INTERACTION OF PROBATE COURT AND FAMILY LAW

HONORABLE GUY HERMAN, Austin
Travis County Probate Court Number One

JIMMY VAUGHT, Austin
Law Offices of Edwin J. (Ted) Terry, Jr.

Authors:

EDWIN J. (TED) TERRY, JR.
JIMMY VAUGHT
KARL E. HAYS
Law Offices of Edwin J. (Ted) Terry, Jr.
805 W. 10th, Suite 300
Austin, Texas 78701
(512) 476-9597
Fax: (512) 476-6106

The authors thank Lisa H. Jamieson for permission to use substantial portions of "Family Law and Guardianship Law: Whenever the Two Shall Meet," Guardianship Issues in Texas Probate and Family Law Courts (State Bar of Texas 1998), and Katie Pearson Klein for permission to use substantial portions of "The Disabled Adult Child of Marriage," 23rd Annual Advanced Family Law Course (State Bar of Texas 1998)

FAMILY LAW ON THE FRONT LINES
HOW TO EFFECTIVELY AND EFFICIENTLY SERVE TYPICALCLIENTS
THE UNIVERSITY OF TEXAS LAW SCHOOL
April 26-27, 2001

TABLE OF CONTENTS

INTERACTION OF PROBATE COURT AND FAMILY LAW

I. INTRODUCTION

Family law and probate matters often overlap, and many times there may be conflicts between the two bodies of law and the court system applying those laws. This article is intended to help practitioners know the areas of conflict and overlap between the

Family Code and the Probate Code. These provisions may conflict occasionally, and other times a practitioner will need to evaluate a situation to determine whether the provisions under the Family Code or the Probate Code best meet his or her client's needs.

II. FAMILY LAW AND PROBATE

A. Guardian or Next Friend for Incapacitated Spouse

Prior to 1988, a guardian or next friend could not obtain a divorce for a person who was incapacitated. *See Hart v. Hart*, 705 S.W.2d 332 (Tex. App.– Houston 1986, writ ref'd n.r.e.) (the next friend could not file a divorce for the mentally incompetent person because the next friend lacked standing to maintain the suit). In 1988, the Texas Supreme Court in *Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575 (Tex. 1988), disapproved *Hart* and other cases holding to the contrary.

In *Wahlenmaier*, Mary Wahlenmaier filed suit for divorce from Leonard Wahlenmaier. When she filed for divorce, Mary was competent. Subsequently Mary's metal condition deteriorated and she was placed in a nursing home. At the time of the final hearing, Mary's mental condition was such that she was unable to testify concerning her desire for a divorce. The court appointed a guardian ad litem to represent her interests and proceeded to hear testimony concerning the grounds for divorce. A daughter and son from Mary's first marriage as well as her sister and a neighbor testified that there was substantial discord in the marriage and that there was no possibility of reconciliation. Leonard testified that he did not want a divorce. The trial court granted the divorce. The El Paso Court of Appeals held that a court appointed guardian ad litem or next friend could exercise the rights of a mentally ill person to obtain a divorce. 750 S.W.2d at 839. The Supreme Court approved the Court of Appeals holding that a guardian ad litem or next friend can exercise the right of a mentally ill person to obtain a divorce. 762 S.W.2d at 575. *See Stubbs v. Ortega*, 977 S.W.2d 718, 722 (Tex. App. – Fort Worth 1998, pet. denied) (allowing guardian to petition for divorce on behalf of ward does not violate Texas public policy); TEX. HEALTH & SAFETY CODE § 576.001.

If a guardian wishes to seek or to participate in a divorce proceeding on behalf of a ward, application for permission to exercise those powers should be brought in the probate court having jurisdiction over the guardianship proceedings. The probate court can then issue an order authorizing divorce proceedings and allowing the guardian to participate in those divorce proceedings or bring the divorce proceedings in district court. However, it is unclear what test must be used by the probate court in determining whether a guardian may bring a divorce action on behalf of the ward. A guardian is a fiduciary on behalf of the ward, and any decisions made on behalf of the ward must be for the benefit of the ward and in the ward's best interest. In order for a divorce proceeding to be approved by the probate court, the probate court is going to look to whether the proceedings are in the best interest of the ward and/or the ward's estate. The "test" is further complicated when there are minor children of the marriage whose best interest must also be considered.

B. Probate Jurisdiction Over Family Law Matters

1. <u>Pertinent Sections of the Probate Code</u>

a. Section 606 - District Court and Other Court of Record Jurisdiction

(a) The district court has original control and jurisdiction over guardians

and wards under regulations as may be prescribed by law.

(b) In those counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships, mental health matters, and other matters covered by this chapter shall be filed and heard in the county court, except that in contested guardianship matters, the judge of the county court may on the judge's own motion, or shall on the motion of any party to the proceeding, according to the motion, request as provided by Section 25.0022, Government Code, the assignment of a statutory probate court judge to hear the contested portion of the proceeding, or transfer the contested portion of the proceeding to the district court, which may hear the transferred contested matters as if originally filed in the district court. If the judge of the county court has not transferred a contested guardianship matter to the district court at the time a party files a motion for assignment of a statutory probate court judge, the county judge shall grant the motion and may not transfer the matter to district court unless the party withdraws the motion. A statutory probate court judge assigned to a contested probate matter as provided by this subsection has for that matter the jurisdiction and authority granted to a statutory probate court by Sections 607 and 608 of this code. The county court continues to exercise jurisdiction over the management of the guardianship with the exception of the contested matter until final disposition of the contested matter is made by the assigned judge or the district court. In contested matters transferred to the district court as provided by this subsection, the district court, concurrently with the county court, has the general jurisdiction of a probate court. On resolution of all pending contested matters, the district court shall transfer the contested portion of the guardianship proceeding to the county court for further proceedings not inconsistent with the orders of the district court. If a contested portion of the proceeding is transferred to a district court under this subsection, the clerk of the district court may perform in relation to the transferred portion of the proceeding any function a county clerk may perform in that type of contested proceeding.

(c) In those counties in which there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships, mental illness matters, or other matters addressed by this chapter shall be filed and heard in those courts and the constitutional county court, rather than in the district courts, unless otherwise provided by the legislature, and the judge of a county court may hear any of those matters sitting for the judge of any other county court. Except as provided by Section 608 of this code, in contested guardianship matters, the judge of the constitutional county court may on the judge's own motion, and shall on the motion of a party to the proceeding, transfer the proceeding to the statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court. The court to which the proceeding is transferred may hear the

proceeding as if originally filed in the court.

(d) A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as guardian.

(e) A court that exercises original probate jurisdiction has the power to hear all matters incident to an estate. When a surety is called on to perform in place of a guardian or former guardian, a court exercising original probate jurisdiction may award judgment against the guardian or former guardian in favor of the surety of the guardian or former guardian in the same suit, even if the ward has died, regained capacity, or the ward's disabilities of minority have been removed.

(f) A final order of a court that exercises original probate jurisdiction is appealable to a court of appeals.

b. Section 607 - Matters Appertaining and Incident to an Estate

(a) In a proceeding in a constitutional county court or a statutory county court at law, the phrases "appertaining to estates" and "incident to an estate" in this chapter include the appointment of guardians, the issuance of letters of guardianship, a claim by or against a guardianship estate, all actions for trial of title to land incident to a guardianship estate and for the enforcement of liens incident to a guardianship estate, all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate.

(b) In a proceeding in a statutory probate court or district court, the phrases "appertaining to estates" and "incident to an estate" in this chapter include the appointment of guardians, the issuance of letters of guardianship, all claims by or against a guardianship estate, all actions for trial of title to land and for the enforcement of liens on the land, all actions for trial of the right of property, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate. A statutory probate court, in the exercise of its jurisdiction and notwithstanding any other provision of this chapter, may hear all suits, actions, and applications filed against or on behalf of any guardianship; all such suits, actions, and applications are appertaining to and incident to an estate. In a situation in which the jurisdiction of a statutory probate court is concurrent with that of a district court, a cause of action appertaining to or incident to a guardianship estate shall be brought in a statutory probate court rather than in the district court.

(c) In all actions by or against a person in the person's capacity as a guardian, a statutory probate court has concurrent jurisdiction with a district court.

(d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.

(e) Subsection (d) of this section applies whether or not the matter is

appertaining to or incident to a guardianship estate.

Thus matters "appertaining and incident to an estate" include (1) the appointment of guardians, (2) the issuance of letters of guardianship, (3) all claims by or against a guardianship estate, (4) all actions for trial of title to land and for the enforcement of liens on the land, (5) all actions for trial of the right of property, (6) all matters relating to the settlement, partition, and distribution of a guardianship estate, (7) all suits, actions, and applications filed against or on behalf of any guardianship, and (8) all actions by or against a person in the person's capacity as a guardian. In addition, a statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy whether or not the matter is appertaining to or incident to a guardianship estate.

c. Section 608 - Transfer of Guardianship Proceeding

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

Thus, both a cause of action appertaining to or incident to a guardianship estate that is pending in the statutory probate court and a cause of action in which a personal representative of an estate pending in the statutory probate court is a party may be transferred to statutory probate court.

d. Section 609 - Contested Guardianship of the Person of a Minor

(a) If an interested person contests an application for the appointment of a guardian of the person of a minor or an interested person seeks the removal of a guardian of the person of a minor, the judge, on the judge's own motion, may transfer all matters relating to the guardianship of the person of the minor to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Family Code is pending.

(b) The probate court that transfers a proceeding under this section to a court with proper jurisdiction over suits affecting the parent-child relationship shall send to the court to which the transfer is made the complete files in all matters affecting the guardianship of the person of the minor and certified copies of all entries in the minutes. The transferring court shall keep a copy of the transferred files. If the transferring court retains jurisdiction of the guardianship of the estate of the minor or of another minor who was the subject of the suit, the court shall send a copy of the complete files to the court to which the transfer is made and shall keep the original files.

(c) The court to which a transfer is made under this section shall apply the procedural and substantive provisions of the Family Code, including Sections 155.005 and 155.205, in regard to enforcing an order rendered

by the court from which the proceeding was transferred.

2. *In Re Graham*, 971 S.W.2d 56 (Tex. 1998)

Gitta and Richard Milton were husband and wife and had one child. As the result of a failed suicide attempt in April 1995, Richard Milton was in a vegetative state and residing in a nursing center. In July 1995, Gitta Milton was appointed guardian of the person and estate of her husband by the probate court. In September 1996, an attorney ad litem was appointed for Richard Milton after a court investigator's report raised questions concerning the proper management of the guardianship property by the guardian, Gitta Milton. Subsequently, the probate court issued a show cause order requiring Gitta Milton to appear and show cause why she should not be removed as guardian "on the grounds appearing to support belief that she has misapplied, embezzled, or removed from the state, or is about to misapply, embezzle, or remove from the state, all or any part of the property committed to her care." At the show cause hearing, the probate court instructed Gitta Milton to take various corrective actions and supply information to the attorney ad litem for Richard Milton.

In January 1997, while she was still the guardian of the person and estate of her husband, Gitta Milton filed for divorce in the Travis County District Court. The next day, Gitta Milton resigned as guardian of the person and estate of her husband. Subsequently, the attorney ad litem for Richard Milton was appointed the guardian of his estate, and Richard Milton's mother was appointed guardian of his person. Afterward, the guardian of Richard Milton's estate filed a motion to transfer the divorce to probate court. In February 1997, the probate court heard and granted the motion to transfer the divorce pending in district court to probate court. Subsequently, Gitta Milton filed a motion for leave to file petition for writ of mandamus in the Austin Court of Appeals which was granted. *See Milton v. Herman*, 947 S.W.2d 737 (Tex. App. -- Austin 1997, orig. proceeding). The Court of Appeals held that a statutory probate court lacked the statutory authority to transfer a divorce and parent-child proceeding pending in district court to the statutory probate court. *Id.* at 742.

The guardian of Richard Milton's estate filed a mandamus in the Texas Supreme Court which was granted. In *In Re Graham*, 971 S.W.2d 56 (Tex. 1998), the Texas Supreme Court held that a statutory probate court has authority under section 608 of the Probate Code to transfer to itself from district court a divorce proceeding when one party to the divorce is a ward of the probate court. More specifically, the Supreme Court determined that "the outcome of this divorce proceeding, which involves child support but not child custody or visitation, necessarily appertains to Mr. Milton's estate because it directly impacts the assimilation, distribution, and settlement of his estate." 971 S.W.2d at 59 (citing TEX. PROB. CODE § 607 and TEX. FAM. CODE § 3.63). The Supreme Court also concluded that "[b]ecause Mr. Milton's child support obligations will be paid from his guardianship estate, the probate court can effectively and efficiently supervise the payments to ensure that the interests of both Mr. Milton and his child are protected." *Id.* at 60.

The Texas Supreme Court based its holding upon section 608 of the Probate Code. Section 608, effective when *In Re Graham* was decided, provided for transfer to a statutory probate court of a cause of action in another court when (1) the court exercising the power to transfer a cause of action under section 608 is a statutory probate court, (2) there is a guardianship pending in the statutory probate court, (3) there is a cause of action

pending in a district, county or statutory court, and (4) the cause of action is appertaining to and incident to the guardianship estate pending in the statutory probate court. In 1999, the Legislature expanded section 608 to also include a cause of action in which a personal representative of an estate pending in the statutory probate court is a party.

In *In Re Graham*, the Supreme Court discussed "appertaining or incident to an estate" and probate jurisdiction:

> A cause of action is appertaining or incident to an estate if section 607 of the Probate Court explicitly defines it as such or if the controlling issue in the suit is the settlement, partition, or distribution of an estate. *See Palmer v. Coble Wall Trust Co., Inc.*, 851 S.W.2d 178, 182 (Tex. 1992). Section 607 defines the term "appertaining to or incident to an estate" to include, among other things, "all actions for trial of the right of property incident to a guardianship estate, and generally all matters relating to the settlement, partition, and distribution of a guardianship estate." TEX. PROB. CODE § 607(b)....
>
> * * * *
>
> The Probate Code confers jurisdiction on statutory probate courts to hear matters appertaining to or incident to a guardianship estate. *See* TEX. PROB. CODE § 607(b) ("In a situation in which the jurisdiction of a statutory probate court is concurrent with that of a district court, a cause of action appertaining to or incident to a guardianship estate shall be brought in a statutory probate court rather than in the district court."); TEX. PROB. CODE § 606(c) ("In those counties in which there is a statutory probate court . . . all applications, petitions and motions regarding guardianships . . . or other matters addressed by this chapter shall be filed and heard in those courts . . ."); TEX. PROB. CODE § 606(e) ("A court that exercises original probate jurisdiction has the power to hear all matters incident to an estate."). Thus, current Texas law does not impede a probate court from providing all necessary relief in a divorce action when it properly transfers to itself a cause of action appertaining or incident to a guardianship estate.
>
> * * * *
>
> Courts have determined that a variety of matters are appertaining or incident to an estate. *See Lucik v. Taylor*, 596 S.W.2d 514, 516 (Tex. 1980) (holding that suits "incident to an estate" include determining whether property was part of marital estate); *Potter v. Potter*, 545 S.W.2d 43, 44 (Tex. Civ. App. — Houston [1st Dist.] 1976, writ ref'd n.r.e.) (concluding that probate court has jurisdiction to determine whether shares of stock were part of community estate or separate property); *see also Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 582 (Tex. 1993) (recovery of delinquent ad valorem taxes); *English v. Cobb*, 593 S.W.2d 674, 674 (Tex. 1979) (conversion of estate's bank account); *Parr v. White*, 543 S.W.2d 440, 444 (Tex. Civ. App. -- Corpus Christi 1976, writ ref'd n.r.e.) (probate court determines who has the right to control, transfer, and vote the stock of decedent). ...

971 S.W.2d at 58-59.

The Supreme Court also recognized the significance of the same court hearing all

of the issues in the case and the broad grant of statutory probate court jurisdiction:

> The Probate Code provides that these claims may be resolved in the same court by the same judge. *See* TEX. PROB. CODE §§ 607 - 608. This interpretation comports with legislative intent as evidenced by the Legislature's persistent expansion of statutory probate court jurisdiction over the years. *See Palmer*, 851 S.W.2d at 181 ("In 1985, the legislature responded to *Seay* by amending the Texas Probate Code to broaden statutory probate court jurisdiction."); *Seay v. Hall*, 677 S.W.2d 19, 21, 25 (Tex. 1984) (noting that the Legislature recognizes probate court expertise in handling estate matters but concluding that statutory probate courts do not have jurisdiction to hear wrongful death and survival claims).

971 S.W.2d at 59-60.

The Supreme Court also acknowledged that statutory probate courts were qualified to handle issues unique to a suit affecting the parent-child relationship such as child support:

> That this case involves child support issues does not alter our conclusion. The Probate Code affirmatively grants probate courts the authority to order child support payments after balancing the child's interests with the ward's interests. *See* TEX. PROB. CODE § 776A(a)-(b) (granting probate courts broad authority to order expenditure of funds from ward's estate for the education and maintenance of ward's spouse or dependents after considering, among other things, the circumstances of ward, ward's spouse, and ward's dependents). The Probate Code also charges the probate court with monitoring payments from the guardianship estate. *See, e.g.*, TEX. PROB. CODE § 671(a) (requiring courts to determine whether guardian is performing all duties that pertain to ward and ward's estate); TEX. PROB. CODE § 741 (requiring the probate court to review guardian's accounting of ward's estate at least annually); TEX. PROB. CODE § 742 (describing when court may authorize payments of claims made against the guardianship estate after reviewing guardian's accounting); TEX. PROB. CODE § 743 (requiring probate court to review guardian's annual report of "disbursements for the support and maintenance of the ward and . . . the ward's dependents"). Because [the Ward's] child support obligations will be paid from his guardianship estate, the probate court can effectively and efficiently supervise the payments to ensure that the interests of both Mr. Milton and his child are protected.

971 S.W.2d at 60. The Supreme Court also disagreed with the argument that a probate court does not have authority to transfer to itself a divorce proceeding because only district courts have the power to grant all requested relief in family matters. 971 S.W.2d at 58.

3. Divorce

When there is an existing guardianship and the guardian or spouse files for divorce in district court, it is now clear that the probate court may transfer the divorce proceeding to probate court. In fact, a divorce proceeding may be filed in probate court. In many ways, it makes sense to transfer the divorce proceeding to probate court. For example, a

guardian cannot enter into a settlement agreement incident to divorce on behalf of the ward without prior approval from the probate court. *See* TEX. PROBATE CODE § 774(a)(4). Without the transfer, any settlement in the divorce proceedings would not only be subject to approval by the district court but also the probate court. Failure of the guardian to obtain approval to enter into the settlement agreement would make the settlement agreement void as to that party. Furthermore, most divorce proceedings will have a significant impact on collecting, partitioning, and distributing the guardianship estate. In fact, the practical effect of the divorce will be to partition, distribute and probably consume most of the guardianship estate. Common sense suggests that the divorce and the guardianship be heard in the same court and by the same judge.

4. Suits Affecting the Parent-Child Relationship

Apparently a suit affecting the parent-child relationship ("SAPCR") may not be filed in probate court if a district court has already obtained continuing jurisdiction over the parent-child relationship. *See Fleming v. Easton*, 998 S.W.2d 252, 254 (Tex. App. – Dallas 1999, no pet.). In *Fleming*, Marla and Chris Easton were divorced in 1993. The decree provided that Chris Easton pay child support and that the provision for child support would not terminate on his death but would become an obligation of his estate. Chris Easton died in 1994. After the probate court admitted Chris Easton's will to probate and issued letters testamentary, Marla Easton Fleming filed a motion to confirm child support arrearages and to modify the divorce decree to provide for a lump sum payment of all future child support in probate court. *Id.* at 253-54. The probate court granted the motion to confirm child support arrearages but denied the motion to modify the divorce decree. The Dallas Court of Appeals dismissed the case because the probate court did not have jurisdiction. The Court of Appeals recognized that collection of delinquent child support and modification of support orders have consistently been treated as matters affecting the parent-child relationship over which the court rendering the divorce decree has continuing and exclusive jurisdiction. *Id.* at 254. The Court of Appeals concluded that since Marla Easton Fleming's claims involve matters pertaining to the parent-child relationship between Chris Easton and their child, the district court that had previously acquired jurisdiction over the child through the divorce proceeding retains continuing and exclusive jurisdiction to decide these issues. *Id.* at 255. However, the Court of Appeals qualified its holding, stating that the probate court would have had to divest the district court of its jurisdiction before deciding the case and that there was nothing in the record indicating that a transfer or other form of permissible divestiture had occurred. *Id.* (referencing *In Re Graham*, 971 S.W.2d at 58). If the divorce was filed in probate court or a SAPCR had previously been transferred to probate court, the probate court would have continuing and exclusive jurisdiction over matters affecting the parent-child relationship and a SAPCR could be filed in probate court. However, *Fleming* would not apply in all circumstances. For example, when one of the spouses dies after the divorce was granted or the parties had signed an agreement incident to divorce but the divorce had not been granted, the agreement incident to divorce and/or the divorce decree could be enforced in the probate court in which the deceased spouse's estate was being probated.

Undoubtedly, a SAPCR may be transferred to probate court especially when it involves child support issues since it would have a bearing on the settlement, partition and distribution of the guardianship estate. *See In Re Graham*, 971 S.W.2d at 60. Even when a petition to modify the parent-child

relationship involves conservatorship and possession and access, transfer to probate court may be appropriate. For example, the petition to modify could affect the rights and duties of a conservator with regard to the use of the guardianship estate for the support, medical care and education of the minor child. This would potentially have a direct bearing on the settlement, partition and distribution of the guardianship estate. Furthermore, a petition to modify the parent-child relationship involving conservatorship and possession and access would arguably constitute a cause of action appertaining to or incident to a guardianship estate, an action by or against a person in the person's capacity as a guardian, or a cause of action in which a personal representative of an estate is a party.

In addition, the probate court can provide adequate and complete relief. The probate court can determine all of the financial issues such as authorizing the expenditure of funds from the guardianship estate for the education, medical expenses, support and maintenance of the minor child. Furthermore, there is no reason why the probate court could not appoint the managing conservator of the child and make decisions concerning possession and access. This would simply permit probate courts to efficiently and effectively resolve issues concerning the guardianship estate. *See generally Henry v. Lagrone*, 842 S.W.2d 324, 327 (Tex. App. – Amarillo 1992, no writ). In fact, the Probate Code specifically requires the probate court to determine which parent or other person will be the guardian of a minor child based upon the best interests of the child. *See* TEX. PROB. CODE § 676. This is the same standard articulated in the Family Code for conservatorship and possession and access. *See* TEX. FAM. CODE § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."). Furthermore, the guardianship of the person has essentially the same powers and duties as the managing conservator of a minor. *Guardianship of Henson*, 551 S.W.2d 136, 139-40 (Tex. Civ. App. – Corpus Christi 1977, writ ref'd n.r.e.); *Little v. Little*, 576 S.W.2d 493, 495 (Tex. Civ. App. – San Antonio 1979, no writ); *Cruz v. Scanlan*, 682 S.W.2d 422, 423 (Tex. App. – Houston [1st Dist.] 1984, no writ).

Even if the SAPCR is not appertaining to and incident to the guardianship estate or a cause of action in which a personal representative of an estate is a party, the probate court might exercise pendent and ancillary jurisdiction over the SAPCR to promote judicial efficiency and economy. *See* TEX. PROBATE CODE § 607(d). For example, if the probate court had jurisdiction over the child support portion of a SAPCR but not over the conservatorship or possession/access portions of a SAPCR, the probate court could transfer the SAPCR to itself and arguably exercise pendent and ancillary jurisdiction over the conservatorship or possession/access portions even if they are not clearly within probate court jurisdiction.

"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 in a federal court.'" *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 719 n.3 (Tex. 1990) (quoting *Owen Equip.& Erection Co. v. Kroger*, 437 U.S. 365, 376, 98 S.Ct. 2396, 2404, 57 L.Ed.2d 274 (1987)) *See W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 871 (5th Cir.1990). Pendent jurisdiction involves jurisdiction over parties not named in claims properly before the court and over whom there is not an independent basis of jurisdiction. *See Eagle Properties, Ltd.*, 807 S.W.2d at 719 n. 3.; *Sabine Gas Transmission Co. v. Winnie*

Pipeline Co., 15 S.W.3d 199, 201 n. 4 (Tex. App. – Houston (14th Dist.) 2000, no pet.). In other words, pendent and ancillary jurisdiction relate to claims that are connected to causes of action that are clearly within probate court jurisdiction, but are not in themselves causes of action clearly within probate court jurisdiction. The purpose of pendent and ancillary jurisdiction is to permit the hearing of tangentially related issues if hearing these case would promote judicial economy. Combining the guardianship proceeding and all portions of the SAPCR, which may have several identical and overlapping issues, would promote judicial efficiency and economy and also possibly avoid potential conflicts between the district court and the probate court. If the cases were consolidated, one hearing could resolve all relevant issues and the parties would not incur the expense and uncertainty associated with litigating in two courts. Since only one court should arguably control the litigation, the probate court is in a unique position to insure that the interests of ward and the minor child are protected and fairly represented, having a familiarity and history with the guardianship estate. Since the probate court would have jurisdiction over the guardianship, the probate court could transfer the SAPCR to itself and arguably exercise pendent and ancillary jurisdiction over portions of the SAPCR which may not be clearly within probate court jurisdiction.

5. Incapacity During Pendency of Divorce or SAPCR

What if one of the spouses becomes incapacitated after the divorce or SAPCR is filed? For example, a spouse is seriously injured in an auto accident or is discovered to be mentally ill or develops a mental illness or is impaired from chronic alcohol or drug abuse so that they lack sufficient capacity to agree to settlement of the case or assist in his/her representation. In that situation, filing an application for appointment of a guardian in probate court followed by a motion to transfer the divorce or SAPCR after the application for appointment of a guardian is granted would be appropriate. Otherwise, any settlement agreement, decree or order would arguably be in jeopardy of being set aside later.

C. Classification of Child Support Claims Against Estates

Claims against an estate are classified and assigned a priority for payment out of the estate based upon their classification. TEX. PROBATE CODE § 322. Before 1999, a claim for delinquent child support and arrearages owed by an obligor's estate was assigned a class 7 priority following claims in classes 1 through 6 owed by the obligor decedent. Claims for delinquent child support and arrearages followed funeral expenses and expenses of last sickness, costs of administering and managing the estate, secured claims including tax liens, claims for taxes, penalties, and interest due, claims for the costs of confinement in the Texas Department of Criminal Justice, and claims for repayment of medical assistance payments made by the State to the decedent. In 1999, section 322 was amended and claims for delinquent child and arrearage were reclassified from a class 7 claim to a class 4 claim. As a result, claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to a money judgment have priority against an estate of an obligor decedent following only funeral expenses and medical bills, estate management expenses, and secured claims.

III. INCAPACITATED, MISSING, ABANDONED, MISSING OR SEPARATED SPOUSE: MANAGEMENT, CONTROL AND

DISPOSITION OF COMMUNITY ESTATE

The Family Code includes provisions for the management and control of the community estate when one spouse has become incapacitated, or is missing, or has permanently abandoned the other spouse or the spouses are permanently separated. TEX. FAM. CODE §§ 3.301-3.309. The Family Code also includes provisions that provide for the sale and disposition of separate and community homestead when one spouse has become incapacitated, or is missing, or has permanently abandoned the homestead and other spouse or has permanently abandoned the homestead and the spouses are permanently separated, or one spouse is a prisoner of war or missing on public service. TEX. FAM. CODE §§ 5.002-5.108.

The Probate Code also includes provisions for the management and control of the community estate when one spouse has become incapacitated and the appointment of a receiver in certain circumstances. TEX. PROBATE CODE §§ 883-885. The Civil Practice and Remedies Code includes provisions for the appointment of a receiver for a missing person which may include the management and control of the community estate. TEX. CIV. PRAC. & REM. CODE §§ 64.101-64.108. However, the provisions in the Family Code, the Probate Code and the Civil Practice and Remedies Code contain diverse and sometimes conflicting requirements and restrictions concerning the power and authority of the competent spouse to manage and control the community assets.

A. Family Code Provisions - Incapacitated, Missing, Abandoned, or Separated Spouse - Non-Homestead Property

1. Sworn Petition

The competent spouse may file a sworn petition stating the facts that make it desirable for the competent spouse to manage, control, and dispose of community property described in the petition that would otherwise be subject to the sole or joint management, control, and disposition of the "other" spouse if (1) the other spouse is unable to manage, control, or dispose of the community property subject to that spouse's sole or joint management, control, and disposition because of physical or mental incapacity, (2) the other spouse has disappeared and that spouse's location remains unknown to the competent spouse (unless the spouse is reported to be a prisoner of war or missing on public service), (3) the other spouse has permanently abandoned the competent spouse, or (4) the spouses are permanently separated. TEX. FAM. CODE § 3.301. Of course, this provision immediately raises questions such as when is a spouse considered to be "permanently abandoned" or "permanently separated." The competent spouse files the petition in the county in which the competent spouse resided at the time the incapacity or separation began, or the abandonment or disappearance occurred. However, the petition may not be filed earlier than sixty days after the date of the "occurrence of the event." If both spouses are nonresidents at the time the petition is filed, the petition may be filed in a county in which any part of the community property described in the petition is located. TEX. FAM. CODE § 3.301.

2. Prisoner of War or Missing on the Public Service of the United States

If a spouse is reported by an executive department of the United States to be a prisoner of war or missing on the public service of the United States, the spouse of the prisoner of war or missing person may file a sworn petition stating the facts that make it desirable for the petitioner to manage, control, and dispose of the community property that

would otherwise be subject to the sole or joint management, control, and disposition of the imprisoned or missing spouse. The petition may be filed in the county in which the spouse resided at the time the report was made. However, the petition may not be filed earlier than six months after the date of the notice that a spouse is reported to be a prisoner of war or missing on public service. If both spouses were nonresidents at the time the report was made, the petition will be filed in a county in which any part of the described property is located. TEX. FAM. CODE § 3.302.

3. Appointment of Attorney

The court may appoint an attorney for the incapacitated or missing spouse. However, when the missing spouse is reported to be a prisoner of war or missing on public service, the court is required to appoint an attorney for the missing spouse. TEX. FAM. CODE § 3.303. If an attorney has been appointed for the incapacitated or missing spouse, a notice of the hearing along with a copy of the petition is issued and served on the attorney representing the incapacitated or missing spouse. If an attorney has not been appointed, citation is issued and served on the incapacitated or missing spouse as in other civil cases. If the residence of the incapacitated or missing spouse is unknown, the citation is served by publication. TEX. FAM. CODE §§ 3.304-3.305.

4. Evidentiary Hearing and Court Order

After an evidentiary hearing, the court, on terms it considers just and equitable, will render an order describing or defining the community property at issue that will be subject to the management, control, and disposition of each spouse during marriage. The court may (1) impose any condition and restriction it deems necessary to protect the rights of the incapacitated or missing spouse, (2) require a bond conditioned on the faithful administration of the property, and (3) require payment to the registry of the court of all or a portion of the proceeds of the sale of the property to be disbursed in accordance with the court's further directions. TEX. FAM. CODE § 3.306. The court has continuing jurisdiction over the court's order. After notice and hearing and on the motion of either spouse, the court will amend or vacate the original order if the incapacitated spouse's capacity is restored, the spouse who disappeared reappears, the abandonment or permanent separation ends or the spouse who was reported to be a prisoner of war or missing on public service returns. TEX. FAM. CODE § 3.307. Because of the restrictions and requirements in sections 3.301-3.309 of the Family Code, many practitioners prefer to use the Probate Code provisions for managing an incapacitated spouse's community assets.

B. Family Code Provisions - Incapacitated, Missing, Abandoned, or Separated Spouse - Separate and Community Property Homestead

1. Sworn Petition

a. Separate Property Homestead

If homestead is the separate property of a spouse, that spouse may file a sworn petition that gives a description of the property, states the facts that make it desirable for that spouse to sell, convey, or encumber the homestead without the joinder of the other spouse, if (1) the other spouse is incapacitated, whether judicially declared incapacitated or not; (2) the other spouse has disappeared and that the location of the other spouse remains unknown (unless the spouse is reported to b a prisoner of war or missing on public service); and (3) the other spouse has permanently abandoned the homestead and the petitioning spouse; (4) has permanently abandoned the homestead and the spouses are permanently separated. TEX. FAM. CODE §§ 5.101.

b. Community Property Homestead

If the homestead is the community property of the spouses, one spouse may file a sworn petition that gives a description of the property, states the facts that make it desirable for the petitioning spouse to sell, convey, or encumber the homestead without the joinder of the other spouse, if (1) the other spouse is incapacitated, whether judicially declared incapacitated or not; (2) the other spouse has disappeared and that the location of the spouse remains unknown to the petitioning spouse (unless the spouse is reported to b a prisoner of war or missing on public service); (3) the other spouse has permanently abandoned the homestead and the petitioning spouse; and (4) has permanently abandoned the homestead and the spouses are permanently separated. TEX. FAM. CODE §§ 5.102.

The petition may be filed in the county in which any portion of the property is located. However, the petition may not be filed earlier than sixty days after the date of the "occurrence of the event,"(i.e., incapacity, disappearance, or abandonment). TEX. FAM. CODE §§ 5.103.

2. Prisoner of War or Missing on the Public Service of the United States

If a spouse is reported by an executive department of the United States to be a prisoner of war or missing on the public service of the United States, the spouse of the prisoner of war or missing person may file a sworn petition that gives a description of the property, states the facts that make it desirable for that spouse to sell, convey, or encumber the homestead without the joinder of the other spouse. The petition may be filed in the county in which any portion of the property is located. However, the petition may not be filed earlier than six months after the date of the notice that a spouse is reported to be a prisoner of war or missing on public service. TEX. FAM. CODE § 5.101-5.103.

3. Appointment of Attorney

The court may appoint an attorney for the incapacitated or missing spouse. However, when the missing spouse is reported to be a prisoner of war or missing on public service, the court is required to appoint an attorney for the missing spouse. TEX. FAM. CODE § 5.104. If an attorney has been appointed for the incapacitated or missing spouse, a notice of the hearing along with a copy of the petition is issued and served on the attorney representing the incapacitated or missing spouse. If an attorney has not been appointed, citation is issued and served on the incapacitated or missing spouse as in other civil cases. If the residence of the incapacitated or missing spouse is unknown, the citation is served by publication. TEX. FAM. CODE §§ 5.105.

4. Hearing and Court Order

a. Separate Property Homestead

After a hearing, the court will render an order it deems just and equitable with respect to the sale, conveyance, or encumbrance of a separate property homestead. TEX. FAM. CODE § 5.106(a).

b. Community Property Homestead

After an evidentiary hearing, the court, on terms it deems just and equitable, shall render an order describing or defining the community property at issue that will be subject to the management, control, and disposition of each spouse during marriage. The court may (1) impose any condition and restriction it deems necessary to protect the rights of the incapacitated or missing spouse, (2) require a bond conditioned on the faithful administration of the property, and (3) require payment to the registry of the court of all or a

portion of the proceeds of the sale of the property to be disbursed in accordance with the court's further directions. TEX. FAM. CODE § 5.106(b)-(c).

5.. Sale of Homestead When Spouse has been Judicially Declared Incapacitated

If the homestead is the separate property of a spouse and the other spouse has been judicially declared incapacitated, the competent spouse may sell, convey, or encumber the homestead without the joinder of the other spouse.

If the homestead is the community property of the spouses and one spouse has been judicially declared incapacitated, the competent spouse may sell, convey, or encumber the homestead without the joinder of the other spouse.

C. Probate Code Provisions - Incapacitated Spouse

1. General Powers of "Other" Spouse

Under the pertinent provision of the Probate Code, an "incapacitated person" means an adult, who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for his or her own physical health, or to manage his or her own financial affairs. TEX. PROBATE CODE § 601(13). When a spouse is judicially declared to be incapacitated, the other spouse acquires full power to manage, control, and dispose of the entire community estate, including the part of the community estate that the incapacitated spouse legally has the power to manage in the absence of the incapacity without an administration. However, the other spouse remains subject to a fiduciary duty to the incapacitated spouse in the management, control and disposition of community estate. *See generally In re Marriage of Moore*, 890 S.W.2d 821, 827 (Tex. App.-Amarillo 1994, no writ); *Carnes v. Meador*, 533 S.W.2d 365, 370 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.). Furthermore, if the court finds that it is in the best interest of the incapacitated spouse and that the other spouse would not be disqualified to serve as guardian under the Probate Code, guardianship of the estate of the incapacitated spouse may not be necessary when the other spouse is not incapacitated. TEX. PROBATE CODE § 883.

2. Grounds for Disqualification of Other Spouse

The other spouse would be disqualified to serve as guardian if, among other things, he or she is (1) a person whose conduct is notoriously bad, (2) an incapacitated person, (3) a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward, unless the court determines that the lawsuit of the person who has applied to be appointed guardian is not in conflict with the lawsuit of the proposed ward or appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit, (4) a person indebted to the proposed ward unless the person pays the debt before appointment, (5) a person asserting a claim adverse to the proposed ward or the proposed ward's real or personal property, and (6) a person who, because of inexperience or lack of education, is incapable of properly and prudently managing and controlling the ward or the ward's estate. TEX. PROBATE CODE § 681. *See, e.g., Dobrowolski v. Wyman*, 397 S.W.2d 930, 931-32 (Tex. Civ. App.-San Antonio 1965, no writ) (husband disqualified to serve as guardian of his wife's estate because of a conflict of interest); *Trimble v Protective & Reg. Service*, 981 S.W.2d 211, 216 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (elderly husband was not qualified to serve as guardian of his elderly

wife's person or estate because he was incapable of controlling and managing his elderly wife and her estate and he lacked the ability to follow through with recommendations from Protective Service and with court orders).

3. Separate Property of Incapacitated Spouse; Special Powers of Other Spouse; Termination of Special Powers of Other Spouse

If the incapacitated spouse owns separate property, however, a guardianship of the separate estate of the incapacitated spouse will be necessary. TEX. PROBATE CODE § 883. Regardless, the qualification of a guardian of the estate of an incapacitated spouse does not deprive the competent spouse of the right to manage, control, and dispose of the entire community estate. Section 884 of the Probate Code provides that upon the demand of the competent spouse, the guardian of the estate of an incapacitated spouse who, as guardian, is administering community property as part of the incapacitated spouse's estate, must deliver the community property to the competent spouse. TEX. PROBATE CODE § 884. Even if the competent spouse may be disqualified to serve as guardian and thus unable to manage and control the entire community estate under Section 883, the competent spouse apparently has the right to possession of all of the community assets to the exclusion of the guardian of the estate for the incapacitated spouse pursuant to Section 884. When the court finds that the incapacitated spouse is no longer incapacitated, the special powers of management, control, and disposition conferred on the other spouse by the Probate Code terminate. TEX. PROBATE CODE § 883A.

D. Probate Code Provisions - Receivership

1. Appointment of Receiver; Specification of Duties and Powers

Section 885 of the Probate Code provides for the appointment of a receiver in certain circumstances. When any portion of the estate of an incapacitated person appears in danger of injury, loss, or waste and in need of a guardianship or other representative and there is no guardian of the estate who is qualified in this state and a guardian is not needed, the county judge of the county in which the incapacitated person resides or in which the endangered estate is located will enter an order, with or without application, appointing a suitable person as receiver to take charge of the estate. The court order shall require a receiver to give a bond as in ordinary receiverships in an amount the court deems necessary to protect the estate. The court order shall specify the duties and powers of the receiver as the court deems necessary for the protection, conservation, and preservation of the estate. The person who is appointed receiver will proceed to take charge of the endangered estate pursuant to the powers and duties granted that person by the order of appointment and subsequent orders.

2. Use of Income or Corpus of the Estate for Incapacitated Spouse

If, during the pendency of the receivership, the needs of the incapacitated spouse require the use of the income or corpus of the estate for the education, clothing, or subsistence of the incapacitated spouse, the court will enter an order that appropriates a sufficient amount of income or corpus. The receiver uses the amount appropriated by the court to pay a claim for the education, clothing, or subsistence of the incapacitated spouse that is presented to the court for approval and ordered by the court to be paid.

3. Court Hearing Concerning Continuing Danger of Injury, Loss, or Waste to the Estate

When the threatened danger has abated and the estate is no longer liable to injury, loss, or waste, the receiver shall report to the judge, file with the clerk a full and final sworn account of all property of the estate the receiver received, had on hand when the receivership was pending, all sums paid out, all acts performed by the receiver concerning the estate, and all property of the estate that remains in the receiver's hands on the date of the report. After the report is filed, the clerk issues a notice to all persons interested in the welfare of the incapacitated spouse and gives personal notice to the person who has "custody" of the incapacitated spouse to appear before the court and contest the report and account if so desired.

If, after a hearing on the receiver's report and account, the court is satisfied that the danger of injury, loss, or waste to the estate has abated and that the report and account are correct, the court will enter an order finding that the danger of injury, loss, or waste to the estate has abated and directing the receiver to deliver the estate to the person from whom the receiver took possession, to the person who has "custody" of the incapacitated spouse, or to another person the court determines is entitled to possession of the estate. If the court is not satisfied that the danger has abated, or if the court is not satisfied with the receiver's report and account, the court will enter an order that continues the receivership in effect until he or she is satisfied that the danger has abated or is satisfied with the report and account.

E. Civil Practice and Remedies Code - Receivership for Missing Person

1. Appointment of Receiver for Missing Person

A court having family law jurisdiction or a probate court located in the county in which a missing person resides or, if the missing person is not a resident of this state, located in the county in which the majority of the property of a missing person's estate is located may, on the court's own motion or on the application of an interested party, appoint a receiver for the missing person if it appears that the estate of the missing person is in danger of injury, loss, or waste and the estate of the missing person is in need of a representative. TEX. CIV. PRAC. & REM. CODE § 64.001(d). A "missing person" means a person 18 years old or older whose disappearance is possibly not voluntary. A "missing person" also means a person 18 years old or older and (1) is under a proven physical or mental disability or is senile, and because of one or more of these conditions is subject to immediate danger or is a danger to others, or (2) is in the company of another person or is in a situation indicating that the missing person's safety is in doubt. TEX. CODE CRIMINAL PRO. § 63.001.

2. Citation

After an application for the appointment of a receiver for a missing person is filed, the court clerk issues a citation stating that the application for receivership was filed, including the name of the missing person and the name of the applicant. The citation must cite all persons interested in the welfare of the missing person to appear for purposes of contesting the application. The citation is published in a newspaper of general circulation once in the county in which the missing person resides and once in each county in which property of the missing person's estate is located. TEX. CIV. PRAC. & REM. CODE § 64.101.

3. Appointment of Attorney Ad Litem and Guardian Ad Litem; Term of Receivership

The court will appoint an attorney ad litem to represent the interests of a missing spouse at a proceeding to appoint a receiver for the missing spouse. The court may appoint a guardian ad litem for a missing spouse if the court determines that the appointment would be in the best interest of the missing spouse. The guardian ad litem will protect the missing spouse in a manner that will enable the court to determine the appropriate action to take concerning the best interest of the missing spouse. The term of a receivership for a missing spouse may not exceed six months unless, before the expiration of the term and for good cause shown, the court extends the receivership for another term not to exceed six months. TEX. CIV. PRAC. & REM. CODE § 64.102. Before assuming his or her duties, the receiver must execute a bond in an amount determined by the court that is necessary to protect the estate of the missing spouse. TEX. CIV. PRAC. & REM. CODE §§ 64.023, 64.103.

4. Use of Income or Corpus of the Estate

If, during the receivership for a missing spouse, the needs of the spouse or dependent children of the missing spouse require the use of the income or corpus of the estate for education, clothing, or subsistence, the court may, with or without application, appropriate a sufficient amount of the income or corpus for that purpose. The income or corpus is to be used by the receiver to pay claims for education, clothing, or subsistence that are presented to the court and approved. TEX. CIV. PRAC. & REM. CODE § 64.104.

5. "Annual" Report and Reimbursement of Receiver

All necessary expenses incurred by the receiver for the missing spouse in administering the property is reported to the court at intervals not more than six months in length and is reported in an annual report filed after the end of each calendar year if the court extends the receivership. The report includes a description of the receiver's acts, the condition of the property, the status of the threatened danger to the property and the progress made toward abatement of the threatened danger. If the court is satisfied, the court will approve the report and authorize the reimbursement of the receiver from the funds under the receiver's control. TEX. CIV. PRAC. & REM. CODE § 64.105.

6. Court Hearing Concerning Continuing Danger of Injury, Loss, or Waste to the Estate

When the threatened danger has abated and the estate of the missing spouse for whom a receiver was appointed is no longer liable to injury, loss, or waste for the lack of a representative or when the receivership expires, the receiver reports to the court, and files with the clerk a full and final sworn account of all property received by the receiver, all sums paid out, all acts performed by the receiver concerning the property, and all property remaining in the receiver's control. TEX. CIV. PRAC. & REM. CODE § 64.106. If, after a hearing on the report and account, the court is satisfied that the danger of injury, loss, or waste has abated and that the report and account are correct, the court will render an order finding that the danger has abated and that the report and account are correct and direct the receiver to deliver the property to the person from whom the receiver took possession, to the missing spouse, or to another person entitled to possession of the estate. If the court is not satisfied that the danger has abated, or is not satisfied with the report and account, the court will render an order continuing the receivership in effect until the court is satisfied that the danger has abated and that the report and account are

correct subject to the time limitation for the extension of a receivership. TEX. CIV. PRAC. & REM. CODE § 64.107.

7. Application to Divorce Proceedings

Although several courts have held that section 64.001 is not applicable to divorce proceedings, *see Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App. – Houston [1st Dist.] 1993, writ denied); *Young v. Young*, 765 S.W.2d 440, 444 (Tex. App. – Dallas 1988, no writ), the better practice would be for trial courts to adhere to that section when appointing receivers. *See Rusk v. Rusk*, 5 S.W.3d 299, 307 n. 10 (Tex. App. – Houston [14th Dist.] 1999, pet. denied). There are cases stating that, in a divorce case, the court may appoint a receiver without any showing that the property is in danger of being lost, removed, or materially injured. *See Sparr v. Sparr*, 596 S.W.2d 164, 165 (Tex. Civ. App. – Texarkana 1980, no writ); *Jones v. Jones*, 211 S.W.2d 269, 274 (Tex. Civ. App. – El Paso 1944, no writ); *Hursey v. Hursey*, 147 S.W.2d 968, 970 (Tex. Civ. App. – Dallas 1941, no writ). *See also* TEX. FAM. CODE § 6.502(5) (trial court may grant temporary injunction appointing a receiver for the preservation and protection of the property of the parties). However, the better rule requires a showing that the parties' property was in danger of being lost, removed, or materially injured and that a less harsh remedy was unavailable before a receiver is appointed. *See Readhimer v. Readhimer*, 728 S.W.2d 872, 873 (Tex. App. – Houston [1st Dist.] 1987, no writ). *See also Parness v. Parness*, 650 S.W.2d 181, 182 (Tex. Civ. App. – Dallas 1977, writ ref'd n.r.e.); *Whitehill v. Whitehill*, 628 S.W.2d 148, 151 (Tex. App. – Houston [14th Dist.] 1982, no writ). In addition, the appointment of a receiver is left to the sound discretion of the trial court. *See Vannerson*, 857 S.W.2d at 673; *Young*, 765 S.W.2d at 444.

IV. DISABLED ADULT CHILDREN

A. Guardianship of Adult Disabled Child

1. Incapacitated Adult

Under the pertinent provision of the Probate Code, an "incapacitated person" means an adult, who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for his or her own physical health, or to manage his or her own financial affairs. TEX. PROBATE CODE § 601. In addition, the courts have expanded the meaning of "incompetent persons" to include a "person of unsound mind" or an "insane person." *See, e.g., Jones v. Miller*, 964 S.W.2d 159, 164-65 (Tex. App. – Houston [14th Dist.] 1998, no pet.). The trial court must find that a proposed ward is an incapacitated person by clear and convincing evidence. TEX. PROBATE CODE § 684(a)(1); *Trimble*, 981 S.W.2d at 216. A court determines the incapacity of a proposed ward from evidence of recurring acts or occurrences within the six month period preceding the determination and not by isolated instances of negligence or bad judgment. TEX. PROBATE CODE § 684(c); *Trimble*, 981 S.W.2d at 216.

2. Guardians of Incapacitated Adults

A guardian includes guardian of the estate and the guardian of the person of an incapacitated person. TEX. PROBATE CODE § 601(10). A court appoints a guardian according the circumstances of each case and considering the best interests of the proposed ward. TEX. PROBATE CODE § 677; *Trimble*, 981 S.W.2d at 215. The Probate Code has established a set of guidelines to select the appropriate individual to be appointed guardian. TEX. PROBATE CODE § 677. Unless disqualified, the ward's spouse is the preferred selection for the guardianship. TEX. PROBATE

CODE § 677; *Mireles v. Alvarez*, 789 S.W.2d 947, 948 (Tex. App. - San Antonio 1990, writ denied). If the spouse is disqualified or if there is no spouse, the nearest related family member who is eligible is entitled to the guardianship. TEX. PROBATE CODE § 677; *Trimble*, 981 S.W.2d at 215-16. In addition, a court is granted the discretion to appoint an eligible individual who is best qualified to serve as a guardian if (1) an eligible spouse or next of kin refuses to serve as guardian, (2) there appears to be two individuals equally related in kinship to the ward, or (3) if neither the spouse nor relative qualifies as an eligible guardian. TEX. PROBATE CODE § 677(a)(3).

3. Disqualifications

An individual would be disqualified to serve as guardian if, among other things, he or she is (1) a minor, (2) a person whose conduct is notoriously bad, (3) an incapacitated person, (4) a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward, unless the court determines that the lawsuit of the person who has applied to be appointed guardian is not in conflict with the lawsuit of the proposed ward or appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit, (5) a person indebted to the proposed ward unless the person pays the debt before appointment, (6) a person asserting a claim adverse to the proposed ward or the proposed ward's real or personal property, and (7) a person who,

because of inexperience or lack of education, is incapable of properly and prudently managing and controlling the ward or the ward's estate. TEX. PROBATE CODE § 681. *See, e.g., Dobrowolski v. Wyman*, 397 S.W.2d at 931-32; *Trimble*, 981 S.W.2d at 216. The burden of proof to establish a disqualification of a proposed guardian is on the party challenging the appointment. *Chapa v. Hernandez*, 587 S.W.2d 778, 781 (Tex. Civ. App. – Corpus Christi 1979, no writ).

4. Jurisdiction of Guardianship Issues

A county court is vested with the general jurisdiction of a probate court. It appoints guardians and transacts all business appertaining to estates subject to guardianship. TEX. PROBATE CODE § 605.

a. No Statutory Probate Court

In counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all matters regarding guardianships must be filed and heard in the county court. However, in contested guardianship matters, the county court may request the assignment of such issue to a statutory probate court to hear the contested portion of the proceeding, or transfer the contested portion of the proceeding to the district court. The county court retains authority over the management of the guardianship with the exception of the contested issue. TEX. PROBATE CODE § 606(b).

b. Statutory Probate Court

In counties in which there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all matters regarding guardianships must be filed and heard in those courts and the constitutional county court. TEX. PROBATE CODE § 606(c). A statutory probate court has concurrent jurisdiction with the district court in all actions by or against a person in the person's capacity as guardian. TEX. PROBATE CODE § 606(d). A court that exercises original probate jurisdiction has the power to hear all matters incident to an estate. TEX. PROBATE CODE § 606(e). *See Garland v.*

Garland, 868 S.W.2d 847, 849-50 (Tex. App. – Dallas 1993, no writ) (family district court's continuing jurisdiction over support of a disabled adult child does not vest that court with jurisdiction to grant or deny a guardianship of that adult child's estate).

5. Venue of Guardianship Issues

A proceeding for the appointment of a guardian for either the person or estate of an incapacitated person must be filed in the county in which the proposed ward resides or is located on the date the application for guardianship is filed. In addition, the same proceedings may be filed in the county in which the principal estate of the proposed ward is located. TEX. PROBATE CODE § 610(a). The burden of proving facts illustrating proper venue of a guardianship proceeding rests on the applicant for the guardianship. *Owens v. Stovall*, 64 S.W.2d 360, 362 (Tex Civ. App. – Waco 1933, writ ref'd). An applicant for guardianship has the burden of introducing evidence to establish where the proposed ward had been living prior to the proceedings. *See Loudd v. Davis*, 650 S.W.2d 556, 557 (Tex. App. – Houston [14th Dist.] 1983, no writ).

6. Powers and Duties of Guardians

a. Guardian of the Person

The guardian of the person is entitled to the charge and control of the ward. The guardian of the person of the adult disabled child has (1) the right to have physical possession of the ward and to establish the ward's legal domicile, (2) the duty of care, control and protection of the ward, (3) the duty to provide the ward with clothing, food, medical care, and shelter, and (4) the power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward. TEX. PROBATE CODE § 767. In fact, the guardianship of the person has essentially the same powers and duties as the managing conservator of a minor. *Guardianship of Henson*, 551 S.W.2d at 139-40; *Little v. Little*, 576 S.W.2d at 495; *Cruz v. Scanlan*, 682 S.W.2d at 423.

b. Guardian of the Estate

The guardian of the estate of the ward is entitled to the possession and management of all property belonging to the ward, to collect all debts, rentals, or claims that are due to the ward, to enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward. It is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage his or her own property. TEX. PROBATE CODE § 768.

B. Child Support for Adult Disabled Child

1. Definitions

An "adult child" means a child 18 years of age or older. A "child" means a son or daughter of any age. TEX. FAM. CODE § 154.301. An adult disabled child means a child 18 years of age or older, whether institutionalized or not, (1) who requires substantial care and personal supervision because of a mental or physical disability and (2) who will not be capable of self-support. TEX. FAM. CODE § 154.302(a). *See Rose v. Rubenstein*, 693 S.W.2d 580, 582-83 (Tex. App. – Houston [14th Dist.] 1985, writ dism'd) (the fact that a 24 year old, mildly retarded son lived alone in an apartment and worked full time as part of a special independent living program for mildly retarded adults did not preclude findings that he required continuous care and personal supervision and that he was not able to support himself); *Attaway v. Attaway*, 704 S.W.2d 492, 494 (Tex. App. – Corpus Christi 1986, no writ).

2. Standing

A suit to provide financial support of an adult disabled child may be filed by a parent of the child or another person having physical custody or guardianship of the child under a court order. TEX. FAM. CODE § 154.303(a). This would apparently include a parent, an adult sibling, grandparent, another relative, a guardian, or even a state agency. In addition, a suit to provide financial support of an adult disabled child may be filed by the child if the child is 18 years of age or older, does not have a mental disability, and is determined by the court to be capable of managing his or her financial affairs. TEX. FAM. CODE § 154.303(a). The parent, the child, if the child is 18 years of age or older, or other person may not transfer or assign the cause of action for financial support to any person, including a governmental or private entity or agency, except for an assignment made to the Title IV-D agency. TEX. FAM. CODE § 154.303(b). Furthermore, a suit to provide financial support of an adult disabled child may be filed (1) regardless of the age of the child, and (2) as an independent cause of action or joined with any other claim or remedy. TEX. FAM. CODE § 154.305(a).

3. Continuing Jurisdiction

If no court retains continuing, exclusive jurisdiction of the child, an action may be filed as an original suit affecting the parent-child relationship. TEX. FAM. CODE § 154.305(b). However, if a court of continuing, exclusive jurisdiction exists, an action for support of an adult disabled child may be filed as a suit for modification. TEX. FAM. CODE § 154.305(c).

4. Court Ordered Support for Disabled Child

A trial court may order either or both parents to provide for the financial support of their children for an indefinite period. A trial court may also determine the rights and duties of the parents if the court finds that (1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support, and (2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child. TEX. FAMILY CODE § 154.302(a). In addition, a trial court that orders support under section 154.302 must designate a parent of the child or another person having physical custody or guardianship of the child under a court order to receive the support for the child. A trial court may also designate a child who is 18 years of age or older to receive the support directly. TEX. FAMILY CODE § 154.302(b).

5. Amount of Support After the Age of Majority

In determining the amount of support that a parent or another person having physical custody or guardianship of the child will be required to pay, the specific terms and conditions of the extended support, and the rights and duties of each parent or other person with respect to the child's support, a trial court shall give special consideration to:

1. any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;

2. whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;

3. The financial resources available to both parents for the support, care, and supervision of the adult child; and

4. any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

TEX. FAMILY CODE § 154.306.

6. Modification and Enforcement

An order in a suit to provide financial support of an adult disabled child may contain provisions governing the rights and duties of both parents with respect to the support of the child and may be modified or enforced in the same manner as any other order. TEX. FAMILY CODE § 154.307. Sections 154.301-310 of the Family Code do not affect a parent's cause of action for the support of a disabled child under any other law, or the ability to contract for the support of a disabled child, and do not affect the substantive or procedural rights or remedies of a person other than a parent, including a governmental or private entity or agency, with respect to the support of a disabled child under any other law. TEX. FAMILY CODE § 154.308.

C. Possession of and Access to an Adult Disabled Child

A court may order any variation of possession of or access to an adult disabled child that it concludes is appropriate under the circumstances. TEX. FAMILY CODE § 154.309(a). However, an adult disabled child may refuse to submit to possession or access if the adult disabled child is competent enough to make the decision. TEX. FAMILY CODE § 154.309(b). A suit affecting the parent-child relationship involving the possession of or access to an adult disabled child may be filed by a parent of the child or another person having physical custody or guardianship of the child under a court order. TEX. FAM. CODE § 154.303(a). This would apparently include a parent, an adult sibling, grandparent, another relative, or a guardian. In addition, the suit may be filed (1) regardless of the age of the child, and (2) as an independent cause of action or joined with any other claim or remedy. TEX. FAM. CODE § 154.305(a). A court that acquires continuing, exclusive jurisdiction of a suit affecting the parent-child relationship involving a disabled child retains continuing, exclusive jurisdiction of subsequent proceedings involving the person, including proceedings after the person is an adult. TEX. FAMILY CODE § 154.309(c).

D. Potential Conflicts Between Probate Court and Family Law Court Involving the Disabled Adult Child

1. Relevant Definitions

A “child” or “minor” means a person under eighteen years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes. In the context of child support, “child includes a person over eighteen years of age for whom a person may be obligated to pay child support. In addition, “adult” means a person who is not a child. TEX. FAMILY CODE § 101.003. *See* TEX. PROBATE CODE § 601(15). “Managing conservatorship” means the relationship between a child and a managing conservator appointed by court order. TEX. FAMILY CODE § 101.019. An "adult child" means a child 18 years of age or older; a “child" means a son or daughter of any age. TEX. FAM. CODE § 154.301. If an interested person contests an application for the appointment of a guardian of the person of a minor or an interested person seeks the removal of a guardian of the person of a minor, the probate court may transfer all

matters relating to the guardianship of the person of the minor to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Family Code is pending. TEX. PROBATE CODE § 609(a).

2. Divorce Occurs When Disabled Child is Younger Than 18 Years Old

Garland v. Garland, 868 S.W.2d 847 (Tex. App. – Dallas 1993, no writ), involved a divorce in which the disabled child was younger than 18 years old at the time of the divorce. The specific issue before the court of appeals was whether the family district court's continuing jurisdiction over support of a disabled adult child vested that court with jurisdiction to grant or deny a guardianship of the adult child's estate. However, *Garland* provides an example of potential problems involving disabled children of divorce.

Thomas Garland and Judith Anne Garland are the natural parents of Daniel Thomas Garland, who suffers from Down's syndrome. Thomas and Judith divorced when Daniel was sixteen years old. The family district court appointed Judith managing conservator of Daniel. Because Daniel suffered from Down's syndrome at the time of the divorce, the family district court also ordered continuing support payments for him past the age of majority. When Daniel was twenty-two years old, Thomas filed an application in probate court to appoint him guardian of the estate and person of Daniel. Judith filed a motion to dismiss the application for guardianship because she contended the family district court had exclusive continuing jurisdiction over Daniel. The probate court granted her motion and dismissed the case based on the continuing jurisdiction of the family district court.

The court of appeals noted that Dallas County was a county in which there is a statutory probate court and that section 606 of the Probate Code clearly requires all applications regarding guardianships to be filed and heard in the statutory probate court. The appellate court stated that since Daniel was 22 years old, he was not a child as defined in what is now section 101.003; thus, the provisions concerning continuing, exclusive jurisdiction and child support – now sections 154.001-154.002 and 155.001-155.002 – did not apply. The court of appeals also noted that even though section 154.302 allows a family district court to order support for a disabled adult child, the presence of a statutory probate court in Dallas County required that any guardianship of an adult child must first be filed in the statutory probate court. The appellate court also mentioned that section 609 of the Probate Code allows a statutory probate court to transfer the guardianship of the person of a minor, but not an "adult child," to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Family Code is pending. Thus, the guardianship of Daniel's person and estate had to be filed in the Dallas County probate court and it could not be transferred to family district court in which the divorce was granted.

A guardianship is not necessarily inconsistent with the determination of child support and possession of or access to an adult disabled child. In fact, under section 154.303 of the Family Code, a guardian has standing to seek an order for child support and possession of or access to an adult disabled child. Under *In Re Graham*, a suit filed in family district court seeking an order for child support and possession of or access to an adult disabled child could be transferred to a pending guardianship proceeding in probate court. Concerning possession when the disabled child was younger than 18 years old at the time of the divorce, a court that acquires continuing, exclusive jurisdiction of a suit affecting the parent-child relationship

involving a disabled child retains continuing, exclusive jurisdiction of subsequent proceedings involving the child, including proceedings after the child is an adult. Thus, a petition to modify possession and access of an adult disabled child apparently must be filed in the family district court even if it may subsequently be transferred to a pending guardianship proceeding in probate court. *See Fleming v. Easton*, 998 S.W.2d 252, 254-55 (Tex. App. – Dallas 1999, no pet.) (a suit affecting the parent-child relationship may not be filed in probate court if a district court has already obtained continuing jurisdiction over the parent-child relationship).

Concerning the appointment of a guardian after the divorce, if the parents are joint managing conservators, the probate judge will usually appoint them as joint or co-guardians of the adult disabled child. Since the guardianship of the person has essentially the same powers and duties as the managing conservator of a minor, *Guardianship of Henson*, 551 S.W.2d at 139-40; *Little v. Little*, 576 S.W.2d at 495; *Cruz v. Scanlan*, 682 S.W.2d at 423, joint or co-guardians will have the rights and duties of a managing conservator which apparently must be exercised jointly regardless of and perhaps contrary to allocation of the rights and duties in the divorce decree. Likewise, if one parent is the sole managing conservator, the probate judge will usually appoint him or her as guardian of the adult disabled child and the rights and duties of the guardian will basically mirror the rights and duties of the sole managing conservator. However, problems will certainly arise if the probate judge appoints the possessory conservator, one of the joint managing conservators or a non-parent as guardian who will have rights and duties which conflict with the divorce decree. This can be particularly troublesome since the guardian has the right to have physical possession of the ward and to establish the ward's legal domicile and is entitled to the possession and management of all property belonging to the ward. Thus, the guardian may collect support from a parent or the guardianship estate yet deny the other parent possession of the adult disabled child. In these circumstances, the probate judge should step in and monitor the situation and prevent any abuses. In addition, although it is not clear, there does not appear to be any reason why the "wronged" parent could not seek to remove the guardian.

3. Divorce Occurs When Disabled Child is 18 Years of Age or Older

a. Disability Exists or Cause of Disability is Known to Exist on or Before 18th Birthday

If the divorce occurs when the disabled child is 18 years old or older, neither parent may be appointed managing conservator of the adult disabled child since "managing conservatorship" describes the relationship between a child and a managing conservator and "child" describes a person under eighteen years of age. Consequently, for a court to enter orders for support or possession of and access to an adult disabled child, it appears that it must be done through the appointment of a guardian and not a managing conservator since these orders involve an adult disabled child and not a minor child. Although it is not clear, a guardianship could be filed in probate court followed by the filing of a petition to modify in family district court which could be transferred to the guardianship pending in probate court. The probate court could then apply the appropriate provisions of the Family Code in determining support for or possession of and access to the adult disabled child.

b. Disability Does Not Exist or Cause of Disability is Not Known to Exist on or Before 18th Birthday

If the divorce occurs when the disabled child is 18 years old or older at the time of the divorce and the disability does not exist, or the cause of the disability is not known to exist, on or before the child's 18th birthday, sections 154.301-309 of the Family Code do not apply and the parents only recourse is through the appointment of a guardian of the adult disabled child.

V. CUSTODY OF MINORS

A. Jurisdiction and Standing

1. Jurisdiction of Probate Courts

Custody of minors in the Probate Code is governed by the guardianship provisions. All guardianship provisions are found in Chapter XIII of the Texas Probate Code. Sections 605 and 606 of the Probate Code determine jurisdiction for guardianship proceedings. Section 605 provides county courts with the authority to appoint guardians of minors and other incapacitated persons. Section 606(a) grants district courts original jurisdiction over guardians and wards. In counties which do not have a statutory probate court, county court at law or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships and mental health matters will be filed and heard in the county court. TEX. PROBATE CODE § 606(b). If a guardianship proceeding becomes contested, a county judge may request the assignment of a statutory probate judge or a transfer to a district court. TEX. PROBATE CODE § 606(b). If requested by a party, the transfer is mandatory. TEX. PROBATE CODE § 606(b). The county court will maintain jurisdiction over the uncontested guardianship proceedings until the final disposition of the case is made by the district court or the assigned judge. TEX. PROBATE CODE § 606(b).

In those counties in which there is a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding guardianships must be filed and heard in those courts and the constitutional county court, rather than in the district courts unless otherwise provided by the Legislature. TEX. PROBATE CODE § 606(c). In contested guardianship matters, the judge of a constitutional county court may transfer the proceeding to a statutory probate court, county court at law or other statutory court exercising jurisdiction of a probate court. Further, if any party requests such transfer, the court must transfer the proceeding. The court to which the proceeding is transferred may hear the proceeding as if originally filed in the court. TEX. PROBATE CODE § 606(c).

A statutory probate court and the district courts have concurrent jurisdiction in a suit by or against a person in the person's capacity as a guardian. TEX. PROBATE CODE § 606(d). However, in counties containing a statutory probate court, guardianship applications must be filed in that court rather than the district court. TEX. PROBATE CODE § 606(c).

Section 676 of the Probate Code sets forth the individuals with priority to serve as guardians of minors. If the parents live together, both parents are the natural guardians of the person of the minor children by the marriage. If one parent is dead, the survivor is the natural guardian of the person of the minor children. The rights of parents who do not live together are equal, and the guardianship of their minor children will be assigned to one or the other, considering only the best interests of the children. If the minor child is an orphan and the last surviving parent did not appoint a guardian, the nearest ascendant in the direct line of the minor is entitled to guardianship of the person of the

minor. If more than one ascendant exists in the same degree in the direct line, one ascendant will be appointed, according to circumstances and considering the best interests of the minor. If the minor has no ascendant in the direct line, the nearest of kin will be appointed, and if there are two or more persons in the same degree of kinship, one will be appointed, according to circumstances and considering the best interests of the minor. However, if no relative of the minor is eligible to be guardian, or if no eligible person applies to be guardian, the court will appoint a qualified person as guardian. TEX. PROBATE CODE § 676.

2. Jurisdiction of the Family District Courts

The Texas Government Code grants the family district courts concurrent jurisdiction with other district courts. TEX. GOV. CODE § 24.601. Section 24.601 provides in pertinent part as follows:

> (a) A family district court has the jurisdiction and power provided for district courts by the constitution and laws of this state. Its jurisdiction is concurrent with that of other district courts in the county in which it is located.
>
> (b) A family district court has primary responsibility for cases involving family law matters. These matters include:
>
> (1) adoptions;
> (2) birth records;
> (3) divorce and marriage annulment;
> (4) child welfare, custody, support and reciprocal support, dependency, neglect, and delinquency;
> (5) parent and child; and
> (6) husband and wife.

TEX. GOV. CODE § 24.601(a), (b). If the parties to a divorce are parents of children, the divorce must include a suit affecting the parent-child relationship. TEX. FAM. CODE § 6.406(b). If a suit affecting the parent-child relations is pending at the time suit for divorce is filed, then the court will transfer the pending suit affecting the parent-child relationship to the county where the divorce is currently pending. TEX. FAM. CODE § 6.406(a). If the parties are the parents of a child who is under the continuing jurisdiction of another court, either party to the divorce may move for the court having continuing jurisdiction to transfer the proceedings to the court hearing the divorce suit. TEX. FAM. CODE § 6.407(b). The requirements to transfer the suit affecting the parent-child relationship to the county where the divorce is pending apply whether or not the suit affecting the parent-child relationship was filed first. TEX. FAM. CODE § 6.407(b).

3. Standing in the Probate Courts

It is not difficult to have standing to bring or contest a guardianship proceeding under the Probate Code. Section 642 of the Probate Code governs standing and provides as follows:

> (a) Except as provided by Subsection (b) of this section, any person has the right to commence any guardianship proceeding, including a proceeding for complete restoration of a ward's capacity or modification of a ward's guardianship, or to appear and contest any guardianship proceeding or the appointment of a particular person as guardian.
>
> (b) A person who has an interest that is adverse to a proposed ward or incapacitated person may not:
>
> (1) file an application to create a guardianship for the

> proposed ward or incapacitated person;
> (2) contest the creation of a guardianship for the proposed ward or incapacitated person;
> (3) contest the appointment of a person as a guardian of the person or estate, or both, of the proposed ward or incapacitated person; or
> (4) contest an application for complete restoration of a ward's capacity or modification of a ward's guardianship.
>
> (c) The court shall determine by motion in limine the standing of a person who has an interest that is adverse to a proposed ward or incapacitated person.

TEX. PROBATE CODE § 642. Therefore, the only limitation concerning standing in a guardianship proceeding appears to be whether the person has an interest adverse to the proposed ward.

4. Standing in the Family District Courts

Contrary to the Probate Code, the Family Code sets out specific guidelines regarding who can maintain a suit affecting the parent-child relationship. The standing requirements are governed by section 102.003(a) which provides:

> (a) An original suit may be filed at any time by:
> (1) a parent of the child;
> (2) the child through a representative authorized by the court;
> (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
> (4) a guardian of the person or of the estate of the child;
> (5) a governmental entity;
> (6) an authorized agency;
> (7) a licensed child placing agency;
> (8) a man alleging himself to be the biological father of a child filing in accordance with Chapter 160, subject to the limitations of Section 160.101, but not otherwise;
> (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
> (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
> (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition; or
> (12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than

> 90 days preceding the date of the filing of the petition.
> (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition.

TEX. FAM. CODE § 102.003(a). The standing requirements for grandparents are set out in section 102.004. This provision provides that grandparents may file an original proceeding requesting managing conservatorship if (1) satisfactory proof exists to the court that the order requested is necessary because the child's present environment presents a serious question concerning the child's physical health or welfare, or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. TEX. FAM. CODE § 102.004(a). This provision also allows a grandparent or any other person deemed by the court to have had substantial past contact with the child to intervene in a pending suit affecting the parent-child relationship. TEX. FAM. CODE § 102.004(b).

B. Potential Conflicts in Jurisdiction

1. Family Law Court as Court of Continuing Jurisdiction

The family courts acquire continuing exclusive jurisdiction of matters affecting the parent-child relationship and any suits affecting the parent-child relationship. TEX. FAM. CODE § 155.001(a). However, the probate courts also have been granted jurisdiction to hear applications for appointment of guardians of the person for minors. TEX. PROBATE CODE § 606; TEX. PROBATE CODE § 607(b) ("In a situation in which the jurisdiction of a statutory probate court is concurrent with that of a district court, a cause of action appertaining to or incident to a guardianship estate shall be brought in a statutory probate court rather than in the district court."). Consequently, conflicts have arisen concerning which court has jurisdiction to determine the custody of minors when there has been a court of continuing jurisdiction. Apparently a suit affecting the parent-child relationship may not be filed in probate court if a district court has already obtained continuing jurisdiction over the parent-child relationship. *See Fleming v. Easton*, 998 S.W.2d 252, 254-55 (Tex. App. – Dallas 1999, no pet.) (The Court of Appeals recognized that collection of delinquent child support and modification of support orders have consistently been treated as matters affecting the parent-child relationship over which the court rendering the divorce decree has continuing and exclusive jurisdiction, and concluded that since the ex-wife's claims filed in probate court involve matters pertaining to the parent-child relationship between her deceased ex-husband and their child, the district court that had previously acquired jurisdiction over the child through the divorce proceeding retains continuing and exclusive jurisdiction to decide these issues.).

In *Cruz v. Scanlan*, 682 S.W.2d 422, 423 (Tex. App.– Houston [1st Dist.] 1984, orig. proceeding), the court held that once a district court acquires continuing jurisdiction of a suit affecting the parent-child relationship, no other court has jurisdiction of parties and matters in connection with the child. The court concluded that the district court with continuing jurisdiction had the authority to hear custody matters regarding the minor child to the exclusion of the statutory probate court. *See also In Re Guardianship of C.G.*, 2001 WL 46976 (Tex. App. – El Paso 2001, no pet.) (District court appointed managing and possessory conservators for children. After death of managing conservators, attorney ad litem filed

application for appointment of permanent guardian for the children in county court at law. The Court of Appeals held that district court retained jurisdiction over an attempt to modify an order affecting the parent-child relationship.); *Williams v. Scanlan,* 714 S.W.2d 38, 40 (Tex. App – Houston [14th Dist] 1986, orig. proceeding) (When district court had gained jurisdiction of an estate before the estate assumed a probate nature and the probate court does not have jurisdiction adequate to grant all requested relief, it is inappropriate for probate court to exercise jurisdiction over the estate.); *English v. Gregory,* 714 S.W.2d 443, 446 (Tex. App. – Houston [14th Dist.] 1986, orig. proceeding) (same); *Rowland v. Willy*, 751 S.W.2d 725, 726-27 (Tex. App. – Houston [14th Dist.] 1988, orig. proceeding) (Court appears to rely on the first in time rule by recognizing that once the family district court obtained continuing exclusive jurisdiction, the matters affecting the custody of the child should remain in those courts as opposed to the statutory probate court which has concurrent jurisdiction with district courts with respect to guardianships). However, the continuing validity of these cases based upon the district court's exclusive jurisdiction and the inability of the probate court to grant all requested relief was called into question by *In Re Graham*. In *In Re Graham*, the Supreme Court distinguished *Williams v. Scanlan* and *English v. Gregory*, stating that "[a]lthough *Williams* and *English* imply that district court jurisdiction over divorces is exclusive, both cases were decided before the Legislature narrowed the exclusive jurisdiction of district courts in 1987. Before 1987, the Government Code specified that district courts had exclusive jurisdiction over divorces." *In Re Graham*, 971 S.W.2d at 58-59 (citations omitted). Furthermore, the Supreme Court stated that "current Texas law does not impede a probate court from providing all necessary relief in a divorce action when it properly transfers to itself a cause of action appertaining or incident to a guardianship estate." *Id.* at 59.

2. No Court of Continuing Jurisdiction

If there is no court of continuing jurisdiction with respect to custody of a minor child, the action may be brought in either the probate court or the family district court. A court that maintains continuing jurisdiction over a parent-child relationship continues to maintain that jurisdiction even after the death of the managing conservator. *See Dohrn v. Delgado*, 941 S.W.2d 244, 248 (Tex. App. – Corpus Christi 1996, orig. proceeding); *Lewis v. McCoy*, 747 S.W.2d 48, 50 (Tex. App. – El Paso 1988, orig. proceeding).

C. Choice of Forum

1. Parent Deceased

If the parent of a child is deceased, an action for appointment of managing conservator may be brought in the family district court or an application for appointment of a guardian of the person of a minor may be brought in probate court. If an action for appointment of managing conservatorship is being brought, the applicant's standing to bring the action must be determined. *See* TEX. FAM. CODE § 102.003. However, any person who has an interest in the child may seek appointment as guardian of the child in the probate courts. TEX. PROBATE CODE § 642. In the probate courts, an attorney ad litem is required to be appointed for any application for the appointment of a guardian. TEX. PROBATE CODE § 646. However, in the family district courts, the court has discretion to determine whether to appoint an attorney ad litem. TEX. FAM. CODE § 107.011, 107.0135. This may reduce significantly the cost of the proceedings. Under the Probate Code, a surviving parent will still be considered the natural guardian of the child although the guardian of the person for the minor child has

the right to have physical possession of the minor child and has essentially the same powers and duties as the managing conservator. *See* TEX. PROBATE CODE § 676, 767. However, if the applicant is appointed managing conservator in family district court, the court has the authority to divide possession and access of the child between the managing conservator and possessory conservator of the child.

2. Guardianship when Parents are Living

There may be many situations when a guardianship is requested for a minor child even when the parent or parents of a minor child are living. In many instances these actions are brought because the child is no longer living with the parent or because of a necessity to obtain health insurance or other insurance benefits for the child. As stated above, the standing requirements are much easier to satisfy in the probate courts as opposed to the family district courts. The appointment of a guardian of the person of a minor child does not terminate the parent's rights and the parent is still considered the natural guardian of the child; however, the guardian of the person for the minor child has the right to have physical possession of the minor child and has essentially the same powers and duties as the managing conservator. *See* TEX. PROBATE CODE § 676, 767. Thus, the rights of possession and control of the child may conflict with the powers or rights of the guardian of the person of the minor child. In addition, because of the requirement that an attorney ad litem be appointed in all guardianship actions, this may effect the cost in choosing the forum for determining custody of a minor child. *See* TEX. PROBATE CODE § 646. Further, a guardian of the person is required to file annual reports with the probate court on the status of the child. *See* TEX. PROBATE CODE § 743. In addition, some statutory probate courts may require the guardian of the person of the minor child to post a personal or corporate surety bond to ensure that he or she will comply with his or her duties as guardian of the person.

Any time the probate courts are chosen as the forum for determining custody of a minor child, the practitioner must keep in mind that section 609 of the Probate Code provides that if an interested person contests an application for appointment of a guardian of the person of a minor or seeks the removal of a guardian of the person of a minor, the judge on the judge's own motion may transfer all matters relating to the guardianship of the person of the minor to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Family Code is pending. Consequently, even if the parties have brought a custody fight to probate court, the probate court has the discretion to transfer the suit back to the family courts if there is pending a case affecting the parent-child relationship in that court.

VI. ESTATES OF MINORS

A. Jurisdiction and Standing

1. Jurisdiction of Probate Court

The jurisdiction of the probate court to appoint a guardian of the estate of a minor with respect to any property of the minor's estate is the same as for the appointment of a guardian of the person of the minor as described above. *See* TEX. PROBATE CODE §§ 605, 606. Further, the standing requirements to bring an application for guardianship or to contest an application are the same as described above. *See* TEX. PROBATE CODE § 642. Section 676 of the Probate Code sets forth the individuals with priority to serve as guardians of minors. If the parents live together, one of the parents is entitled to be appointed guardian of the estates of the minor

children. If the parents disagree as to which parent should be appointed, the court shall make the appointment on the basis of which parent is better qualified to serve in that capacity. If one parent is dead, the survivor is entitled to be appointed guardian of the minor children's estates. The rights of parents who do not live together are equal, and the guardianship of their minor children will be assigned to one or the other, considering only the best interests of the children. If the minor child is an orphan and the last surviving parent did not appoint a guardian, the nearest ascendant in the direct line of the minor is entitled to guardianship of the estate of the minor. If more than one ascendant exists in the same degree in the direct line, one ascendant will be appointed, according to circumstances and considering the best interests of the minor. If the minor has no ascendant in the direct line, the nearest of kin will be appointed, and if there are two or more persons in the same degree of kinship, one will be appointed, according to circumstances and considering the best interests of the minor. However, if no relative of the minor is eligible to be guardian, or if no eligible person applies to be guardian, the court will appoint a qualified person as guardian. TEX. PROBATE CODE § 676.

2. Jurisdiction of Family Courts

The Family Code appears to give parents appointed as conservators for a child rights to manage the estate of the child to the extent that the estate has been created by the parent or the parent's family. TEX. FAM. CODE § 153.073(a). Further, the sole managing conservator of a child has the right to represent the child in legal actions and make other decisions of substantial legal significance concerning the child and except when a guardian of the child's estate or guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by the State, United States or a foreign government. TEX. FAM. CODE § 153.132. Consequently, a conservator of a child may be given specific orders to manage property on behalf of the minor's estate if it falls within the powers set forth in sections 153.073 or 153.132 of the Family Code.

B. Choice of Forum

In determining whether to manage the estate of a minor through the powers granted to conservators in the family courts or through the use of a guardian of the estate, one must understand the pros and cons of each forum.

The appointment of a guardian of the estate for a minor can be quite expensive. An attorney ad litem is required to be appointed for any application for the appointment of a guardian. *See* TEX. PROBATE CODE § 646. The guardian that is appointed will be required to provide a corporate surety bond for the value of the assets under that guardian's care and control. *See* TEX. PROBATE CODE §§ 702, 703. There are numerous reporting requirements for the guardian of the estate including the filing of an inventory and annual accounting to show in detail the receipts and disbursements of the funds held under the guardian's care and control. *See* TEX. PROBATE CODE §§ 729, 730, 733, 741, 742. Further, no expenditures from guardianship assets may be made by the guardian without court approval. *See* TEX. PROBATE CODE § 774. Section 777 of the Probate Code provides that a parent who is a guardian of the person of a ward who is seventeen years of age or younger may not use the income or the corpus from the ward's estate for the ward's support, education or maintenance. TEX. PROBATE CODE § 777(a). However, a court may authorize the guardian to spend income or the corpus from the ward's estate to support, educate or maintain the ward if the guardian presents clear and convincing evidence to the

court that the ward's parents are unable without unreasonable hardship to pay for all the expenses related to the ward's support. TEX. PROBATE CODE § 777(b). Consequently, strict limitations will be placed upon the use of the ward's funds for the ward's maintenance and support during minority.

On the other hand, the expense and cumbersome requirements of a guardianship of the estate may be avoided if the conservator of the child is granted the authority to manage assets of the estate as allowed by the Family Code. This will probably be of assistance only in certain limited situations. As a practical matter, though, it will be difficult to receive payment of funds from third parties such as insurance companies, brokerage firms, or banks on behalf of the minor without a court-appointed guardian.

C. Alternatives to Guardianship of Estates for Minors

In evaluating whether the guardianship of an estate of a minor is necessary, not only should one consider the powers given to the conservator with respect to the estate of the minor, but he or she should consider whether there are other alternatives to a guardianship of the estate. The Probate Code provides various options.

1. Payment of Claims without Guardianship

Section 887 of the Probate Code provides that when a person is a minor or incapacitated person and is without a guardian of his or her estate and that person is entitled to money in an amount that is $50,000.00 or less, the right of which is liquidated and is uncontested in any pending lawsuit, the debtor may pay the money to the county clerk of the county in which the minor resides to the account of the minor giving the minor's name, the nature of the minor's disability and the minor's age and address. This is an effective method for receiving funds on behalf of a minor when those funds do not exceed $50,000.00. Such funds may be from life insurance proceeds, annuity proceeds, small inheritances or similar sources. There are also provisions for the parents or custodian of the child to remove the funds from the registry of the court before the child reaches age eighteen if such funds are needed and the person posts an adequate bond. When the child reaches eighteen, the child is entitled to claim the funds from the registry of the court. TEX. PROBATE CODE § 777(b).

2. Sale of the Property of a Minor

Section 889 of the Probate Code provides for the sale of property of a minor by a parent without guardianship. This provision applies when the value of a minor's interest in real or personal property in an estate does not exceed $50,000.00. The application for the sale of the property may be brought by the child's parent or managing conservator. Generally, proof will have to be provided to the court so that the court is satisfied that the sale is in the best interests of the minor. Also, some courts may appoint an attorney ad litem or guardian ad litem to represent the interest of the minor ward. Upon the sale of the property, the court's order will require that the proceeds from the sale belonging to the minor be paid into the registry of the court. TEX. PROBATE CODE § 889.

3. Management Trust

Sections 867-873 of the Probate Code provide for the creation of a management trust by which the ward's funds may be placed in trust for the use and benefit of the ward. The trust is created by court order, and the trustee of the trust must be a trust company or a state or national bank that has trust powers in this state. TEX. PROBATE CODE § 867. The trustee of the trust must provide an annual account to

the probate court each year. TEX. PROBATE CODE § 871. The fees the trustee may charge are limited by the statutory fees for a guardian of the estate under the Probate Code. TEX. PROBATE CODE § 868. Consequently, it may be difficult to place the funds in a management trust with a corporate trustee which is willing to be limited by the statutory fees under the Probate Code unless the trustee is able to show that it has expended additional effort on behalf of the ward to justify a higher fee. Further, the trust terminates on the death of the ward or the ward's 18th birthday, whichever is earlier, or on the date provided by court order which may not be later than the ward's 25th birthday.

4. Emancipation of Minor

If a minor is sixteen years old or above, consideration should be given to whether removal of the disabilities of the minor under Chapter 31 of the Family Code would be more suitable to the child than the appointment of a guardian of the estate for the child. Section 31.001 provides that the minor may petition to have the disabilities of minority removed for limited or general purposes if the minor is (1) a resident of the state; (2) seventeen years of age, or at least sixteen years of age and living separate and apart from the minor's parents, managing conservator or guardian; and (3) self-supporting and managing his or her own financial affairs. TEX. FAM. CODE § 31.001(a). A minor may file suit under these provisions in the minor's own name and need not be represented by a next friend. TEX. FAM. CODE § 31.001(b). A parent of the petitioner must verify the petition except that if there is a managing conservator or guardian of the person that has been appointed, then that individual shall verify the petition. If the person who is to verify the petition is unavailable or that person's whereabouts are unknown, the guardian ad litem shall verify the petition. TEX. FAM. CODE § 31.002(b). Section 31.004 of the Family Code provides that a guardian ad litem shall be appointed to represent the interest of the minor at the hearing. TEX. FAM. CODE § 31.004. Except for specific constitutional and statutory age requirements, a minor whose disabilities are removed for general purposes has the capacity of an adult, including the capacity to contract. TEX. FAM. CODE § 31.006. Consequently, with the removal of the disabilities of minority, the need for a guardianship of the estate should be eliminated in most instances.

VII. CONCLUSION

Hopefully this article has enlightened the family law practitioner on probate issues that could effect practice in the family law courts and the probate courts. Since family law and probate matters often overlap, conflicts between the two bodies of law and the court system applying those laws are inevitable. Furthermore, many times there are no definitive answers for the jurisdictional and other issues that arise when family law and probate law conflict. Consequently, it is imperative that family law practitioners have a working knowledge of both probate law and family law and how those two areas of the law may conflict so that we may determine whether the provisions under the Family Code or the Probate Code best meet the client's needs.