

# “What You Are Dying To Know About Probate”

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Your attorney has just been appointed as a guardian ad litem in a wrongful death action relating to an airplane crash you heard about on CNN News many months ago. What is surprising to you is the fact that the appointment came from a probate court. You thought a probate court only heard matters relating to decedent's estates, guardianships, trusts and incompetents. What you didn't know is that the Texas Legislature recently expanded the jurisdiction of the Texas Statutory Probate Courts. Today, these courts have original probate jurisdiction with district courts. Succinctly stated, the legislature has conferred statutory probate courts with jurisdiction to hear any actions by or against a personal representative that might have been brought in district court and exclusive jurisdiction over all matters appertaining to or incident to estates. Consequently, urban trial lawyers are surprised to discover that the lawsuits they used to file in district court may now be filed in a statutory probate court. Refer your attorney to Charles B. Corham's article "The Jurisdiction of Statutory Probate Courts", Texas Bar Journal, March, 1996 for an in-depth explanation of their jurisdiction.

Jurisdiction aside, what matters do these courts generally hear? Historically, statutory probate courts hear matters appertaining to the settlement of decedent estates, i.e. decedents who die with a will (testate estates) and those without a will (intestate estates). The vast majority of decedent estates fall within the purview of testate succession. The probate court has limited control or review over the duly qualified independent executor appointed by the decedent in their will. Conversely, the court exercises' complete control over the duly qualified administrator of an intestate estate. The obvious financial conclusion drawn from this dichotomy is that your attorney's remuneration from a testate estate will allow him to send you flowers on your birthday or Dom Perignon at Christmas should he be settling an intestate estate.

Guardianship matters are an integral part of the court's docket. They take the form of a guardianship of a person, a person's estate or both. Probate courts may not impose a guardianship over a person unless the evidence is clear and convincing that same is required. Remember your chagrin when you were a teenager and your Mom or Dad, i.e. natural guardian(s), told you "No, you can not take the car for a late night outing with your friends!" Imagine how you would feel fifty (50) years later when a court appointed guardian again told you "No" to this same request. A guardianship of the estate involves the court's appointment of a person or entity to manage a person's financial and business affairs. This type of guardianship always required a substantial bond of the guardian to protect the estate from theft, waste or other forms of mismanagement. The court may appoint a person as guardian in both capacities if a person, i.e. the ward, is totally incapacitated. The probate court appoints an attorney ad litem to advocate the desires of a proposed ward and may appoint a guardian ad litem to represent the best interests of a proposed ward. Guardianship matters require you and your attorney to employ those human attributes often learned at your grandmother's knee, e.g. compassion and understanding for the frailties of advanced age.

The statutory probate court resolves issues surrounding intervivos and testamentary trusts. An intervivos trust simply means a trust that is drafted and effective "within your lifetime". A testamentary trust denotes trust provisions placed in your will that take effect upon your death. Irrespective of the meaning, we must remember these convoluted Latin-ese terms help justify the hourly billing that allows the managing partner to send you the ever increasing Christmas bonus. Succinctly stated, trust issues usually revolve around the trustor's, i.e. the person asking your

attorney to draft the trust, use of vague and indefinite language in the instrument. Example! The trustor states, "I hope my present wife, Lolita Smith, will continue my annual gift of \$10,000.00 on April 1st to my former wife, Ms. Alimonious Bounty, to celebrate our former wedding anniversary". The clear and inherent issues relating the trust language, "I hope" are obvious to any attorney whether they graduated Magna Cum Difficulty or not.

The court may also amend, modify or delete trust provisions depending on the circumstances surrounding the instrument, e.g. court deletion of a stated bank as trustee after it has ceased to do business.

The probate court hears the mental health docket and resolves a myriad of ancillary issues thereto, e.g. Order for Protective Custody compelling, upon probable cause, the commitment of a person for physical and/or psychiatric care when he or she may be a danger to themselves or others or may deteriorate further without medical intervention. The court conducts mental health hearings to determine whether or not a person should be released from protective care or transferred to a psychiatric facility for further diagnosis and treatment. Lastly, but only by way of description and not limitation, the court conducts medication hearings to determine the necessity of a drug's usage when a patient is opposed to same. It conducts a hearing to determine whether it should issue an Order not resuscitate a terminally ill patient under a guardianship.

The foregoing evidences the continual life and death decisions made daily in a statutory probate court. The trial court role surrounding these issues has been expanded to include any issue that is appertaining or incident to an estate. Likewise, this court may also exercise pendent and ancillary jurisdiction to promote judicial efficiency and economy. Because statutory probate courts exercising pendent and ancillary jurisdiction may now adjudicate any matter that was previously heard in district courts, your attorney can look forward to his appointment in such matters as survival and wrongful death actions and/or tort and contract actions relating to the rights and duties of a decedent.