St. Mary's Law Journal

Volume 36 | Number 1 Article 2

1-1-2004

Playing the Probate Card: A Plaintiff's Guide to Transfer to Statutory Probate Court.

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PLAYING THE PROBATE CARD: A PLAINTIFF'S GUIDE TO TRANSFER TO STATUTORY PROBATE COURT

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I. INTRODUCTION

To many lawyers, pursuing a lawsuit in probate court promises no obvious benefits, if indeed they knew it was possible in the first place. However, many of the repeat players—plaintiffs and defendants—in the field of tort litigation are opting for statutory probate courts in Texas, and with good reason.

II. A BRIEF HISTORY: THE EVOLUTION OF THE STATUTORY PROBATE COURT

In Texas, the species of county court referred to as a "statutory probate court"[1] has evolved to a forum where, unlike the more lim-

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1. *See* TEX. GOV'T CODE ANN. § 21.009 (Vernon 2003) (providing that examples of a statutory county court include "county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code"); *see also* TEX. PROB. CODE ANN.

ited county court at law, claims by or against a probate estate can be *fully* adjudicated, without litigants having recourse in a district court.[2] The statutory probate court has jurisdiction to resolve not only routinely contested probate affairs, for example, will contests or guardianship administration disputes, but even tangential lawsuits implicating the estate through its representative, such as wrongful death suits.[3] Chartered under Chapter 25.0021 of the Government Code and shaped by some thirty years of legislation and jurisprudence, statutory probate courts today occupy eleven counties, all in major cities, and host a total of sixteen judges.[4]

Texas probate courts have enjoyed a steady rise to power relative to district courts since the first major jurisdictional changes in the 1970s.[5] In 1973, legislative changes eliminated the crippling option of de novo appeal of any county court ruling in district court, and modestly expanded the matters over which county courts could exercise jurisdiction.[6] In counties where the county courts featured a lawyer-judge,[7] a new breed of probate court emerged, with jurisdiction formerly reserved for district courts: The power to resolve

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§ 3(e) (Vernon 2003) (defining "[c]ounty [c]ourt[s] . . . [as] county courts in the exercise of their probate jurisdiction, court[s] . . . authorized to exercise original probate jurisdiction, and district courts exercising probate jurisdiction in contested matters").

2. *See* TEX. CONST. art. V, § 8 (promulgating statutory reorganization of probate jurisdiction); Boone Schwartzel & Doug Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323, 326 (1975) (noting that prior to 1973, district courts in Texas had appellate jurisdiction over county probate courts under TEX. CONST. art. V, § 8).

3. *See* TEX. PROB. CODE ANN. §§ 5A, 607 (Vernon 2003) (providing for statutory probate court jurisdiction over matters appertaining and incident to an estate).

4. *See* TEX. GOV'T CODE ANN. §§ 25.0021–25.2656 (Vernon 1988 & Supp. 2004) (noting the statutory probate courts and number of judges are: Austin (Travis County), one judge; Dallas (Dallas County), three judges; Denton (Denton County), one judge; Edinburg (Hidalgo County), one judge; El Paso (El Paso County), one judge; Fort Worth (Tarrant County), two judges; Galveston (Galveston County), one judge; Houston (Harris County), four judges; McKinney (Collin County), one judge; and San Antonio (Bexar County), two judges).

5. *See* Boone Schwartzel & Doug Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323, 336 (1975) (stating TEX. PROB. CODE ANN. § 5 "forces the judiciary to define probate jurisdiction in order to define 'incident to an estate' because the 'including but not limited to' phrase removes all of the old constraints on county courts' probate powers").

6. *Id.* at 335-36.

7. *See* TEX. CONST. art. V, § 15 (providing for election of constitutional county court judges, requiring the judge to be "well informed in the law of the State," but not to be a licensed attorney); *see also* Little v. State, 75 Tex. 616, 12 S.W. 965, 967 (1890) (discussing the legal education requirements for county judges). The case states:

contested matters.[8] An exhaustive review of every detail of the 1973 and 1975 changes to the Code may be found in two Texas Law Review articles written by Boone Schwartzel and Doug Wilshusen.[9]

This momentum in favor of more jurisdiction for county probate courts in relation to district courts came to a head in the early 1980s. In 1984, the Texas Supreme Court in *Seay v. Hall*[10] made an effort to rein in what was seen by some as an over-zealous use of statutory probate courts.[11] The court reversed an appellate court's decision to extend the jurisdiction of a statutory probate court to the resolution of survival and wrongful death claims.[12] In doing so, the court leaned heavily on the Schwartzel and Wilshusen articles, declaring verbatim these authors' assertions regarding the sole legislative intent of the Probate Code's jurisdictional Section 5A.[13] The court's deference to the wisdom of these law review articles rested on the judiciary committee's interim report, which evidently quoted sections of the lawyers' comments.[14] The court ordained the authors' interpretations of legislative intent as substantive law, in a strangely "wag the dog" fashion:

> It is apparent that county judges were not required to be lawyers, because that qualification is expressly provided by the constitution for judges of the higher courts. In this state, more than half the county judges who have been elected since the constitution was adopted have been persons who have never devoted a day to the study of the law; and probably there have been more lawyers elected to the position than was expected when the constitution was framed.

Id.

8. *See* Boone Schwartzel & Doug Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323, 325 (1975) (stating that the legislative changes did not require county courts to transfer contested matters).

9. *See generally id.* (reviewing the 1973 legislative reforms to probate jurisdiction); Boone Schwartzel & Doug Wilshusen, *Texas Probate Jurisdiction—New Patches for the Texas Probate Code*, 54 TEX. L. REV. 372 (1976) (discussing the 1973 amendments to the probate code).

10. 677 S.W.2d 19 (Tex. 1984).

11. *See* Seay v. Hall, 677 S.W.2d 19, 20 (Tex. 1984) (denying the probate court jurisdiction over a survival action); Boone Schwartzel & Doug Wilshusen, *Texas Probate Jurisdiction—There's a Will, Where's the Way?*, 53 TEX. L. REV. 323, 323 (1975) (lamenting "the legislature's unwillingness to place adequate restrictions on politically powerful county court judges").

12. *See Seay*, 677 S.W.2d at 20 (holding that the probate court does not have jurisdiction over wrongful death and survival claims).

13. *Id.* at 22.

14. *Id.*

> [Schwartzel and Wilshusen] further stated that issues not falling within this definition of probate jurisdiction should be determined independent of probate jurisdiction. . . . In their second law review comment, Schwartzel and Wilshusen stated that while the statutory list of probate court powers was increased, the general scope of probate jurisdiction had not changed.[15]

Regardless, the legislature effectively overruled *Seay* with revisions in 1985,[16] 1987,[17] and 1989,[18] continuing to amend Section 5 and the corresponding guardianship provisions[19] of the Probate Code. Accordingly, the legislature expanded the jurisdiction of the statutory probate courts in an attempt to include wrongful death and survival actions.[20]

However, sparring continued over the power to transfer claims to probate courts, giving rise to a split among Texas appellate courts over whether Section 5A of the Probate Code is a statute that controls jurisdiction or venue.[21] The Texas Supreme Court has

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15. *Id.*

16. *See* Tex. H.B. 479, 69th Leg., R.S., 1985 Tex. Gen. Laws 2995 (amending TEX. PROB. CODE ANN. § 5A(b) to afford statutory probate courts concurrent jurisdiction in suits "by or against a personal representative"); *see also* Palmer v. Coble Wall Trust Co., 851 S.W.2d 178, 181-82 (Tex. 1992) (stating that the purpose of House Bill 479 was to overrule *Seay v. Hall*).

17. *See* Tex. H.B. 360, 70th Leg., R.S., 1987 Tex. Gen. Laws 20043 (italics omitted) (extending statutory probate court jurisdiction to "matters involving an inter vivos trust").

18. *See* Tex. H.B. 570, 71st Leg., R.S., 1989 Tex. Gen. Laws 4163-64 (expanding statutory probate jurisdiction to all matters involving charitable and testamentary trusts).

19. TEX. PROB. CODE ANN. §§ 606–07 (Vernon 2003).

20. *See Palmer*, 851 S.W.2d at 182 (stating that the enactment of the 1985 revisions was an attempt "to give probate courts jurisdiction over wrongful death and survival actions").

21. While the limits of the statutory probate courts' transfer powers are in dispute, these courts continue to use their transfer power as a "trump card" similar to the transfer power of federal bankruptcy courts. Appellate courts have generally upheld this use. *Compare* Henry v. LaGrone, 842 S.W.2d 324, 327 (Tex. App.—Amarillo 1992, orig. proceeding [leave denied]) (holding that a statutory probate court may transfer regardless of proper venue); *In re* Azle Manor, Inc., 83 S.W.3d 410, 414 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]) (noting that a judge has broad discretion to transfer; transfer is not mandatory but permissive); *In re* Houston Northwest Partners, 98 S.W.3d 777, 780 (Tex. App.—Austin 2003, orig. proceeding [mand. pending]) (holding that dominant jurisdiction and venue outweighed by purpose of transfer statute), *with* Reliant Energy, Inc. v. Gonzalez, 102 S.W.3d 868, 870 (Tex. App.—Houston [1st Dist.] 2003, pet. granted) (holding that the venue statute trumps the probate transfer provision).

heard oral argument on this issue, but has not yet ruled as of the date of this publication.[22]

In the 2003 legislative session, the legislature amended Section 5A(b) of the Texas Probate Code, which in conjunction with Section 5(h),[23] defines the probate jurisdiction of statutory courts in yet another bid to unequivocally include wrongful death claims within the jurisdiction of the statutory probate courts.[24]

In short, the merry dance of legislation and judicial review continues to unsettle Texas probate jurisdiction. However, the very legitimate purpose of this steadily expanding jurisdiction is to resolve lawsuits linked to guardianship or decedents' estates more efficiently while preserving the interests of all parties. Statutory probate courts, mindful of the nuanced protections provided by law to incapacitated persons and decedents' estates, offer the ideal forum for such litigation.

III. THE CASE

A typical scenario in which a plaintiff will attempt to transfer a suit from a district court to a statutory probate court under the Probate Code's Section 608 power is the following:

> An infant is injured at birth in a Houston hospital. The unmarried[25] mother of the infant wants to bring a claim on behalf of her son against the hospital for damages. The alleged negligent acts took place in Harris County, the defendant hospital has its principal office in Harris County, and the medical staff involved were residents of Harris County at the time the cause of action accrued.

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22. Reply Brief for Petitioners at 1, Reliant Energy, Inc. v. Gonzalez, 102 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2003, pet. granted) (Nos. 03-0469 and 03-0470).

23. *See* TEX. PROB. CODE ANN. § 5(h) (Vernon Supp. 2004) (stating "[a] statutory probate court has jurisdiction over any matter appertaining to an estate or incident to an estate and has jurisdiction over any cause of action in which a personal representative of an estate pending in the statutory probate court is a party").

24. *See id.* (detailing the jurisdiction of Texas courts pursuant to probate proceedings and the appeals from probate orders); *see also* §§ 606-08 (Vernon 2003) (establishing statutory probate court jurisdiction); TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(c) (Vernon 1997) (discussing the rights of executors and administrators). The language in 5A(b) that "all matters relating to the settlement, partition, and distribution of estates" was expanded to include "collection," which ostensibly covers the situations where the estate is entitled to bring an action for unliquidated damages, such as wrongful death. TEX. PROB. CODE ANN. § 5A(b) (Vernon 2003).

25. Assume that the mother is the managing conservator of her son.

The mother brings suit as "next friend"[26] in a Harris County district court on behalf of her infant son.

However, months after filing suit in the Harris County District Court, the mother moves to Tarrant County with her infant and establishes residence in Fort Worth.

The mother now wants to try the case in Tarrant County.

How can the child's case be tried in Tarrant County? The general rules for personal injury apply.[27] Transfer to a Tarrant County district court is impossible under Section 15.063 of the Civil Practice and Remedies Code;[28] both the events in question and all the defendants were clearly in Harris County.[29] However, transfer to the statutory probate court in Tarrant County or any other statutory probate court in which the guardianship estate may be pending[30] may be entirely possible—even advantageous—under the Probate Code.[31]

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26. *See* TEX. R. CIV. P. 44 (stating that a minor "may sue and be represented by 'next friend'").

27. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (Vernon 1997) (stating the general venue rules which include personal injury actions).

28. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (Vernon 1997) (describing instances that are proper for venue transfer). Section 15.063 specifically states a court must transfer an action to the proper venue if (1) the action is pending in a county which is not proper; (2) an impartial trial in the present county cannot be had; (3) all parties sign a written consent. *Id.*

29. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (Vernon 1997) (describing when venue is proper). Proper venue includes among others "the county in which all or a substantial part of the events or omissions giving rise to the claim occurred" and the "county of the defendant's principal office . . . ." *Id.*

30. *See* TEX. PROB. CODE ANN. § 608 (Vernon 2003) (discussing the transfer of guardianship pleadings); *In re* Houston Northwest Partners, 98 S.W.3d 777, 780 (Tex. App.—Austin 2003, orig. proceeding [mand. dism'd]) (holding that, absent an indication of forum shopping, the Probate Code grants discretion to a statutory probate court to transfer a case to itself, notwithstanding venue provisions of the Civil Practice and Remedies Code).

31. TEX. PROB. CODE ANN. § 608 (Vernon 2003). Section 608 states:

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

IV. How to Transfer

A. *Create a Guardianship Estate*

The first step is to create a guardianship of the estate of the child in Tarrant County. While the unmarried mother is the "natural guardian"[32] of her son,[33] this alone will not enable her to bring suit on behalf of her son's estate; that designation merely allows her to proceed as "next friend."[34] "Next friend" standing limits the mother to the district court as a forum for her son's claim, as there is no estate pending in probate court, and thus no basis for probate jurisdiction.[35] In short, if the mother proceeds in district court, she and her son are limited to the "proper" venue of Harris County.[36] For a single working mother of a child (who may require considerable extra care) in Fort Worth, the prospect of trying the case 270 miles away in Houston is, to say the least, forbidding.

Our plaintiff-mother faces not only the venue problem but also future financial problems she may not have even considered. More subtle than venue considerations, but no less important, is the way that the mother should style her son's case: Merely proceeding as "next friend" can result in pitfalls due to the lack of explicit court approval of the "friend's" authority to enter into fee agreements and handle money judgments.[37]

Fortunately, opening a guardianship in the Tarrant County Probate Court solves both problems.

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32. *See* Tex. Prob. Code Ann. §§ 694(b), 699, 700, 703 (Vernon 2003) (determining the term of appointment of the guardian, qualifications of the guardian, the oath of the guardian, and the bond of the guardian); *see also* Tex. Prob. Code Ann. §§ 682-700 (Vernon 2003) (dictating the process requirements for the application and appointment of a guardian of an incapacitated person). Natural guardianship should not be confused with a formal guardianship, which requires court action on an application, posting a bond, and taking an oath. *Id.*

33. *See id.* § 676 (addressing parental guardianships of children).

34. *See* Tex. R. Civ. P. 44 (stating that a "next friend" may represent minors with certain rules).

35. Tex. Prob. Code Ann. §§ 5A(b), 607 (Vernon 2003).

36. Tex. Civ. Prac. & Rem. Code Ann. § 15.002 (Vernon 2003) (dictating standard venue rules for personal injury claims).

37. *See* Stern v. Wonzer, 846 S.W.2d 939, 945–46 (Tex. App.—Houston [1st Dist.] 1993, no writ) (rejecting the claims by a child's parents to recover attorney fees in seeking judgment for injured child); *see also* Massey v. Galvan, 822 S.W.2d 309, 319 (Tex. App.—Houston [14th Dist.] 1992, no writ) (denying a parent's claim of attorney fees for an action brought by the parents for wrongful death action).

(1) *Regarding venue*: Upon application with the court of original jurisdiction in probate matters (here, the Tarrant County Probate Court),[38] a guardian ad litem will be appointed for the child,[39] and the mother will be appointed guardian of his estate.[40] The administration of which will occur under the oversight of the court.[41] As an indirect result, our plaintiff will be able to avail herself to the Probate Code's Section 608 transfer power to move the case against the hospital, with the Tarrant County Probate Judge's approval, to Tarrant County.

(2) *Regarding financial issues*: In the event of a successful outcome of the case against the hospital, a wise attorney for our plaintiffs will recognize the eventual necessity of a guardianship of the estate in order to offer his client the most favorable trust terms; for instance, the flexible "867" trust, which requires a guardian to deliver guardianship assets to one court appointed trustee.[42] In short, regardless of venue, a guardianship is advisable if the claim is at all potentially valuable.

Having opened a guardianship in Tarrant County, the pump is primed to force the personal injury lawsuit into Fort Worth against the usual venue rules of the Texas Civil Practice and Remedies Code.[43]

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38. TEX. PROB. CODE ANN. § 610 (Vernon 2003 & Supp. 2004); *see also* TEX. PROB. CODE ANN. § 6 (Vernon 2003 & Supp. 2004) (addressing the venue requirements for administration of the estates of decedents).

39. *See* TEX. PROB. CODE ANN. § 745(d) (Vernon 2003) (discussing guardian ad litem appointments to represent a ward).

40. *See id.* § 676 (stating that a parent is entitled to be appointed guardian of their children's estates).

41. *See id.* § 671 (granting the court authority to determine the administrative duties of the guardian).

42. *See* TEX. PROB. CODE ANN. § 867 (Vernon 2003) (stating that a court may direct an order that creates a trust for the benefit of a minor if it finds the trust to be in the child's best interest); *see also* TEX. PROP. CODE ANN. § 142.002–142.009 (Vernon 2003) (describing rules and requirements for "next friend" in situations concerning a minor or incapacitated person and property). Section 867 trusts are preferable to those created under Section 142 of the Property Code, in that the Section 867 trustee is not bound by the strict rules of investment and double bond required under Section 142, among other reasons. *Id.* at §§ 142.002, 142.004.

43. TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon 2003).

B. *Moving to Transfer*

The transfer is accomplished by simply filing a Motion to Transfer Cause of Action Pursuant to Section 608[44] in the statutory probate court where the ward's estate is pending. While an often-cited appellate case lists four conditions that must be met for transfer,[45] we can assume that we have already met two outright—that the court exercising the transfer power is a statutory probate court and that the case to be transferred is in a district court. The two dispositive conditions for transfer in our scenario, then, are (1) that there must be an estate pending in the Tarrant County Probate Court and (2) that the cause of action in the other court (the Harris County District Court) is "appertaining to or incident to" the estate pending in the statutory probate court.[46] The first condition is met with the son's guardianship estate currently pending in Tarrant County. The second condition is met in our case by legislation enacted in 2003 that expressly includes "a cause of action relating to a guardianship in which a guardian, ward, or proposed ward in a guardianship . . . is a party," in addition to matters, "appertaining to or incident to a guardianship estate," within the transfer power.[47]

The statutory probate judge will then exercise his discretion in granting or denying the transfer.[48] The judge cannot be forced to

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44. TEX. PROB. CODE ANN. § 608 (Vernon 2003 & Supp. 2004); *see also id.* § 5B (discussing decedent's estates).

45. Henry v. LaGrone, 842 S.W.2d 324, 326 (Tex. App.—Amarillo 1992, orig. proceeding [leave denied]). The case states:

> Section B authorizes the judge of a statutory probate court to transfer a cause of action to his court when the following four conditions exist:
>
> 1. The Court exercising the power to transfer a cause of action under section 5B is a statutory probate court.
> 2. There is an estate pending in the statutory probate court.
> 3. There is a cause of action pending in a district, county or statutory court; and
> 4. That cause of action is appertaining to or incident to the estate pending in the statutory probate court.

Id.

46. Conditions "1" and "3" above are met for transfer.

47. TEX. PROB. CODE ANN. § 608 (Vernon Supp. 2004). The legislature similarly clarified and liberalized the language permitting transfer in decedents' estates. TEX. PROB. CODE ANN. §§ 5, 5A, 5B (Vernon 2003).

48. *In re* Azle Manor, Inc., 83 S.W.3d 410, 413 (Tex. App.—Fort Worth 2002, orig. proceeding [mand. denied]) (providing that the decision to grant or deny a transfer is discretionary); TEX. PROB. CODE ANN. § 608 (Vernon Supp. 2004). The legislature similarly

transfer the personal injury lawsuit into his court, even if all the above conditions are met.[49] However, it is highly likely in our case that the judge will. The policies that drive the transfer provision militate for a probate court as the best forum for the lawsuit: (1) the sole asset in the ward's estate is his unliquidated claim for damages and (2) the statutory probate court bears the responsibility of protecting the minor's financial interests by virtue of the fact that the guardianship estate is pending there.[50]

C. *Why a Statutory Probate Court?*

Justifying a motion to transfer will require appealing to the statutory probate court's particular interest in the case, which is the incapacitated son's estate. The statutory probate court which oversees the guardianship estate is, generally speaking, better suited than a district court to manage the collection of the claims belonging to the infant ward. A judge unfamiliar with the protections provided by the Probate Code risks gravely compromising the interests of the most vulnerable party, the incapacitated person. For instance:

(1) The judge, and counsel, should know to appoint a guardian ad litem to represent the ward's interests, in this case the minor son's interests, as they differ from the guardian's interests.[51] For example, the mother may have reasons to settle the case for less than the son. However, with vigorous representation, the son could recover a greater amount.[52] At trial or mediation, a properly trained and ap-

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clarified and liberalized the language permitting transfer in decedents' estates. TEX. PROB. CODE ANN. §§ 5, 5A, 5B (Vernon 2003).

49. *Id.* (noting that Section 5B authority in granting transfers to a statutory probate court is permissive); *see also* Ash v. Ford Motor Co., 246 F. Supp. 2d 629, 632 (S.D. Tex. 2003) (recognizing that, under Texas law, a wrongful death claim may be tried in district court even if it is incident or appertaining to an estate).

50. *See* TEX. PROB. CODE ANN. § 671(d) (Vernon 2003) (stating that a probate judge is liable on bond for those persons damaged by the judge's neglect).

51. *See* TEX. R. CIV. P. 173 (stating that when a next friend or guardian's interest is adverse to a "minor, lunatic, idiot or non-compos mentis, the court shall appoint a guardian ad litem"); *see also* TEX. PROB. CODE ANN. § 645(a) (Vernon 2003) (noting a "judge may appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding").

52. In our case this conflict of interest may not be as much of a concern as it would be had the child died and the mother represented the estate in both a survival action and wrongful death action: parents have derivative claims for loss of consortium only if the child dies. *See* Roberts v. Williamson, 111 S.W.3d 113, 119–20 (Tex. 2003) (stating damages

pointed guardian ad litem[53] of the child will emphasize certain damages that perhaps the appointed guardian (mother) has less incentive to pursue. It would be understandable if the mother, exhausted with the inconvenience and uncertainties of litigation, found satisfactory a settlement that compensated her for the costs of past and future medical care for her son. Conversely, the attorney charged with representing only the best interests of the child, that is, the guardian ad litem, would insist on a maximum recovery of pain and suffering damages and loss of earning capacity that the child is entitled to over and above his mother's interest in covering out-of-pocket expenses. Additionally, the guardian ad litem's fees are taxed as costs.[54]

(2) The statutory probate court's expertise is also brought to bear in monitoring the final disposition of the money judgment itself. The money judgment belonging to a ward in the care of an appointed guardian should be placed in trust for the ward's benefit, usually in an 867 trust if the judgment is significant.[55]

(3) Finally, there is mounting evidence that the best interests of the *judge* are also at stake. Judges who fail, whether by negligence or, more likely, lack of expertise, to manage the competing interests at play in a guardianship or in a lawsuit brought on behalf of a minor, face not only remand[56] or reversal, but even monetary liability.[57]

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for a non-fatal injury to a child are not recoverable by the child's parents). If the parents of the child had derivative claims, they would be paid out of the same prospective "pie"—e.g., the insurance policy limits—as the child's own recovery. This represents a fundamental conflict of interest between the child and parent, which the guardian ad litem addresses. *Id.* (asserting reasons for not allowing loss of consortium claims to parents of children who have been seriously injured).

53. TEX. PROB. CODE ANN. §§ 646, 647, 647A (Vernon 2003).

54. TEX. R. CIV. P. 173. Note that a recent award of excessive guardian ad litem fees by a Webb County district judge (not a statutory probate court judge) earned the outrage of the Fourth District Court of Appeals, and rightly so. *See* Goodyear Dunlop Tires N. Am. v. Gamez, No. 04-02-00932-CV, 2004 WL 1881746, at *9-13 (Tex. App.—San Antonio Aug. 25, 2004, no pet. h.) (not designated for publication) (reversing and remanding an award of $397,741.12 in guardian ad litem fees based on "unconscionable" billing practices, including billing for more than 24 hours per day and for sleeping). However, the critical role that ad litems play should not be eclipsed by this instance of corruption. *Id.* at *11. The conduct of the attorneys and trial judge in *Gamez* is much more an embarrassment to the reputation of the bar generally than it is—as some will surely argue—a particular indictment of the role of guardians ad litem in litigation.

55. *See* TEX. PROB. CODE ANN. § 867 (Vernon 2003) (providing for the creation of a trust to manage guardianship funds for which the court may appoint a financial institution to serve as trustee).

56. *See* Velasquez v. Lundsford, No. 14-95-00172-CV, 1996 WL 544429, at *9 (Tex. App.—Houston [14th Dist.] Sept. 26, 1996, no writ) (not designated for publication) (as-

As a general rule, judges enjoy immunity from civil liability in Texas for judicial acts.[58] However, the state legislature may abrogate this immunity, which it has *already* done for courts sitting in probate. Section 36 of the Probate Code creates a duty for "each county and probate court" to exercise reasonable diligence in overseeing the affairs of probate estates.[59] This Section also provides that in cases of gross neglect of this duty, the judge "shall be liable on his bond to those damaged by such neglect."[60] Section 671 of the Probate Code states essentially the same terms for guardianship estates.[61]

Because of this potential monetary liability, those county court judges who deal with probate estates, including statutory probate judges, must post bonds in the thousands of dollars.[62] It is odd that this bond requirement applies only to probate courts, given that probate court, as defined in the Code, expressly includes those district courts resolving probate matters.[63] A plain reading of the

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serting that the failure to join a party exposed the minor plaintiff to multiple liability for attorneys' fees and was an abuse of discretion).

57. *See* TEX. PROB. CODE ANN. § 671(d) (Vernon 2003) (stating that a probate judge is liable for persons damaged pursuant to the judge's neglect).

58. *See* Hawkins v. Walvoord, 25 S.W.3d 882, 890 (Tex. App.—El Paso 2000, pet. denied) (stating that Texas follows the principles set out by the United States Supreme Court regarding absolute immunity in *Sparkman v. Sparkman*); *see also* Sparkman v. Sparkman, 435 U.S. 349, 362 (1978) (upholding absolute judicial immunity when the judge performs a normal judicial function and is acting in his judicial capacity).

59. TEX. PROB. CODE ANN. § 36(a) (Vernon 2003).

60. *Id.* The full text of the provision states:

> It shall be the duty of each county and probate court to use reasonable diligence to see that personal representatives of estates being administered under orders of the court and other officers of the court perform the duty enjoined upon them by law pertaining to such estates. The judge shall annually, if in his opinion the same be necessary, examine the condition of each of said estates and the solvency of the bonds of personal representatives of estates. He shall, at any time he finds that the personal representative's bond is not sufficient to protect such estate, require such personal representatives to execute a new bond in accordance with law. In each case, he shall notify the personal representative, and the sureties on the bond, as provided by law; and should damage or loss result to estates through the gross neglect of the judge to use reasonable diligence in the performance of his duty, he shall be liable on his bond to those damaged by such neglect.

Id.

61. *Id.* § 671(d).

62. TEX. GOV'T CODE ANN. §§ 25.0006, 26.001 (Vernon 2004) (requiring constitutional county courts to post a bond between $1,000 and $10,000).

63. *See* TEX. PROB. CODE ANN. § 3(e)–(g) (Vernon 2003) (defining the various courts and their respective subject matter jurisdiction).

Code combined with the fact that the same interests are at stake—the interests of an incapacitated person—whether the court is a county court or district court, begs the inevitable question: To what bond will one look for damages if his loss is due to the gross neglect of a *district judge* sitting in probate? While no one today has attempted to ascertain a district judge's liability on his "missing" bond, there are no guarantees that a bond may not be imposed upon state district (even federal) court judges in the future when they sit "in probate."

While Section 671 of the Probate Code appears to hold a judge sitting in probate liable only on his bond,[64] a case recently decided by the Fourteenth District Court of Appeals in Houston, *Twilligear v. Carrell*,[65] involved whether to extend liability beyond the amount of bond.[66] The plaintiffs in the case forwarded the theory that a judge's liability on bond under Section 671 of the Texas Probate Code is merely an "additional pocket" to an *independent duty* to reimburse an estate for injury due to the judge's gross negligence.[67]

The plaintiff's theory in *Twilligear* failed to extend liability beyond the county judge's bond,[68] but the case nonetheless represents another potential probate hazard for both of the judges—district and statutory probate court—involved in our hypothetical case. For instance, consider the hypothetical situation in which the Tarrant County Probate Judge knows the son's unliquidated claim is of potentially great value and appoints the mother as guardian of her son's estate. The judge sets a nominal bond for the guardianship estate (which otherwise contains no assets) in order to allow the lawsuit in Harris County to proceed in an economically feasible fashion, understandably deeming it in the best interests of the son.

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64. *See id.* § 671(d) (stating that "the judge shall be liable on the judge's bond to those damaged by the judge's neglect"). Nothing in the Probate Code, however, explicitly limits the judge's liability to *only* the amount of his bond.

65. No. 14-03-01049-CV, 2004 WL 1899015 (Tex. App.—Houston [14th Dist.] Aug. 26, 2004, no pet. h.) (not designated for publication).

66. Twilligear v. Carrell, No. 14-03-01049-CV, 2004 WL 1899015, at *1 (Tex. App.—Houston [14th Dist.] Aug. 26, 2004, no pet. h.) (not designated for publication).

67. Post-Submission Brief for Appellee at 4, Twilligear v. Carrell, No. 14-03-01049-CV, 2004 WL 1899015 (Tex. App.—Houston [14th Dist.] 2004).

68. *See Twilligear*, 2004 WL 1899015, at *2 (reversing and rendering the judge's motion for summary judgment on the defense of judicial immunity in an action by the plaintiff to recover beyond the amount of their bonds).

However, the judge does not transfer the unliquidated claim from the Harris County district court where it is pending and so the court cannot supervise its collection and distribution. The case is tried in Harris County district court. Subsequently, the Harris County district court judge in our hypothetical situation hears the lawsuit himself, enters a large judgment in favor of the injured son, but in gross neglect orders it paid over to the child's mother without restriction under the assumption that their interests are aligned.[69]

If the mother, having been awarded a monetary sum by the court far in excess of the minimal bond she had posted in Tarrant County as guardian before the suit began, now proceeds to loot the estate against the child's best interests, which judge will the minor—using *Twilligear*'s theory and Section 36(a)—sue for gross neglect upon obtaining majority? While the district court judge is at fault, the Tarrant County statutory probate court judge is the only adequately bonded entity in sight. Suffice it to say that this weighs in favor of transfer of the lawsuit into the complete supervision of the probate court.

V. Opposing the Transfer

A. *The Likely Result of* Reliant Energy, Inc. v. Gonzalez[70]

It is important to note that the transfer power under Sections 5B and 608 of the Probate Code is not fully settled in Texas law. The question of whether Section 5B, which applies to decedents' estates, is potent enough to transfer a personal injury lawsuit away from the county of proper venue under the Civil Practice and Remedies Code is currently under advisement with the Texas Supreme Court.[71] The issue, specifically, is whether Section 5B is subject to the language in the Texas Civil Practice and Remedies Code that declares that its venue provisions prevail over those of the Probate Code.[72] (Section 608, the transfer provision which applies to

69. While this scenario, to the author's knowledge, is entirely fictional, cases such as *Twilligear* indicate that it is by no means impossible.

70. 102 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2003, pet. granted).

71. Reply Brief for Petitioners at 1, Reliant Energy, Inc. v. Gonzalez, 102 S.W.3d 868 (Tex. App.—Houston [1st Dist.] 2003, pet. granted) (Nos. 03-0469 and 03-0470).

72. Tex. Civ. Prac. & Rem. Code Ann. § 15.007 (Vernon 2003).

guardianships, will almost certainly be treated identically).[73] However, the answer seems clear: Sections 5B and 608 define not venue but jurisdiction, thus making the "prevailing" language in the Civil Practices and Remedies Code irrelevant.[74] Most appellate courts have upheld the statutory probate courts in the exercise of this transfer power, though a few have denied it.[75]

B. *Means of Opposing the Transfer*

In the hypothetical case previously discussed, if a transfer of the case is granted by the statutory probate court under Section 608 of the Probate Code (or 5B if the case involved an estate) the defendant has several remedies available to oppose the transfer. First, the defendant may petition for a writ of mandamus forcing the Tarrant County probate judge to deny the motion to transfer.[76] If that tactic fails, the defendant has recourse to the Second District Court of Appeals to make his case for improper venue after a final judg-

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73. *See In re* Terex Corp., 123 S.W.3d 673, 675 (Tex. App.—El Paso 2003, mandamus pet. stayed) (stating that the analysis regarding the interplay between the Texas Civil Practice and Remedies Code and Section 5B has been applied to Section 608 of the Probate Code).

74. *See In re* Houston Northwest Partners, 98 S.W.3d 777, 780 (Tex. App.—Austin 2993, orig. proceeding [mand. pending]) (upholding transfer of claim to statutory probate court in spite of Civil Practice and Remedies Code venue provisions).

75. *See In re* Ramsey, 28 S.W.3d 58, 61 (Tex. App.—Texarkana 2000, orig. proceeding) (stating that Section 5B "authorizes a statutory probate court . . . to transfer a suit pending in a district or other court when that suit is one in which a personal representative of an estate pending in that probate court is a party"); *In re* J7S, Inc., 979 S.W.2d 374, 377-78 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding [mand. denied]) (upholding a decision by a statutory probate court to not transfer a case to a district court); Lanier v. Stem, 931 S.W.2d 1, 3 (Tex. App.—Waco 1996, orig. proceeding) (holding that 608 of the Probate Code "allows the probate court to assume authority over cases pending in other courts, notwithstanding the venue statutes"); Henry v. LaGrone, 842 S.W.2d 324, 326-27(Tex. App.—Amarillo 1992, orig. proceeding [leave denied]) (upholding the transfer power of probate courts). *But see* Reliant Energy, Inc. v. Gonzalez, 102 S.W.3d 868, 874 (Tex. App.—Houston [1st Dist.] 2003, pet. granted) (holding that "[S]ection 15.007 controls over [S]ection 6 of the Probate Code . . . [and] further hold[ing] that [S]ections 5A and 5B of the Probate Code in no way limit the application of [S]ection 15.007 of the Civil Practice and Remedies Code"); DB Entm't, Inc. v. Windle, 927 S.W.2d 283, 288-89 (Tex. App.—Fort Worth 1996, orig. proceeding [leave denied]) (concluding that the statutory probate court abused its discretion by transferring the wrongful death case).

76. *See* Milton v. Herman, 947 S.W.2d 737, 741 (Tex. App.—Austin 1997, orig. proceeding) (discussing a writ of mandamus against a statutory probate court for abuse of discretion).

ment in the Tarrant County Probate Court.[77] As a last resort, the defendant may apply for a temporary restraining order against the Harris County District Clerk to prevent the transfer.[78]

VI. CONCLUSION

The legislature has armed statutory probate courts with expansive jurisdiction to ensure the orderly and efficient administration of estates as well as to promote judicial economy. Recognizing that prudence at times demands exceptions to mandatory venue statutes, the legislature granted statutory probate courts a transfer power complementary to its jurisdiction. Thus, in cases like ours, where not only judicial economy but considerations of judicial expertise and the danger of conflicting interests call for the oversight of a probate judge, transfer to a county of "improper" venue may be the most just solution. The very reasons the legislature founded statutory probate courts would demand that the mother be able to proceed with her son's lawsuit in the statutory probate court in the county in which the guardianship is pending.

77. *Cf.* Canadian Helicopters, Ltd. v. Wittig, 876 S.W.2d 304, 306 (Tex. 1994) (holding that "appeal is an adequate remedy to address a trial court's denial of a plea to the jurisdiction, and therefore a writ of mandamus will not issue to correct it").

78. *See* Wilson N. Jones Mem'l Hosp. v. Huff, No. 05-03-00596-CV, 2003 WL 22332387, *1 (Tex. App.—Dallas Oct. 14, 2003, no pet.) (not designated for publication) (describing how the appellants received a restraining order to enjoin the district clerk from transferring the case).