (listing probate jurisdiction of district court).

19. Compare Law of June 16, 1876, ch. 27, § 4, 1876 Tex. Gen. Laws 17, 8 H. GAMMEL, LAWS OF TEXAS 855 (1898) (probate jurisdiction of constitutional county court included probating wills, appointing guardians, granting letters testamentary and administration, settling accounts, transacting business appertaining to estates, including settlement, distribution, and partition) with TEX. CONST. art. IV, § 16 (1866) (constitutional provision identical to original 1876 statute except that constitutional provision extends jurisdiction to common drunkards and to granting letters of guardianship, and limits settlement, partition, and distribution only to estates of deceased persons). When the first statute on constitutional county court probate jurisdiction was adopted in 1876 the county court was just being reinstated after being abolished in 1869. See G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 431 (1978).

and the second lists jurisdiction over guardians and wards.<sup>20</sup> The separation of the statute into the two titles "decedent's estates" and "guardian and ward" did not change the scope of probate jurisdiction.<sup>21</sup> The legislature continued to define probate jurisdiction by the two sets of statutes until the adoption of the Probate Code in 1955.<sup>22</sup> Constitutional county court jurisdiction was codified in section 4 of the Probate Code and the Code adopted essentially the same language that was used in the 1876 statute.<sup>23</sup> In 1879, the original statutory provisions for district court probate jurisdiction included appellate jurisdiction over probate matters and original jurisdiction over executors, administrators, guardians, and wards.<sup>24</sup> The language and structure of the district court statutes paralleled the constitutional county court statutes, and the provisions did not change until 1955.<sup>25</sup> Section 5 of the Probate Code granted the district court jurisdic-

20. See TEX. CIV. STAT. art. 1789 (1879) (jurisdiction to "probate wills, grant letters testamentary, or of administration, settle the accounts of executors and administrators, and transact all business appertaining to the estates of deceased persons, including the settlement, partition, and distribution of such estates") (superseded 1895); *id.* art. 2469 (jurisdiction to appoint guardians, settle accounts of guardians) (superseded 1895).

21. Compare Law of June 16, 1876, ch. 27, § 4, 1876 Tex. Gen. Laws 17, 8 H. GAMMEL, LAWS OF TEXAS 855 (1898) (county court statutory probate jurisdiction) with TEX. CIV. STAT. arts. 1789, 2469 (1879) (identical authority granted, separated into two statutes) (superseded 1895).

22. See TEX. REV. CIV. STAT. arts. 1840, 2550 (1895) (deceased's estate, guardian and ward) (superseded 1911); *id.* arts. 3206, 4043 (1911) (deceased's estate, guardian and ward) (superseded 1925); *id.* arts. 3290, 4102 (1925) (deceased's estate, guardian and ward) (repealed 1955). There was one significant amendment throughout the statutory history of constitutional county court probate jurisdiction. See Act of March 28, 1927, ch. 179, § 1, 1927 Tex. Gen. Laws, Gen. & Spec. 257, 257 (amending art. 4102 with provision to appoint guardians to receive federal funds) (repealed 1955).

23. Compare TEX. PROB. CODE ANN. § 4 (Vernon 1980) (county court authority to "probate wills, appoint guardians of minors and incompetents, grant letters testamentary and of administration and guardianship, settle accounts of personal representatives, and transact all business appertaining to estates subject to administration or guardianship, including the settlement, partition, and distribution of such estates," and appoint guardian to receive federal funds) with Law of June 16, 1876, ch. 27, § 4, 1876 Tex. Gen. Laws 17, 8 H. GAMMEL, LAWS OF TEXAS 855 (1898) (statutory probate jurisdiction of county court). The language is identical except for two areas. The Code does not provide for the apprentice of minors as the 1876 statute did. Additionally, the Code provides for appointment of guardians to receive funds from a government agency, whereas the 1876 statute does not. Compare TEX. PROB. CODE ANN. § 4 (Vernon 1980) with Law of June 16, 1876, ch. 27, § 4, 1876 Tex. Gen. Laws 17, 8 H. GAMMEL, LAWS OF TEXAS 855 (1898).

24. See TEX. CIV. STAT. art. 1790 (1879) (appellate jurisdiction over probating wills, granting letters testamentary and of administration, accounts of executors and administrators, business appertaining to the estate; original jurisdiction over executors and administrators) (superseded 1895); *id.* art. 2470 (appellate jurisdiction over guardianship; original jurisdiction over guardians and wards) (superseded 1895).

25. See TEX. REV. CIV. STAT. arts. 1841, 2551 (1895) (deceaseds' estates, guardian and

tion "in all probate matters" and returned to the court original jurisdiction over executors, administrators, guardians, and wards.<sup>26</sup> The broad language of section 5 is different from the detailed language found in related constitutional and statutory provisions, but does not alter the jurisdiction conferred.<sup>27</sup>

### C. Recent Probate Code Amendments

In 1973 the legislature adopted a major revision to section 5 of the Probate Code.<sup>28</sup> Before the legislature could implement these changes, how-

ward) (superseded 1911); TEX. REV. CIV. STAT. arts. 3207, 4044 (1911) (deceaseds' estates, guardian and ward) (superseded 1925); TEX. REV. CIV. STAT. arts. 3291, 4103 (1925) (repealed 1955). The district court jurisdiction was separated between deceaseds' estates and guardian and ward in 1879 when the same division was implemented in constitutional county courts. Compare TEX. CIV. STAT. art. 1789 (1879) (county court jurisdiction over deceaseds' estates) (superseded 1895) with TEX. CIV. STAT. art. 1790 (1879) (district court jurisdiction over deceaseds' estate) (superseded 1895).

26. See Law of March 17, 1955, ch. 55, § 5, 1955 Tex. Gen. Laws, Gen. & Spec. 88, 91 (amended 1973, 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). "The district court shall have appellate jurisdiction and general control over the county court in all probate matters, and original control and jurisdiction over executors, administrators and wards. . . ." *Id.*

27. Compare *id.* (appellate jurisdiction "in all probate matters") with TEX. CONST. art. V, § 8 (appellate jurisdiction "for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates") and TEX. REV. CIV. STAT. art. 3291 (1925) ("probating wills, granting letters testamentary or of administration, settling accounts of executors and administrators") (repealed 1955).

28. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Compare Act of March 17, 1955, ch. 55, § 5, 1955 Tex. Gen. Laws, Gen. & Spec. 88, 91 ("The district court shall have appellate jurisdiction and general control over the county court in all probate matters, and original control and jurisdiction over executors, administrators, guardians and wards.") (amended 1973, 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)) with Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The 1973 amendment to § 5 set out district court probate jurisdiction and first established Group I and Group II counties:

The district court shall have original control and jurisdiction over executors, administrators, guardians and wards under such regulations as may be prescribed by law.

In those counties in which there is no statutory probate court, county court at law or other statutory court exercising the jurisdiction of a probate court, the district court, concurrently with the county court, shall have the general jurisdiction of a probate court. In those counties it shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased

ever, a constitutional amendment was necessary to authorize a change in the probate jurisdiction of constitutional county courts.<sup>29</sup> Article V, sec-

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persons and to apprentice minors, as provided by law. All applications, petitions and motions regarding probate, administrations, guardianships, and mental illness matters shall be filed and heard in the count [sic] court, except that in contested probate proceedings, the judge of the county court on his own motion, or the parties by agreement may transfer such proceedings to the district court, which may then hear such proceeding as if originally filed in such court. In such counties all final orders in such matters shall be appealable to the courts of (civil) appeals.

In those counties where there is a statutory probate court, county court at law, or other statutory court exercising the jurisdictions of a probate court, all applications, petitions and motions regarding probate, administrations, guardianships, and mental illness matters shall be filed and heard in such courts, and the constitutional county court, rather than in the district courts, unless otherwise provided by the legislature, and the judges of such courts may hear any of such matters sitting for the judge of any of such courts. In such counties all final orders in such matters shall be appealable to the courts of (civil) appeals. All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate, including but 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 and all actions for trial of the right of property incident to an estate.

Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

29. See TEX. CONST. art. V, § 8 (granting legislature authority to alter probate jurisdiction in district and county courts, "Section 16 of Article V of this Constitution notwithstanding"). Prior to this, probate jurisdiction of county courts could not be changed. See TEX. CONST. art. V, § 22 (legislature could only alter civil and criminal jurisdiction of constitutional county court); see also TEX. CONST. art. V, § 22, interp. commentary (Vernon 1955) (probate jurisdiction separate from civil and criminal jurisdiction, therefore, unable to be changed by statute). *But cf.* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (1971) (more logical that the terms civil and criminal as used in art. V, § 22 included probate). The authors cite *State v. Gillette's Estate* and *State ex rel. Rector v. McClelland* as the two leading cases on probate jurisdiction. See 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (1971). *Gillette's Estate* held a statutory county court exercising probate jurisdiction to be unconstitutional. See *State v. Gillette's Estate*, 10 S.W.2d 984, 988-89 (Tex. Comm'n App. 1928, judgment adopted). This reasoning was not followed in *McClelland* when the Texas Supreme Court validated a statutory probate court in Harris County. Compare *State v. Gillette's Estate*, 10 S.W.2d 984, 988-89 (Tex. Comm'n App. 1928, judgment adopted) (statutory probate court invalid) with *State ex rel. Rector v. McClelland*, 148 Tex. 372, 378-79, 224 S.W.2d 706, 710 (1949) (statutory probate court valid). See also 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (1971). The *McClelland* case did not mention the *Gillette's Estate* case in the opinion. See *State ex rel. Rector v. McClelland*, 148 Tex. 372, 378-79, 224 S.W.2d 706, 710 (1949) (no mention of *Gillette's Estate* case); see also TEX. CONST. art. V, § 22, interp. commentary (Vernon Supp. 1982). The 1973 amendment to art. V, § 8 retained the district court's appellate jurisdiction over probate matters. See TEX. CONST. art. V, § 8. The legislature, however, eliminated the appellate jurisdiction by delegating to the district court only general jurisdiction over probate matters, concurrent with the county court. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (Group I



tion 8 of the Texas Constitution was amended to grant the legislature the authority to "increase, diminish or eliminate" the probate jurisdiction of the district court or the constitutional county court.<sup>30</sup> The implications of this grant of authority become clear after noting that prior to the amendment the legislature had no authority to change probate jurisdiction of the constitutional county courts,<sup>31</sup> and the district court probate jurisdiction had remained essentially unchanged from 1845 until 1973.<sup>32</sup>

The 1973 amendment to section 5 was intended to simplify and clarify probate jurisdiction by reorganizing the probate court system.<sup>33</sup> Initially, the amendment separated counties into Group I, those counties with no statutory probate courts, county courts at law, or other statutory courts exercising probate jurisdiction, and Group II, those counties which have a statutory probate court, county court at law, or other statutory court exercising probate jurisdiction.<sup>34</sup> In Group I counties the district court was given concurrent probate jurisdiction with the constitutional county

counties—district court's general jurisdiction over probate) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

30. See TEX. CONST. art. V, § 8 (granting legislature authority to increase, diminish, or eliminate probate jurisdiction of district or county courts).

31. See *id.* § 22 (legislature could change only civil and criminal jurisdiction of constitutional county courts, not probate).

32. Compare TEX. CONST. art. IV, § 15 (1845) ("District Courts shall have original and appellate jurisdiction, and control over the said inferior tribunals, and original and general control over executors, administrators, guardians, and minors. . . .") with Act of March 17, 1955, ch. 55, § 5, 1955 Tex. Gen. Laws, Gen. & Spec. 88, 91 ("The district court shall have the appellate jurisdiction and general control over the county court in all probate matters, and original control and jurisdiction over executors, administrators, guardians and wards. . . .") (amended 1973, 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

33. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The legislative history states the need for "a more convenient forum . . . to hear questions concerning the estate." See HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 1398, 63rd Leg. (1973). See generally Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 372 (1976) ("drastic change" in "time-honored division of probate jurisdiction"). Judge Pat Gregory, draftsman of the original version of the 1973 amendment, has explained that the probate court system was faced with many problems before the 1973 revision. These problems included the waste of time and money spent on trials in county courts that would be tried de novo in district court, the lack of judicial economy in the de novo appeal, and the amount of time and money it cost the estate and litigants during the trial. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984).

34. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The reason for dividing the counties may be to facilitate the purpose stated in the legislative history, that is to have the district court exercise probate

court.<sup>35</sup> The constitutional county court judge, on his own motion or by agreement of the parties, could transfer a contested matter to the district court.<sup>36</sup> Courts in Group I counties had the authority to “transact all business appertaining to deceased persons . . . including settlement, partition, and distribution of estates.”<sup>37</sup> In comparison, probate matters in Group II counties must be filed in statutory probate courts, statutory county courts, or constitutional county courts, not in district court.<sup>38</sup> Additionally, section 5 provided that “[a]ll courts exercising original probate jurisdiction shall have the power to hear all matters ‘incident to an estate.’”<sup>39</sup> The amendment provided that all appeals were to the court of civil appeals, a marked change from the long standing district court appellate jurisdiction.<sup>40</sup>

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jurisdiction only if no other court has probate court jurisdiction. *See* HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 1398, 63d Leg. (1973).

35. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (district court’s general jurisdiction of probate court) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

36. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (transfer occurs on judge’s motion or by party agreement) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). This provision requiring the agreement of the parties to transfer a case was met with opposition, and by 1975 the transfer was possible upon a party’s request. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). The most recent development provides for an additional transfer proceeding to statutory probate courts. *See* TEX. PROB. CODE ANN. § 5B (Vernon Supp. 1984). The statute provides:

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

*Id.*

37. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The quoted language was also used in § 4 of the Probate Code to define probate jurisdiction of constitutional county courts. *See* TEX. PROB. CODE ANN. § 4 (Vernon 1980).

38. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (mandatory provision for filing in statutory probate or constitutional county courts) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

39. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The phrase “incident to an estate” is used for the first time here. *See* Gregory & Watkins, *Recent Developments In Probate Court Jurisdiction And Independent Administration*, STATE BAR OF TEXAS—1 ADVANCED ESTATE PLANNING & PROBATE COURSE A-6 (1980).

40. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (eliminated district court review de novo from constitutional county court) (amended

Following the initial revisions to the Probate Code, three more amendments were adopted in an attempt to clarify procedures enacted in 1973.<sup>41</sup> The 1975 amendment to section 5 clarified the transfer proceedings in Group I counties from the constitutional county court to the district court in two ways.<sup>42</sup> First, the transfer could be compelled on the motion of any party, rather than requiring an agreement of the parties to authorize a transfer.<sup>43</sup> The judge's permissive authority to transfer the case on his own

1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)); *see also* HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 1398, 63d Leg. (1973) (explicit purpose of amendment to provide appeal to court of civil appeals). *See generally* Allen, *Probate Practice and Procedure*, 7 TEX. B.J. 306, 323-24 (1944) (de novo review causes delay, adds costs; suggests eliminating de novo review); Comment, *The District Court's Trial De Novo On Appeal From the Probate Court*, 24 BAYLOR L. REV. 547, 551-52 (1972) (review of de novo appeals).

41. *See* Grant & Whitehill, *The Revision of the Texas Probate Code*, 43 TEX. B.J. 892, 893 (1980) (1979 amendment "fills in the gap" in 1975 amendment); Gregory & Watkins, *Recent Developments In Probate Court Jurisdiction And Independent Administration*, STATE BAR OF TEXAS—1 ADVANCED ESTATE PLANNING & PROBATE COURSE A-7 (1980) (1975 amendment clarifying jurisdiction of Group I counties). The 1977 amendment to § 5 contained only a provision on sureties as part of the phrase "incident to an estate." *See* Act of May 23, 1977, ch. 448, § 1, 1977 Tex. Gen. Laws, Gen. & Spec. 1170, 1170 (amended 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The 1977 amendment will not be thoroughly discussed in this comment, but for a review of the purpose of the amendment, *see* HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 690, 65th Leg. (1977). Additionally, there was no additional cost to the government expected as a result of the 1977 amendment. *See* FISCAL NOTE, Tex. H.B. 690, 65th Leg. (1977). For a discussion of sureties and the personal representative, *see generally* 18 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 645 (1971 & Supp. 1980).

42. *See* Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (two changes in transfer proceeding involved eliminating the need for an agreement to compel transfer and the disposition of case upon resolution in district court) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). *See generally* Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 377 (1976) (discussion of 1975 amendment; transfer provisions "most important change").

43. *See* Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (transfer mandatory on motion of party, permissive on judge's own motion) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). This provision was one of the revisions proposed by a committee from the Real Estate, Probate and Trust Law Council of the Texas State Bar. *See* Cameron, *Proposed Amendments to Probate Laws*, 37 TEX. B.J. 1172, 1172 (1974) (proposal to require the transfer upon party request). Judge Pat Gregory stated that the change to a mandatory provision was in response to the claim that a party should have a right to transfer a case to a court which has a lawyer judge. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). In 1983, § 5B of the Probate Code was enacted to provide for a new transfer proceeding to a statutory probate court. *See* TEX. PROB. CODE ANN. § 5B (Vernon Supp. 1984) (party or interested person may transfer cause to statutory probate court and consolidate if appertaining or incident to estate). The statute

motion remained unchanged.<sup>44</sup> Second, the 1975 amendment required that the case was to be returned to the county court upon resolution of the issue in district court.<sup>45</sup> Additionally, the legislature eliminated the district court's concurrent jurisdiction with the constitutional county court that was granted in 1973 and restricted district court jurisdiction to the transferred cases from the constitutional county court.<sup>46</sup>

Another major change implemented in 1975 was the grant of authority to construe wills to all courts exercising original probate jurisdiction.<sup>47</sup> Previously, will construction was within the exclusive jurisdiction of the district court, with the constitutional county court exercising only the lim-

is intended to "preclude multiple law suits and forum shopping." See 22 STATE BAR NEWSLETTER: REAL ESTATE, PROBATE AND TRUST LAW 20 (Oct. 1983).

44. See Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (judge may transfer sua sponte) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The transfer proceedings must be initiated by either the judge or a party. See *id.* at 2195. Absent a motion to transfer, the constitutional county court retains the jurisdiction to hear contested matters under its general probate jurisdiction. See *In re Estate of Merrick*, 630 S.W.2d 500, 503 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (transfer provision does not operate to deprive constitutional county court of general probate jurisdiction).

45. See Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Commentators found this provision helped decrease district court dockets, one goal of the 1973 amendment. See Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 380 n.54 (1976), (citing HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973)).

46. Compare Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (district court jurisdiction over contested matters from constitutional county court) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)) with Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (district court, concurrent with county court, to have general jurisdiction of probate court) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). See generally 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 28 (Supp. 1981) (discussion of district court jurisdiction when estate pending in county court); Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 380 (1976) (district court jurisdiction only in contested matters). Case law has recognized the change in district court jurisdiction from 1973 to 1975. See *Boyd v. Ratliff*, 541 S.W.2d 223, 224 (Tex. Civ. App.—Dallas 1976, writ dismissed) (the section "denies to the district court only that 'general jurisdiction of a probate court' " provided by 1973 constitutional amendment).

47. See Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). This grant of authority to all courts exercising probate jurisdiction did not diminish the authority of the district court to construe wills, but if the suit is filed in probate court initially, the district court will probably defer. See Metts, *Probate Court Jurisdiction*, STATE BAR OF TEXAS—1 ADVANCED ESTATE PLANNING & PROBATE COURSE E-9, E-10 (1978) (discussion of will construction before and after 1973). See generally 10 E. BAILEY, TEXAS PRACTICE § 560 (1968) (discussion of will construction).

ited authority to construe wills incident to a probate matter.<sup>48</sup> The concurrent jurisdiction over will construction further manifested the original goal to relieve the overcrowded district court docket.<sup>49</sup>

The most significant aspect of the 1979 amendment was the creation of section 5A to address the issue of non-traditional probate matters.<sup>50</sup> Section 5A was introduced in the Probate Code to define the phrases "appertaining to an estate" and "incident to an estate."<sup>51</sup> The legislature placed

48. See *Benson v. Greenville Nat'l Exch. Bank*, 253 S.W.2d 918, 925 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.) (exclusive jurisdiction of will construction in district court). See generally Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 8, 9 (C. Saunders ed. Supp. 1980) (discussion of will construction after 1975 amendment, noting concurrent jurisdiction in county courts, statutory probate courts, and district courts); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 343-44 (1975) (discussion of will construction).

49. See HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973) (stating need to relieve docket of district court); see also Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 385 (1976) ("one of the principal goals of Section 5—to give more authority and control over probate matters to statutory probate courts and thereby help relieve overcrowded district court dockets") (citing HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973)).

50. See TEX. PROB. CODE ANN. § 5A (Vernon 1980). The expansion of probate jurisdiction over the recent years, and the use of "incident to an estate" and "appertaining to an estate" in case law was ambiguous. See HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 329, 66th Leg. (1979) ("Current law is not altogether clear concerning the true jurisdictional powers of the probate court."). Additionally, the 1979 amendment provided a transfer procedure in Group II counties from constitutional county courts to statutory probate or county courts. See TEX. PROB. CODE ANN. § 5(c) (Vernon 1980 & Supp. 1984). Transfers may only originate in a constitutional county court, not the county court at law. See *Beeson v. Beeson*, 578 S.W.2d 517, 518 (Tex. Civ. App.—El Paso 1979, no writ) (transfer from county court at law to district court invalid). The transfer may be made on the motion of the judge and is mandatory on the motion of any party. See TEX. PROB. CODE ANN. §§ 5(b)-(c) (Vernon 1980 & Supp. 1984) (judge may transfer on own motion, mandatory on motion of party). The legislature retained the mandatory transfer provision that was implemented in the 1975 amendment. See Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195-96 (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The statutory probate court or county court does not return the case to constitutional county court after resolution. See TEX. PROB. CODE ANN. § 5(c) (Vernon 1980 & Supp. 1984) (statutory probate court hears case as if originally filed, no return to constitutional county court). Compare TEX. PROB. CODE ANN. § 5(c) (Vernon 1980 & Supp. 1984) (case heard as if originally filed) with TEX. PROB. CODE ANN. § 5(b) (Vernon 1980) (after district court resolution, return to constitutional county court). See generally Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 380 (1976) (returning the transferred proceeding to county court relieves district court of administrative probate matters).

51. See TEX. PROB. CODE ANN. § 5A (Vernon 1980 & Supp. 1984) ("the phrases 'appertaining to estates' and 'incident to an estate' include . . ."). The meanings of the terms were not clear. See Grant & Whitehill, *The Revision of the Texas Probate Code*, 43 TEX. B.J. 892, 893 (1980) ("two terms that have caused confusion").

constitutional county courts and statutory county courts together in one section, statutory probate courts and district courts in a second section,<sup>52</sup> and defined the authority conferred by the phrases according to each group.<sup>53</sup> The only distinction between the two sections is that statutory probate courts and district courts have the additional authority to interpret and administer testamentary trusts, to apply constructive trusts, and to hear all actions filed against or on behalf of an estate.<sup>54</sup>

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52. See TEX. PROB. CODE ANN. § 5A (Vernon 1980). Section 5A(a) includes constitutional county courts and statutory county courts. The constitutional county court's authority originates in art. V, § 16 of the Texas Constitution and it is frequently the only court with original probate jurisdiction in small counties. See 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (Supp. 1981). Statutory county courts, found in more populated counties, are given probate jurisdiction by the legislature. Some statutory courts have additional authority conferred by law. See *id.* Section 5A(b) covers district courts and statutory probate courts. The district court, as set out in § 5(b) of the Probate Code, exercises general jurisdiction of the probate court over contested matters transferred by the constitutional county court. See TEX. PROB. CODE ANN. § 5(b) (Vernon 1980 & Supp. 1984). See generally Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 382 (1976) (role of district court in cases transferred from county court). A statutory probate court exercises solely probate jurisdiction and is found in counties having major cities. See 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (Supp. 1981). As of 1984, there are three statutory probate courts in Dallas County, two in Harris County, one in Tarrant County, and two in Bexar County. See TEX. REV. CIV. STAT. ANN. arts. 1970-31a, -31b (Vernon 1964) (Probate Court and Probate Court No. 2, Dallas County); TEX. REV. CIV. STAT. ANN. arts. 1970-31c, -110a.2, -110a.3, -301e.2, -345a (Vernon Supp. 1984) (Probate Court No. 3, Dallas County; Probate Court No. 2, Harris County; Probate Court No. 3, Harris County; Probate Courts No.1 and 2, Bexar County; Probate Court No. 2, Tarrant County). The first statutory probate court was created in response to the overcrowded docket in Harris County and sought to relieve the problem by delegating probate matters to a newly created court. See TEX. CONST. art. V, § 22, interp. commentary (Vernon Supp. 1982) (large docket seriously affected administration in Harris County). For the definition of the term "statutory probate court," see TEX. PROB. CODE ANN. § 3(ii) (Vernon 1980).

53. See TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980). Section 5A(a) provides that the phrases include:

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 wards and deceased persons.

*Id.* Section 5A(b) provides for the same definition of the phrases, with the only addition being the authority to interpret and administer testamentary trusts, apply constructive trusts, and hear all actions filed against or on behalf of the estate. See TEX. PROB. CODE ANN. § 5A(b) (Vernon 1980). See generally Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 8, 10-12 (C. Saunders ed. Supp. 1980) (discussion of extent of "incident to" and "appertaining to an estate").

54. See TEX. PROB. CODE ANN. § 5A (Vernon 1980); see also 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 9 (Supp. 1981) (discussion of additional authority of statutory

Section 5A originates in the old Texas constitutions where the phrase "appertaining to an estate" was first used, and in the 1973 amendment to section 5 of the Probate Code where "incident to an estate" was introduced.<sup>55</sup> Section 5A consolidates two terms that have previously been used differently;<sup>56</sup> therefore, the background of the phrases will be examined in an attempt to clarify the implications of section 5A.

### III. RECONCILING "APPERTAINING TO AN ESTATE" AND "INCIDENT TO AN ESTATE"

#### A. *Background of Each Phrase*

"Transacting business appertaining to estates" first appeared in the 1845 Texas Constitution as a probate duty assigned to inferior tribunals.<sup>57</sup> There were no limiting words used with the phrase; however, by 1866, the constitutional provision on county courts broadened the scope of the phrase by specifying the estates affected and by including "settlement, par-

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probate courts). *See generally* G. BOGERT, TRUSTS AND TRUSTEES §§ 103, 471 (1978 & Supp. 1983) (discussion of testamentary and constructive trusts).

55. *See* TEX. CONST. art. IV, § 15 (1845) (inferior tribunals established to "transact business appertaining to estates"); *see also* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (authority to hear matters "incident to an estate" given to all courts exercising original probate jurisdiction) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The two terms have implicit distinctions: the former has constitutional origins, the latter statutory; the former is over 130 years old, the latter is 10 years old; the former has been used primarily referring to the constitutional county court, the latter was first used referring to four courts. *Compare* TEX. CONST. art. IV, § 15 (1845) ("appertaining to estate" used) *with* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 ("incident to an estate" introduced) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

56. *See* TEX. CONST. art. IV, § 15 (1845) (first use of words settlement, partition, and distribution with "appertaining to an estate"). By 1866, the descriptive words settlement, distribution, and partition were attached to the phrase "appertaining to an estate" and they have remained as part of the phrase. *See* TEX. PROB. CODE ANN. § 4 (Vernon 1980) ("transact all business appertaining to estates . . . including settlement, partition and distribution"). In contrast, when "incident to an estate" was first used in 1973, an open ended phrase was immediately attached. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 ("matters incident to an estate, including but not limited to") (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The authority encompassed in the phrase has been gradually expanding. *See* Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (included the authority to construe wills) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

57. *See* TEX. CONST. art. IV, § 15 (1845) ("transaction of business appertaining to estates"). The phrase was used as one of the four duties of the inferior tribunals, including "appointing guardians, granting letters testamentary and of administration, . . . settling accounts of executors, administrators and guardians." *See id.*

tion, and distribution" as part of the phrase.<sup>58</sup> The constitutional provisions using "appertaining to an estate" have remained essentially consistent.<sup>59</sup> The early statutes adopted the constitutional provisions<sup>60</sup> and similarly did not change until the adoption of the Probate Code in 1955.<sup>61</sup> Pre-code case law, which interpreted the constitutional and statutory provisions, generally limited "appertaining to an estate" to cases involving the settlement, distribution, and partition of decedents' estates.<sup>62</sup>

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58. See TEX. CONST. art. IV, § 16 (1866). The estates included deceased persons, minors, idiots, lunatics, and persons non compos mentis. See *id.* The current statutory definition of incompetents includes "persons non compos mentis, idiots, lunatics, insane persons, common or habitual drunkards, and other persons who are mentally incompetent to care for themselves or to manage their property and financial affairs." See TEX. PROB. CODE ANN. § 3(p) (Vernon 1980). Thus, the estates encompassed in probate jurisdiction have not significantly changed throughout probate development. Compare TEX. CONST. art. IV, § 16 (1866) (list of estates) with TEX. PROB. CODE ANN. §§ 3(p), 4, 5 (Vernon 1980 & Supp. 1984) (list of estates identical to 1866 list; adds drunkards in §§ 3(p) and 5).

59. Compare TEX. CONST. art. IV, § 16 (1866) (phrase included settlement, partition, and distribution of enumerated estates) with TEX. CONST. art. V, § 16 (drunkards added to list of estates; settlement, distribution, and partition limited to estates of deceased persons).

60. Compare TEX. REV. CIV. STAT. art. 1840 (1895) (phrase refers to estates of deceased persons) (superseded 1911) and TEX. REV. CIV. STAT. art. 2550 (1895) (phrase refers to estates of minors, persons of unsound mind, and habitual drunkards) (superseded 1911) with TEX. CONST. art. V, § 16 ("transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition, and distribution of estates of deceased persons").

61. Compare TEX. REV. CIV. STAT. arts. 1840, 2550 (1895) (jurisdiction over deceaseds' estates and guardians) (superseded 1911) with TEX. REV. CIV. STAT. arts. 3290, 4102 (1925) (jurisdiction over deceased persons, and guardians and wards) (repealed 1955). The only change was the addition of the provision to appoint guardians to receive funds from the federal government, implemented in 1927. See Act of Mar. 28, 1927, ch. 179, § 1, 1927 Tex. Gen. Laws, Gen. & Spec. 257 (repealed 1955).

62. See *Zamora v. Gonzalez*, 128 S.W.2d 166, 168 (Tex. Civ. App.—San Antonio 1939, writ ref'd) (county courts' exclusive original jurisdiction over business pertaining to estates of deceased persons includes settlement, distribution, and partition of estates). Texas courts have held that a constitutional county court has authority to establish a lien when the lien has been rejected by an administrator. See *Western M. & I. Co. v. Jackman*, 77 Tex. 622, 626, 14 S.W. 305, 307 (1890) (jurisdiction to approve claim and enforce lien), cited with approval in *State v. Jordan*, 59 S.W. 826, 827 (Tex. Civ. App.—Galveston 1900, no writ) (county court jurisdiction to determine priority to tax lien and widow's homestead allowance); cf. *Jenkins v. Cain*, 12 S.W. 1114, 1115 (Tex. 1889) (district court jurisdiction to render judgment of a lien against an estate). Additionally, the county court may authorize selling property for payment of debts. See *Taylor v. Phillips Petroleum Co.*, 295 S.W.2d 738, 742 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) (county court jurisdiction to sell property for debts when estate pending). The county court has been held to have jurisdiction to determine whether there was intent in the will to name an independent executor. See *McMahan v. McMahan*, 175 S.W. 157, 159 (Tex. Civ. App.—Dallas 1915, writ ref'd). The county court has jurisdiction to determine if an administrator has a potential adverse interest in a claim. See *Jones v. Wynne*, 133 Tex. 436, 447, 129 S.W.2d 279, 285 (1939) (jurisdiction to decide if father adversely interested).



When the legislature adopted the Probate Code in 1955, it maintained the long-standing association between "appertaining to an estate" and constitutional county court jurisdiction in section 4, but excluded the phrase from district court jurisdiction in section 5.<sup>63</sup> In the 1973 jurisdictional reform, section 4 remained unchanged, but section 5 was revised to include the phrase while describing the authority of constitutional county courts in Group I counties, those counties which have no statutory probate or statutory county courts.<sup>64</sup> The legislature introduced the phrase "incident to an estate" in the provision referring to Group II counties, those counties having statutory probate or statutory county courts, but it was used to enlarge the scope of jurisdiction in all courts exercising original probate jurisdiction.<sup>65</sup> The authority encompassed by "incident to an estate" included areas that were previously in the exclusive jurisdiction of the district court.<sup>66</sup>

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63. Compare TEX. PROB. CODE ANN. § 4 (Vernon 1980) (jurisdiction to transact all business appertaining to estates, including settlement, partition, and distribution) with Act of Mar. 17, 1955, ch. 55, § 5, 1955 Tex. Gen. Laws, Gen. & Spec. 88, 91 (no mention of the phrase "appertaining to estate") (amended 1973, 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The phrase has been part of constitutional county court jurisdiction since 1845. See TEX. CONST. art. IV, § 15 (1845) ("appertaining to estates" used in reference to inferior tribunals). The phrase was not used in reference to district courts until 1866. See TEX. CONST. art. IV, § 6 (1866) (phrase made part of district court jurisdiction).

64. Compare Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)) with TEX. PROB. CODE ANN. § 4 (Vernon 1980) (maintaining "appertaining to estates"). The phrase is used only in reference to Group I counties which contain constitutional county courts and concurrent jurisdiction in district courts. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). There is only one minor difference in the use of the phrase in §§ 4 and 5. In § 4 the phrase refers to estates that are subject to administration or guardianship. See TEX. PROB. CODE ANN. § 4 (Vernon 1980). In contrast, the phrase in § 5 refers to estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)).

65. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (phrase appears under Group II counties, but refers to all courts having original probate jurisdiction) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Courts which exercise original probate jurisdiction are constitutional county courts, county courts at law, district courts, and statutory probate courts. See generally 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 1 (Supp. 1981) (discussion of the four different courts).

66. See Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The jurisdiction of all courts exercising original probate jurisdiction included "all claims by or against an estate, all actions for trial of title to land inci-

The legislature specified that the areas listed were not comprehensive,<sup>67</sup> and by 1975, "incident to an estate" included the authority to construe wills.<sup>68</sup> Subsequent amendments continued to expand the scope of the phrase "incident to an estate,"<sup>69</sup> a marked contrast to the relatively static development of "appertaining to an estate."<sup>70</sup>

In light of the differences between the two phrases' historical development, the joint definition of the phrases in section 5A becomes particularly

dent to an estate, and for the enforcement of liens thereon incident to an estate and of all actions for trial of the right of property incident to an estate." *Id.* Prior to this amendment, the authority to determine title to land had been exclusively in the district court. *See* TEX. CONST. art. V, § 8 (land jurisdiction in district court); TEX. CONST. art. V, § 16 (land jurisdiction expressly prohibited in constitutional county court). Additionally, the authority to enforce liens on land was in the district court. *See* *Brooks v. O'Connor*, 120 Tex. 126, 138, 39 S.W.2d 14, 21 (1931). *See generally* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 26 (1971 & Supp. 1981) (discussion of determination of title to land in probate jurisdiction). There arose a constitutional question regarding the authority of the legislature to grant land title jurisdiction to constitutional county courts. The Texas Constitution provides that county courts "shall not have jurisdiction of suits for the recovery of land." TEX. CONST. art. V, § 16. The Attorney General reasoned that in light of the 1973 constitutional amendment to art. V, § 8, that granted the legislature the authority to increase, diminish, or eliminate probate jurisdiction, the 1973 Probate Code amendment was valid. *See* Op. Tex. Att'y Gen. No. H-434 (1974).

67. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). By adding the phrase "including but not limited to," the legislature clearly intended that the list not be exclusive. *See id.*; *see also* Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337-38 (1975) ("including but not limited to" indicates broader construction).

68. *See* Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Prior to the 1975 amendment, the constitutional county court had limited authority to construe wills incident to a pending probate matter. *See* *Day v. Day*, 257 S.W.2d 793, 794-95 (Tex. Civ. App.—Amarillo 1953, no writ). The district court had exclusive authority over cases brought for the sole purpose of construing the will. *See* *Hayden v. Middleton*, 135 S.W.2d 281, 283 (Tex. Civ. App.—Beaumont 1939, no writ). *See generally* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 25 (1971 & Supp. 1981) (discussion of will construction); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 343-44 (1975) (difference between district and county courts in power to construe wills).

69. *See* Act of May 23, 1977, ch. 448, § 1, 1977 Tex. Gen. Laws, Gen. & Spec. 1170, 1170 (adding authority to enter judgment for sureties against administrator or guardian) (amended 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). *See generally* HOUSE JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 690, 65th Leg. (1977) (provision in Section by Section Analysis). In 1979, the legislature defined "incident to an estate" in a new § 5A, adding the authority to interpret and administer testamentary trusts and apply constructive trusts. *See* TEX. PROB. CODE ANN. § 5A (Vernon 1980).

70. *Compare* TEX. PROB. CODE ANN. § 5A (Vernon 1980) (third amendment expanding "incident to an estate" since first use in 1973) *with* TEX. PROB. CODE ANN. § 4 (Vernon 1980) ("appertaining to estate" as originally used in early Texas constitutions).

troublesome. Questions arise as to whether there was legislative intent to abandon the connotations associated with each phrase for legislative convenience or whether the legislature retained the subtle distinctions between the two terms. The remainder of this comment will determine whether there is a difference between the two phrases. Further, a specific examination of the interpretive case law will be made.

## B. *Analysis of the Phrases in Light of Section 5A*

### 1. Synonymous Phrases

The language of section 5A and the legislative history of the amendment are the strongest indications that "appertaining to an estate" and "incident to an estate" are interchangeable.<sup>71</sup> The simple statutory language implies no distinction between the two phrases.<sup>72</sup> When the language "incident to an estate" was first adopted in 1973, there was no specific reference to the term in the Bill Analysis either as a new term or in relation to the term "appertaining to an estate."<sup>73</sup> Moreover, when section 5A was created in 1979, the legislative history only expressed an intention to define the two phrases, not to differentiate between the two.<sup>74</sup>

Commentators have hesitated to give an explicit opinion regarding the relationship between the two phrases, but their treatment of the terms reveals a tendency to view the terms as synonymous.<sup>75</sup> One approach has been to reconcile the terms because both have been defined as referring to the settlement, partition, and distribution of an estate.<sup>76</sup> A second ap-

71. See TEX. PROB. CODE ANN. § 5A (Vernon 1980) ("the phrases 'appertaining to estates' and 'incident to an estate' in this Code include . . .").

72. See *id.* See generally Grant & Whitehill, *The Revision of the Texas Probate Code*, 43 TEX. B.J. 892, 893-94 (1980) (discussion of § 5A).

73. Cf. HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973) (intent to expedite estate administration, relieve district court docket).

74. Cf. HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 329, 66th Leg. (1979) (need to clarify effect of the two phrases in county courts and statutory probate courts). The Bill Analysis acknowledges that the meanings of the two phrases as they are used in both §§ 4 and 5(d) of the Probate Code are not clear. See *id.* In the Section by Section Analysis, the legislature simply states that § 5A is "to provide definitions for the terms." See *id.* At no point does the specific question as to the distinction between the two terms arise. Cf. *id.*

75. See Comment, *Contractual Wills—Do 1979 Probate Code Revisions Solve the Procedural Problems?*, 12 ST. MARY'S L.J. 436, 443 (1980) (discussion of expanded jurisdiction includes matters appertaining or incident to an estate); cf. Comment, *Section 5 of the Texas Probate Code: An Indirect Reduction of District Court Jurisdiction?*, 30 BAYLOR L. REV. 129, 133 (1978) (discussion of "probate matters"; incident to an estate limited to settlement, partition and distribution).

76. See *Cowgill v. White*, 543 S.W.2d 437, 439 (Tex. Civ. App.—Corpus Christi 1976, no writ) ("The only real question then is whether the interpleader action was incident to the settlement, partition and distribution of said estate."), cited in Comment, *Section 5 of the Texas Probate Code: An Indirect Reduction of District Court Jurisdiction*, 30 BAYLOR L. REV.

proach toward the terms is simply to refer to them together and attribute the same authority to both.<sup>77</sup> For example, some courts have referred to the terms together while construing section 5A.<sup>78</sup> Nonetheless, commentators and the original draftsman of section 5 support the theory that “incident to an estate” is to be construed more liberally than “appertaining to an estate.”<sup>79</sup>

## 2. Distinguishing the Phrases

Rather than look for a significant difference in the authority conferred by the two phrases, there may be a more subtle distinction between the terms that the drafter sought to preserve. When the legislature introduced “incident to an estate” in reference to all courts exercising original probate jurisdiction, it still retained “appertaining to an estate” in the section 5 reference to constitutional county courts.<sup>80</sup> By retaining the two phrases,

129, 133 (1978) (incident to estate means settlement, partition, and distribution); *accord* Schwartzel & Wilshusen, *Texas Probate Jurisdiction: New Patches for the Texas Probate Code*, 54 TEXAS L. REV. 372, 383 (1976) (the issue is what kinds of probate matters are part of settlement, partition, and distribution).

77. See Comment, *Contractual Wills—Do 1979 Probate Code Revisions Solve the Procedural Problems?*, 12 ST. MARY’S L.J. 436, 443 (1980) (“jurisdiction of all matters appertaining or incident to an estate”); 18 STATE BAR NEWSLETTER: REAL ESTATE, PROBATE AND TRUST LAW 6 (Oct. 1979) (“The effect of the new terms . . .”).

78. See *Bank of Southwest Nat’l Ass’n v. Stehle*, 660 S.W.2d 572, 574 (Tex. App.—San Antonio 1983, writ ref’d n.r.e.) (“suit . . . was a cause of action appertaining to estates or incident to an estate”); *Sobel v. Taylor*, 640 S.W.2d 704, 707 (Tex. App.—Houston [14th Dist.] 1982, no writ) (suit not “appertaining to or incident to an estate”). Most courts, however, only use “incident to an estate” when construing § 5A. See *Mejorada v. Gonzalez*, 663 S.W.2d 891, 893 (Tex. App.—San Antonio 1983, no writ) (“incident to an estate” defined in Section 5A); *Adams v. Calloway*, 662 S.W.2d 423, 426 (Tex. App.—Corpus Christi 1983, no writ) (defining “incident to an estate”).

79. See Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There’s a Will, Where’s the Way?*, 53 TEXAS L. REV. 323, 337 (1975) (“including but not limited to” may indicate a broader construction of the phrase “incident to an estate”); Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984) (original draftsman of 1973 amendment intended to give “incident to an estate” broader meaning than “appertaining to an estate”).

80. Compare Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (constitutional county court jurisdiction over matter appertaining to an estate including settlement, partition, and distribution) (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5(b) (Vernon Supp. 1984)) with Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (all courts exercising original probate jurisdiction have authority over matters “incident to an estate”) (amended 1975, 1977, 1979) (current version at TEX. PROB. CODE ANN. § 5(d) (Vernon 1980)). The concurrent district court jurisdiction given in 1973 was eliminated by 1975, leaving the constitutional county court the only court associated with the phrase “appertaining to an estate.” See Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp.

the legislature was free to give "incident to an estate" a broader meaning while not diminishing the use of "appertaining to an estate."<sup>81</sup> The fact that the legislature has retained the two phrases throughout three amendments, including the 1979 amendment in which both terms were defined together in section 5A, indicates an intention to maintain a distinction.<sup>82</sup> Moreover, the fact that section 5A grouped the two phrases together does not defeat the legislative intent to emphasize the difference between the jurisdictional limits associated with constitutional county courts in section 4 and the expanded authority granted in section 5.<sup>83</sup> By introducing a new, but similar word, the drafter permits "incident to an estate" to have a more liberal construction while not being bound by the limitations associated with "appertaining to an estate."<sup>84</sup>

When "incident to an estate" was originally used, it was meant to be construed more liberally than "appertaining to an estate," and the language used by the drafter reflects this intent.<sup>85</sup> Initially, the statute specifies that the areas listed as part of the phrase are not comprehensive, leaving the statute subject to continuous expansion.<sup>86</sup> Because "incident to

1984)); *see also* Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337 (1975) (noting language difference in 1973 amendment).

81. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). When Judge Gregory drafted the original version of § 5 in 1973, he deliberately chose a word different than "appertaining" in order to give the new phrase broader connotations. *Id.*

82. *See* Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 ("appertaining" referring to Group I counties; "incident" referring to all courts) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)); Act of May 23, 1977, ch. 448, § 1, 1977 Tex. Gen. Laws, Gen. & Spec. 1170, 1170 (language unchanged from 1975 amendment) (amended 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)); TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 1980 & Supp. 1984) (section 5 use of phrases unchanged; § 5A defines terms together).

83. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984) ("incident to an estate" to encompass "broader spectrum" than "appertaining to an estate").

84. *Id.* ("incident to an estate" to be more broadly construed than "appertaining to an estate"); *cf.* Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337 (1975) ("incident to an estate" expands power, not scope of probate jurisdiction).

85. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). The original draftsman of § 5, Judge Pat Gregory, explained that using the phrase "including but not limited to" is an effective way to be explicit as to the authority conferred, yet at the same time the phrase is not precluded from expansion. *Id.*

86. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 ("statute provides: including but not limited") (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). The legislature

an estate" was meant to be given a broader interpretation, however, the drafter was careful to specify that each grant of authority was qualified by the phrase "incident to an estate,"<sup>87</sup> indicating that the authority should be exercised only if an estate is pending.<sup>88</sup> Secondly, the fact that the phrase confers potential jurisdiction on four courts implies a much broader grant of authority than is associated with "appertaining to an estate."<sup>89</sup> Thirdly, the exact language used in section 5 in 1973 was enacted in section 5A in

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has, in fact, expanded the scope of "incident to an estate" in each subsequent amendment. *See, e.g.*, Act of May 29, 1975, ch. 701, § 2, 1975 Tex. Gen. Laws, Gen. & Spec. 2195, 2195-96 (added authority to construe wills) (amended 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)); Act of May 23, 1977, ch. 448, § 1, 1977 Tex. Gen. Laws, Gen. & Spec. 1170, 1170 (added authority to render judgment for surety) (amended 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)); TEX. PROB. CODE ANN. § 5A (Vernon 1980) (added authority to district courts and statutory probate courts to administer and interpret testamentary trusts).

87. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Section 5 provides in pertinent part:

matters incident to an estate, including but 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* and of all actions for trial of the right of property *incident to an estate* . . . .

*Id.* (emphasis added). Judge Gregory's theory of drafting was to make the new statute as clear as possible because he anticipated the close scrutiny that it would undergo. The statute had to expressly specify the extent of the authority conferred. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). The courts have scrutinized the phrase closely and have maintained the mandate to only exercise the authority if the matter is incident to an estate. *See* Lucik v. Taylor, 596 S.W.2d 514, 514-16 (Tex. 1980) (probate filed in June, injunction sought in August); *accord* Sumarak v. Todd, 560 S.W.2d 141, 144 (Tex. Civ. App.—Tyler 1977, no writ) (since no estate pending, do not consider "incident to an estate"); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 338 (1975) (noting the repetitive use of "incident to an estate" as indication of authority to be exercised if "controlling issue" is settlement, partition, and distribution).

88. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Gregory realized the 1973 amendment was a far reaching provision and that the new phrase would be tested. When he drafted the statute, he sought to make it clear that the exercise of the authority over the areas listed hinged on the fact that it must be incident to an estate. *Id.*; *see also* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 9 (Supp. 1981) ("A probate proceeding must actually be pending at the time that a suit . . . is filed, before the claim can be regarded as incident to the estate.")

89. *See* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 ("all courts exercising original probate jurisdiction") (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)). Judge Gregory considered that drafting a jurisdictional statute to apply to four courts was a critical element. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Gregory explained that each court had its own special characteristics to be considered, such as the district court's overcrowded docket, the fact that many constitutional county court judges are not lawyers, the fact that probate is

1979,<sup>90</sup> indicating that the legislature approved the expansive treatment that the phrase had been given and sought to preserve the clause as drafted.

Commentators have recognized that "incident to an estate" has received a more liberal reading than "appertaining to an estate."<sup>91</sup> Commentators have suggested that factors such as the convenience of the parties, the efficient settlement of the estate, and the effect of the exercise of jurisdiction on other rights and privileges are considered to determine whether a matter is "incident to an estate."<sup>92</sup> Another view relies on the fact that the original purpose of section 5 was to increase the jurisdiction of courts hearing probate matters; consequently, the phrase should be liberally construed.<sup>93</sup> A third approach has been to rely on the phrase "including but not limited to" as the legislature's indication to the courts to construe "incident to an estate" broadly.<sup>94</sup>

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only one of many types of cases that a county court at law hears, and that statutory probate courts are specialty courts created to hear probate matters exclusively. *Id.*

90. Compare Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 (definition of incident to estate—"including but 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 and of all actions for trial of the right to property incident to an estate") (amended 1975, 1977, 1979, 1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984)) with TEX. PROB. CODE ANN. § 5A(a) (Vernon 1980) (adopting language of 1973 original definition of "incident to estate").

91. See, e.g., 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 9 (Supp. 1981) (factors used to determine "incident to an estate"); Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 8, 10 (C. Saunders ed. Supp. 1980) (the phrase should be liberally construed); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337-38 (1975) ("including but not limited to" indicates a broader interpretation of "incident to an estate").

92. See 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 9 (Supp. 1981) (factors listed when considering § 5 as remedial measure). One court has recognized these factors in determining whether the probate court has jurisdiction. See *Potter v. Potter*, 545 S.W.2d 43, 44-45 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) ("no showing of . . . why the probate court should not accept the plaintiff's claim, such as inconvenience to the parties or conflict with the application of . . . statute or rule").

93. See Reid, *The Probate Court and Its Function*, in TEXAS ESTATE ADMINISTRATION 8, 10 (C. Saunders ed. Supp. 1980) (phrase liberally construed); Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984) (intent to give "incident to estate" broad meaning); accord HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973) (need for "more convenient forum" and to relieve district court docket). The Section by Section part of the Bill Analysis states that the district court would have probate jurisdiction only when no other court has jurisdiction. See HOUSE JUDICIARY COMM., BILL ANALYSIS, TEX. H.B. 1398, 63d Leg. (1973).

94. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Pat Gregory explained that when he drafted the original § 5 he sought to make the extent of the phrase clear, but also leave it open for expansion. *Id.*

### C. *Interpretive Case Law*

Before a court determines whether an issue is “incident” or “appertaining to an estate,” the case must involve a pending estate.<sup>95</sup> The original draftsman of the 1973 amendment to section 5 intended that the pending estate be a prerequisite,<sup>96</sup> and commentators have recognized the requirement as a condition to interpreting the two terms.<sup>97</sup> After meeting the threshold requirement of a pending estate, courts’ interpretations of the phrases are either that each is a broad grant of authority, or that each phrase is limited to the issues of settlement, partition, and distribution of an estate.<sup>98</sup>

Leading probate cases have held that “incident to an estate”<sup>99</sup> encom-

95. *See, e.g.*, *Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (probate filed in June, injunction sought in August); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (conversion of funds belonging to an estate); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.) (filing the will confers probate jurisdiction). The *Pullen* court expressly disagrees with *Bowman v. Howell*, 618 S.W.2d 913, 916 (Tex. Civ. App.—Fort Worth 1981, no writ), which implied that an estate need not be pending in order to confer jurisdiction on a statutory probate court. *See Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.) (“power to hear all matters incident to an estate necessarily presupposes that a probate proceeding is already pending in that court”); *accord Bell v. Hinkle*, 562 S.W.2d 35, 38 (Tex. Civ. App.—Houston [14th Dist.] 1978) (since no estate pending, district court had jurisdiction over trespass to try title), *aff’d on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981); *Sumarak v. Todd*, 560 S.W.2d 141, 144 (Tex. Civ. App.—Tyler 1977, no writ) (since no estate pending, do not consider situation to be “incident to an estate”).

96. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984) (prerequisite to whether an issue is “incident to an estate”).

97. *See* 17 M. WOODWARD & E. SMITH, TEXAS PRACTICE § 9 (Supp. 1981) (“A probate proceeding must actually be pending at the time that a suit . . . is filed, before the claim can be regarded as incident to the estate.”) (citing *Wolford v. Wolford*, 590 S.W.2d 769, 771 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Bell v. Hinkle*, 562 S.W.2d 35, 37-38 (Tex. Civ. App.—Houston [14th Dist.] 1978), *aff’d on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981); *Sumarak v. Todd*, 560 S.W.2d 141, 144 (Tex. Civ. App.—Tyler 1977, no writ).

98. *Compare* *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (determine that issue is incident to an estate, then decide if issue involves settlement, partition, and distribution) *with* *Bell v. Hinkle*, 562 S.W.2d 35, 37-38 (Tex. Civ. App.—Houston [14th Dist.] 1978) (exclusive jurisdiction only if issue is settlement, partition, and distribution), *aff’d on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981).

99. *Cf.* *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (“incident to an estate” given broad interpretation); *Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (injunctive relief to protect estate assets as “incident to an estate”); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (discussion of scope of “incident to an estate”). The phrase “incident to an estate” has become the preferred term, even though both “incident to an estate” and “appertaining to an estate” are defined together in § 5A. The majority of courts refer only to



passes issues beyond the specific statutory authority found in sections 5 and 5A.<sup>100</sup> One line of cases deals with the preservation of the assets of an estate before settlement, partition, and distribution begins.<sup>101</sup> A second group of cases attributes the determination of ownership interest in assets of the estate as "incident to an estate."<sup>102</sup> Additionally, "incident to an estate" has been held to include the authority to determine the contractual nature of a will<sup>103</sup> and to cancel a trustee's deed.<sup>104</sup> The courts have imposed some limit on the broad construction of the phrase, however, and have held that a forcible entry and detainer action,<sup>105</sup> a misrepresentation

"incident to an estate." See *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (discussing scope of "incident to an estate"). But see *Bank of Southwest Nat'l Ass'n v. Stehle*, 660 S.W.2d 572, 574 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (the "cause of action [was] appertaining to estates or incident to an estate"); *Sobel v. Taylor*, 640 S.W.2d 704, 707 (Tex. App.—Houston [14th Dist.] 1982, no writ) (misdeeds and misrepresentations not appertaining or incident to an estate).

100. See, e.g., *Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (injunction to protect potential assets); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (determination of rights to estate assets); *Onoray Davis Trucking Co. v. Lewis*, 635 S.W.2d 622, 624 (Tex. App.—Houston [14th Dist.] 1982, writ dismissed) (temporary injunction considered "incident to estate"). Commentators have recognized the broad interpretation of the phrase. See generally 17 M. WOODWARD & E. SMITH, *TEXAS PRACTICE* §§ 9, 10 (Supp. 1981) (listing factors to determine if "incident to estate"); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337 n.91 (1975) (settlement, partition, and distribution "characterize" "appertaining to an estate," do not limit it).

101. See *Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (injunction against beneficiary regarding estate property is within statutory probate court jurisdiction); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (jurisdiction over claim of promissory note against estate); *Onoray Davis Trucking Co. v. Lewis*, 635 S.W.2d 622, 624-25 (Tex. App.—Houston [14th Dist.] 1982, writ dismissed) (injunctive relief to protect estate assets is within statutory probate court jurisdiction); *Davis v. Thomas*, 548 S.W.2d 755, 758 (Tex. Civ. App.—Tyler) (authority to cancel deed of incompetent ward), *rev'd on other grounds*, 553 S.W.2d 624, 626 (Tex. 1977).

102. See *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (determine deceased's right in joint savings account); *Rosemont Enters., Inc. v. Lummis*, 596 S.W.2d 916, 922 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (claim on note allowed even though amount exceeded jurisdictional maximum of probate court); *Potter v. Potter*, 545 S.W.2d 43, 44 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (determine ownership of stock in estate); *Parr v. White*, 543 S.W.2d 445, 448 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (jurisdiction over deceased's property properly vested in probate court).

103. See *Novak v. Stevens*, 596 S.W.2d 848, 851 (Tex. 1980) (court may determine contractual nature of will under authority to construe wills). See generally Comment, *Contractual Wills—Do 1979 Probate Code Revisions Solve the Procedural Problems?*, 12 ST. MARY'S L.J. 436, 443 (1980) (discussion of jurisdictional aspects of proof and enforcement of contractual wills).

104. See *Folliott v. Bozeman*, 526 S.W.2d 577, 580 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (jurisdiction to cancel trustee's deed), *aff'd*, 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

105. See *Chapman v. Southern Hospitalities, Inc.*, 624 S.W.2d 320, 321 (Tex. App.—

action for damages,<sup>106</sup> and wrongful death and survival action<sup>107</sup> are not within the scope of "incident to an estate."

In contrast with the broad interpretation of the phrase, other courts have restricted "incident to an estate" to the matters of settlement, partition, and distribution of an estate.<sup>108</sup> The issues considered to be within this interpretation are the determination of heirship<sup>109</sup> and the determination of nature and title to property.<sup>110</sup> Each of these issues was first determined to be incident to the settlement, partition, and distribution of the estates before being considered "incident to an estate."<sup>111</sup> Despite the variety of

Tyler 1981, no writ) (FED action concurrent in statutory county court and statutory probate court). The *Chapman* court reasoned that the appellate jurisdiction granted to statutory county courts over FED actions was not repealed by § 5 of the Probate Code, and that only traditional probate matters "'shall be filed' in the statutory probate court." *See id.* at 322.

106. *See Sobel v. Taylor*, 640 S.W.2d 704, 707 (Tex. App.—Houston [14th Dist.] 1982, no writ) (misdeeds and misrepresentation prior to death are not incident or appertaining to estate).

107. *See Seay v. Hall*, 28 Tex. Sup. Ct. J. 9, 13 (Oct. 6, 1984) (wrongful death and survival action not within probate court jurisdiction); *see also McPherson v. Judge*, 592 S.W.2d 406, 410 (Tex. Civ. App.—Amarillo 1979, no writ) (concurrent jurisdiction in probate court and district court for personal injury claim against estate). The reasoning in *McPherson* is similar to *Chapman* in that the courts simply hold that there is concurrent jurisdiction. *Compare McPherson v. Judge*, 592 S.W.2d 406, 410 (Tex. Civ. App.—Amarillo 1979, no writ) (concurrent jurisdiction in district court and constitutional county court) *with Chapman v. Southern Hospitalities, Inc.*, 624 S.W.2d 320, 322 (Tex. App.—Tyler 1981, no writ) (concurrent jurisdiction in statutory county court and statutory probate court).

108. *See, e.g., Thomas v. Tollon*, 609 S.W.2d 859, 861 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (matter must relate to settlement, partition, and distribution); *Bell v. Hinkle*, 562 S.W.2d 35, 37-38 (Tex. Civ. App.—Houston [14th Dist.] 1978) (exclusive jurisdiction in probate courts only if matter relates to settlement, partition, and distribution), *aff'd on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981); *Sumarak v. Todd*, 560 S.W.2d 141, 144 (Tex. Civ. App.—Tyler 1977, no writ) (section 5 deals only with matters referring to settlement, partition, and distribution).

109. *See Thomas v. Tollon*, 609 S.W.2d 859, 860-61 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (determination of heirship in county court exercising probate jurisdiction); *Bell v. Hinkle*, 562 S.W.2d 35, 37 (Tex. Civ. App.—Houston [14th Dist.] 1978) (heirship determination in exclusive jurisdiction of probate court), *aff'd on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981). *See generally Basye, Streamlining Administration Under the New Texas Probate Code*, 35 TEXAS L. REV. 165, 169 (1956) (discussion of heirship proceedings).

110. *See Parr v. White*, 543 S.W.2d 440, 443 (Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e.*, 559 S.W.2d 344 (Tex. 1977) (possession or title to land or damages for conversion incident to partition of estate); *Cowgill v. White*, 543 S.W.2d 437, 439 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (interpleader action by receiver to determine community property incident to partition and distribution).

111. *See, e.g., Thomas v. Tollon*, 609 S.W.2d 859, 860-61 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (heirship incident to estate in which "controlling issue is the settlement, partition or distribution of an estate"); *Parr v. White*, 543 S.W.2d 440, 443

topics included, the rationale that the issue must first relate to settlement, partition, and distribution is more limited than the theory that does not require such a prerequisite.<sup>112</sup>

The Texas Supreme Court, in the recent case of *Seay v. Hall*,<sup>113</sup> holds that probate court jurisdiction includes only matters in which the controlling issue is settlement, partition, or distribution of an estate.<sup>114</sup> The court interprets the legislative intent of the recent amendments<sup>115</sup> and determines that wrongful death and survival actions are not within the scope of probate jurisdiction.<sup>116</sup> The court's narrow construction appears to be inconsistent with the intent of Judge Pat Gregory, drafter of the 1973 amendment to section 5, with the legislative development, and with the interpretation of noted commentators.<sup>117</sup> Judge Gregory asserts that the intention was to give "incident to an estate" a broad scope.<sup>118</sup> Significantly, the legislature has not limited the scope of the phrase "incident to an estate" since its introduction in 1973, despite four subsequent amendments.<sup>119</sup> Moreover, some commentators have recognized settlement, par-

(Tex. Civ. App.—Corpus Christi 1976), *writ ref'd n.r.e.*, 559 S.W.2d 344 (Tex. 1977) (claim to land incident to partition of estate); *Cowgill v. White*, 543 S.W.2d 437, 439 (Tex. Civ. App.—Corpus Christi 1976, *writ ref'd n.r.e.*) (nature of community property incident to partition and distribution).

112. *Compare* *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (issue was incident to pending estate; "[f]urthermore, the outcome of this suit will have a direct bearing on the assimilation, collection, and distribution" of estate) (emphasis added) *with* *Bell v. Hinkle*, 562 S.W.2d 35, 37-38 (Tex. Civ. App.—Houston [14th Dist.] 1978) ("Matters incident to an estate which give the statutory probate court exclusive jurisdiction apply *only* to those matters in which the controlling issues are the settlement, partition and distribution of an estate.") (emphasis added), *aff'd on other grounds*, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied*, 454 U.S. 826 (1981).

113. 28 Tex. Sup. Ct. J. 9 (Oct. 6, 1984).

114. *See id.* at 12.

115. *See id.* at 10-13. The court also examines the history of probate jurisdiction. *See id.* at 10.

116. *See id.* at 12. The court holds that wrongful death and survival actions are not "even arguably" matters relating to settlement, distribution, and partition. *See id.* at 12.

117. *See* TEX. PROB. CODE ANN. § 5A (Vernon 1980); Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 336-37 (1975); Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984).

118. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Gregory explains that he deliberately chose "incident to" rather than "appertaining to" to allow for a more broad connotation. *Id.* In contrast, the *Seay* court determines that since wrongful death and survival actions are not specifically mentioned during the legislative process, the intent is not to include the actions in probate jurisdiction. *See Seay v. Hall*, 28 Tex. Sup. Ct. J. 9, 12 (Oct. 6, 1984).

119. *Compare* Act of May 24, 1973, ch. 610, § 1, 1973 Tex. Gen. Laws, Gen. & Spec. 1684, 1684 ("power to hear all matters incident to an estate") (amended 1975, 1977, 1979,

tion, and distribution as words that characterize, rather than limit, "appertaining to an estate."<sup>120</sup>

#### IV. CONCLUSION

In 1973, the legislature directly addressed the problems facing probate jurisdiction and developed a system that accommodated four court systems,<sup>121</sup> improved judicial economy,<sup>122</sup> and consequently saved litigants time and money. Despite the fact that the current statutes are increasingly clear and consistent, the courts are now reconciling cases which were decided under a code that has been amended four times since 1973. The present case law reflects the development period of the Code, and necessarily results in conflicts. The system must only endure this final growth period until it reaches maturity.

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1983) (current version at TEX. PROB. CODE ANN. § 5 (Vernon 1980 & Supp. 1984) with TEX. PROB. CODE ANN. § 5A (Vernon 1980) (" 'incident to an estate' in this Code include[s]").

120. See Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 337 n.91 (1975) ("The enumerated functions characterize the 'appertaining to estates' phrase; they do not necessarily limit its meaning."). The authors are referring to § 4 of the Probate Code; however, the same phrase was used in the 1979 amendment when defining the two terms together. See TEX. PROB. CODE ANN. § 5A (Vernon 1980) (the phrases "include . . . generally all matters relating to the settlement, partition, and distribution of estates"). The commentators state that probate jurisdiction should be limited to the probate functions of validating wills and assimilating, managing, and distributing property. See Schwartzel & Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEXAS L. REV. 323, 336 (1975). The commentators add, however, that "courts need not have adopted a strict interpretation of the statute and restricted probate jurisdiction to matters concerning only the settlement, partition, and distribution of estates." See *id.* at 337 n.91.

121. See TEX. PROB. CODE ANN. §§ 5, 5A (Vernon 1980 & Supp. 1984) (accommodating constitutional county court, statutory county court, statutory probate court, and district court). The Code provides for three transfer proceedings among the courts. See TEX. PROB. CODE ANN. § 5B (Vernon Supp. 1984) (creating a transfer provision to statutory probate court in § 5B); TEX. PROB. CODE ANN. § 5(b) (Vernon 1980 & Supp. 1984) (transfers contested matters from constitutional county court to district court); TEX. PROB. CODE ANN. § 5(c) (Vernon 1980 & Supp. 1984) (transfers contested issue from constitutional county court to statutory probate court).

122. Telephone interview with the Honorable Pat Gregory, Judge of Harris County Probate Court No. 2 (Feb. 2, 1984). Judge Gregory reports that the docket for the Harris County Probate Court has been reduced by one-third since implementing the 1973 probate reforms that increased the authority of statutory probate courts, county courts at law, and constitutional county courts. *Id.*