

“WINNING LITIGATION WITH DEAD PEOPLE”

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Jerry Frank Jones

1. **Introduction.** This outline will highlight issues to be addressed when a party is dead or dies when there are personal injury claims..

2. **Probate, Guardianship, Trust and Property Codes.**

a. The Texas Probate Code is not a code under the Texas Code Construction Act. The Texas Probate Code is all Sections from 1 to 905. It includes not only the provisions regarding decedent's estates, Sections 1 to 435, it also includes the provisions regarding "Non Testamentary Transfers, Section 436 to 473, the Durable Power of Attorney Act, Section 481 to 506 and the Texas Guardianship Code, Sections 601 to 905. Sometimes references are made to the Probate Code but are actually referring to sections concerning guardianships. Further, when references are made to a section of the Guardianship Code, it is contained within the Probate Code.

Any references in this paper to sections mean sections of the Texas Probate Code unless otherwise stated..

b. The Texas Trust Code (Sections 111.001 to 117.012) is contained within the Texas Property Code. References to Trust Code sections are references to the Property

Code. Likewise, references to the Property Code Sections 111.001 to 117.012 are to the Trust Code.

3. **Do You Need A Guide?** For most lawyers, it is helpful to have a lawyer with particular expertise in probate matters. The probate court is a specialty court and can have a set of bewildering rules that are not readily obvious from the statutes. Further, an experienced probate attorney may be able to see further down the "probate road" than a plaintiff's attorneys. This outline will identify some of the more obvious issues but is a poor substitute for an experienced probate attorney.

4. **Two Statutes.** At common law personal injury claims did not survive death, Russell v Ingersoll-Rand Co., 841 S.W.2d 343,344 (Tex. 1992). The legislature has enacted two statutes that allow suit by and against deceased parties. Those statutes may require the involvement of the probate court. Or at least an awareness of relevant probate issues.

a. **Survival.** The survival action, Texas Civil Practice and Remedies Code (CPRC) Section 71.021 described the action.

i. Subsection (a) says an action for person injury to the "health, reputation or personal" does not abate

because of the death of an injured person or the person liable for the injury.

ii. Further, subsection (b) says that the actions survives to and in favor of

(1) The heirs,
(2) Legal representatives, and
(3) the estate of the injured person.¹

iii. Finally, subsection (c) says that the action may be pursued as if the liable person was alive.

iv. While not set out in the statute, it is clear that the claims under this statute are derived from the decedent (plus funeral expenses). They are generally described as:

(1) Conscious pain and suffering,
(2) Medical expenses, and
(3) Funeral expenses. See Russell v. Ingersoll-Rand Co., supra.

b. **Wrongful Death.** CPRC Section 71.001 et seq allows suits for wrongful death.

i. Subsection (a), the damages are “for the exclusive benefit of the surviving spouse, children and parents of the deceased.”

¹ While this statute refers to the estate having a claim, do not be misled, it is clear that an estate is not an entity, see discussion infra.

ii. Subsection (b), allows one or more of those people to bring the action for the benefit of all.

iii. Subsection (c) says the personal representative of the estate shall (emphasis added) bring the action if none of the listed people have sued within 3 months of the death unless all of the rightful claimants tell him not to.

iv. Subsection (c) raises several fiduciary duty questions:

(1) It raises the question about who gets the recovery. Does it somehow belong to the estate since the personal representative collected the funds. Probably not. More likely the personal representative must pursue the claim for each of the wrongful death beneficiaries including proving the amount that each should recover. If that is right, then the personal representative would have to hold the recovered amounts for the wrongful death claimants. But, who then determines how much of the recovery passes to each of those claimants. It looks like a job fraught with bad consequences (duty of impartiality for example) for the personal representative, that would be best solved by application to the court to declare how the proceeds are to be split.

(2) If the personal representative has to pursue this for the wrongful death claimants, he may have a conflict because of the claim on behalf of the estate.

(3) Because of the “shall” language, it does not appear to be a job the personal representative

can ignore. If he failed to pursue the claim and it was then time barred, it appears a lawsuit could be brought against the personal representative for failing to carry out his fiduciary duties. If for some reason the personal representative does not want to pursue the claims, he should get a release from all of the claimants or seek court authorization to not pursue.

5. Definitions

- a. **“Probate.”** Probate means
 - i. Determining the successors to the decedent. This may mean probating a will that states who the beneficiaries are. Or it may mean determining the intestate heirs because there was no valid will.
 - ii. Collecting the assets of the decedent. This would include pursuing any claims that survived death.
 - iii. Paying the decedent’s debts.
 - iv. Paying the decedents taxes. This may be his income taxes but it may also include transfer taxes (estate, gift and generation skipping).
 - v. Distributing the assets to the proper heirs or beneficiaries.
- b. **“Probate Alternatives.”** It is not always necessary to have a probate proceeding. There are several probate alternatives that are discussed infra.

c. **“Personal representative.”** Section 3(aa) of the Texas Probate Code defines personal representative as executors, independent executors, administrators, independent administrators, and temporary administrators. While each of these types of personal representatives have significant different characteristics, they are often used loosely and interchangeably. For a good general review see the commentary following Section 145 of Prof. Stanley Johanson’s Texas Probate Code Annotated. The different personal representatives are:

- i. **“Executor”** An executor is a persona named in a will, usually but not always an independent executor..
- ii. **“Independent Personal Representative.”** This is either a personal representative named in a will (executor) or chosen by all of the heirs. If the will says that the named person is to act independent of court supervision, it is an independent executor, Texas Probate Code Sections 3(q).and 145 et seq. Despite being named an independent executor, this personal representative may have to post a bond unless that requirement is specifically waived, Texas Probate Code Section 149.

Or all of the distributees of the estate, whether by a will or intestacy, can ask the court to appoint an independent administrator, Section 145.

- iii. **“Administrator.”**

Administrator is a person (or qualified corporate fiduciary) who is not named in an instrument but rather is appointed by a court. This appointment can be dependent or independent.

iv. **“Temporary Administrator.”** A temporary administrator is one appointed under Sections 131A *et seq* when an administrator is needed immediately or when there is a contest regarding the probate of a will or the appointment of a permanent personal representative.

d. **“Independent v Dependent Administration.”** If a probate proceeding is independent of court supervision, then once the inventory is filed, the personal representative generally does not need permission of the court to take action.

However, with a dependent administration, almost all of the personal representatives actions require prior approval of the court. Further, a bond is required, there are annual accounts and a final account. Despite these restrictions and additional requirements, heirs sometimes choose a dependent administration over an independent administration.

For example, a plaintiff may want a bond and court supervision, if he is concerned that the heirs will distribute the estate before, he can obtain and collect a judgment.

A personal representative may prefer to be subject to court authority if he does not get along with the heirs or otherwise

believes they may criticize his actions. If he is dependent, he can, and most of the time has to, go to the probate court before he acts. If the heirs have a complaint they can make it to the court.

Most often, dependent administrations are chosen because there are significant creditors. A dependent administration allows the personal representative to be sure that the debts are properly settled without any later liability on the personal representative.

e. **Letters Testamentary and Letters of Administration.** After qualifying as executor, the clerk of the court issues “letters testamentary.” After qualifying as administrator, the clerk of the court issues “letters of administration.” See Probate Code Sections 182, 183 and 186. These “letters” are the badge of office that a personal representative may present to third parties. These “letters” inform third parties that the holder is authorized to act on behalf of the estate including to settle any claims, Probate Code Section 188.

f. **“Creditor: Interested Person.”** Texas Probate Code Section 3(r) defines interested persons to include creditors. This means that creditors have standing to participate in most of the proceeding in a probate matter. However, that right is not universal. For example, a creditor cannot object to the probate of a will. The creditor’s rights are not impacted by whether the decedent’s estate passes by intestacy or by will, Daniels v. Jones,

224 S.W.2d 476 (San Antonio 1920, writ ref'd). Also see general discussion at Logan v. Thomason, 202 S.W.2d 212 (Tex. 1947).

g. **“Debtor: Not An Interested Person.”** There is no authority for a debtor, a defendant, to seek the appointment of a personal representative of a dead plaintiff.

h. **“Beneficiaries, Heirs and Distributees.”** Heirs are the persons who inherit if a person dies intestate (there is no will); they are the intestate takers (Section 3(o)). Beneficiaries are those persons who take under a will (not defined by the Probate Code). Distributees covers both categories, persons who take under a will or who take by intestacy (Section 3(j))

6. **The Need for An Administration: Plaintiff’s Estate.** The general rule is that only the personal representative of the decedent’s estate can bring actions that belonged to the decedent or that now belong to the estate. Russell v. Ingersoll-Rand Co., supra.

a. **When the Heirs Can Proceed Without An Estate.**

i. **No Probate Pending or Necessary.** There are numerous cases allowing heirs to proceed when there is no administration pending or necessary, Shepherd v. Ledford, 962 SW2d 98 (Tex. 1997).

ii. **Family Settlement Agreement.** Shepherd also says that the heirs can proceed without an administration when the family has agreed to a family settlement. Not just

any family settlement will do. It would have to have all of the heirs, it would have to agree on how debts were to be paid (and probably that they are paid or paid out of the proceeds) and that no administration is necessary or will be sought.

In Cooper v Coe (Tyler 1995) the family entered into an agreement including how debts were to be paid. However, the debts had not been paid. The court held that payment was not necessary, merely an agreement would suffice. While this case may be the proper law, it is contrary to one of the primary purposes of probate: Settling claims of creditors. For example, such a family settlement agreement would not prevent a creditor for filing a probate proceeding. A lawyer should be very cautious about relying on this decision.

iii. **Derivative Actions.**

The heirs may also proceed, in a derivative action, when the administrator has failed or refused to act. See discussion at “Derivative Actions,” infra Section 9d on page 6.

b. **Administration May Be Otherwise Necessary.** A probate proceeding may be necessary for other, non personal injury, purposes. There may be other assets that need to be administered. There may be other debts. Or there may be other reasons that an administration is desirable.

c. **Proceeding Without An Estate: No Administration Needed.** For heirs to be able to bring an action without a personal representative they have to plead and prove that no

administration is pending and none is necessary, Shepherd v. Ledford, 962 SW2d 98 (Tex. 1997).

d. When An Administration Is Necessary

i. **Statute.** Generally, an administration is necessary if there are two or more debts or if it is desired to have the court partition the estate, Texas Probate Code Section 178(b).

ii. **Other Reasons.** For other reasons that an administration may be required, or desirable, see the discussion at Texas Practice Series, "Probate and Decedent's Estates" by Woodward and Smith, Sections 624 and 625.

e. **Court determination of No Administration Necessary.** Sometimes the heirs want to pursue an action without taking out a probate proceeding. If in doubt as to whether or not an administration is necessary, they can apply to the probate court to enter an order that no administration is necessary. Texas Probate Code Sections 139-142.

7. The Need for An Administration: Defendant's Estate

a. **Compelling Administration.** Sometimes, none of the family has sought the administration of the dead defendant's estate. This may be a tactic of those defending the defendant's interest or because there is no other asset requiring administration.

b. **Plaintiff As Interested Party.** As a claimant, a plaintiff can

seek the appointment of a personal representative of the defendant's estate. Texas Probate Code Sections 3(r) and 76. Section 77 even allows a creditor be appointed as the personal representative. Even if the probate court were willing, this is generally not wise. The plaintiff should apply for the appointment of an administrator but ask the court to appoint someone else.

c. **Proceeding Without An Estate.** The plaintiff, as a creditor of the decedent, may bring an action directly against the heirs of the dead defendant upon pleading that no administration is pending and none is necessary. See Woodward and Smith, supra, Sections 174 to 176 for a full discussion.

d. **No Administration Available.** It is conceivable that the plaintiff would be unable to establish an administration: There is no will, there is only one heir and no other debts. In such a case, the plaintiff would probably have to pursue the claims against the heir directly.

However, to pursue a claim against heirs sounds like herding cats and a plaintiff would be much better off with the personal representative of an estate as the defendant.

8. **All of the Heirs.** It is critical to both the plaintiff and the defendant that all of the heirs are before the court. Defendants are not going to want to settle without being sure that all claimants have been quieted.

While not always necessary, the safest procedure is to

have the heirship determined by a probate court using the procedures set out in Texas Probate Code Section 48-56. Often the defendant will accept proof (such as an affidavit of heirship) that all of the heirs are parties to the settlement. However, this entails risks. Without a court determination of heirship, the settlement would not be binding on any other heirs. Most typically they are common law spouses or descendants born outside of the marriage relationship.

A separate question is whether or not the ruling of the probate court is binding on the other side in the separate personal injury or death litigation, see _____ **infra**.

9. The Personal Representative Will Not Proceed. Sometimes there is a personal representative but he will not pursue a claim or will not defend a claim.

a. Court Order to Pursue or Defend. While there are some limitations regarding independent personal representatives, an interested person (heir or creditor) can seek an order compelling the administrator to sue or defend. If they still fail to act then it will add another grounds for removal.

b. Removal. The obvious remedy for a personal representative that will not pursue or defend a claim is to seek his removal, Sections 222 and 149C.

c. Impose or Increase Bond. An heir can also seek the

imposition or increase in a bond, Texas Probate Code See Sections 149 for independent executors and Section 204 to 206 for dependent administrators. When the bonding company finds out why a bond has been ordered or increased, it probably will refuse to provide a bond and the personal representative can then be removed.

d. Derivative actions. If the personal representative will not pursue a claim an heir may to pursue the claim on behalf of the estate. See, Interfirst Bank-Houston, N.A. v Quintana Petroleum Corporation, 699 S.W.2d 864 (Hous 1st, 1985 writ ref'd n.r.e.), Richardson v Vaughn, 23 S.W. 640 (Tex 1893), Tex Jur 3d, Decedent's Estate, Section 834. The following is from Woodward & Smith, supra, Section 171.

"The rule has been summarized in the statement that the heirs may sue when "it appears that the administrator will not or cannot act, or that his interest is antagonistic to that of the heirs desiring to sue."

10. Claims Procedure. Claims include tort claims such as those for wrongful death and survival, Section 3(c). For a discussion of probate claims procedures see Featherston, "Handling Claims Against Decedent's Estates," 1995 Advanced Estate Planning and Probate Course, Tab J and the most recent update of Boone Schwartzel's article which is attached to Mark Schreiber's "Creditor's Claims in Independent, Dependent and Guardianship Estates," 2001 Advanced Estate Planning and Probate Course, Tab 5.

a. **Liquidated Claims.** The claims procedure set out in Texas Probate Code Sections 294 to 329 applies primarily to liquidated claims in dependent administrations. Thus it is not necessary for a plaintiff to make a claim and have it rejected before filing suit.

b. **Four Month Letter.** However, Texas has a fairly new provision for notice to creditors. Texas Probate Code Section 294(d). It states that a personal representative may send a certified mail notice to an “unsecured creditor having a claim for money against the estate...” Then that creditor has four months to “present a claim.”

i. In the general claims statutes it has been held that “claims for money” does not apply to unliquidated claims, such as tort claims, Wilder v. Mossler, 583 S.W.2d 664 (Hous 1st 1979, no writ).

ii. While there are no cases under this new Section 294(d), its purpose (to promptly notify the personal representative of all possible claims against the estate) suggests it should apply to unliquidated claims.

iii. Since there are no cases at this time, if a plaintiff receives this notice, he should assume that he has four months to make his claim.

iv. Then he has to decide what “presenting a claim” means in this setting.

v. The claims procedure generally does not apply to

independent administrations, Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968).

vi. However, Section 146(a)(2) states that an independent personal representative “may give the notice permitted under Section 294(d) and bar a claim under that subsection;”

vii. In addition, Section 314 says that a judgment cannot be rendered in favor of a claimant “for money” which has not been presented.

viii. While a personal representative should be entitled to make all claimants come forward, it does not help the process to subject tort claimants to issues about making a presentment before filing suit and all of the rest of the thicket of probate claims.

11. **Jurisdiction**

a. **Statutory Probate Courts.** Statutory probate courts have jurisdiction over wrongful death and personal injury matters in which a personal representative appointed by that court is a party, Texas Probate Code Section 5(e).

b. **County Courts and County Court at Law.** These courts do not have jurisdiction over wrongful death and personal injury cases. Seay v. Hall, 677 S.W. 2d 19 (Tex. 1984). However, the jurisdictional statutes of the particular county court at law may have a broader grant of jurisdiction.

12. **Venue** Probate courts only have venue of wrongful death and

personal injury matters if they are the proper county under the provisions of the Civil Practice & Remedies Code. Section 15.007 of the CPRC makes clear that it controls and not the Probate Code when it comes to “personal injury, death or property damages.” Any lingering doubts about the meaning of 15.007 were laid to rest in Gonzales v. Reliant Energy, Inc., 159 S.W.3d 615 (Tex. 2005). Also see Probate Code Section 5A(f).

13. **Transfers** Likewise, Gonzales, supra, made it clear that a statutory probate court may not transfer a suit for “personal injury, death or property damages” to itself unless it has venue under the Civil Practices & Remedies Code.

However, Section 5B of the Probate Code will allow a transfer of a personal injury suit filed in another county. If a personal representative, appointed by a statutory probate court, is a party to a personal injury action in another county, the statutory⁷ probate court may order the matter transferred if venue is proper under the CPRC.

14. **Foreign Administrators** Section 71.012 CPRC allows a foreign personal representative to pursue a claim as a plaintiff in Texas without seeking ancillary letters testamentary. Two caveats

a. **Comply with Section 95.** First, the statute require compliance with Section 95 of the Texas Probate Code. That section provides several alternatives but the simplest is to file an attested copy of the will, order admitting it to probate (95(d)). Notice that it

requires both the clerk and the judge of the foreign jurisdiction to sign.

b. **Testate Only.** Second, Section 95 applies only when there is a will in the foreign jurisdiction. If there is merely an appointment of an administrator without or without a determination of heirship, the benefits of 71.012 will not be available.

For reasons unknown Section 71.022 is identical to Section 71.012.

15. **Statute of Limitations**

a. **Death Tolls The Survival Statute.** Statutes of limitation are tolled for up to 12 months after the date of a death, CPRC Section 16.062. However, if an administrator is appointed within that 12 months, then the tolling is only from the date of death to the date the administrator “qualifies.”

b. **Death Does Not Toll The Wrongful Death Statute.** Note that CPRC Section 16.062 only tolls the claims on behalf of the decedent, not for those making claims under the wrongful death statute (CRPC 71.001 et seq.)

c. **Relation Back.** In Austin Nursing Center, Inc. v Lovato, 171 S.W. 3d 845 (Tex 2005), a woman sued because of the death of her mother. She sued within the statute of limitation individually and as personal representative of her mother’s estate. In fact she was not the personal representative, although she subsequently was appointed but after

the running of the statute of limitations. The Court made several holdings worth noting:

i. First and foremost that the claims were not barred and that her claims as personal representative related back to her original filing.

ii. That this was a capacity issue, not a standing issue. As such it had to be raised by the defendant in the trial court by verified pleading.

iii. It said that standing could be raised for the first time on appeal because that had to do with subject matter jurisdiction (849).

Also see, Lorentz v. Dunn, 171 S.W.3d 854 (Tex. 2005), decided the same on similar facts. In this case, the defendant also asked that the claim be dismissed as a sanction for the plaintiff breaching Rule 13 by claiming to be an administrator when she was not.

Covington v. Sisters of Charity, _____ S.W.3d _____ (Amarillo 2005) was decided after Lovato and has a good discussion of its effect. In Covington the sister of the decedent brought an action for herself and “on behalf of the estate” even though one of the decedent’s children had already been appointed administrator. After being challenged, and after the statute of limitations had run, the sister amended her lawsuit to include the court appointed administrator. The Amarillo court held that the relation back doctrine did not work primarily because the sister was a

“stranger” to the lawsuit, she did not have any claims.

This case is also worth noting because the administrator did not bring an action, as required by CPRC Section 71.001(c). This case does not discuss the administrator’s possible liability.

Caveat. In both cases the plaintiffs said they were the personal representative when they were not. It is not clear that the result would have been the same if they had sued originally only individually.

d. **Suit Against Estate.** If there is a suit against the estate, and the personal representative does not appear or participate, it appears that the judgment is void, Estate of C.M. v. S.G., 937 S.W.2d 8 (Hous 14th, 1996, no writ) and the statute may have run.

e. **Temporary Administrators.** At best a permanent personal representative cannot be appointed until the first Monday 10 days after the application is filed and citation is posted. Texas Probate Code Section 128 and 33(f)(2).

i. If the statute of limitations will run before an administrator can be appointed, the court can appoint a temporary administrator. That temporary administrator should be authorized to accept service on the personal injury or wrongful death action, notify the insurance carrier of the lawsuit and demand defense and indemnity and to co-operate with the insurance company.

ii. The court should be asked to appoint someone of its choosing, that will properly carry out these duties.

iii. If the plaintiffs are asking that an administrator be appointed of the defendant's estate, they should decline to serve and ask that an independent third party appointed.

iv. If the deceased does not have any assets (or at least not any non exempt assets), the applicant may have to pay the temporary administrator's fees and expenses.

v. The temporary administration procedure is set out in Texas Probate Code Sections 131A et seq. Also see the discussion at Sections 461-480 of Woodward and Smith, supra.

vi. Temporary administrations should be avoided if at all possible. It will double the administration costs. Also, some probate judges are openly hostile to establishing a temporary administration because a plaintiff's attorney has not been diligent

16. **Estate Not an Entity.** Do not sue an estate. It is clear under Texas law, that an estate is not an entity and cannot be sued, Henson v. Estate of Crow, 734 S.W.2d 648 (Tex. 1987). However, if the personal representative appears or participates, the judgment will not be set aside, see Dueitt v.

Dueitt, 802 S.W.2d 859 (Houston 1st, 1991, no writ). Mere service on the personal representative will not solve the problem, Henson v Estate of Crow, supra.

17. **Deathus Interruptus.** If a party dies after suit has been filed, a notice of death must be filed and a scire facias issued.

a. **The Plaintiff Dies.**

i. If a plaintiff dies, the personal representative (or the heirs if permitted as discussed above) may appear and continue with the lawsuit. Rule 151, Texas Rules of Civil Procedure.

ii. If no one appears, the defendant makes a suggestion of death and the clerk issues a scire facias for the heirs or administrator.

iii. If no one appears the defendant may move to have the suit dismissed.

b. **The Defendant Dies.**

i. If the defendant dies, TRCP, Rule 152 provides that upon a suggestion of death or a petition by the plaintiff, that the clerk will issue a scire facias for the administrator or heirs of the defendant.

ii. Upon return the suit will continue.

c. **The Personal Representative Dies or Ceases to Serve.** If the personal representative

dies, Rule 153, TRCP, provides that the lawsuit shall proceed against the successor “upon like proceedings being had as provided in the two preceding rules, or the suit may be dismissed.”

d. **Election: Surviving Parties.** If there are 2 or more plaintiffs or two or more defendants and there is a death, Rule 155, TRCP, allows the proceedings to go forward in the name of the surviving parties. However, this constitutes an election and the parties cannot later complain or pursue the dead party’s personal representative. First National Bank v. Hawn, 392 S.W.2d 377 (Dallas, 1965, writ ref’d n.r.e.)

e. **Death Before Judgment.** If a party dies after the close of evidence but before a judgment is entered, the judgment may be entered as if all parties were still living. Rule 156.

18. **Contracts.** Section 233 of the Texas Probate Code governs contracts between lawyers and personal representatives.

a. If a contract is with a dependent personal representative, it must be approved by the probate court. Subsection (b).

b. If the contract is with an independent executor, the contract must be approved if it is for more than one third.

c. Subsection (b) limits the amount of attorneys fees to one third. While the statute is not very clear, the reimbursable expenses are in addition

to that one third.

d. A court may approve a contract greater than one third under Subsections (c) and (d).

e. It requires the contract to be approved before the attorney performs any legal services.

f. Any contract in violation of this section is “void” unless subsequently “ratified or reformed” by the court.

g. Subsection (d) sets out the criteria the court should look to in determining the amount of the contingent fee.

h. At paragraph 21 g, there is a discussion of contracting with a “next friend” if the fee is greater than one third.

19. **Guardians, Next Friends & Ad Litem.** Someone has to represent the interests of those who do not have capacity. For a general discussion in the probate and trusts context see, John Round, “Virtual Representation: Role of Ad Litem in Non-Guardianship Cases,” Chapter 42, State Bar of Texas, Advanced Estate Planning and Probate Course.

a. **Persons Requiring Representation.** The following may give rise to additional representation.

- i. minor,
 - ii. incapacitated
- persons,
- iii. Missing persons,

- iv. Unknown persons, and
- v. Unborn or unascertained persons.

b. **Attorney Ad Litem: Probate Code** Probate Code Sections 34A, 53 and 601(1) authorize a probate court to appoint an attorney ad litem. An attorney ad litem is the attorney for the appointed person. As such the attorney has duties to the client the same as if he had been privately hired.

i. Section 34A allows the court to appoint an attorney ad litem to represent “person having a legal disability, a nonresident, an unborn or unascertained person, or an unknown heir” in any probate proceedings.

ii. Section 53 compels a probate court to appoint an attorney ad litem in all proceedings to determine heirship. It also authorizes the appointment of a guardian ad litem.

iii. Section 601(1) of the guardianship code gives the clear definition of an attorney ad litem as an attorney appointed by a court to “represent and advocate on behalf of an incapacitated person. While this definition is not included in the definitions for decedent’s estates, it is honored by most probate judges.

iv. The court must appoint an attorney ad litem in all guardianship matters, Section 646. The duties are set out in Section 647.

v. Unless there is some continuing need, the ad litem is discharged when the guardian is

appointed. The most common reason is when there is a potential conflict such as the both the guardian and the ward have claims against in the same lawsuit.

vi. This is distinguished from a guardian ad litem, infra, who is to act in the best interest of an incapacitated person. In some instances the court will also appoint a guardian ad litem

c. **Attorney Ad Litem: Publication** Rule 244, Texas Rules of Civil Procedure requires a court to appoint an attorney to represent the interest of those persons served by publication.

d. **Guardian Ad Litem:** The Probate Code Sections 53 and 645, 583 and 694A authorize the appointment of guardian ad litem.

i. As stated above, a guardian ad litem is to act in the best interest of the incapacitated person.(Section 601(12)). As with attorney ad litem, while this definition is set out only in the guardianship portion of the code, probate judges tend to respect and follow these distinctions even in a probate context.

ii. It is also worth nothing that a guardian ad litem, but not an attorney ad litem, has immunity for some purposes , Section 645A.

e. **Guardian Ad Litem: Trust Code.** While the distinction between attorney ad litem and guardian ad litem are fairly clear in the

Probate Code, the Trust Code seems to confuse the two.

i. Section 115.014 says a court, in trust litigation, may appoint a “guardian ad litem” to represent the interest of “an incapacitated person, unborn or unascertained person, or person whose identify or address is unknown.” While it is important to have someone represent those interests it seems the clear role of an attorney not a guardian ad litem.

ii. At the same time, Section 115.014(c) (which was added by the 2005 Legislature) allows that ad litem to consider the general benefit accruing to the living members of a person’s family.

f. **Guardian Ad Litem: Rules of Civil Procedure.** Rule 173 of the Texas Rules of Civil Procedure put yet another face on the office of guardian ad litem.

i. Under 173 the court “must appoint a guardian ad litem for a party represented by a next friend or a guardian only if:” there is a conflict or the parties agree. It is not clear if those are the only circumstances in which a court may make an appointment or if those are the only mandatory circumstances.

ii. Once appointed under 173, the role of the ad litem is “...as an officer and advisor to the court.” This sounds like a guardian ad litem acting for the best interest of the minor or incapacitated person, but it is not clear.

iii. The duties of this ad litem appear to be only to determine if a conflict exists, advise the court if the settlement is in the best interest of the minor or incapacitated person and participate in reaching a settlement.

iv. Rule 173.4(d) prohibits the guardian ad litem from taking part in “discovery, trial or any other part of the litigation,” except for adverse interest matters and as directed by the court.

v. Interestingly, Rule 173.5 makes clear that all communications between the ad litem and the incapacitated person, and next friend, guardian and their attorneys are privileged. The Rule even says “as if the guardian ad litem were the attorney for the party.”

g. **Next Friend.** Rule 44, Texas Rules of Civil Procedure allows an action to be brought by someone as the next friend of the minor or incapacitated person provided there is no guardianship pending. However, it is not clear, that someone can, acting as next friend, represent a defendant who is a minor or incapacitated. For a general discussion of these various actors, see Saldarriaga v. Saldarriaga, 121 S.W.3d 493 (Tex.App.-Austin,2003, no writ hist.).

Rule 44 says a next friend shall have the same rights as a guardian. This has been construed to mean that a contract with a next friend for more than one third has to be approved pursuant to Section 665(c), just like it would for a guardian. Presumably, such an approval could

come from the court in which the litigation is pending and not a probate court.

h. **Virtual Representation.** If one party has the same interests as another and there are no conflicts of interest, they may be virtually represented. If virtually represented, the court may be able to dispense with the appointment of one of these court created ad litem. Starcrest Trust v. Barry, 926 S.W.2d 343, 355 (Austin, 1996, no writ) and Mason v. Mason, 366 S.W.2d 352 (Tex. 1963).

i. **Surrogate Decision Makers.** Section 313.001 et seq of the Texas Health and Safety Code allows the following people to make medical decisions for a person who is comatose or otherwise incapacitated. They are in the following order of priority:

- i. The patient's spouse;
- ii. Adult child of a patient who has the consent of the other adult children;
- iii. A majority fo the adult children;
- iv. the patient's parents; or,
- v. a person clearly identified by the patient to act.

20. **Caveat: Ad Litem Etc.** Ad litem have real clients, with real legal rights. Ad litem owe real duties to them. Those clients (or their successors in interest) are absolutely

entitled to sue the ad litem years later for malpractice the same as any client who hires an attorney for cash on the barrelhead.

A good general discussion of the duties of an ad litem has been written by Ft. Worth Probate Judge Steve M. King. This article has been presented at various seminars and can be found as "Ad Litem 2002: A Probate Odyssey, the Roles of Attorneys and Guardian Ad Litem." Chapter 3. State Bar of Texas, Guardianship 2002: an Elder and Mental Health Perspective.

All too often, a lawyer is looking for a friend to rubber stamp his deal. Beware!!!

21. **Probate Alternatives.** The following is a list of alternate probate proceedings that may be helpful in some instances.

a. **Proceeding to Declare Heirship.** Sections 48-56 allow a probate court to determine the heirs of the decedent. If in doubt about who the heirs are (common law spouse or descendants outside of marriage or distant relatives), it is prudent to seek a court determination. However, an heirship determination in the probate court may not be binding on the defendant, Buster v. Metropolitan Transit Authority, 835 S.W.2d 236 (Hous 1st 1992).

b. **Affidavit of Heirship.** These affidavits have been in our jurisprudence forever. In 2001 the legislature enacted Probate Code Section 52A which is a form for

affidavits of heirship. Especially in smaller matters they are an excellent substitute for a probate proceeding.

c. **Small Estate Affidavit.** Section 137-135 allows heirs of small estates to file an affidavit with the court and have the court find it complies with the statute. A certified copy of that affidavit and the court's finding can be presented to third parties to collect assets. This affidavit is limited to estate's worth less than \$50,000 when there is no administration pending. Further, it only applies to real estate that is the decedent's homestead.

d. **Family Settlement Agreements.** Texas has long favored settlements by heirs and beneficiaries. In fact this is one of the ways to avoid having an administrator pursue any claims, Shepherd v. Ledferd, 962 S.W.2d 28 (Tex. 1998)

e. **Administrations.** See prior discussion regarding probate and personal representatives.

f. **Muniment of Title.** If there is no need for the administration of an estate, a will can be admitted to probate as a muniment of title, Sections 89A, 89B and 89C. Generally, no administration means no debts and the statute requires that be specifically proved.

g. **No Administration Necessary.** It is possible to obtain from a court a determination that no administration is necessary. See supra.

22. Settlement Agreements

a. **No Administration.** Sometimes, and especially in smaller claims or when the damages exceed the available insurance, there will be a settlement with little or no litigation and without a probate proceeding.

The attorney, or adjustor. For the insurance company will want the administrator to sign the settlement.

It is possible for the defendants to safely settle these matters without the expense and delay of a probate proceeding. Many of the "Probate Alternatives" discussed above may work.

However, the most common and most effective is the affidavit of heirship coupled with certain representations and indemnities. The affidavit of heirship has been satisfactorily used in Texas for generations. In 1995 the Texas Legislature codified this practice and provided a form in Probate Code Section 52A.

If there is no administration pending, and none is necessary, this affidavit and an agreement signed by all of the heirs should be sufficient to dispense with the requirement that an administrator be a party to the proceeding.

Finally, if the defendants agree to accept an alternative to probate, they should not issue any checks that include the administrator of the estate. This all too often happens and it is the responsibility of the plaintiffs

attorney to emphasize that no administrator should be included on the check.

b. **Dependent: Probate Court Approval.** In a dependent administration, the personal representative cannot bind the estate without court permission. Always include in any agreement that it is subject to probate court approval. This approval is necessary in any probate court, not just a statutory probate court.

c. **District Court Approval Will Not Do.** An approval by the district court will not suffice if there is a guardianship or a dependent administration. The district court approval is not binding on the probate court.

d. **Independent: No Approval Needed.** If the administration is independent, it is not necessary to get court approval. However, that does not mean a beneficiary of an estate will not challenge a settlement.

e. **Allocating Proceeds.** If the plaintiff's attorney is representing more than one plaintiff, there will be conflict issues.

i. Lawyers have fiduciary duties to their clients. A breach of those duties has many consequences including the risk of forfeiture of fees, Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999).

ii. The distributees of an estate may be different from the wrongful death claimants. And even if

they are the same, their interests in the estate may be different from their individual claims.

iii. In determining the share for the estate, the administrator (and his lawyer) must consider the claims of the estate (medical, funeral, conscious pain and suffering). If the decedent was married the personal representative must also determine what parts of the settlement are separate and what parts are community.

iv. In settling, even in an independent administration where no court approval is needed, the administrator is not a free agent. He has to consider the fair value of the estate's claims. If all of the distributees of the estate are happy with the settlement, he still has responsibilities. He has to make sure the distributees, who are approving, have full and fair disclosure of all facts effecting the settlement and their rights.

v. The administrator also has duties to the creditors of the estate. It is risky business to agree that little or nothing pass to the estate, if the result is that the creditors will take little or nothing.

f. **Confidentiality.** While probate courts will honor requests of confidentiality and seal the records upon proper request, in a dependent administration, the proceeds will have to be reported on an annual or final account.

i. The agreement should be clear that it is not a violation of the confidentiality provisions if

disclosure is required by other law, such as annual or final accountings..

ii. Even if independent, the personal representative will have to report and account to the creditors and beneficiaries for the funds received.

g. **Authority to Settle.** A prudent defense attorney will demand proof that he is settling with someone properly authorized to represent the decedent's estate. That will include demanding a current copy of letters testamentary or letters of administration. By providing a current copy of the letters the defendants may be certain that the purported personal representative has not been removed.

A prudent defense attorney would also examine the probate file to not only make certain that the personal representative is in good standing but also to make certain that there is nothing else that would raise an issue about settlement authority.

23. **Guardianship.** When there is a minor or an incapacitated person, a court may appoint a guardian to act on behalf of that incapacitated person. Generally, a guardian requires court permission to take action and is very similar to the rules set out above for dependent administrations.

a. There is no specific requirement that a guardian get permission to file a suit,

b. However, a guardian should get permission to employ an attorney. Even if the attorney is to be paid on an hourly rate, the guardian cannot make those payments without the prior approval, of the court.

c. And, the guardian, even if the employment has been approved, should submit an application to the court for payment of each bill.

d. A guardian must have permission to settle a lawsuit and should include in any settlement agreement that it is subject to approval of the probate court.

24. **Court Created Trusts** Courts are authorized to create trusts under Section 142 et seq of the Texas Property Code. Probate Courts can create trusts under Section 867 of the Texas Probate Code. The best article on these trusts and there use is "Court-Created Trusts in Texas," Glen Karisch, Advanced Drafting: Estate Planning and Probate Law Course (1995). This article has been updated and is on Mr. Karisch's website, www.texasprobate.com.