

JURISDICTION AND VENUE IN PROBATE PROCEEDINGS

*Lauren Davis Hunt**

I. INTRODUCTION	434
II. PROBATE JURISDICTION.....	435
A. <i>Courts Exercising Probate Jurisdiction</i>	435
1. <i>Statutory Probate Courts</i>	436
2. <i>County Courts at Law Exercising Original Probate Jurisdiction</i>	437
3. <i>Constitutional County Courts</i>	438
4. <i>County Court at Law or Constitutional County Court?</i>	439
B. <i>Subject Matter Jurisdiction and Probate</i>	441
1. <i>Jurisdiction Over a “Probate Proceeding”</i>	441
2. <i>Jurisdiction Over “Matters Related to the Probate Proceeding”</i>	442
a. <i>Prior Law: “Matters Appertaining to or Incident to an Estate”</i>	442
b. <i>Statutory Probate Courts</i>	444
i. <i>Exclusive Jurisdiction Over “Matters Related to the Probate Proceeding”</i>	444
ii. <i>Statutory Probate Courts and Concurrent Jurisdiction with District Courts</i>	448
c. <i>County Courts at Law and “Matters Related to the Probate Proceeding”</i>	449
d. <i>Constitutional County Courts and “Matters Related to the Probate Proceeding”</i>	450
e. <i>The “Controlling Issue Test”</i>	452
3. <i>Pendent and Ancillary Jurisdiction</i>	453
C. <i>Plea in Abatement and Plea to the Jurisdiction</i>	455
D. <i>Mandamus</i>	455
E. <i>Contested Probate Matters in Constitutional County Court</i>	457
1. <i>Contested Probate Matters in Constitutional County Court in County Without County Court at Law</i>	458
a. <i>Assignment of Contested Matter to Statutory Probate Judge</i>	458
b. <i>Transfer of Contested Matter to District Court</i>	459

* Partner at Osborne, Helman, Knebel & Scott, L.L.P., Austin, TX. J.D., Baylor University School of Law, 2007; B.A., Rhodes College, 2001.

2. <i>Contested Matters in Constitutional County Court in County with County Court at Law Exercising Original Probate Jurisdiction</i>	460
III. VENUE FOR PROBATE PROCEEDINGS	460
A. <i>Venue Generally</i>	460
1. <i>Venue to Probate Wills and Grant Letters Testamentary and of Administration</i>	461
a. <i>“Domicile” and “Fixed Place of Residence”</i>	461
2. <i>Venue for Heirship Proceedings</i>	465
3. <i>Venue for Action Related to a Probate Proceeding in Statutory Probate Court</i>	465
4. <i>Venue for Personal Injury, Death, or Property Damages</i>	465
5. <i>Suit for Money Demand Against Estate</i>	467
6. <i>Suit Against Estate for Decedent’s Negligent Acts</i>	467
B. <i>Waiver and Consent to Venue</i>	467
C. <i>Venue Disputes</i>	468
D. <i>When Court Has Subject Matter Jurisdiction but Apparently Not Venue</i>	469
1. <i>Statutory Probate Courts</i>	469
2. <i>Other Courts</i>	469
E. <i>Transfer Procedures</i>	471
1. <i>Transfer of Probate Proceeding When Venue Is Not Proper</i>	471
2. <i>Transfer for Convenience</i>	472
F. <i>The Proceeding to Determine Venue</i>	472
1. <i>Trial Court</i>	472
2. <i>Interlocutory Appeal</i>	475
3. <i>Mandamus</i>	475
4. <i>Appeal</i>	476
IV. CONCLUSION	477

I. INTRODUCTION

When I meet new practitioners in trust and estate litigation, I always give them this advice: the learning curve is steep.¹ Trust and estate litigation is complicated, and seemingly simple concepts are often frustratingly complex.² You will find times when you think you should know something, and you are surprised that you do not already know it.³ But we are all in the same boat and have the same experience from time to time.⁴

1. Author’s original thought.
 2. Author’s original thought.
 3. Author’s original thought.
 4. Author’s original thought.

Probate jurisdiction and venue are the epitomai of this lesson.⁵ For fundamental concepts in litigation, they are incredibly confusing and complex in the probate context.⁶ Part of the issue is that the law has changed several times, making it sometimes difficult to know if older case law is still applicable.⁷ Part of the issue is that while there are statutes governing probate jurisdiction, the final answer as to which court in a given county has probate jurisdiction often comes down to unwritten rules and local politics.⁸ This Article intends to help practitioners understand the jungle out there.⁹

II. PROBATE JURISDICTION

There are generally three elements of jurisdiction: “(1) jurisdiction over the subject matter; (2) jurisdiction over the person or *res*,” and (3) the court’s power to render the particular relief awarded.¹⁰ “Subject matter jurisdiction exists when the nature of the case falls within a general category of cases the court is empowered, under applicable statutory and constitutional provisions, to adjudicate.”¹¹

Subject matter jurisdiction is essential to a court’s power to decide a case.¹² “Subject matter jurisdiction exists by operation of law and cannot be conferred on a court by consent or waiver.”¹³ A court without subject matter jurisdiction has no choice but to dismiss the case.¹⁴ The absence of subject matter jurisdiction renders a judgment void.¹⁵ Subject matter jurisdiction is subject to *de novo* review because it raises a question of law.¹⁶ Because a party cannot waive subject matter jurisdiction, a party or the court can raise the issue for the first time on appeal.¹⁷

A. Courts Exercising Probate Jurisdiction

One may only file probate proceedings in courts with “original probate jurisdiction.”¹⁸ In the Estates Code, “[t]he terms ‘probate matter,’ ‘probate proceedings,’ ‘proceeding in probate,’ and ‘proceedings for probate’” are

5. See *infra* Parts II–III and accompanying text.

6. Author’s original thought.

7. Author’s original thought.

8. Author’s original thought.

9. Author’s original thought.

10. McGuire v. McGuire, 18 S.W.3d 801, 804 (Tex. App.—El Paso 2000, no writ).

11. *Id.*

12. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553–54 (Tex. 2000).

13. Lee v. Hersey, 223 S.W.3d 439, 444 (Tex. App. —Amarillo 2006, pet. denied).

14. Tex. Ass’n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993).

15. *Lee*, 223 S.W.3d at 444.

16. *Id.*

17. *Id.* at 445–46.

18. TEX. EST. CODE ANN. § 32.001(a).

interchangeable terms and also include matters and proceedings concerning a decedent's estate.¹⁹

In Texas, there are generally three types of courts that exercise original jurisdiction over probate proceedings: constitutional county courts, also referred to as county courts; county courts at law, also referred to as statutory county courts, and statutory probate courts.²⁰ District courts sometimes exercise probate jurisdiction over contested probate matters that originated in the constitutional county court.²¹

The Estates Code treats the terms "county court" and "probate court" as synonymous, and such terms mean: (1) "a county court in the exercise of its probate jurisdiction," i.e., a constitutional county court; (2) "a court created by statute and authorized to exercise original probate jurisdiction," i.e., a county court at law or statutory probate court; and (3) "a district court exercising original probate jurisdiction in a contested matter."²² Any reference to "court" in the Estates Code refers to these courts.²³

In this Article, to distinguish among the various courts, I use the terms "constitutional county court," for county courts, "county court at law" for statutory county courts exercising original probate jurisdiction, and "statutory probate court."²⁴

The type of court with probate jurisdiction in a county can determine many facets of the case; thus, it is important to understand in which court to file the probate proceeding and the special jurisdiction, rules, and powers that pertain to each type of court.²⁵

1. Statutory Probate Courts

A statutory probate court is "a court created by statute and designated as a statutory probate court under Chapter 25, Government Code."²⁶ County courts at law that exercise probate jurisdiction are not statutory probate courts "unless the court is designated a statutory probate court under Chapter 25, Government Code."²⁷

In counties with statutory probate courts, the statutory probate court has original and exclusive jurisdiction of all probate proceedings, regardless of whether a matter is contested or uncontested.²⁸ Matters related to a probate proceeding must be brought in the statutory probate court unless jurisdiction

19. *Id.* § 22.029.

20. *Id.* § 22.007.

21. *See infra* Section II.E and accompanying text.

22. EST. § 22.007(b).

23. *Id.* § 22.007(a).

24. *Id.* § 22.007.

25. *See id.*

26. *Id.* § 22.007(c).

27. *Id.*

28. *Id.* §§ 32.002(c), 32.005(a); TEX. GOV'T CODE ANN. § 25.003(e).

over the court is concurrent with the district court under the Texas Estates Code Section 32.007.²⁹

As of January 2022, there are nineteen statutory probate courts in ten counties.³⁰ The statutory probate courts are in the following counties:

- Bexar (2)
- Collin (1)
- Dallas (3)
- Denton (2)
- El Paso (2)
- Galveston (1)
- Harris (4)
- Hidalgo (1)
- Tarrant (2)
- Travis (1)³¹

2. County Courts at Law Exercising Original Probate Jurisdiction

The Texas Constitution provides the legislature with authority to “establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof.”³² Courts created under this provision are called “statutory county courts,” which include “county courts at law” and “statutory probate courts.”³³

As of September 2021, there are 256 county courts at law in ninety-four Texas counties.³⁴

There is a specific statute that creates each county court at law and statutory probate court.³⁵ While there are general jurisdiction provisions for statutory county courts in Texas Government Code Section 25.0003, to the extent there is a specific provision for a particular court that conflicts, the county-specific provision controls.³⁶

Unless otherwise provided by law, a county court at law has concurrent original jurisdiction over all causes and proceedings prescribed by law for constitutional county courts, including probate jurisdiction (unless there is a statutory probate court in that county).³⁷

29. EST. §§ 32.005(b), 32.007.

30. GOV'T § 25.0631; *Texas Statutory Probate Courts*, BALLOT PEDIA, https://Balletpedia.org/Texas_statutory_probate_courts (last visited Jan. 23, 2022) [<https://perma.cc/HZX4-MT36>].

31. *Texas Statutory Probate Courts*, *supra* note 30.

32. TEX. CONST. art. V, § 1.

33. *Id.*

34. *Counties with County Courts at Law*, TXCOURTS.GOV (Sept. 2021), <https://www.txcourts.gov/media/1452713/county-courts-at-lawseptember-2021-8x11.pdf> [<https://perma.cc/C47J-U433>].

35. *See, e.g.*, GOV'T § 25.0041.

36. *Id.* § 25.0001(a).

37. *Id.* § 25.0003(d); TEX. EST. CODE ANN. § 32.002(b).

However, in a county where the constitutional county court and a county court at law have concurrent jurisdiction over both probate matters and proceedings under the Texas Mental Health Code (Subtitle C, Title 7 of the Health and Safety Code), then if the constitutional county court judge files a statement by January 15th of each year electing not to hear probate matters or mental health matters, then such cases and proceedings must be filed in the county court at law.³⁸

The county courts at law for each county are created in Subchapter C, starting at Section 25.0041 of the Texas Government Code.³⁹ This is a good place to determine whether a specific county court at law has probate jurisdiction.⁴⁰ If the statute creating a specific county court at law is silent regarding probate jurisdiction, then Texas Government Code Section 25.0003(d) applies, and the county court at law technically has probate jurisdiction concurrent with the constitutional county court.⁴¹

When exercising original probate jurisdiction, a county court at law is not subject to amount-in-controversy limits that apply to civil cases.⁴²

3. Constitutional County Courts

Article V, Section 15 of the Texas Constitution establishes a “county court” in all 254 counties in the state, known as “constitutional county courts.”⁴³ The “county judge” is an elected official who presides over the constitutional county court.⁴⁴ Although the county judge “shall be well informed in the law of the State,” the county judge does not have to be a lawyer and, in most cases, is not a lawyer.⁴⁵ In the more populous counties, the county judge is primarily responsible for the administration of the county government and does not exercise any judicial functions.⁴⁶ References in the Estates Code to a “county court” are intended to refer to a constitutional county court.⁴⁷

Constitutional county courts have “jurisdiction as provided by law.”⁴⁸ This means the legislature controls and determines the constitutional county

38. GOV'T § 26.052.

39. *Id.* § 25.0041.

40. *See id.*

41. *But see* Section II.A.4.

42. *Jurgens v. Martin*, 631 S.W.3d 395, 399 (Tex. App.—Eastland 2021, mand. denied.); *Eng. v. Cobb*, 593 S.W.2d 674, 675 (Tex. 1979).

43. TEX. CONST. art. V, § 15.

44. *Id.*

45. *Id.*

46. *E.g.*, *Frequently Asked Questions: What are the Responsibilities of the County Judge?*, TRAVIS CNTY. TX, <https://traviscountytx.gov/commissioners-court/county-judge/frequently-asked-questions> (last visited Jan. 23, 2022) [<https://perma.cc/A4UR-68AC>].

47. *See* TEX. EST. CODE ANN. § 32.

48. TEX. CONST. art. V, § 16.

courts' jurisdiction.⁴⁹ Chapter 26 of the Texas Government Code addresses constitutional county courts.⁵⁰

In a county with no statutory probate court or county court at law exercising original probate jurisdiction, the constitutional county court has original jurisdiction of probate proceedings.⁵¹

Additionally, in general, in a county where there is no statutory probate court, but there is a county court at law exercising original probate jurisdiction, the county court at law exercising original probate jurisdiction and the constitutional county court have concurrent original jurisdiction of a probate proceeding unless otherwise provided by law.⁵² However, this is not always the rule.⁵³ The legislature has adopted jurisdictional provisions for the constitutional county courts in particular counties starting at Texas Government Code Section 26.103.⁵⁴ Thus, to determine whether a county follows the general jurisdiction rules, look for the specific county in that section of the Code.⁵⁵ For instance, Government Code Section 26.104 provides that Aransas County's constitutional county court "has no probate, juvenile, civil, or criminal jurisdiction."⁵⁶

In a county where the constitutional county court and a county court at law have concurrent jurisdiction over both probate matters and proceedings under the Texas Mental Health Code (Subtitle C, Title 7 of the Health and Safety Code), the constitutional county court judge can file a statement by January 15th of each year electing not to hear probate matters or mental health matters.⁵⁷ If the judge files such a statement, then probate and mental health proceedings *must* be filed in the county court at law.⁵⁸

When exercising original probate jurisdiction, a constitutional county court is not subject to amount-in-controversy limits that apply to civil cases generally.⁵⁹

4. County Court at Law or Constitutional County Court?

Unless there is a statute expressly stating otherwise, in most cases where there are both a county court at law and constitutional county court in a

49. *See id.*; TEX. GOV'T CODE ANN. § 26.041.

50. GOV'T § 26.

51. EST. § 32.002(a).

52. *Id.* § 32.002(b).

53. *See* GOV'T § 26.103.

54. *Id.*

55. *See, e.g., id.* § 26.104.

56. *Id.*

57. *Id.* § 26.052.

58. *Id.*

59. *Womble v. Atkins*, 331 S.W.2d 294, 299 (Tex. 1960).

county, both courts technically have probate jurisdiction.⁶⁰ However, often only one of the two courts will actually exercise such jurisdiction.⁶¹

Unfortunately, determining which court(s) exercise probate jurisdiction in a given county is complicated, confusing, and essentially left to local politics.⁶² Where jurisdiction is granted to both courts, the local authorities (i.e., judges, county commissioners, and other county officials) can decide for themselves whether a given court actually exercises probate jurisdiction.⁶³ For instance, in a particular county, the county court at law judge may have a heavier than usual criminal law docket, so local officials may choose to send all probate administration cases to the county judge, or the constitutional county judge who has probate jurisdiction may need to handle the county's administrative matters, so all probate is handled in the county court at law.⁶⁴

The local determination of probate jurisdiction is often not posted publicly and can change after an election cycle depending on whom the people elected as judges of the various courts.⁶⁵ While some county websites are helpful, many do not have information about which court exercises probate jurisdiction in the local county.⁶⁶ If an attorney does not practice regularly in a county, it may not be clear in which court the probate proceeding will be filed.⁶⁷

A good example of the difficulty of understanding which court to file in is Cameron County.⁶⁸ In Cameron County, there are five county courts at law.⁶⁹ The statute on the county court at law jurisdiction in Cameron County says, "a county court at law in Cameron County has . . . concurrent with the county court, the probate jurisdiction provided by general law for county courts."⁷⁰ However, the statute also says: "The County Court at Law No. 4 of Cameron County shall give preference to probate, guardianship, and mental health matters."⁷¹ Thus, it appears that the constitutional county court and all five county courts at law in Cameron County have probate jurisdiction, but County Court at Law No. 4 is the primary court with probate jurisdiction.⁷² Further, it appears from the Cameron County website that the county judge handles administrative matters rather than exercising judicial functions.⁷³

60. See THOMAS M. FEATHERSTON, JR., TEXAS PRACTICE GUIDE PROBATE § 14:3 (2nd ed. 2021).

61. *Id.*

62. See *Palmer v. Coble Wall Tr. Co., Inc.*, 851 S.W.2d 178, 180 n. 3 (Tex. 1992).

63. FEATHERSTON, *supra* note 60.

64. *Id.*

65. See *id.*

66. See, e.g., *Austin County Texas*, AUSTIN CNTY., <https://www.austincounty.com/page/austin.County.Clerk> (last visited Jan. 24, 2022) [<https://perma.cc/6X8X-FFPX>].

67. See TEX. GOV'T CODE ANN. § 25.0331.

68. *Id.*

69. *Id.* § 25.0331.

70. *Id.* § 25.0332(a)(1).

71. *Id.* § 25.0332(b).

72. *Id.* §§ 25.0332(a)(1), 25.0332(b), 25.0003(e).

73. See *Cameron County Court of Law No. 4*, CAMERON CNTY, <https://www.cameroncountytexas.gov/>

Thus, while the constitutional county court and all county courts at law in Cameron County appear to have probate jurisdiction, most cases will be brought in County Court at Law No. 4.⁷⁴

Bottom line: if the answer is not clear, sometimes the best bet is to call the county clerk to ask which court in that county handles probate cases.⁷⁵

B. Subject Matter Jurisdiction and Probate

The constitutional county court, a county court at law exercising probate jurisdiction, and a statutory probate court can exercise jurisdiction over three types of proceedings related to probate.⁷⁶ First, each type of court has jurisdiction over proceedings that meet the definition of “probate proceeding” found in Section 31.001 of the Texas Estates Code.⁷⁷ Second, all three courts have jurisdiction over “matters related to the probate proceeding,” but Section 31.002 defines what is a “matter related to the probate proceeding” depending on the type of court at issue.⁷⁸ Finally, all three courts may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.⁷⁹

1. Jurisdiction Over a “Probate Proceeding”

Any court exercising original probate jurisdiction has jurisdiction over “probate proceedings.”⁸⁰ The Estates Code defines a “probate proceeding” as including:

- (1) the probate of a will, with or without administration of the estate;
- (2) the issuance of letters testamentary and of administration;
- (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
- (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
- (5) a claim arising from an estate administration and any action brought on the claim;
- (6) the settling of a personal representative’s account of an estate and any other matter related to the settlement, partition, or distribution of an estate;
- (7) a will construction suit; and

cameron-county-courts-at-law/#1588790450357-76ac34ac-0d10 (last visited Jan. 23, 2022) [<https://perm.a.cc/QAN7-G6N9>] (showing the county judge’s functions for Cameron County).

74. *Id.*; GOV’T § 25.0332(b).

75. *See Cameron County Court of Law No. 4, supra* note 73.

76. TEX. EST. CODE ANN. § 32.001.

77. *See id.*

78. *Id.* §§ 32.001(a), 31.002(a).

79. *Id.* § 32.001(b).

80. *Id.* § 32.001(a).

(8) a will modification or reformation proceeding under Subchapter J, Chapter 255 [of the Estates Code].⁸¹

2. Jurisdiction Over “Matters Related to the Probate Proceeding”

There are many types of cases that do not fall within the Section 31.001 definition of a “probate proceeding” but are matters that relate in some way to an existing “probate proceeding.”⁸² Depending on the type of court hearing the probate proceeding, the court may or may not hear the matters related to the probate proceeding.⁸³ Texas Estates Code Section 32.001 determines whether a “matter related to a probate proceeding” can be heard in the particular type of court in which the underlying probate is pending.⁸⁴

Importantly, a probate proceeding must be pending in the court before a court can exercise its probate jurisdiction over matters related to the probate proceeding.⁸⁵ If a probate proceeding is not pending in a court exercising probate jurisdiction, then a matter that would be related to a probate proceeding, if a probate proceeding existed, can be brought in any other court of proper jurisdiction.⁸⁶

a. Prior Law: “Matters Appertaining to or Incident to an Estate”

Many Texas probate jurisdiction and venue cases refer to matters “appertaining to” or “incident to an estate.”⁸⁷ These phrases are in prior versions of the statutes.⁸⁸ Before the 2009 Legislative Session, Section 5A of the Texas Probate Code titled “Matters Appertaining and Incident to an Estate” defined the phrases “appertaining to estates,” and “incident to an estate,” according to the type of court at issue, similar to how current Texas Estates Code Section 31.002 defines “a matter related to a probate proceeding” depending on the type of court at issue.⁸⁹ Formerly, Section 5B of the Texas Probate Code provided that “[a] judge of a statutory probate court . . . may transfer to his court from a district, county, or statutory court

81. *Id.* § 31.001.

82. *Id.*

83. *Id.* §§ 31.001, 32.001.

84. *Id.* § 32.001.

85. Valdez v. Hollenbeck, 465 S.W.3d 217, 223 n. 8 (Tex. 2015) (citing Frost Nat’l Bank v. Fernandez, 315 S.W.3d 494, 506 (Tex. 2010)); Mortensen v. Villegas, 630 S.W.3d 355, 361–62 (Tex. App.—El Paso 2021, no pet.).

86. See Garza v. Rodriguez, 18 S.W.3d 694, 697 (Tex. App.—San Antonio 2000, no pet.).

87. *Id.*

88. Act of Sept. 1, 1993, 73th Leg., ch. 957, § 1, 1993 Tex. Gen. Laws 4081, 4084 (repealed 2009); see EST. § 31.002(a).

89. Act of Sept. 1, 2003, 78th Leg., ch. 1060, §§ 3, 4, 16, 2003 Tex. Gen. Laws 3052, 3053, 3057 (repealed 2009).

a cause of action appertaining to or incident to an estate pending in the statutory probate court.”⁹⁰

In 2009, the Texas legislature modified the jurisdiction provisions of the Probate Code to make them more streamlined.⁹¹ Probate Code Section 5A was repealed, and Probate Code Section 5B was changed.⁹² Where Probate Code Section 5B previously said a statutory probate judge can transfer from another court “a cause of action appertaining to or incident to an estate pending in the statutory probate court,” the 2009 revision changed the language to say the judge can transfer from another court “a cause of action related to a probate proceeding pending in the statutory probate court.”⁹³ Additionally, in 2009, the definition of “probate proceeding” was added to Texas Probate Code Section 3(b).⁹⁴

The changes to Probate Code Section 5B were carried forward into the Estates Code as Section 34.001, the definition of “probate proceeding” was carried forward in the Estates Code as Section 31.001, and the definition of matters “related to a probate proceeding” is in Estates Code Section 31.002.⁹⁵

Although the language changed slightly, there does not appear to be a difference in the meaning of the statutes.⁹⁶ Several courts have noted that the same analysis applies to determine if a lawsuit is “related” to an estate as the analysis to determine if a lawsuit is “incident” to an estate.⁹⁷

Thus, it appears safe to say that the cases regarding “a cause of action appertaining to or incident to an estate pending in the statutory probate court” are equally applicable to the “new” statutory language of “a cause of action related to a probate proceeding pending in the statutory probate court.”⁹⁸ Many of the cases cited in this Article interpreted the Probate Code Section 5A and 5B “appertaining to or incident to an estate” language, but such analysis should apply equally to the new “related to a probate proceeding” language.⁹⁹

90. Act of Sept. 1, 2003, 78th Leg., ch. 204, § 3.06, 2003 Tex. Gen. Laws 847, 854 (amended 2009) (current version at EST. §§ 34.001–34.002).

91. See Act of Sept. 1, 2009, 81st Leg., ch. 1351, § 13(a), 2009 Tex. Gen. Laws 4273, 4279–80 (codified at EST. §§ 32.001–32.007).

92. *Id.*

93. *Id.* at 4278.

94. See *id.* at 4275.

95. EST. §§ 34.001(a), 31.001, 31.002(a).

96. *Id.*

97. See *In re Frank Schuster Farms, Inc.*, No. 13-10-00225-CV, 2010 WL 2638481, at *6 (Tex. App.—Corpus Christi–Edinburgh June 29, 2010) (pet. denied) (mem. op.); see also *Est. Puckett*, No. 02-18-00349-CV, 2019 WL 3492396, at n. 5 (Tex. App.—Fort Worth Aug. 1, 2019, not pet.) (mem. op.) (“The former probate code conferred probate jurisdiction over matters ‘incident to an estate’; but the statutory change to ‘matters related to a probate proceeding’ in the current estates code is not a substantive difference.”).

98. See *In re Frank Schuster Farms, Inc.*, 2010 WL 2638481, at *6; *Est. Puckett*, 2019 WL 3492396, at n. 5.

99. *Garza v. Rodriguez*, 18 S.W.3d 694, 699 (Tex. App.—San Antonio 2000, no pet.) (noting no statutory difference in the current estate code § 5A and § 5B analysis from previous versions).

b. Statutory Probate Courts

i. Exclusive Jurisdiction Over “Matters Related to the Probate Proceeding”

In addition to having jurisdiction over “probate proceedings,” as defined in Texas Estates Code Section 31.001, and “pendent and ancillary jurisdiction” under Texas Estates Code Section 32.001(b), statutory probate courts have exclusive jurisdiction over the following “matters related to a probate proceeding”:

“Section A” matters:

- (1) an action against a personal representative or former personal representative arising out of the representative’s performance of the duties of a personal representative;
- (2) an action against a surety of a personal representative or former personal representative;
- (3) a claim brought by a personal representative on behalf of an estate;
- (4) an action brought against a personal representative in the representative’s capacity as personal representative;
- (5) an action for trial of title to real property that is estate property, including enforcement of a lien against the property; and
- (6) an action for trial of the right of property that is estate property.¹⁰⁰

“Section B” matters:

....

- (2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
- (3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.¹⁰¹

“Section C” matters:

....

- (2) any cause of action in which a personal representative of an estate pending in the Statutory Probate Court is a party in the representative’s capacity as personal representative.¹⁰²

The statutory probate court has exclusive jurisdiction over all probate proceedings.¹⁰³ Any cause of action “related to a probate proceeding” must be brought in a statutory probate court unless the jurisdiction of the statutory

100. EST. § 31.002(a) (herein referred to as “Section A” matters).

101. *Id.* § 31.002(b) (herein referred to as “Section B” matters).

102. *Id.* § 31.002(c) (herein referred to as “Section C” matters).

103. *Id.* §§ 32.005, 25.0003(e).

probate court is concurrent with the jurisdiction of a district court as provided by Section 32.007 or with the jurisdiction of any other court.¹⁰⁴

Once a statutory probate court has acquired jurisdiction over a probate proceeding, a party should not file other matters related to the probate proceeding in any court other than the statutory probate court (unless the matter is of the type listed under Texas Estates Code Section 32.007 in which the district court has concurrent jurisdiction with the statutory probate court).¹⁰⁵

A judge of a statutory probate court may transfer to the judge's court from a district court, constitutional county court, or county court at law a cause of action related to a probate proceeding 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.¹⁰⁶

The statutory probate court may also consolidate the transferred cause of action with the other proceedings.¹⁰⁷ When actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.¹⁰⁸

The motion to transfer may be made by a party to the action or on the motion of a person interested in an estate.¹⁰⁹ A judge of a statutory probate court is authorized to transfer a cause of action to the judge's court when the following four conditions exist:

1. The court exercising the power to transfer a cause of action under [Texas Estates Code Section 34.001] 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 [a matter related to] the estate pending in the statutory probate court.¹¹⁰

Section 34.001 of the Estates Code is not a venue statute.¹¹¹ If the four conditions authorizing the judge to transfer a cause of action to the judge's court are met, then the judge has authority to transfer the case notwithstanding mandatory venue provisions.¹¹²

104. *Id.* § 32.005(a).

105. *See Pullen v. Swanson*, 667 S.W.2d 359, 362 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *id.* § 32.007.

106. EST. § 34.001(a).

107. *Id.*

108. TEX. R. CIV. P. 174.

109. EST. § 34.001(a).

110. *Henry v. LaGrone*, 842 S.W.2d 324, 326 (Tex. App.—Amarillo 1993, writ denied).

111. *Id.* at 327.

112. *Id.*

In *Henry v. LaGrone*, the party opposing the transfer to the statutory probate court argued that his declaratory judgment and trust cause of action was subject to mandatory venue provisions requiring the filing in a county different from the county in which the statutory probate court presided over the guardianship estate.¹¹³ The Court of Appeals disagreed because the statute authorizing the transfer to the statutory probate court is not a venue statute.¹¹⁴ The Court noted that:

The purpose of Section 5B [now Texas Estate Code Section 34.001] is to allow a statutory probate court to consolidate all causes of action which are incident to an estate so that the estate can be efficiently administered. Judicial economy is thereby served. The aims of Section 5B would be thwarted if that section did not authorize the statutory probate court to transfer to itself causes of action that were originally filed in proper venues.¹¹⁵

In *In re SWEPI, L.P.*, the Texas Supreme Court considered whether a proceeding was “appertaining to or incident to an estate,” thus allowing a statutory probate court to transfer the case to itself.¹¹⁶ Ms. Bowdle died in Wichita County, and her will was admitted to probate there.¹¹⁷ Bowdle was a partner in Bridwell Oil Company at her death.¹¹⁸ Upon her death, the partnership interests passed to some trusts for the benefit of her descendants, and then the trusts terminated, and the partnership interests passed outright to the descendants.¹¹⁹ Bridwell Oil Company owned several overriding royalty interests, and the company began questioning whether Shell was properly calculating royalties.¹²⁰ “Shell filed a declaratory judgment action in Harris County district court against [the lessor] and Bridwell Oil.”¹²¹ The descendants of Ms. Bridwell then filed in Wichita County Court at Law Number 2 an application to appoint an administrator of Ms. Bowdle’s estate, which was granted.¹²² The administrator then asked to transfer the administration to the Denton County Statutory Probate Court, where a different lawsuit was pending.¹²³ The transfer was made.¹²⁴ The Denton County Statutory Probate Court then granted a motion to transfer the Harris

113. *Id.*

114. *Id.*

115. *Id.* (citations omitted).

116. *In re SWEPI, L.P.*, 85 S.W.3d 800, 805 (Tex. 2002) (orig. proceeding).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 802.

121. *Id.* at 803.

122. *Id.*

123. *Id.* at 804.

124. *Id.*

County District Court suit to the Denton County Statutory Probate Court.¹²⁵ The issue before the Texas Supreme Court was whether the Harris County suit was a matter “appertaining to or incident to an estate,” thus permitting the statutory probate court to transfer the case.¹²⁶ The Court noted that Bowdle’s estate was not a party to the Harris County lawsuit and that the estate no longer had an interest in Bridwell Oil Company, which owned the interests at issue in the Harris County suit.¹²⁷ None of the relief sought by any party in the Harris County suit directly affected the estate.¹²⁸ Thus, the Harris County suit was not appertaining to or incident to the estate, and the Denton County Statutory Probate Court clearly abused its discretion in transferring the suit.¹²⁹

Narvaez v. Powell is an interesting case examining the exclusive and ancillary pendent jurisdiction of a statutory probate court.¹³⁰ In *Narvaez*, a law firm represented some heirs of a decedent’s estate in applying to probate a will and in the will contest that proceeded thereafter.¹³¹ The will contest was filed in the El Paso Statutory Probate Court.¹³² The law firm had a contingency fee agreement with the heirs, and after the heirs settled the will contest suit, they filed suit against the law firm in district court, alleging breach of fiduciary duty and barratry, seeking declaratory relief, and claiming legal malpractice.¹³³ The heirs sought recovery of fees paid out of the estate to the law firm.¹³⁴ The law firm filed a verified motion to dismiss the suit for lack of jurisdiction on the ground that the El Paso Statutory Probate Court had jurisdiction of the claims.¹³⁵ The court of appeals concluded that the breach of fiduciary duty claim was a “probate proceeding” under Texas Estates Code Section 31.001(6) because it is a matter related to the settlement, partition, or distribution of an estate.¹³⁶ Likewise, the barratry cause of action pertained to the legal fees distributed from the estate to the law firm and thus fell within the definition of a “probate proceeding” under Section 31.001(6).¹³⁷ The declaratory judgment related to the conveyance of mineral interests to the law firm and the request to declare those conveyances void was characterized as an action involving trial of title to real property that is estate property under Section 31.002(a)(5), and thus was “related” to a

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 809.

129. *Id.*

130. *Narvaez v. Powell*, 564 S.W.3d 49, 51 (Tex. App.—El Paso 2018, no pet.).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 56.

137. *Id.*

pending probate proceeding.¹³⁸ For the matters that were “probate proceedings” and “related to a pending probate proceeding,” the court determined the statutory probate court had exclusive jurisdiction.¹³⁹ Regarding the legal malpractice claim, the court determined it was not a “probate proceeding” or related to a probate proceeding, but that the probate court could exercise pendent and ancillary jurisdiction over such claim because it was interwoven and related to the other claims in the case.¹⁴⁰

ii. Statutory Probate Courts and Concurrent Jurisdiction with District Courts

Under Texas Estates Code Section 32.007, a statutory probate court has concurrent jurisdiction with the district court in:

- (1) a personal injury, survival, or wrongful death action by or against a person in the person’s capacity as a personal representative;
- (2) an action by or against a trustee;
- (3) an action involving an inter vivos trust, testamentary trust, or charitable trust, including a charitable trust as defined by Section 123.001, Property Code;
- (4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;
- (5) an action against an agent or former agent under a power of attorney arising out of the agent’s performance of the duties of an agent; and
- (6) an action to determine the validity of a power of attorney or to determine an agent’s rights, powers, or duties under a power of attorney.¹⁴¹

In *In re CenterPoint Energy Houston Electric LLC*, the Texas Supreme Court looked at a statutory probate court’s authority over personal injury claims.¹⁴² The representatives of an estate brought a wrongful death and survival claim against CenterPoint in a Harris County Statutory Probate Court related to the death of a person who was electrocuted by a downed power line.¹⁴³ As the court noted, the Estates Code provides that a probate court has *concurrent* jurisdiction with the district court over survival and wrongful death matters.¹⁴⁴ Thus, the probate court did not have exclusive jurisdiction over such claims.¹⁴⁵ Probate court jurisdiction over the claims is

138. *Id.* at 57.

139. *Id.*

140. *Id.* at 58.

141. TEX. EST. CODE ANN. § 32.007.

142. *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 153 (Tex. 2021).

143. *Id.*

144. *Id.* at 165.

145. *Id.*

no greater than the district court's jurisdiction would be.¹⁴⁶ Thus, like district courts, probate courts must defer to exclusive agency jurisdiction (i.e., the Public Utility Commission) where applicable.¹⁴⁷

c. County Courts at Law and "Matters Related to the Probate Proceeding"

In counties where there is no statutory probate court, but there is a county court at law exercising original probate jurisdiction, the county court at law has jurisdiction over "matters related to a probate proceeding," listed in "Section A" and "Section B" of Texas Estates Code Section 31.002, but not those matters listed in "Section C."¹⁴⁸ Such jurisdiction is in addition to jurisdiction over "probate proceedings," as defined in Texas Estates Code Section 31.001, and "pendent and ancillary jurisdiction" under Texas Estates Code Section 32.001(b).¹⁴⁹

Once a probate proceeding is pending in a county court at law, that court has dominant jurisdiction over matters related to a probate proceeding listed in Section A and Section B of Texas Estates Code Section 31.002.¹⁵⁰

In *In re Hannah*, decedent and Hannah lived together in Aransas County.¹⁵¹ Decedent executed a will leaving property to Hannah, but shortly before his death, he changed the will, leaving nothing to Hannah.¹⁵² The will was admitted to probate as a muniment of title in the Aransas County Court at Law.¹⁵³ Hannah later sued decedent's sons in Harris County (where one of the sons lived) for tortious interference with inheritance, slander, and conspiracy.¹⁵⁴ Hannah sought monetary damages against the sons, alleging they slandered her to the decedent and got him to change his will.¹⁵⁵ The defendants in the Harris County case filed a motion to transfer venue to Aransas County, arguing the lawsuit is a probate proceeding over which the Aransas County Court at Law had continuing jurisdiction and proper venue.¹⁵⁶ For Hannah's suit to be subject to the jurisdiction and venue provisions of the Estates Code, the suit must qualify as either a "probate proceeding" or a "matter related to a probate proceeding."¹⁵⁷ In determining that the matter was not a "probate proceeding," the court noted that the claim

146. *Id.*

147. *Id.*

148. TEX. EST. CODE ANN. § 31.002(b).

149. *Id.* § 31.001.

150. *See Green v. Watson*, 860 S.W.2d 238, 243 (Tex. App.—Austin 1993, no writ).

151. *In re Hannah*, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (per curiam).

152. *Id.* at 804.

153. *Id.* at 805.

154. *Id.*

155. *Id.*

156. *Id.*

157. TEX. EST. CODE ANN. §§ 31.001–31.002.

was for money damages against the sons, not the estate.¹⁵⁸ Further, Hannah did not contest the validity or interpretation of the decedent's will, claim to be an heir of the decedent, assert a claim for money owed by the decedent or his estate, or challenge the distribution of the decedent's property pursuant to the terms of the will.¹⁵⁹ Thus, Hannah's claims were not a "probate proceeding" under the definition in Texas Estates Code Section 31.001.¹⁶⁰ The sons argued that the suit was a "matter related to a probate proceeding" because they claimed Hannah brought an action for the right to property that is classified as estate property.¹⁶¹ However, the court disagreed, noting that Hannah did not bring any claims related to estate property.¹⁶² Thus, the suit was not a "matter related to a probate proceeding."¹⁶³ Because the lawsuit was neither a probate proceeding nor a matter related to a probate proceeding, the jurisdiction and venue provisions of the Estates Code did not apply, and jurisdiction and venue were not mandatory in the County Court at Law of Aransas County.¹⁶⁴

d. Constitutional County Courts and "Matters Related to the Probate Proceeding"

In addition to having jurisdiction over "probate proceedings," as defined in Texas Estates Code Section 31.001, and "pendent and ancillary jurisdiction" under Texas Estates Code Section 32.001(b), constitutional county courts have jurisdiction over certain "matters related to the probate proceeding" as defined by Texas Estates Code Section 31.002.¹⁶⁵

Where there is no statutory probate court or county court at law exercising probate jurisdiction in the county, a constitutional county court has jurisdiction of all "matters related to the probate proceeding" listed in Section A of Texas Estates Code Section 31.002.¹⁶⁶ The constitutional county court does not have jurisdiction over matters related to the probate proceeding listed in Sections B or C of Section 31.002, which notably include matters related to testamentary trusts created by the decedent or *inter vivos* trusts created by the decedent.¹⁶⁷ If these issues arise and the probate proceeding is before the constitutional county court, those matters will need to be heard by the district court in a separate proceeding.¹⁶⁸

158. *In re Hannah*, 431 S.W.3d at 806.

159. *Id.* at 809.

160. *Id.*

161. *Id.*

162. *Id.* at 810.

163. *Id.*

164. *Id.* at 810.

165. TEX. EST. CODE § 31.002.

166. *Id.*

167. *Id.*

168. *See id.*

Once a probate proceeding is pending in a county court at law, that court has dominant jurisdiction over “matters related to a probate proceeding” listed in Section A of Texas Estates Code Section 31.002.¹⁶⁹

Note that there are special jurisdiction provisions related to contested probate matters brought in constitutional county courts.¹⁷⁰

In *Saenz v. Saenz*, a probate was pending in a constitutional county court when a lawsuit was filed in district court in the same county whereby parties asserted their right to property addressed in the will.¹⁷¹ The district court dismissed the lawsuit for lack of subject matter jurisdiction.¹⁷² On appeal, the appellate court agreed that title to the land conveyed by the will and subsequent deeds is a “matter appertaining to” the decedent’s estate, and thus, jurisdiction of the constitutional county court was exclusive while the administration was pending in that court.¹⁷³

In the *Puig* case, a corporation called Puig Bros. held title to a Webb County ranch.¹⁷⁴ Before her death, the decedent filed for divorce from her husband and alleged Puig Bros. was her husband’s alter ego.¹⁷⁵ The decedent did not join Puig Bros. in the divorce proceeding.¹⁷⁶ The court in the divorce proceeding agreed Puig Bros. was the husband’s alter ego and awarded 60% of the ranch to the decedent, who died shortly thereafter.¹⁷⁷ The decedent’s will was admitted to probate in Fort Bend County Court.¹⁷⁸ The decedent’s husband refused to sign a deed conveying the property to the decedent, so the Fort Bend Court appointed a master in chancery to act as his attorney in fact to execute the deeds, which was done.¹⁷⁹ Some of the decedent’s children and Puig Bros. filed suit in Webb County District Court alleging Puig Bros. was not a party to the divorce proceeding, so the order awarding the ranch to the decedent was void.¹⁸⁰ The Texas Supreme Court determined that because the administration of the decedent’s estate was initiated well before the Webb County lawsuit was filed, the Fort Bend County Court clearly attained dominant jurisdiction over the decedent’s estate and all matters related thereto, which included the suit regarding the title to the ranch.¹⁸¹ However, because a plea to the jurisdiction was filed rather than a plea in abatement, it was proper for the district court to deny the plea to the jurisdiction.¹⁸²

169. See *Green v. Watson*, 860 S.W.2d 238, 243 (Tex. App.—Austin 1993, no writ).

170. See *infra* Section II.E.

171. *Saenz v. Saenz*, 49 S.W.3d 447, 449 (Tex. App.—San Antonio 2001, no writ).

172. *Id.* at 449.

173. *Id.*

174. *Id.* at 304.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *In re Puig*, 351 S.W.3d 301, 304 (Tex. 2011).

180. *Id.* at 303.

181. *Id.* at 306.

182. *Id.*

e. The “Controlling Issue Test”

Several probate jurisdiction and venue cases refer to the “controlling issue test.”¹⁸³ However, it is unclear whether such test is still applicable after the legislative changes enacted in 2009.¹⁸⁴

Back when there was a Section 5A of the Texas Probate Code, the section defined the phrases “appertaining to estates” and “incident to estates” to include a number of listed matters, including the probate of wills, the issuance of letters testamentary and of administration, the determination of heirship, claims by or against an estate, all actions for trial of title to land incident to an estate and for the enforcement of liens thereon incident to an estate, all actions for trial of the right of property incident to an estate, actions to construe wills, “and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.”¹⁸⁵

When Section 5A was repealed in 2009, a definition of “probate proceeding” was added as Texas Probate Code Section 3(b), which later became Texas Estates Code Section 31.001.¹⁸⁶ Some of the previously listed matters in Texas Probate Code Section 5A were moved into the definition of “probate proceeding.”¹⁸⁷ For instance, a “probate proceeding” includes the probate of wills, issuance of letters testamentary and of administration, determination of heirship, the settling of a personal representative’s account of an estate and “any other matter related to the settlement, partition, or distribution of an estate.”¹⁸⁸

Some of the matters listed in former Section 5A of the Texas Probate Code were incorporated into the Texas Estates Code Section 31.002 definition of “matters related to a probate proceeding.”¹⁸⁹ For instance, an action for trial of title to real property that is estate property, including the enforcement of a lien against the property, is now under “Section A” of the definition of a matter related to a probate proceeding.¹⁹⁰

When Section 5A of the Probate Code was in effect, the Texas Supreme Court stated that “[w]hen a matter raised in a separate lawsuit is not expressly mentioned in the Probate Code’s definition of matters appertaining and incident to an estate, we have employed the ‘controlling issue’ test to determine whether the matter meets that definition.”¹⁹¹ Under the controlling

183. *See id.*; *In re SWEPI, L.P.*, 85 S.W.3d 800, 805–06 (Tex. 2002) (orig. proceeding).

184. *See* TEX. PROB. CODE ANN. § 5A.

185. Act of Sept. 1, 2009, 81st Leg., ch. 1351, § 12(a), 2009 Tex. Gen. Laws 4273, 4279–80 (codified at TEX. EST. CODE ANN. §§ 32.001–32.007).

186. *See id.*

187. *See* EST. § 31.001.

188. *Id.*

189. *Id.* § 31.002.

190. *Id.* § 31.002(a).

191. *In re Puig*, 351 S.W.3d 301, 304 (Tex. 2011) (citing *In re SWEPI, L.P.*, 85 S.W.3d 800, 805 (Tex. 2002) (orig. proceeding)).

issue test, a cause of action is appertaining or incident to an estate if the controlling issue in the suit is the settlement, partition, or distribution of an estate.¹⁹²

The controlling issue test originated from the clause “and generally all matters relating to the settlement, partition, and distribution of estates,” a catchall phrase in Section 5A of the Probate Code.¹⁹³ Thus, it made sense to create a test that said a matter is “appertaining and incident” to an estate if the matter is expressly listed or is within the scope of the catchall phrase.¹⁹⁴

However, it is not clear whether the “controlling issue test” is applicable as a separate test after the revocation of Section 5A, the creation of the definition of “probate proceeding” in Texas Estates Code Section 31.001, and the designation of “matters related to probate proceeding” in Texas Estates Code Section 31.002.¹⁹⁵

The phrase “any other matter related to the settlement, partition, or distribution of an estate” is now included in the definition of “probate proceeding.”¹⁹⁶ Such phrase is not part of the “matters related to probate proceeding” analysis in Texas Estates Code Section 31.002 like it was part of the “appertaining and incident to an estate” analysis.¹⁹⁷

However, at least two cases apply the “controlling issue test” in cases determined after the codification of the Estates Code.¹⁹⁸

3. *Pendent and Ancillary Jurisdiction*

In addition to jurisdiction over “probate proceedings” and “matters related to the probate proceeding,” a court exercising probate jurisdiction may exercise pendent and “ancillary jurisdiction as necessary to promote judicial efficiency and economy.”¹⁹⁹

“Ancillary jurisdiction generally involves claims asserted defensively, i.e., ‘claims by a defending party hailed into court against his will,’ or by a party ‘whose rights might be irretrievably lost unless he could assert them in an ongoing action.’”²⁰⁰ Pendent jurisdiction is jurisdiction over parties that are not named in claims properly before the court when there is no independent basis for the court’s jurisdiction.²⁰¹

192. *Id.*

193. TEX. PROB. CODE ANN. § 5A(a) (2009).

194. *In re Puig*, 351 S.W.3d at 304.

195. EST. §§ 31.001–31.002.

196. *Id.* § 31.001.

197. *Id.* § 31.002.

198. See *Johnson v. Johnson*, No. 04-19-00500-CV, 2020 WL 214762, at *3 (Tex. App.—San Antonio Jan. 15, 2020, no pet.) (mem. op.); *In re Kholaiif*, No. 14-18-00825-CV, 2018 WL 5832899, at *2 (Tex. App.—Houston [14th Dist.] Nov. 8, 2018, no pet.) (per curiam) (mem. op.) (orig. proceeding).

199. EST. § 32.001(b).

200. *Eagle Props., LTD v. Scharbauer*, 807 S.W.2d 714, n. 3 (Tex. 1990).

201. *Id.*

Section 32.001(b) confers jurisdiction on a court over nonprobate claims that bear some relationship to the estate pending before the court.²⁰² “Typically, probate courts exercise ancillary or pendent jurisdiction when a close relationship exists between the nonprobate claims and the claims against the estate.”²⁰³ Probate courts can only exercise their pendent or ancillary jurisdiction over nonprobate matters “when doing so will aid in the efficient administration of an estate pending in the probate court.”²⁰⁴

Pendent and ancillary claims are nonprobate claims.²⁰⁵ As mentioned earlier, when a constitutional county court or county court at law is hearing a probate matter, the amount-in-controversy limit for such court does not apply.²⁰⁶ However, because a pendent and ancillary claim is a nonprobate claim, any amount-in-controversy limit that applies to the court hearing the matter does apply to the ancillary or pendent claim.²⁰⁷

Once the estate is closed, the claim is “ancillary” or “pendent” to nothing, and the court loses jurisdiction.²⁰⁸ A probate court has discretion to resolve ancillary claims against third parties, but only to the extent such claims are necessary to resolve claims within the court’s original jurisdiction.²⁰⁹ Where an executor of an estate brings a lawsuit in probate court against a defendant, and the defendant brings ancillary claims against a third party, if the executor’s claims are dismissed, then the court loses jurisdiction over the ancillary claims against the third party.²¹⁰

In *Dailey v. McAfee*, the issue was whether a statutory probate court exercising ancillary and pendent jurisdiction could determine assets disposed of by a divorce decree or whether the family law court had exclusive jurisdiction.²¹¹ Carl and Ruth were divorced, and the divorce decree ordered Carl to transfer some assets to Ruth.²¹² Carl died, and then Ruth died.²¹³ It was then discovered that Carl did not transfer the assets to Ruth.²¹⁴ Dailey, as

202. *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 294 (Tex. App.—Fort Worth 2004, no pet.); EST. § 32.001(b).

203. *Jurgens v. Martin*, 631 S.W.3d 385, 400 (Tex. App.—Eastland 2021, mand. denied) (orig. proceeding) (quoting *Shell Cortez Pipeline Co.*, 127 S.W.3d at 294).

204. *Shell Cortez Pipeline Co.*, 127 S.W.3d at 295.

205. *Id.* at 293.

206. *See Womble v. Atkins*, 331 S.W.2d 294, 299 (Tex. 1960); *Jurgens*, 631 S.W.3d at 399; *Eng. v. Cobb*, 593 S.W.2d 674, 675 (Tex. 1979).

207. *Jurgens*, 631 S.W.3d at 399; *Dowell v. Quiroz*, 462 S.W.3d 578, 585–86 (Tex. App.—Corpus Christi–Edinburg 2015, no pet.).

208. *Jurgens*, 631 S.W.3d at 399.

209. *Goodman v. Summit West Rim, LTD*, 952 S.W.2d 934, 934 (Tex. App.—Austin 1997, no pet.).

210. *Id.*; *see also Sabine Gas Transmission Co. v. Winnie Pipeline Co.*, 15 S.W.3d 199, 200–01 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (Although executor settled claims with one party, the estate was still pending in the probate court; thus, the court did not lose jurisdiction but could choose to dismiss the case because the probate court’s resolution of the nonprobate claims is no longer efficient.).

211. *Dailey v. McAfee*, No. 01-18-01060-CV, 2020 WL 4758429, at *5–6 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.).

212. *Id.* at *1.

213. *Id.* at *2.

214. *Id.*

executor of Ruth's estate, filed a petition for declaratory judgment in Harris County Statutory Probate Court seeking a declaration that the property belonged to Ruth's estate.²¹⁵ A default declaratory judgment was entered because the administrator of Carl's estate was incapacitated at the time she was served with citation.²¹⁶ A later administrator of Carl's estate filed a bill of review in the probate court alleging the probate court should set aside the declaratory judgment because the probate court did not have subject matter jurisdiction and that the district court that had granted the divorce had exclusive jurisdiction.²¹⁷ The probate court granted the bill of review.²¹⁸ The administrator of Ruth's estate argued that the statutory probate court had pendent and ancillary jurisdiction over the declaratory judgment action.²¹⁹ Because there was no evidence otherwise, the court had to presume that the default declaratory judgment was valid.²²⁰ The court then determined that the district court rendering a divorce decree does not have exclusive jurisdiction over post-divorce actions to construe or enforce contract rights acquired under the decree.²²¹ Thus, the court in *Dailey* allowed the probate court to exercise its pendent and ancillary jurisdiction.²²²

C. Plea in Abatement and Plea to the Jurisdiction

If a suit is brought in one court when another court has exclusive jurisdiction, then a party should challenge the issue of exclusive jurisdiction by filing a plea to the jurisdiction in the court that does not have jurisdiction.²²³

When two courts have concurrent jurisdiction to determine inherently intertwined issues, a party should file a plea in abatement in the court where the second suit is commenced to draw a court's attention to another court's possible dominant jurisdiction.²²⁴

D. Mandamus

When reviewing older case law, it is important to understand that mandamus was not always available in every case where a plea in abatement

215. *Id.* at *3.

216. *Id.* at *5.

217. *Id.* at *1.

218. *Id.* at *5–6.

219. *Id.* at *6.

220. *Id.* at *5–6.

221. *Id.*

222. *Id.* at *6.

223. See *In re Puig*, 351 S.W.3d 301, 305–06 (Tex. 2011).

224. See generally *id.* at 306 (filing of a plea to the jurisdiction rather than a plea in abatement was inappropriate where the party wished to challenge a court's interference with another court having dominant jurisdiction rather than exclusive jurisdiction).

was denied.²²⁵ In *Abor v. Black*, the Texas Supreme Court posited a very stringent standard for permitting mandamus relief in the context of a denial of a plea in abatement.²²⁶ “*Abor* held that mandamus relief is unavailable to correct an erroneous denial of a plea in abatement [if] there is ‘no conflict of jurisdiction[,]’” meaning mandamus was inappropriate if “there was no injunction or order in one court ‘which actively interferes with the exercise of jurisdiction’ in the other court.”²²⁷ In criticizing such standard, the Texas Supreme Court in *J.B. Hunt* noted:

[S]tringency makes *Abor* a wasteful standard in cases where a trial court abused its discretion by not granting a plea in abatement but there is no requisite conflict of jurisdiction: An appellate court cannot correct the reversible error through mandamus relief, which then leads to “the gross and unnecessary waste of economic and judicial resources” as the case is tried in the wrong court only to be automatically reversed on appeal after judgment.²²⁸

Typically, “mandamus relief requires the relator to establish both (1) a trial court’s abuse of discretion, and (2) no adequate remedy by appeal.”²²⁹ The *J.B. Hunt* court noted that mandamus review is not “an easily wielded tool, but such review of significant rulings in exceptional cases may be essential to, among other things, ‘spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’”²³⁰ The *J.B. Hunt* case abrogated *Abor*’s inflexible standard regarding the “adequate remedy by appeal” prong.²³¹

The *J.B. Hunt* court held that in the context of a plea in abatement in a dominant-jurisdiction case, “a relator need only establish a trial court’s abuse of discretion to demonstrate entitlement to mandamus relief.”²³²

Thus, it is still true that “when a court issues an ‘order which actively interferes with the exercise of jurisdiction’ by a court possessing dominant jurisdiction, mandamus relief is appropriate.”²³³ This doctrine is applicable to review a probate court’s transfer of a suit pending in district court to

225. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985).

226. *Id.* at 567.

227. *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 298 (Tex. 2016) (citing *Abor*, 695 S.W.2d at 567).

228. *Id.* at 298–99.

229. *Id.* at 299.

230. *Id.*

231. *Id.*

232. *Id.*

233. *In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011); *In re SWEPI, L.P.*, 85 S.W.3d 800, 809 (Tex. 2002) (orig. proceeding).

itself.²³⁴ Nevertheless, the opportunity for mandamus relief is now more expansive than in the past.²³⁵

The court of appeals conducts a dominant-jurisdiction analysis under the abuse of discretion standard.²³⁶ “A trial court abuses its discretion when it acts ‘arbitrarily, unreasonably, or without regard to guiding legal principles.’”²³⁷ With regard to factual issues, “the abuse-of-discretion standard is more akin to a clear-error standard.”²³⁸ Concerning questions of law, “[a] trial court has no ‘discretion’ in determining what the law is or applying the law to the facts.”²³⁹

The general “rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.”²⁴⁰ A court presiding over a subsequently filed suit must dismiss the second suit if a party to that suit calls the second court’s attention to the pendency of the prior suit by a plea in abatement.²⁴¹ If the second court refuses to sustain a plea in abatement or attempts to interfere with the prior action, then mandamus is appropriate.²⁴²

E. Contested Probate Matters in Constitutional County Court

The judge of a constitutional county court is usually not an attorney.²⁴³ The constitutional county court can handle run-of-the-mill probate applications just fine.²⁴⁴ However, when the probate proceeding becomes contested, it does not usually make sense to have the county judge hear the contested matter.²⁴⁵ The litigants have several options for handling the contested portion of the case, which turn on whether there is a county court at law exercising probate jurisdiction in the county.²⁴⁶

234. *In re SWEPI, L.P.*, 85 S.W.3d at 809.

235. See Michelle May O’Neil, *Mandamus After McAllen: Have the Sands Really Shifted?* O’NEIL WYSOCKI FAM. L. (Sept. 17, 2019), <https://www.oneilattorneys.com/firm-news/2019/September/Mandamus-after-mcallen-have-the-sands-really-shi/> [https://perma.cc/BZ6G-D5F4].

236. *J.B. Hunt Transp., Inc.*, 492 S.W.3d at 294.

237. *Id.* at 293–94.

238. *Id.* at 294.

239. *Id.*

240. *Id.*

241. *Id.* at 294–95.

242. *In re Puig*, 351 S.W.3d 301, 306 (Tex. 2011).

243. TEX. CONST. art. V, § 15.

244. TEX. EST. CODE ANN. § 32.002.

245. *Id.* § 32.003.

246. *Id.* § 32.004.

1. Contested Probate Matters in Constitutional County Court in County Without County Court at Law

If a matter in a probate proceeding being heard by the constitutional county court becomes contested, and if the county does not have a statutory probate court or a “county court at law exercising original probate jurisdiction,” then the judge of the constitutional county court “may, on the judge’s own motion, or shall, on the motion of any party to the proceeding,” either “request the assignment of a statutory probate court judge to hear the contested matter” or “transfer the contested matter to the district court.”²⁴⁷

a. Assignment of Contested Matter to Statutory Probate Judge

“If a party to a probate proceeding files a motion for the assignment of a statutory probate court judge to hear a contested matter in the proceeding before the judge of the [constitutional] county court transfers the contested matter to a district court,” then the county judge must grant the motion and cannot transfer the matter to the district court.²⁴⁸

Importantly, a party can file a motion to assign a statutory probate judge to hear contested matters in the case *before* any contested matters arise.²⁴⁹ The motion is given effect at the time the matter later becomes contested, and a statutory probate judge must be appointed.²⁵⁰

If a constitutional county court assigns the case to the district court before a party requests the appointment of a statutory probate judge, the request to assign a statutory probate judge must be denied.²⁵¹

If a contested matter in a probate proceeding is transferred to district court under any authority other than Texas Estates Code Section 32.003, such transfer does not defeat the right of a party to have the matter assigned to a statutory probate judge per Section 32.003.²⁵²

If a statutory probate judge is assigned to the contested matter, the constitutional county court may request that the statutory probate judge be assigned to the entire probate proceeding, not just the contested matter.²⁵³ However, if only the contested matter is transferred to the statutory probate judge, then the constitutional county court retains jurisdiction over the management of the estate, other than the contested matter, until the final disposition of the contested matter.²⁵⁴

247. *Id.* § 32.003.

248. *Id.* § 32.003(b).

249. *Id.* § 32.003(c).

250. *Id.*

251. *In re Denison*, 145 S.W.3d 803, 803 (Tex. App.—Eastland 2004, pet. denied).

252. EST. § 32.003(d).

253. *Id.* § 32.003(b).

254. *Id.* § 32.003(g).

Where a statutory probate judge is assigned to hear a contested matter under Texas Estates Code Section 32.003, such judge shall be assigned to hear any contested matter that is later filed in the probate proceeding.²⁵⁵

If the statutory probate judge is assigned to hear only the contested matters in a probate proceeding, then on resolution of the matter, including any appeal of the matter, the statutory probate judge must return the matter to the constitutional county court for further proceedings not inconsistent with the orders of the statutory probate court or court of appeals.²⁵⁶

If the statutory probate judge is assigned to hear the entire probate proceeding, not just the contested matter, then on resolution of the contested matter in the proceeding (including any appeal of the matter), the judge must return the entire proceeding to the constitutional county court for further proceedings not inconsistent with the orders of the statutory probate court or court of appeals.²⁵⁷

b. Transfer of Contested Matter to District Court

Where the constitutional county court transfers a contested matter to the district court, the district court has the jurisdiction and authority granted to a statutory probate court.²⁵⁸ Thus, the district court exercises original probate jurisdiction over the probate proceeding and has the power to hear all matters related to the estate.²⁵⁹

If a contested matter is transferred to the district court under Texas Estates Code Section 32.003, any matter related to the probate proceeding may be brought in the district court.²⁶⁰ However, the district court may, on its motion or the motion of a party, find that a matter related to the probate proceeding is not a contested matter and transfer such matter to the constitutional county court “with jurisdiction of the management of the estate.”²⁶¹

There is no provision allowing the constitutional county court to transfer the entire proceeding to the district court.²⁶² Thus, only the contested matter is transferred to the district court, and the constitutional county court retains “jurisdiction over the management of the estate, other than the contested matter, until final disposition of the contested matter.”²⁶³

255. *Id.* § 32.003(h).

256. *Id.* § 32.003(e).

257. *Id.*

258. *Id.* § 32.003(f).

259. *Herbst v. Sheppard*, 995 S.W.2d 310, 313 (Tex. App.—Corpus Christi-Edinburg 1999, pet. denied).

260. EST. § 32.003(g).

261. *Id.*

262. *See id.*

263. *Id.*

Where a contested matter is transferred to the district court under the Texas Estates Code Section 32.003, the district court has jurisdiction over any contested matter in the proceeding that is later filed, and the constitutional county court must transfer those contested matters to the district court.²⁶⁴

“On resolution of a contested matter transferred to the district court . . . including any appeal of the matter, the district court shall return the matter to the county court for further proceedings not inconsistent with the orders of the district court or court of appeals.”²⁶⁵

2. *Contested Matters in Constitutional County Court in County with County Court at Law Exercising Original Probate Jurisdiction*

If a matter in a probate proceeding being heard by the constitutional county court becomes contested, and if the county does not have a statutory probate court, but does have a county court at law exercising original probate jurisdiction, then the “judge of the [constitutional] county court may, on the judge’s own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the county court at law.”²⁶⁶ The constitutional county court may transfer to the county court at law the entire proceeding or just the contested matter.²⁶⁷

The county court at law to which a proceeding is transferred under Section 32.004 “may hear the proceeding as if [it was] originally filed in that court.”²⁶⁸ However, if only the “contested matter in the proceeding is transferred, [then] on the resolution of the matter, the [contested] matter shall be returned to the [constitutional] county court for further proceedings not inconsistent with the orders of the county court at law.”²⁶⁹

III. VENUE FOR PROBATE PROCEEDINGS

A. Venue Generally

“Venue concerns the geographic location within the forum where the case may be tried.”²⁷⁰ “Generally, chapter 15 of the Texas Civil Practice and Remedies Code governs venue of actions.”²⁷¹ Where a mandatory venue

264. *Id.* § 32.003(h).

265. *Id.* § 32.003(f).

266. *Id.* § 32.004(a).

267. *Id.*

268. *Id.* § 32.004(b).

269. *Id.*

270. *In re Hannah*, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding).

271. *Id.* (citing *In re Tex. Dep’t Transp.* 218, SW.3d 74, 76 (Tex. 2007) (per curiam) (orig. proceeding)).

provision in Chapter 15 or outside of Chapter 15 applies, “suit must be brought in the county required by the mandatory venue provision.”²⁷²

“‘Proper venue’ means: (1) the venue required by the mandatory provisions of Subchapter B,” of Texas Civil Practice and Remedies Code Chapter 15, “or another statute prescribing mandatory venue;” or (2) if no mandatory venue provision applies, then the venue provided by Subchapter A or Subchapter C of Texas Civil Practice and Remedies Code Chapter 15.”²⁷³

1. Venue to Probate Wills and Grant Letters Testamentary and of Administration

The Estates Code “provides mandatory venue for the probate of wills and administration of estates.”²⁷⁴

“Venue for a probate proceeding to admit a will to probate or for the granting of letters testamentary or of administration is [usually] . . . in the county in which the decedent resided, if the decedent had a domicile or fixed place of residence” in Texas.²⁷⁵

If the decedent did not have a domicile or fixed place of residence in Texas, then if the decedent died in Texas, venue is in the county in which the decedent’s principal estate was located at the time of the decedent’s death, or in the county where the decedent died.²⁷⁶

If the decedent did not have a domicile or fixed place of residence in Texas and died outside of Texas, then venue is “(i) in any county in which the decedent’s nearest of kin reside; or (ii) if there are no next of kin [in Texas, then] in the county in which the decedent’s principal estate was located at the time of the decedent’s death.”²⁷⁷

a. “Domicile” and “Fixed Place of Residence”

Venue is “in the county in which the decedent resided, if the decedent had a domicile or fixed place of residence” in Texas.²⁷⁸ Although the term “resided” is in the statute, the key to venue is where the decedent was domiciled at the time of the decedent’s death.²⁷⁹

“A person may establish only one domicile, whereas he or she may have several residences.”²⁸⁰ General venue statutes for suits against a living person

272. *Id.* at 806–07.

273. TEX. CIV. PRAC. & REM. CODE ANN. § 15.001(b).

274. *In re Graham*, 251 S.W.3d 844, 847 (Tex. App.—Austin 2008, orig. proceeding).

275. TEX. EST. CODE ANN. § 33.001(a)(1).

276. *Id.* § 33.001(a)(2)(A).

277. *Id.* § 33.001(a)(2)(B).

278. *Id.* § 33.001(a)(1).

279. *See id.*

280. *In re Est. Steed*, 152 S.W.3d 797, 803 (Tex. App.—Texarkana 2004, pet. denied).

often focus on where a defendant *resides*.²⁸¹ Those statutes were “designed to provide for the convenience of the parties involved,” so “when a person [spends] so [much time] in a county as to make it a place of residence, he could not claim that the location was an inconvenient venue for suit.”²⁸² Venue in probate proceedings instead focuses on the *domicile* of the decedent at the time of the decedent’s death because “other factors [become] more important after the person’s death, such as the location of his property and where he had established a home, which was also typically where most creditors would reside.”²⁸³

The term “domicile” means “the home or place of permanent residence of the deceased.”²⁸⁴ The phrase “fixed place of residence” in the statute is intended to explain that the word “domicile” was used to demonstrate a permanent residence rather than a temporary one.²⁸⁵ Thus, “domicile” and “fixed place of residence” are synonymous.²⁸⁶

The elements of domicile are: (1) an actual residence and (2) the intent to “make the place of residence one’s permanent home.”²⁸⁷ The word “home” means a “true fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.”²⁸⁸

The amount of time a decedent resided in a county is irrelevant, as long as the act and intention to acquire a domicile coexist.²⁸⁹ In *Maddox*, the decedent separated from her husband on September 14, 1983, and moved to Houston to live with her son until her death one month later, on October 15, 1983.²⁹⁰ The decedent had filed for divorce in Dallas County on twenty-third of September.²⁹¹ When she separated from her husband, the decedent moved her personal effects to Houston, including her dog, clothing, and jewelry.²⁹² In her move to Houston, the decedent:

terminated at least one of her bank accounts in Dallas and established an account in Houston[,] . . . shopped for a condominium, . . . told the sales representative that she planned to make Houston her permanent home[, and] told friends she would forward her new Houston address as soon as she was settled.²⁹³

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Slay v. Dubose*, 144 S.W.2d 594, 596 (Tex. App.—Fort Worth 1940, writ ref’d).

287. *Maddox v. Surber*, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ).

288. *See id.* at 227; *In re Est. Steed*, 152 S.W.3d at 805 (quoting *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951)).

289. *Maddox*, 677 S.W.2d at 228.

290. *Id.* at 227.

291. *Id.*

292. *Id.*

293. *Id.* at 228.

The Court of Appeals found that the evidence was sufficient to make a prima facie showing that the decedent “resided in Houston at the time of her death and intended to make Harris County her permanent, fixed place of residence.”²⁹⁴ Thus, Harris County was the proper venue to probate her will.²⁹⁵ The court also found it irrelevant that the decedent only resided in Harris County for a month before her death.²⁹⁶

Once a domicile is established in one county, it is not lost unless a person leaves the domicile with the intent not to return.²⁹⁷ The *Nunn* case is not a probate domicile case, but it sheds light on the domicile issue.²⁹⁸ The issue of domicile arose because “[r]esidence is a lessor-included element within the technical definition of domicile.”²⁹⁹ Thus, if the person was domiciled in Bowie County, he, therefore, resided there.³⁰⁰ The person at issue moved to Bowie County on July 20, 1968, and temporarily lived with cousins.³⁰¹ When he moved to Bowie County, he had the intention of establishing domicile in Bowie County, but after searching for permanent housing and finding none, the person rented a home in Cass County with the intent to live there temporarily while he looked for a home in Bowie County.³⁰² On July 27, 1968, the person signed a lease for a home in Bowie County, and on September second, he moved back to Bowie County.³⁰³ The cause of action accrued on August twenty-third, while the person was still living in Cass County.³⁰⁴ The Court of Appeals held that the person had resided in Bowie County with the intent to make Bowie County his domicile, and that after acquiring domicile in Bowie County, he did not intentionally change, give up, or abandon domicile in Bowie County by temporarily moving to Cass County; thus, his domicile was Bowie County.³⁰⁵

“Recitals and declarations ‘in the will as to the testator’s residence [or domicile] ordinarily carry great weight, and will be accepted in the absence of a showing of a change of residence before death.’”³⁰⁶

Where a decedent makes statements regarding residence, such as voter registration, that are inconsistent with the facts showing actual residence,

294. *Id.* at 227.

295. *Id.* at 228.

296. *Id.*

297. *Com. Standard Ins. Co. v. Nunn*, 464 S.W.2d 415, 417 (Tex. App.—Texarkana 1971, writ *dism’d*).

298. *Id.*

299. *Id.* (quoting *Snyder v. Pitts*, 241 S.W.2d 136, 139 (Tex. 1951)).

300. *Id.* at 416.

301. *Id.* at 416–17.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Est. McKinney v. Hair*, 434 S.W.2d 217, 218 (Tex. App.—Waco 1968, writ *ref’d n.r.e.*); *see also In re Graham*, 251 S.W.3d 844, 850 (Tex. App.—Austin 2008, orig. proceeding) (disregarding such a declaration where the will was executed thirteen years before the decedent’s death, and there was ample evidence of a change of residence before death).

such statements “are of slight weight” and cannot establish residence in fact.³⁰⁷ The controlling factor is “the actual fact as to the place of residence and decedent’s real attitude and intention with respect to it as disclosed by his entire course of conduct.”³⁰⁸

In the case of *In re Graham*, the issue was whether Tom Green County or Travis County was the decedent’s domicile.³⁰⁹ The decedent “maintained a mailing address at her family’s office building” in Tom Green County, which she used for “bank accounts, driver’s license, bills and general business correspondence.”³¹⁰ She also used the family office building address to register to vote in Tom Green County, though she never voted there.³¹¹ Her “income tax returns reflect[ed] a Tom Green County address,” which was a P.O. box rather than a residential location.³¹² The decedent never resided at the office building that she used as an address.³¹³ The decedent sold a condominium in Travis County, which she had declared as her homestead, and thereafter signed a lease at apartments in Travis County.³¹⁴ She rented three garages at the apartments for storage, and she continued to renew her lease until her death.³¹⁵ She had “homeowners insurance for her possessions at the apartment,” and “[a]ffidavits from friends and neighbors reflect that [she] frequently entertained guests for meals at the apartment.”³¹⁶ The decedent only returned to Tom Green County once a year for family business meetings.³¹⁷ The court noted that the decedent’s use of a Tom Green County mailing address for her business correspondence and her voter registration in Tom Green County “merely amount to conclusory statements that conflict with the facts of her actual residence.”³¹⁸ Further, although the decedent’s will listed Tom Green County as her domicile, the will was executed thirteen years before her death.³¹⁹ Thus, the court concluded, such matters “are of slight weight,” and the proper venue was in Travis County.³²⁰

307. *In re Graham*, 251 S.W.3d at 850 (citing *Texas v. Florida*, 306 U.S. 398, 425 (1939)).

308. *Id.*

309. *Id.* at 847.

310. *Id.* at 849.

311. *Id.*

312. *Id.*

313. *See id.* at 850.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 851.

318. *Id.*

319. *Id.*

320. *Id.*

2. Venue for Heirship Proceedings

Venue for a proceeding to determine a decedent's heirs is in:

(1) the court of the county in which a proceeding admitting the decedent's will to probate or administering the decedent's estate was most recently pending; or

(2) the court of the county in which venue would be proper for commencement of an administration of the decedent's estate under Section 33.001 if:

(A) no will of the decedent has been admitted to probate in this state and no administration of the decedent's estate has been granted in this state; or

(B) the proceeding is commenced by the trustee of a trust holding assets for the benefit of the decedent.³²¹

If the heirship proceeding relates to the estate of a deceased guardianship ward who died intestate, and there is no administration pending in such person's estate, then venue is in the court in which the guardianship proceeding with respect to the ward's estate was pending on the date of the ward's death.³²² Such proceeding is filed as a separate cause from the guardianship proceeding.³²³

3. Venue for Action Related to a Probate Proceeding in Statutory Probate Court

Except for suits against a personal representative for personal injury, death, or property damages, venue for any cause of action related to a probate proceeding pending in a statutory probate court is proper in the statutory probate court in which the decedent's estate is pending.³²⁴

4. Venue for Personal Injury, Death, or Property Damages

The proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined by Texas Civil Practice and Remedies Code Section 15.007, which states that the Texas Civil Practice and Remedies Code venue provisions control for those types of cases.³²⁵

321. TEX. EST. CODE ANN. § 33.004(a).

322. *Id.* § 33.004(b).

323. *Id.*

324. *Id.* § 33.002.

325. *Id.* § 33.003.

Under the Texas Civil Practice and Remedies Code Section 15.002, lawsuits shall be brought:

- (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
- (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
- (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
- (4) if . . . (1), (2) and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.³²⁶

Although a statutory probate court may have jurisdiction over a wrongful death claim under Texas Estates Code Section 32.007, the venue provision in Texas Estates Code Section 33.003 and Texas Civil Practice and Remedies Code Section 15.002 are mandatory venue provisions that can override the statutory probate court's ability to hear a wrongful death, personal injury, or property damage case.³²⁷ In *Gonzalez*, Mr. Gonzalez resided in Hidalgo County but was killed at a Reliant Energy power plant in Fort Bend County.³²⁸ An estate administration was properly initiated in the Hidalgo County Statutory Probate Court.³²⁹ The administrator of Gonzalez's estate filed a wrongful death and survival action against Reliant in the Hidalgo County Statutory Probate Court.³³⁰ Reliant moved to transfer venue to the district court in Harris County, where its principal place of business is located.³³¹

The Texas Supreme Court noted that the Hidalgo County Statutory Probate Court had subject matter jurisdiction over the wrongful death and survival action under the predecessor to Texas Estates Code Section 32.007, which gives such court concurrent jurisdiction with district courts over such matters.³³² However, the court noted that venue in wrongful death and survival actions is governed by Texas Civil Practice and Remedies Code Section 15.002.³³³ Thus, venue was not proper in Hidalgo County.³³⁴ The court held that Texas Civil Practice and Remedies Code Section 15.007 prohibits a transfer by the statutory probate court to itself of a wrongful death case where venue is not proper in the statutory probate court.³³⁵

326. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1)–(4).

327. See *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 621 (Tex. 2005).

328. *Id.* at 617.

329. *Id.* at 620.

330. *Id.* at 617.

331. *Id.*

332. *Id.* at 620.

333. *Id.*

334. *Id.*

335. *Id.* at 621.

5. Suit for Money Demand Against Estate

In a suit against an executor or administrator (collectively, representative) “to establish a money demand against the estate . . . , the suit may be brought in the county in which the estate is administered.”³³⁶

6. Suit Against Estate for Decedent’s Negligent Acts

If a suit is filed against a representative of an estate “growing out of a negligent act or omission of the [decedent], the suit may be brought in the county in which the negligent act or omission . . . occurred.”³³⁷ This is a permissive venue statute.³³⁸

B. Waiver and Consent to Venue

A party to a lawsuit may expressly or impliedly waive rights conferred upon the party by a venue statute.³³⁹ Venue is a personal privilege that may be waived.³⁴⁰ “An express waiver is shown by clear overt acts evidencing an intent to waive, while an implied waiver occurs when a party, often inadvertently, takes some action inconsistent with his position on the venue issue and therefore is held to have waived his rights thereon.”³⁴¹

A valid Rule 11 agreement to transfer venue of a case will be upheld, as such agreement amounts to an express waiver of the venue issue.³⁴² “A written consent of the parties to transfer the case to another county may be filed with the clerk of court at any time.”³⁴³

In *In re Graham*, the court determined that an estate beneficiary’s execution of a Proof of Death and Other Facts in which the beneficiary states, “Decedent was domiciled and her principal property was located in this county at the date of death” did not waive the beneficiary’s right to later challenge venue of the probate proceeding.³⁴⁴ When the beneficiary signed the affidavit, he was not a party to the probate proceeding, so such affidavit was not a judicial admission because a judicial admission only applies when a party makes a statement of fact that disproves the party’s right of recovery or defense.³⁴⁵ Additionally, the court noted that such statement was a legal

336. TEX. CIV. PRAC. & REM. CODE ANN. § 15.031.

337. *Id.*

338. *Id.*

339. *In re S.D.*, 980 S.W.2d 758, 759 (Tex. App.—San Antonio 1998, pet. denied).

340. *Id.*

341. *Id.* (citing *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309 (Tex. App.—Fort Worth 1988, writ denied)).

342. *Farris v. Ray*, 895 S.W.2d 351, 352 (Tex. 1995).

343. TEX. R. CIV. P. 86(1).

344. *In re Graham*, 251 S.W.3d 844, 849 (Tex. App.—Austin 2008).

345. *Id.*

conclusion that the beneficiary was not qualified to make.³⁴⁶ As a layperson, he could not be expected to know the legal definition of “domicile,” nor could he be expected to know the legal ramification of such statement, and legal counsel did not represent him at the time.³⁴⁷ Because the court will not rely on the beneficiary’s statement regarding domicile, such statement did not operate to waive his later claim that venue was improper.³⁴⁸

C. Venue Disputes

Venue may be proper in more than one county, and in general, the plaintiff is allowed to choose venue first.³⁴⁹ When the county in which the plaintiff files suit is at least a permissive venue, and where no mandatory venue applies, the plaintiff’s venue choice will be respected.³⁵⁰ If a mandatory venue provision allows suit in one of several counties, the plaintiff may choose from among the permissible counties.³⁵¹

Subject to the “first filed” rules in Texas Estates Code Sections 33.052 and 33.053, “a court in which an application for probate proceeding is filed has jurisdiction to determine venue for [that] proceeding and for any matter related to the proceeding,” and such determination “is not subject to collateral attack.”³⁵²

If there is a dispute over the proper venue when there are “probate proceedings involving the same estate . . . commenced in more than one county,” then the court in “the county in which a proceeding was first commenced” has jurisdiction to determine venue, and the proceedings in all other counties are stayed until such determination.³⁵³ This is true even if the first-filed county is not a proper venue.³⁵⁴

Under Section 33.052, “[i]f applications for probate proceedings involving the same estate are filed in two or more courts having *concurrent* venue, the court in which a proceeding involving the estate was first commenced has and retains jurisdiction of the proceeding to the exclusion of the other court[(s)].”³⁵⁵ “The first commenced probate proceeding extends to all of the decedent’s property, including the decedent’s estate property.”³⁵⁶

346. *Id.*

347. *Id.*

348. *Id.*

349. *In re Hannah*, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding).

350. *Id.*

351. *Id.*

352. TEX. EST. CODE ANN. § 33.054.

353. *Id.* § 33.053.

354. *Id.* §§ 33.053, 33.101.

355. *Id.* § 33.052(a) (emphasis added).

356. *Id.* § 33.052(b).

“[A] probate proceeding is considered commenced on the filing of an application for the proceeding that avers facts sufficient to confer venue on the court in which the application is filed.”³⁵⁷

D. When Court Has Subject Matter Jurisdiction but Apparently Not Venue

The Estates Code provisions related to venue for “probate proceedings”—like the probate of wills and administration of estates—are mandatory venue provisions.³⁵⁸ Thus, concerning “probate proceedings,” the general venue provisions in the Texas Civil Practice and Remedies Code do not apply.³⁵⁹ However, for “matters related to probate proceedings,” the issue is more complicated.³⁶⁰

1. Statutory Probate Courts

For a statutory probate court, the Estates Code expressly provides that “venue for any cause of action related to a probate proceeding pending in a statutory probate court is proper” in such court (with a few exceptions).³⁶¹

However, as mentioned above, the Estates Code does provide in Section 33.003 that proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined by the Civil Practices and Remedies Code.³⁶²

2. Other Courts

There is no provision in the Estates Code expressly providing that venue for a cause of action *related to* a probate proceeding pending in a constitutional county court or county court at law is proper in such court.³⁶³ However, according to one court, the probate court’s jurisdiction takes precedence over a venue requirement.³⁶⁴

In *Herring v. Welborn*, Ethel and Lemuel owned land in Wilson County.³⁶⁵ Ethel died, and probate of Ethel’s estate was initiated in San Patricio County Court at Law.³⁶⁶ The dependent administrator entered a

357. *Id.* § 33.051.

358. *In re Graham*, 251 S.W.3d 844, 847 (Tex. App.—Austin 2008, orig. proceeding).

359. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.007.

360. *See* Ullrich v. Ullrich, No. 17-00141, 2019 WL 190442, at *3 (D. N.M. Jan. 11, 2019) (citing *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006)).

361. EST. § 33.002.

362. *See supra* Section III.A.4.1; *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 621 (Tex. 2005).

363. *See* EST. §§ 33.052—33.054.

364. *Herring v. Welborn*, 27 S.W.3d 132, 141 (Tex. App.—San Antonio 2000, writ denied).

365. *Id.* at 134.

366. *Id.*

contract to sell the land to pay estate debts.³⁶⁷ Lemuel refused to sign the deed to the purchasers, so the San Patricio County Court at Law appointed a receiver to carry out the sale.³⁶⁸ Lemuel then sued the administrator and purchasers in Wilson County District Court, where the land is located, seeking a temporary injunction to enjoin the sale of the property.³⁶⁹ The defendants filed pleas to the district court's jurisdiction, which the court granted.³⁷⁰ The court of appeals noted that the San Patricio County Court at Law has the power to hear "all matters incident to an estate," including the power to handle "all actions for trial of title to land incident to an estate."³⁷¹ Lemuel argued that mandatory venue for the real property dispute was in Wilson County, even if a probate proceeding was pending in another county.³⁷² The court noted that it was the legislature's "desire to 'provide a quick and full settlement of a decedent's estate in a single proceeding'" when it broadened the scope of statutory county court jurisdiction.³⁷³ The court stated, "the requirement that suit be brought in the county where the land is located is one of venue or privilege, and not of jurisdiction, and it may be waived."³⁷⁴ In discussing the county court at law's jurisdiction, the court stated, "[t]he broad authority of the San Patricio court . . . exists to the exclusion of the Wilson County district court in matters that are incident to the estate."³⁷⁵ The county court at law had authority to order the sale, and complaints about that order should be brought in that court.³⁷⁶ Importantly, the court stated that "[t]his jurisdictional requirement 'trumps' the venue provision of bringing suit in the county where the land is located."³⁷⁷ "A jurisdictional requirement . . . takes precedence over a venue requirement."³⁷⁸ Further, policy reasons support the court's conclusion, including that "judicial economy favors a consolidated series of actions in one court rather than multiple litigation in many courts."³⁷⁹ The court affirmed the district court's dismissal of the action.³⁸⁰

367. *Id.* at 135.

368. *Id.*

369. *Id.* at 136.

370. *Id.*

371. *Id.* at 137.

372. *Id.* at 139.

373. *Id.* at 138 (quoting Greg Standerfer, *Probate Code Section 5: Jurisdictional Expansion Through Redefinition: Is It Constitutional?*, 37 BAYLOR L. REV. 291, 300 (1985)).

374. *Id.* at 139 (quoting *Camellia Diced Cream Co. v. Chance*, 339 S.W.2d 558, 561 (Tex. App.—Houston [1st Dist.] 1960, no writ).

375. *Id.* at 140.

376. *Id.*

377. *Id.* at 140–41.

378. *Id.* at 141.

379. *Id.*

380. *Id.* at 146.

E. Transfer Procedures

1. Transfer of Probate Proceeding When Venue Is Not Proper

“If it appears to the court at any time before the final order in a probate proceeding is rendered that the court does not have priority of venue over the proceeding,” then the court must, “on the application of an interested person, transfer the proceeding to the proper county.”³⁸¹ The party seeking to transfer venue should file the motion to transfer in the court where the probate proceeding is pending.³⁸²

If the question as to the priority of venue is not raised before a final order in a probate proceeding is announced, then the finality of the order is not affected by any error in venue.³⁸³

The issue of the finality of the order has arisen in a few cases.³⁸⁴ In the Probate Code, the statute said a proceeding could be transferred for want of venue “[i]f it appears to the court at any time before the final decree . . . that the proceeding was commenced in a court which did not have priority of venue.”³⁸⁵ When the Estates Code went into effect in 2014, that section became Texas Estates Code Section 33.102, and the word “decree” changed to “order.”³⁸⁶ There is no evidence that the change was intended as a substantive change; thus, the case law regarding a “final decree” should still be applicable.³⁸⁷

In the case *In re Graham*, a party argued that when a will was admitted to probate, that was a “final decree,” thus prohibiting a subsequent motion to transfer venue of the probate proceeding.³⁸⁸ Graham died in Travis County.³⁸⁹ Her mother, Hanks, filed her will for probate in the Tom Green Constitutional County Court.³⁹⁰ Hanks then disclaimed her interest in the estate, which resulted in the estate passing to Graham’s sons, Preston and Barclay.³⁹¹ Barclay later died, and Hanks sued Preston in Tom Green County, seeking a declaratory judgment that her disclaimer was invalid.³⁹² The constitutional county court transferred the contested issue to the county court at law in Tom Green County.³⁹³ Preston moved to transfer venue of all probate proceedings from Tom Green County to Travis County, asserting that Graham was

381. TEX. EST. CODE ANN. § 33.102.

382. *Id.* § 33.054.

383. *Id.* § 33.102(c).

384. Author’s original thought.

385. TEX. PROB. CODE ANN. § 8A(a) (2013).

386. EST. § 33.102.

387. *See, e.g., In re Graham*, 251 S.W.3d 844, 847–48 (Tex. App.—Austin 2008, orig. proceeding).

388. *Id.* at 848.

389. *Id.* at 847.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

domiciled in Travis County at her death.³⁹⁴ The county court at law denied the motion to transfer, so Preston sought mandamus relief to compel the transfer of the probate proceeding to Travis County.³⁹⁵ The Austin Court of Appeals noted that “final decree” is not defined in the Probate Code.³⁹⁶ The court held that there was not a “final decree” precluding the motion to transfer venue, noting that an independent administration “is not considered closed until all property has been distributed and debts have been paid as fully as the assets allowed.”³⁹⁷

2. Transfer for Convenience

A court can order a probate proceeding to be transferred to a proper court in a different county in the state “if it appears to the court at any time before the proceeding is concluded that the transfer would be in the best interest of: (1) the estate; or (2) if there is no administration of the estate, the decedent’s heirs or beneficiaries under the decedent’s will.”³⁹⁸

F. The Proceeding to Determine Venue

1. Trial Court

As *Cunningham* notes, “[t]he Texas Rules of Civil Procedure govern proceedings in probate matters except in those instances in which a specific provision has been made to the contrary.”³⁹⁹ The motion to transfer must “state that the action should be transferred to another specified county of proper venue” because:

- (a) The county where the action is pending is not a proper county; or
- (b) Mandatory venue of the action [is] in another county [and the motion must clearly designate the statutory authority for mandatory venue].⁴⁰⁰

The motion needs to state both the legal and factual basis for the transfer of the action and request transfer to a specified county of mandatory or proper

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.* at 848.

398. TEX. EST. CODE ANN. § 33.103.

399. *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 812 (Tex. 1983).

400. TEX. R. CIV. P. 86(3).

venue.⁴⁰¹ Verification of the motion is not required, but the motion may be accompanied by supporting affidavits.⁴⁰²

The trial court should decide the motion to transfer venue “promptly” and in a reasonable time before the commencement of the trial on the merits.⁴⁰³ The movant must request a setting on the motion to transfer, and except on leave of court, each party is entitled to at least forty-five days’ notice of the hearing.⁴⁰⁴ Except on leave of court, any response or opposing affidavits must be filed at least thirty days before the hearing.⁴⁰⁵ Except on leave of court, any reply the movant wishes to file must be filed no later than seven days before the hearing.⁴⁰⁶

The party who seeks to maintain venue in a county generally has the burden to prove that venue is maintainable in the county of the suit.⁴⁰⁷ “A party who seeks to transfer venue . . . to another specified county . . . has the burden to make proof . . . that venue is maintainable in the county to which transfer is sought.”⁴⁰⁸

The court makes the venue determination, and there is no right to a jury for the venue determination.⁴⁰⁹ The trial court evaluates venue based on the pleadings and affidavits.⁴¹⁰ Venue questions are to be determined based on “the facts existing at the time the cause of action that is the basis of the suit accrued.”⁴¹¹

No factual proof concerning the merits of the case is required to establish venue, and no party is ever required for venue purposes to prove the existence of a cause of action.⁴¹² At the hearing, the pleadings shall be taken as conclusive on the issue of the existence of a cause of action.⁴¹³

In *Hannah*, the Court found that “[p]roperly pleaded venue facts ‘shall be taken as true unless specifically denied by the adverse party.’”⁴¹⁴ The Texas Rules of Civil Procedure state that “[a] ‘specific denial’ calls for more

401. See *id.* at 87; see also *Baylor Const. Co. v. E. Martinez Sandblasting & Painting*, No. 13-03-087-CV, 2004 WL 1490088, at *1 (Tex. App.—Corpus Christi—Edinburg July 1, 2004, no pet.) (mem. op.) (Baylor only alleged a factual basis for transfer of venue and not a legal basis; thus, it did not make a proper challenge to venue. Verification of the motion is not required, but the motion may be accompanied by supporting affidavits.).

402. See TEX. R. CIV. P. 86(3), 87.

403. *Id.* 87(1).

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* 87(2)(a).

408. *Id.*

409. *Maddox v. Surber*, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ); *id.* at 87(4).

410. *In re Hannah*, 431 S.W.3d 801, 807 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a)); TEX. R. CIV. P. 87(3)(b).

411. TEX. CIV. PRAC. & REM. ANN. § 15.006.

412. *Id.* § 15.064(a); TEX. R. CIV. P. 87(3)(a).

413. TEX. R. CIV. P. 87(3)(a).

414. *In re Hannah*, 431 S.W.3d at 807 (citing TEX. R. CIV. P. 87(3)(a)).

than just the use of the words ‘We specifically deny.’”⁴¹⁵ Furthermore, “[s]pecific denial’ of a venue fact requires that the fact *itself* be denied.”⁴¹⁶ If a party does not specifically deny venue facts, then the other party has no burden to offer *prima facie* proof of the venue facts.⁴¹⁷ However, a party who can establish mandatory venue in another county will still prevail on the motion to transfer even if the party fails to deny the plaintiff’s venue facts specifically.⁴¹⁸

Where a defendant specifically denies the plaintiff’s venue allegations, “the plaintiff must present prima facie proof that venue is proper’ in the county of suit.”⁴¹⁹

Furthermore, “[p]rima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading.”⁴²⁰ “Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.”⁴²¹ “Prima facie proof is not subject to rebuttal, cross-examination, impeachment or even disproof.”⁴²²

If a claimant has adequately pleaded and made prima facie proof that venue is proper in the county of suit . . . then the cause shall not be transferred but shall be retained in the county of suit, *unless* the motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending . . . or on an established ground of mandatory venue,

or if the defendant brings forth conclusive evidence that destroys the plaintiff’s prima facie proof.⁴²³ A mandatory venue is established when the party relying upon mandatory venue presents prima facie proof of it.⁴²⁴

“If the plaintiff fails to establish proper venue, the trial court must transfer venue to the county [requested] in the defendant’s motion to transfer,

415. *Marantha Temple, Inc. v. Enter. Prod. Co.*, 833 S.W.2d 736, 740 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

416. *Id.* at 741.

417. *See Bleeker v. Villareal*, 941 S.W.2d 163, 175 (Tex. App.—Corpus Christi—Edinburg 1996, writ dismissed).

418. *In re Fort Bend County*, 278 S.W.3d 842, 845 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

419. *In re Hannah*, 431 S.W.3d at 807; TEX. R. CIV. P. 87(2)(b).

420. TEX. R. CIV. P. 87(3)(a).

421. *Id.*

422. *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993).

423. TEX. R. CIV. P. 87(3)(c); *In re Hannah*, 431 S.W.3d at 807; *Maddox v. Surber*, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ) (citing TEX. R. CIV. P. 87(3)(c)) (stating that if a party offers prima facie evidence that the decedent was a resident of a county at the time of her death and that venue was proper in Harris County, the court was correct in disregarding the other party’s controverting evidence and ruling for the first party) (emphasis added).

424. TEX. R. CIV. P. 87(3)(c).

provided that the defendant has requested transfer to another county of proper venue,” of which the “defendant has the burden to provide prima facie proof.”⁴²⁵

2. *Interlocutory Appeal*

Generally, there is no interlocutory appeal permitted based on the venue determination.⁴²⁶ A trial court’s venue determination is generally interlocutory and not reviewable until final judgment.⁴²⁷

There has been some question about whether venue determinations in probate proceedings are subject to interlocutory appeal.⁴²⁸ In a proceeding to probate a will, there is “an exception to the general rule requiring a final judgment in probate proceedings because multiple judgments may be rendered on discrete issues before the entire probate proceeding is concluded.”⁴²⁹ However, not all probate orders are appealable, and unless there is an:

“[E]xpress statute . . . declaring the phase of the probate proceedings to be final and appealable,” the probate order must have “sufficient attributes of finality to confer appellate jurisdiction” by adjudicating a “substantial right” or disposing of “all issues in the phase of the proceeding for which it was brought.”⁴³⁰

In the case *In re Estate of Griffith*, the Dallas Court of Appeals noted no express statute allowing the interlocutory appeal of a venue determination in a probate matter.⁴³¹ Further, the court determined that the probate court’s order denying a motion to transfer venue did not affect substantial rights of any party and did not dispose of all issues and parties.⁴³² Thus, such an order was not appealable.⁴³³

3. *Mandamus*

“Generally, mandamus relief is appropriate only [if] the trial court clearly abused its discretion and the relator has no adequate remedy by

425. *In re Hannah*, 431 S.W.3d at 807.

426. TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(a); TEX. R. CIV. P. 87(6).

427. *In re Est. Griffith*, No. 05-19-01144-CV, 2020 WL 113675, at *1 (Tex. App.—Dallas, Jan. 10, 2020, no pet.) (mem. op.).

428. *Id.*

429. *Id.*

430. *Id.* (quoting *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995)) (citations omitted).

431. *Id.* at *2.

432. *Id.*

433. *Id.*

appeal.”⁴³⁴ The party seeking relief bears the burden of demonstrating entitlement to mandamus relief.⁴³⁵

Although venue determinations are generally “incidental trial rulings that are correctable on appeal,” “a party may apply for a writ of mandamus with an appellate court to enforce *mandatory* venue provisions.”⁴³⁶ Because it is presumed that there is no adequate remedy for a failure to enforce a mandatory venue provision, there is no requirement to show a lack of adequate remedy on appeal.⁴³⁷

A mandamus involving mandatory venue is reviewed under an abuse of discretion standard.⁴³⁸ “To satisfy the clear abuse of discretion standard, the relator must show ‘that the trial court could reasonably have reached only one decision.’”⁴³⁹

A court abuses its discretion if it: “(1) reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law; (2) clearly fails to analyze or apply the law correctly; or (3) acts without reference to any guiding rules or principles.”⁴⁴⁰ “The trial court has no discretion in determining the legal principles controlling its ruling or in applying the law to the facts.”⁴⁴¹ When a trial court refuses to transfer a case to the defendant’s chosen venue, the courts of appeal must review such cases to see whether the lower court failed to analyze or correctly apply the law.⁴⁴²

“An application for writ of mandamus must be filed before the later of: (1) the 90th day before the date the trial starts; or (2) the 10th day after the date the party receives notice of the trial setting.”⁴⁴³

4. Appeal

On appeal from the trial of the merits, if venue was improper, such determination is never harmless error and is always reversible error.⁴⁴⁴ “In determining whether venue was . . . proper, the appellate court [must] consider the entire record, including the trial on the merits.”⁴⁴⁵ The appellate

434. *In re Hannah*, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (per curiam).

435. *Id.*

436. *Id.* (citing *Bridgestone/Firestone Inc. v. Thirteenth Court of Appeals*, 929 S.W.2d 440, 441 (Tex. 1997)) (emphasis added); TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642.

437. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642.; *In re Mo. Pac. R.R.*, 998 S.W.2d 212, 215–16 (Tex. 1999).

438. *In re Mo. Pac. R.R.*, 998 S.W.2d at 215; *In re Hannah*, 431 S.W.3d at 807.

439. *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

440. *In re Hannah*, 431 S.W.3d at 806.

441. *In re Mo. Pac. R. Co.*, 998 S.W.2d at 216.

442. *Id.*

443. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642.

444. *Id.* § 15.064(b).

445. *Id.*

court is to “conduct an independent review of the entire record to determine whether any probative evidence supports the trial court’s decision.”⁴⁴⁶ When reviewing the evidentiary record (viewed in the light most favorable to the venue ruling), the appellate court does not defer to the trial court’s application of the law.⁴⁴⁷ The court must affirm the judgment if any probative evidence supports a ruling for venue in the county of the rendered judgment.⁴⁴⁸ If no probative evidence exists, then the court must reverse the judgment.⁴⁴⁹

IV. CONCLUSION

As shown by this Article, the law of jurisdiction and venue in probate proceedings is far more complex than expected.⁴⁵⁰ The particular court and location where the case is heard depend on factors ranging from the first pleader’s choice, statutory mandate, common law, and sometimes even local politics.⁴⁵¹ A practitioner with a good grasp of the intricate rules can often navigate their client to a court that might be more favorable than another court, whether because the court has the specialized knowledge of a statutory probate court or because the venue is more favorable for the client.⁴⁵² This Article is intended to serve as a resource to guide practitioners in such endeavors.⁴⁵³

446. *In re* A.D.P., 281 S.W.3d 541, 545 (Tex. App.—El Paso 2008, no pet.).

447. *Id.*

448. *Id.*

449. *Id.*

450. *See supra* Parts I–III.

451. *See supra* Parts II–III.

452. *See supra* Parts II–III.

453. *See supra* Parts I–III.