JURISDICTIONAL ISSUES
BETWEEN FAMILY AND PROBATE COURTS

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I. INTRODUCTION

Probate and family law matters can often overlap resulting in conflict between the two court systems. This article is intended to provide the practitioner with a primer on probate and family code jurisdiction and standing requirements and provide an analysis on how courts have handled these conflicts. Lastly, the article will examine the requirements for attorneys acting as attorney ad litems under both codes since the new legislation.

II. A PRIMER ON JURISDICTIONAL AND STANDING REQUIREMENTS IN PROBATE AND FAMILY COURTS

Before examining conflicts between the two codes, it is important to understand how a case reached a certain court in the first place. This section will highlight the probate and family statutes the practitioner needs to be familiar with.

A. Jurisdiction and Standing Under the Probate Code

1. JURISDICTION OF PROBATE COURTS

Section 5 of the Texas Probate Code sets out the appropriate jurisdiction with respect to probate proceedings. If the county you reside in does not have a statutory probate court, a county court at law, or other statutory court exercising the jurisdiction of a probate court, then all applications, petitions or motions regarding probate and administrations are to be filed in the county court. Tex.Prob.Code §5(b) (Vernon 1996). A probate matter filed in a county court that becomes contested can be transferred to an assigned statutory probate judge or to a district court on motion of the judge. Tex.Prob.Code §5(b). If a party requests a transfer, the transfer is not discretionary. Id. The county court will maintain jurisdiction over the non-contested portion of the proceeding. Id. After resolution of the contested issue, the case will be transferred back to the county court for proceedings consistent with the district court or assigned judge's order. Tex.Prob.Code §5(b) (1996). Section 4 of the Texas Probate Code provides county courts with the general jurisdiction of a probate court. Tex.Prob.Code §4 (Vernon 1996). This section does not extend jurisdiction to interpretation and administration of testamentary or constructive trusts. Compare Tex.Prob.Code §5A(a) with Tex.Prob.Code §5A(b).

In counties containing a statutory probate court, a county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions and motions regarding probate and administrations will be filed in such courts and the constitutional county courts, rather than the district courts. Tex.Prob.Code §5(c) (Vernon 1996). A proceeding filed in a constitutional

county court that becomes contested may be transferred by the judge to a statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court. Id. A transfer is not discretionary if requested by a party to the action. Id.

The district courts have original jurisdiction over executors and administrators under the Texas Probate Code. Tex.Prob.Code §5(a). A statutory probate court and the district courts have concurrent jurisdiction in a suit against a person acting in their capacity as a personal representative, and in all suits involving an inter vivos trust, a charitable trust, and/or testamentary trust. Tex.Prob.Code §5(d) (Vernon 1996). However, §5(e) of the Probate Code grants courts exercising original probate jurisdiction the power to hear all matters incident to an estate.

2. JURISDICTION IN GUARDIANSHIP PROCEEDINGS

Texas Probate Code §605, §606 determines jurisdiction for guardianship proceedings. These sections largely track the language found in Texas Probate Code §4 and §5 respectively. Section 605 of the Texas Probate Code provides county courts with the authority to appoint guardians of minors and other incapacitated persons. Texas Probate Code §606(a) grants the district courts original jurisdiction over guardians and wards. In counties which do not contain a statutory probate court, a 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 courts. Texas Probate Code §606(b) (Vernon 1996). As with other contested probate proceedings in a county court (see Tex.Prob.Code §5(a)), if the guardianship proceedings become contested, a judge may request the assignment of a statutory probate judge, or a transfer to the district court. Tex.Prob.Code §606(b) (Vernon 1996). If requested by a party, the transfer is mandatory. Id. The county court maintains jurisdiction over the uncontested guardianship proceedings until the final disposition of the case is made by the district court or the assigned judge. Tex.Prob.Code §606(b) (Vernon 1996).

In counties which do contain 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 illness matters will be filed and heard in those courts and the constitutional county courts rather than the district courts. Tex.Prob.Code §606(c) (Vernon 1996). If the guardianship matter becomes contested, then 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 the jurisdiction of a probate court. Id. Again, this transfer is not discretionary if the requested transfer is filed by a party. Id.

The district courts have original jurisdiction over guardians and wards under the Texas Probate Code. Tex.Prob.Code §606(a) (Vernon 1996). 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.Prob.Code §606(d). However, in counties containing a statutory probate court, file guardianship applications in that court rather than the district court. See Tex.Prob.Code §606(c) (Vernon 1996).

3. VENUE FOR PROBATE OF WILLS AND ADMINISTRATION OF ESTATES

Texas Probate Code §6 provides a schedule for venue for the probate of wills and administration of estates. This section provides as follows:

> "Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:
>
> (a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.
>
> (b) If the deceased had no domicile or fixed place of residence in this State but died in this State, then either in the county where his principal property was at the time of his death, or in the county where he died.
>
> (c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.
>
> (d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.
>
> (e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant."

This section mandates venue in the county where the decedent had a domicile or fixed place of residence. Tex.Prob.Code §6(a) (Vernon 1996). If the decedent had no domicile or fixed place of residence, venue could be proper in several counties. See Tex.Prob.Code §6 (Vernon 1996). This eventuality is covered by §8 of the Tex.Prob.Code, which provides that venue is proper in the county where the application for probate is filed first.

4. VENUE FOR APPOINTMENT OF GUARDIAN

Texas Probate Code §610, provides a schedule for venue regarding the appointments of guardians. This section provides in relevant part as follows:

> "(a) Except as otherwise authorized by this section, a proceeding for the appointment of a guardian for the person or estate, or both, of an incapacitated person shall be brought in the county in which the proposed ward resides or is located on the date the application if filed or in the county in which the principal estate of the proposed ward is located.

(b) A proceeding for the appointment of a guardian for the person or estate, or both, of a minor may be brought:

(1) in the county in which both the minor's parents reside;

(2) if the parents do not reside in the same county, in the county in which the parent who is the sole managing conservator of the minor resides, or in the county in which the parent who is the joint managing conservator with the greater period of physical possession of and access to the minor resides;

(3) if only one parent is living and the parent has custody of the minor, in the county in which that parent resides;

(4) if both parents are dead but the minor was in the custody of a deceased parent, in the county in which the last surviving parent having custody resided; or

(5) if both parents of a minor child have died in a common disaster and there is no evidence that the parents died other than simultaneously, in the county in which both deceased parents resided at the time of their simultaneous deaths if they resided in the same county.

(c) A proceeding for the appointment of a guardian who was appointed by will may be brought in the county in which the will was admitted to probate or in the county of the appointee's residence if the appointee resides in this state.

(d) A proceeding for the appointment of a guardian for the estate of a missing person may be brought:

(1) in the county in which the missing person's spouse resides;

(2) if there is no spouse, in the county in which a parent or child of the missing person resides; or

(3) if there is no spouse, parent, or child, in the county in which the missing person's next of kin resides."

The general rule is that where the child resides determines where to file. See Tex.Prob.Code §610 (Vernon 1996). If two courts have a concurrent venue under the statute, then venue is proper in the county where the matter was first filed. Tex.Prob.Code §611 (Vernon 1996).

5. STANDING REQUIREMENTS UNDER THE PROBATE CODE

Standing requirements under the Texas Probate Code provide easy access to the courts.

Section 76 of the Texas Probate Code provides that an executor or "any interested person" may make an application for a probate proceeding to the court of a proper county. Section 3(r) of the Texas Probate Code states that ""interested person" or "persons" means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered, and anyone interested in the welfare of a minor or incompetent ward." Section 10 of the Texas Probate Code extends this broad grant of standing to persons who desire to contest a probate proceeding and provides as follows: "Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits."

Liberal standing requirements also exist with regard to guardianship proceedings. Section 642 of the Texas 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 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; or
>
> (3) contest the appointment of a person as a guardian of the person or estate, or both, of the proposed ward or incapacitated person.
>
> (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."

As provided by this section, the only real limitation on standing is if a person has an interest averse to a proposed ward or incapacitated person. Under §642(c) of the Texas Probate Code, the court shall determine through a motion in limine whether an applicant's standing is averse to a proposed ward.

B. Jurisdiction and Standing Under the Family Code

1. 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 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) husband and wife."

In essence, family courts and district courts have the same powers, but with family courts simply shouldering a different burden of the case load.

Texas Family Code §3.21 provides the general jurisdictional rule that no suit for divorce can be maintained unless one of the parties has been a domiciliary of the state for the preceding six month period and domiciliary of the county in which the suit is filed for ninety days preceding the filing of the suit. If the parties are parents of children, the divorce must include a suit affecting the parent-child relationship. Tex.Fam.Code Ann. §3.55(b). If a suit affecting the parent-child relationship is pending at the time the suit for divorce, annulment, or to declare a marriage void is filed, then the court shall transfer the pending suit affecting the parent-child relationship to the county where the divorce is currently pending. Tex.Fam.Code Ann. §3.55(b) (Vernon 1995), see Tex.Fam.Code Ann. §103.001(a) (Vernon 1995). 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 the court hearing the divorce suit. Tex.Fam.Code Ann. §3.55(c) (Vernon 1995). After the transfer is complete, the court shall consolidate the lawsuits. Id. The requirement to transfer the suit affecting the parent-child relationship to the county where the divorce is pending applies regardless of whether the suit affecting the parent-child relationship was filed first. See Tex. Fam.Code Ann. §3.55(b) (Vernon 1995), Tex.Fam.Code Ann., introductory comment to chapter 103 (Vernon 1995).

2. VENUE FOR AN ORIGINAL SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

If a divorce has been filed, then the county where the divorce is filed will control venue. If no divorce is pending then §103.001 of the Texas Family Code will control. Section 103.001

provides as follows:

> "(a) Except as otherwise provided by this title, an original suit shall be filed in the county where the child resides, unless:
>
> (1) another court has continuing exclusive jurisdiction under Chapter 155; or
>
> (2) venue is fixed in a suit for dissolution of a marriage under Chapter 3.
>
> (b) A suit in which adoption is requested may be filed in the county where the child resides or in the county where the petitioners reside.
>
> (c) A child resides in the county where the child's parents reside or the child's parent resides, if only one parent is living, except that:
>
> (1) if a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;
>
> (2) if the parents of the child do not reside in the same county and if a managing conservator, custodian, or guardian of the person has not been appointed, the child resides in the county where the parent having actual care, control, and possession of the child resides;
>
> (3) if the child is in the care and control of an adult other than a parent and a managing conservator, custodian, or guardian of the person has not been appointed, the child resides where the adult having actual care, control, and possession of the child resides;
>
> (4) if the child is in the actual care, control, and possession of an adult other than a parent and the whereabouts of the parent and the guardian of the person is unknown, the child resides where the adult having actual possession, care, and control of the child resides;
>
> (5) if the person whose residence would otherwise determine venue has left the child in the care and control of the adult, the child resides where that adult resides;
>
> (6) if a guardian or custodian of the child has been appointed by order of a court of another state or country, the child resides in the county where the guardian or custodian resides if that person resides in this state; or
>
> (7) if it appears that the child is not under the actual care, control, and possession of an adult, the child resides where the child is found."

The base rule is to file where the child resides. This base rule has exceptions listed to venue including several which interact with the Probate Code. Texas Family Code §103.001(c)(1) and (6) provide

that a child is deemed to reside in the county where his guardian resides if one has been appointed. Once a court has entered a final order in connection with a suit affecting the parent-child relationship, it shall maintain continuing exclusive jurisdiction over that matter. Tex.Fam.Code Ann. §155.001 (Vernon 1995).

Texas Family Code §155.003 provides limitations on the exercise of the courts continuing exclusive jurisdiction. This section provides in relevant part:

> "(a) Except as otherwise provided by this section, a court with continuing, exclusive jurisdiction may exercise its jurisdiction to modify its order regarding managing conservatorship, possessory conservatorship, possession of and access to the child, and support of the child.
>
> (b) A court of this state may not exercise its continuing, exclusive jurisdiction to modify managing conservatorship if:
>
> (1) the child's home state is other than this state; or
>
> (2) modification is precluded by Chapter 152.
>
> (c) A court of this state may not exercise its continuing, exclusive jurisdiction to modify possessory conservatorship or possession of or access to a child if:
>
> (1) the child's home state is other than this state and all parties have established and continue to maintain their principal residence outside this state; or
>
> (2) each individual party has filed written consent with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction of the suit.
>
> (d) A court of this state may not exercise its continuing, exclusive jurisdiction to modify its child support order if modification is precluded by Chapter 159."

The court of continuing, exclusive jurisdiction must transfer the matter to another court if 1) a suit for divorce of the child's parents has been filed in another county; or 2) a suit to modify or enforce is filed and a timely motion to transfer the suit to a county where the child has resided for six months or longer is filed. Tex.Fam.Code Ann. §155.201 (Vernon 1995). This transfer is not discretionary. Id. (statute uses language "shall transfer")

3. STANDING TO FILE IN A SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

Compared with the general language in the Probate Code, the Texas Family Code sets out specific guidelines for who can maintain a suit affecting the parent-child relationship. The

requirements for standing are governed by Texas Family Code §102.003, which provides as follows:

> "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 who has had actual care, control, and possession of the child for not less than six months preceding 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; or
>
> (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for not less than six months preceding 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."

Standing requirements for grandparents are provided by §102.004, which in essence provides that grandparents may maintain an original action requesting managing conservatorship only if 1) satisfactory proof exists to the court that the child's current environment presents a serious question as to the child's welfare; or 2) if all surviving parents, the managing conservator, or custodian filed the petition or consented to the suit. Tex.Fam.Code Ann. §102.004(a)(2) (Vernon 1995). This section also allows a grandparent or other person deemed by the court to have substantial past contact with the child to intervene in a pending suit.

C. Transfer Provisions within the Texas Probate Code

The Texas Probate Code contains provisions which allow a statutory probate court to reach out and pull in a matter currently in another court and that is appertaining to or incident to an estate or guardianship estate that is currently pending before that probate court. Conversely the Probate Code also allows a statutory probate court to transfer a contested guardianship matter to a court where a suit affecting the parent-child relationship is currently pending.

1. REACH OUT AND TOUCH SOMEONE; Texas Probate Code §5B, §608

Texas Probate Code §5B, and §608 allow a probate judge to reach out and pull in a matter that relates to an estate they are currently administering. Section 5B of the Texas Probate Code deals with issues affecting an estate and provides as follows:

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

The phrases "appertaining to an estate" and "incident to an estate" are defined by §5A of the Texas Probate Code. In the constitutional county courts and the county courts at law these include, but are not limited to, the probate of wills, the issuance of letters testamentary and of administration, the determination of heirship, all claims by or against an estate, all actions for trial of title to land incident to an estate, the enforcement of liens thereon incident to an estate, all actions for trial of the right of property incident to an estate, and actions to construe wills, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons. Tex.Prob.Code §5A(a) (Vernon 1996).

The statutory probate courts and the district courts have the above listed rights along with additional powers. The statutory probate court and district court also have the power to rule on the interpretation and administration of testamentary and constructive trusts. Tex.Prob.Code §5A(b) (Vernon 1996). Additionally, courts have defined "incident to an estate" as "an action is incident to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." Green v. Watson, 667 S.W.2d 359, 362 (Tex.App. -- Houston [14th Dist.] 1984, writ ref'd N.R.E.) (court commenting that the purpose of the legislature having expanded the probate court jurisdiction over recent years is to allow the probate court "to more fully and quickly settle a decedent's estate in one proceeding.") Id. 363.

Section 608 of the Texas Probate Code is the counterpart to §5B, in that it allows a statutory probate court to transfer to itself a matter related to a guardianship estate pending before it. Section 608 provides in relevant part as follows:

> "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 and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to the guardianship estate."

Section 607(a) of the Texas Probate Code defines "appertaining to estates" and "incident to estate" with regard to guardianships. In a statutory county court at law or a constitutional county court, the terms 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 of land incident to a guardianship estate and for the enforcement of liens incident to a guardianship estate, trials regarding 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(a) (Vernon 1996).

Section 607(b) of the Texas Probate Code provides the same definitions for appertaining to estates or incident to estate for the district and statutory probate courts, the county courts at law, and the constitutional county courts. However, the statute does provide that "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." Tex.Prob.Code §607(b) (Vernon 1996).

2. IF YOU HAVE A CUSTODY FIGHT TAKE IT SOMEWHERE ELSE, Texas Probate Code §609

Texas Probate Code §609 allows the judge, on his own motion, to transfer a contested guardianship to a court of competent jurisdiction where a suit affecting the parent-child relationship is currently pending. Section 609 provides in relevant part:

"(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 Section 11.05(h), and its subsequent

amendments, in regard to enforcing an order rendered by the court from which the proceeding was transferred."

In essence, this provision allows a judge to kick what really appears to be a custody fight back into the family courts if a suit there is already pending. Section 11.05(h) of the Texas Family Code has been recodified at §155.005 and §155.205.

III. JURISDICTIONAL CONFLICTS BETWEEN THE COURTS

A. Roberson v. Pickett

1. SYNOPSIS

What do you do when litigants faced with a probate order they do not like run to the family courts to get a new order without notice to the parties in the probate proceeding? This is a situation faced by the court of appeals in Roberson v. Pickett, 900 S.W. 2d 112 (Tex.App. -- Houston [14th Dist.] 1995). To prevent deception the court stretched the notice requirements of the old Texas Family Code §11.09 (now §102.009) to address this problem.

2. THE FACTS IN ROBERSON

Vanessa Roberson had a child in September 1988 with no presumed father. Roberson at 113. Vanessa raised the child until she was murdered in July 1991. Id. at 114. The child's maternal grandmother filed suit individually and on behalf of her granddaughter against those responsible for Vanessa's death. Id. Albert Pickett, the child's purported father (no dispute existed as to whether he was the father) attempted to intervene in the lawsuit, but lacked standing to do so. Id. Albert had never married Vanessa Robertson and the statute had run on proving a common law marriage. Id. The tort lawsuit settled and the portion for the child was deposited with the registry of the court.

In September 1992 the child's grandmother filed to appoint herself guardian in the probate court. Id. Grandmother contended that the child did not have a guardian, that the child lived with her, and that it would be in the child's best interest that she be appointed guardian. Id.

In November 1992 Albert Pickett filed a response contesting the grandmother's appointment as guardian. Id. He claimed that he was the child's biological father, that the child lived with him, that he had not relinquished his parental rights, and that it was in the child's best interest that the grandmother not be appointed guardian. Id. Neither party took any action in the guardianship proceeding for the next six months, although a guardian ad litem was appointed for the child at some point during this time. See Id.

In May 1993, Pickett filed suit in family court seeking to establish the parent-child relationship between himself and the child, be appointed managing conservator, and have the child's last name changed to his. Id. Neither the child's grandmother nor the guardian ad litem was served copies of

the lawsuit. Id. In June 1993, Pickett filed a statement of paternity. Id. Grandmother attempted to intervene, but not before the family court entered an order determining paternity and awarding managing conservatorship to Pickett. Id. Some months later Grandmother filed her writ of error challenging the order. Id.

3. THE COURT'S ANALYSIS

In reviewing this case, the court focused on the lack of notice provided to the child's grandmother who was a party in the probate proceeding. The court examined the applicable family code statute for notice which was §11.09(a) (Vernon Supp. 1992) Roberson at 115. Texas Family Code §11.09(a) (now codified at §102.009) provides as follows:

"(a) Except as provided by Subsection (b), the following are entitled to service of citation on the filing of a petition in an original suit:

(1) a managing conservator;

(2) a possessory conservator;

(3) a person having possession of or access to the child under an order;

(4) a person required by law or by order to provide for the support of the child;

(5) a guardian of the person of the child;

(6) a guardian of the estate of the child;

(7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Chapter 161;

(8) an alleged father, unless there is attached to the petition an affidavit of waiver of interest in a child executed by the alleged father as provided by Chapter 161; and

(9) the Department of Protective and Regulatory Services, if the petition requests that the department be appointed as managing conservator of the child.

(b) Citation may be served on any other person who has or who may assert an interest in the child.

(c) Citation on the filing of an original petition in a suit shall be issued and served as in other civil cases.

(d) If the petition requests the establishment, modification, or enforcement of a support

right assigned to the Title IV-D agency under Chapter 231, notice shall be given to the attorney general in a manner provided by Rule 21a, Texas Rules of Civil Procedure."

In examining the statute the court admitted that the statute did not appear to make service on the grandmother necessary. Id. at 115. The court stating "therefore, at first blush, it appears Appellee did not have to serve notice on Appellant." Id. The grandmother did not fit under any of the mandatory notice provisions, §11.09(a)(1-9); however, she had filed under the probate code to become a guardian, but no order had been issued appointing her guardian. Although, not relied upon by appellant on appeal, the court noted that the guardian ad litem would likely fall under the category of mandatory notice required by §11.09(a)(5). Id. at 116.

The court then examined the optional service provisions of §11.09(b). The court may also give notice to "any other person who has or who may assert an interest in the child . . . ". Tex.Fam.Code Ann. §11.09(b) (Vernon Supp. 1992). The court reasoned that the grandmother's interest in the child had risen above those who may assert an interest in the child because she had already filed seeking guardianship of the child in probate court. Roberson at 115. The court stated ". . . by filing suit to establish the relationship, the person moves from the group of those who have or may assert an interest who are not entitled to mandatory service to the group of those who are entitled to mandatory service." Id. at 116. In applying this reasoning to the statute the court stated "we hold that a person who has filed suit seeking guardianship fits within the meaning of guardian of the person or estate under §11.09(a)(5) and (a)(6)." Id.

The case highlights the interplay between the probate and family law courts. Pickett, in this case, used a perceived loophole in the family code to circumvent the guardianship proceedings. This is at the crux of the court's decision. The court reasoned "The legislature could not have intended for one party to run to a different court while one court was in the process of resolving the same issues . . . The best interests of the child are not served when parties in one suit do not know of a second suit involving the same issues, and cannot intervene in the second suit to inform the court of their claims in the first. Secretly filing suit involving some of the same issues affecting a child serves neither the law nor the litigants. A full and fair hearing of all those who claim an interest in the child is the proper way to protect the best interests of the child." Roberson at 116.

The court remanded the case to the trial court for proceeding consistent with their opinion. This means the case is back in family court, with a guardianship case presumably still out there in probate court. Which court should hear the matter? The judge of the probate court would have several options: 1) under Tex.Prob.Cod §608, the judge on his own motion, or that of a party, could transfer the case from the district court to his court; 2) under Tex.Prob.Code §609, the judge could transfer the guardianship action to the district court for resolution of the contested issues. In general the first court taking jurisdiction over an action has dominant jurisdiction to the exclusion of other courts as long as it has subject matter jurisdiction. Carlisle v. Bennett, 801 S.W.2d 889, 592 (Tex.App. -- Corpus Christi 1990, no writ). So, clearly, the probate court has grounds to keep the action; however, the legislative intent behind §609 of the Texas Probate Code implies that custody fights should be fought in the family courts. But the statute is not mandatory, using may transfer the

case, not shall transfer. See Tex.Prob Code §609 (Vernon 1996).

4. ANY OTHER LOOPHOLES OUT THERE?

Would the situation have been different in Roberson v. Pickett if the courts had been reversed? That is, grandmother files first in the family court and serves purported father. Later, father runs to the probate court and files a guardianship action. Would he have to serve grandmother with the petition? Texas Probate Code §633, Notice and Citation, control notice requirements for applications for guardianships. Section 633 provides in relevant part:

> "(a) On the filing of an application for guardianship, notice shall be issued and served as provided by this section.
>
> (b) The court clerk shall issue a citation stating that the application for guardianship was filed, the name of the proposed ward, and the name of the applicant. The citation must cite all persons interested in the welfare of the proposed ward to appear at the time and place stated in the notice if they wish to contest the application. The citation shall be posted.
>
> (c) The sheriff or other officer shall personally serve citation to appear and answer the application for guardianship on:
>
> (1) a proposed ward who is 12 years of age or older;
>
> (2) the parents of a proposed ward if the whereabouts of the parents are known or can be reasonably ascertained;
>
> (3) any court-appointed conservator or person having control of the care and welfare of the proposed ward;
>
> (4) a proposed ward's spouse; and
>
> (5) an attorney ad litem or guardian ad litem appointed to represent the interests of a missing person.
>
> (d) The court clerk, at the applicant's request, or the applicant shall mail a copy of the notice by registered or certified mail, return receipt requested, to the following persons if their whereabouts are known or can be reasonably ascertained:
>
> (1) all adult siblings and all adult children of a proposed ward;
>
> (2) the administrator of a nursing home facility or similar facility in which the proposed ward resides;

(3) the operator of a residential facility in which the proposed ward resides; and

(4) a person whom the applicant knows to hold a power of attorney signed by the proposed ward.

(e) A person other than the proposed ward who is entitled to receive notice or personal service of citation under Subsections (c) and (d) of this section may choose, in person or by attorney ad litem, by writing filed with the clerk, to waive the receipt of notice or the issuance and personal service of citation.

(f) The court may not act on an application for the creation of a guardianship until the Monday following the expiration of the 10-day period beginning the date service of notice and citation has been made as provided by Subsections (b), (c), and (d)(1) of this section. The validity of a guardianship created under this chapter is not affected by the failure of the clerk or applicant to comply with the requirements of Subsections (d)(2)-(4) of this section.

(g) It is not necessary for a person who files an application for the creation of a guardianship under this chapter to be served with citation or waive the issuance and personal service of citation under this section."

Section 633(c)(3) would appear to mandate service on the grandmother and mandate service on any court appointed conservator or "person having control of the care and welfare of the proposed ward." This is a major distinction between probate and family in terms of notice. The family code does not provide for mandatory service on the person having actual care and control of the child if they are not conservator of the child. Compare Tex.Prob.Code §633 (Vernon 1996) with Tex.Fam.Code Ann. §102.009 (Vernon 1995).

B. Garland v. Garland

1. SYNOPSIS

Garland v. Garland, 868 S.W.2d 847 (Tex.Civ.App. --Dallas, 1993, no writ), addressed the appropriate forum for a guardianship proceeding when a family district court has continuing jurisdiction for support payments. The court of appeals held that jurisdiction is proper in the probate court for filing a guardianship action.

2. FACTS

K. Thomas Garland and Judith Garland are the parents of Daniel Garland, who suffers from Down Syndrome. Garland at 848. Daniel's parents divorced in 1987 when he was sixteen. Id. Judith Garland was appointed managing conservator and because of Daniel's condition child support payments were ordered for him past the age of eighteen. Id.

In 1992, when Daniel was 22, his father filed suit in the probate court asking for guardianship of the person and estate of Daniel. Id. Judith Garland contested the jurisdiction of the probate court and filed a motion to dismiss because she contended the family district court had exclusive continuing jurisdiction over her son. Id. The probate judge agreed with her and dismissed the case because of the continuing jurisdiction of the family district court. Id. Thomas Garland appealed and contended the probate court had original jurisdiction for all applications for guardianships. Id.

3. THE COURT'S ANALYSIS

The court looked to the then new Probate Code §606(c) and concluded that guardianship proceedings must originally be filed in the Dallas Probate Court. Id. at 850. The court held that the language of §606(c) was "clear and unambiguous." Id. at 849. Judith Thomas argued that the Family Code vested jurisdiction in the family district court because that court retained authority to modify Daniel Garland's support order. She based her contentions on §11.05(a), §11.07(b), §14.05(a), and §14.051(b) of the Texas Family Code (now codified at §155.001, §155.002; §102.002; §158,001, §154.001, §154.002, §154.003, and §154.302 respectively.

Sections 11.05(a), 11.07(b), 14.05(a) and 14.051 provide in relevant part:

"Section 11.05 Continuing Jurisdiction.

(a) Except as otherwise provided by this section . . . when a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing, exclusive jurisdiction of all parties and matters provided for under this subtitle in connection with the child.

Section 11.07 Commencement of Suit and Petition for Further Remedy.

(b) Except in a motion to modify . . . a request for further action concerning a child who is the subject of a suit affecting the parent-child relationship and who is under the jurisdiction of court with continuing jurisdiction shall be initiated by the filing of a petition as provided in this chapter.

Section 14.05 Support of Child.

(a) The court may order either or both parents to make periodic payments or a lump sum payment, or both, for the support of a child until he or she is 18 years of age in the manner and to the persons specified by the court in the decree.

Section 15.051 Support for a Minor or Adult Disabled Child.

(a) In this section:

(1) "Adult Child" means a child that is 18 years of age or older.

(2) "Child" means a son or daughter of any age.

(b) The court may order either or both parents to provide for the support of a child for an indefinite period and determine the rights, privileges, duties, and powers of the child's parents for the support of the child 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 able to support himself; and

(2) the disability exists, or the cause of the disability is known to exist, before or on the 18th birthday of the child."

The court rejected Judith Garland's contention that these sections vest the family district court with concurrent jurisdiction of the guardianship proceeding. Id. at 849. Sections 11.05(a), 11.07(b) and 14.05(a) all were deemed inapplicable by the court of appeals. Id. All three of the sections use the term "child" which is defined by the Texas Family Code as "a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes." Tex.Fam.Code Ann. §101.003(a) (Vernon 1995). Because Daniel was 22 years old and not a child as defined by the Code, these sections do not apply. Id. The court further ruled that §14.051(b) of the Texas Family Code only vested in the court the power to enter orders relating to support of Daniel, but this authority did not change the fact that the guardianship was still be filed first in the Probate Code. Id. at 850. The court then noted that under Texas Probate Code §609, a probate court judge can transfer a contested guardianship of a minor to a court of continuing jurisdiction. Id. The statute does not provide for the transfer of a contested guardianship of an adult child. In conclusion, the court of appeals stated "that a 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." Id.

4. LEGISLATIVE CHANGES

The Garland case's holding must be reexamined in light of new legislation. The 74th Legislature enacted §154.309 of the Texas Family Code, possession of or access to an adult disabled child effective September 1, 1995 and applicable to all pending suits. Section 154.309 provides as follows:

"(a) A court may render an order for the possession of or access to an adult disabled child that is appropriate under the circumstances.

(b) Possession of or access to an adult disabled child is enforceable in the manner provided by Chapter 157. An adult disabled child may refuse possession or access if the adult

disabled child is mentally competent.

(c) A court that obtains continuing, exclusive jurisdiction of a suit affecting the parent-child relationship involving a disabled person who is a child retains continuing, exclusive jurisdiction of a subsequent proceeding involving the person, including proceedings after the person is an adult."

This section gives a family district court the right to make orders for possession and access, not just issuing orders for continued support payments. Section 154.309(c) would appear to give the family district court power to rule on a subsequent guardianship proceeding. This would appear to conflict with the grant of jurisdiction by Texas Probate Code §606 and the Garland case. The current Probate Code does not give a probate judge the power to transfer a contested guardianship of an adult child to a family district court.

Additionally, the Court of Appeals in Houston, 14th District, reached a different conclusion from the Garland Court. In Rowland v. Willey, 751 S.W.2d 725 (Tex.App. - Houston [14th Dist.] 1988, no writ), a district court had entered a temporary order extending support payments for a mentally retarded child beyond her 18th birthday. Rowland at 726. While these orders were still in effect, the mother filed an application for guardianship in another county. Id. The father of the child contested the application asserting that jurisdiction lay with the district court. Id. The probate judge rejected this argument and issued an order appointing the child's mother as guardian. The Court of Appeals held that both courts had concurrent jurisdiction and "where the statutory scheme confers concurrent jurisdiction on more than one court, deference to the court first acquiring jurisdiction is a judicial imperative." Rowland, 751 S.W.2d at 726. Therefore, the district should have jurisdiction over the guardianship proceeding because of its continuing jurisdiction over support payments.

In view of the new legislation it would appear that the Rowland Court's view is more likely correct. However, this jurisdictional conflict will have to be resolved by the Texas Supreme Court.

C. Community Property Issues

The death of one party effectively ends the district court's power to enter a divorce and divide the community property as is "just and right". At the death of one spouse the community estate terminates and that estate is divided into two equal undivided interests, one going to the surviving spouse and one going to the estate of the deceased spouse. Brights Estate v. United States, 658 F.2d 999, (C.A. Tex. 1981).

Section 385 of the Texas Probate Code provides for the partition of community property. Section 385 provides as follows:

"(a) Application for Partition. When a husband or wife shall die leaving any community property, the survivor may, at any time after letters testamentary or of administration have been granted, and an inventory, appraisement, and list of the claims of the estate have been

returned, make application in writing to the court which granted such letters for a partition of such community property.

(b) Bond and Action of the Court. The survivor shall execute and deliver to the judge of said court a bond with a corporate surety or two or more good and sufficient personal sureties, payable to and approved by said judge, for an amount equal to the value of the survivor's interest in such community property, conditioned for the payment of one-half of all debts existing against such community property, and the court shall proceed to make a partition of said community property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased. The provisions of this Code respecting the partition and distribution of estates shall apply to such partition so far as the same are applicable.

(c) Lien Upon Property Delivered. Whenever such partition is made, a lien shall exist upon the property delivered to the survivor to secure the payment of the aforementioned bond; and any creditor of said community estate may sue in his own name on such bond, and shall have judgment thereon for one-half of such debt as he shall establish, and for the other one-half he shall be entitled to be paid by the executor or administrator of the deceased."

The major distinction here between the Probate and Family Codes is an equal split of the community as compared with a division that is "just and right." Compare Tex.Prob.Code §385(b) (Vernon 1996) with Tex.Fam.Code Ann. §3.63(b) (Vernon 1995).

If spouse died without a will, the distribution of the community estate is governed by Texas Probate Code §45. Under this section the entire community estate will go to the surviving spouse if no children or other descendent of the deceased spouse survives him. The surviving spouse also inherits the entire community estate if the decedent is survived by children or other descendants, but they are also children or descendants of the surviving spouse. If, however, the deceased spouse dies with children or other descendants who are not also children or descendants of the surviving spouse, then those children or descendants shall inherit one-half of the community estate.

If a spouse dies with a will, that controls the distribution of the decedent's share of the community estate. Section 69 of the Texas Probate Code provides for eliminating a divorced spouse's inheritance from the will of decedent. Section 69 provides as follows:

"(a) If, after making a will, the testator is divorced or the testator's marriage is annulled, all provisions in the will in favor of the testator's former spouse, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children, shall be null and void and of no effect unless the will expressly provides otherwise.

(b) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death."

This statute makes no provision for cutting a spouse out if a divorce was merely in progress. So advise your clients to change their wills as soon as a divorce is filed.

IV. AD LITEM UNDER THE PROBATE AND FAMILY CODES

The legislature has recently amended both the Probate Code and the Family Code with regard to the appointment and duties of attorney ad litems. These changes were made in part to respond to perceived problems with judicial appointments. See Comments to Tex.Fam.Code Ann. §107.006 (Vernon 1995); Report of the Supreme Court Task Force to examine appointments by the judiciary, 5-6 (March 1, 1993) (Task Force identified five problem areas that arise in connection with appointments: 1) lack of information and training by appointees and the judiciary; 2) unnecessary appointments; 3) appointments which involve impropriety or the "appearance of impropriety"; 4) abuse of compensation; and 5) insufficient guidance regarding the scope of an appointee's duties). The new legislation attempts to address this.

A. Attorney Ad Litems Under the Probate Code

1. APPOINTMENT OF ATTORNEY AD LITEMS

Appointment of attorney ad litems under the Probate Code is governed by two statutes: 1) one allowing for discretionary appointment in certain cases; and 2) the mandatory appointment of attorney ad litems in guardianship cases. Section 34A of the Texas Probate Code provides for the discretionary appointment of attorney ad litems. Section 34A provides in relevant part:

> "The judge of a probate court may appoint an attorney ad litem to represent the interests of a person having a legal disability, a nonresident, an unborn or unascertained person, or an unknown heir in any probate proceeding. Each attorney ad litem appointed under this section is entitled to reasonable compensation for services in the amount set by the court and to be taxed as costs in the proceeding."

While §34A provides for discretionary appointment, §646 provides for the mandatory appointment of an attorney ad litem when a guardianship proceeding is filed for a person other than a missing person. Section 646(a) provides as follows:

> "In a proceeding under this chapter for the appointment of a guardian for a person other than a missing person, the court shall appoint an attorney ad litem to represent the interests of the proposed ward. The attorney shall be supplied with copies of all the current records in the case and may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records."

2. DUTIES OF ATTORNEY AD LITEMS UNDER THE PROBATE CODE

The duties and responsibilities for an attorney ad litem appointed in a guardianship proceeding

are governed by Probate Code §647. Section 647 provides as follows:

> "(a) An attorney ad litem appointed under Section 646 of this code to represent a proposed ward shall, within a reasonable time before the hearing, interview the proposed ward. To the greatest extent possible, the attorney shall discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding disposition of the case, and the grounds on which guardianship is sought.
>
> (b) Before the hearing, the attorney shall review the application for guardianship, certificates of current physical, medical, and intellectual examinations, and all of the proposed ward's relevant medical, psychological, and intellectual testing records."

This section mandates a certain minimum standard of preparation for the attorney ad litem. Even without this legislative mandate, it is hard to understand how an attorney ad litem claiming to be operating in that role would not undertake all of the duties listed. Section 647 only apples to attorney ad litems appointed under §646. Attorney ad litems appointed under §34A do not appear to have any legislative mandated responsibilities.

Section 647(a) appears to reinforce the distinction between a guardian ad litem and an attorney ad litem. An attorney in his role as an attorney ad litem is charged with carrying out his client's wishes. The statute directs the attorney to give the proposed ward a clear understanding of the case to the greatest extent possible and formulate opinions.

3. REQUIREMENTS FOR APPOINTMENT AS ATTORNEY AD LITEM

Texas Probate Code §646 specifies the requirements an attorney must meet to be eligible for appointment as an attorney ad litem. Section 646 provides in relevant part as follows:

> "(b) To be eligible for appointment as an attorney ad litem, a person must be certified by the State Bar of Texas or a person or other entity designated by the state bar as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or its designee.
>
> (c) For certification under Subsection (b) of this section, the state bar shall require four hours of credit.
>
> (d) A certificate issued under Subsection (b) of this section expires on the second anniversary of the date the certificate was issued. A person whose certificate has expired must obtain a new certificate to be eligible for appointment as an attorney ad litem."

These minimum qualifications are similar to the qualifications imposed by the Family Code, but are less stringent. However, the requirement to be certified is not present in Family Code requirements for appointment as an ad litem.

B. Attorney Ad Litem Under the Family Code

1. APPOINTMENT OF ATTORNEY AD LITEMS

The Family Code provides for both mandatory and discretionary appointment of attorney ad litems just as the Probate Code does. Section 107.011 of the Texas Family Code provides for mandatory appointment in a suit by a governmental agency requesting termination of the parent-child relationship, or to a named managing conservator. Section 107.011 provides as follows:

> "(a) In a suit in which termination of the parent-child relationship is requested, the court or an associate judge shall appoint a guardian ad litem to represent the interests of the child immediately after the filing of the petition but before the full adversary hearing to ensure adequate representation of the child, unless:
>
> (1) the child is a petitioner;
>
> (2) an attorney ad litem has been appointed for the child; or
>
> (3) the court or an associate judge finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.
>
> (b) In any other suit, the court or an associate judge may appoint a guardian ad litem.
>
> (c) The managing conservator may be appointed guardian ad litem if the managing conservator is not a parent of the child or a person petitioning for adoption of the child and has no personal interest in the suit.
>
> (d) A guardian ad litem shall be appointed to represent any other person entitled to service of citation under this code if the person is incompetent or a child, unless the person has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in child containing a waiver of service of citation."

The legislature amended this section to ensure that an attorney ad litem was in place before a full adversarial hearing. Section 107.013 also mandates the appointment of an attorney ad litem for an indigent parent in a termination case.

Section 107.011 provides for the discretionary appointment of attorney ad litems. Section 107.011 provides in relevant part:

> "(a) An associate judge shall recommend the appointment of an attorney ad litem for any party in a case in which the associate judge deems representation necessary to protect the interests of the child who is the subject matter of the suit.

(b) The court shall appoint an attorney ad litem for any party in a case in which the court deems representation necessary to protect the interests of the child who is the subject matter of the suit."

This section mandates the court to appoint an attorney ad litem when representation is necessary to protect the child's interests. The court has discretion as to when protection of the child's interest warrants representation. The court is not required to appoint an attorney ad litem when a divorce is uncontested or when the issues of possession and access to a child are agreed to by both parents. See Ch. 943 §10 (Vernon 1995).

2. DUTIES AND RESPONSIBILITIES OF AN ATTORNEY AD LITEM

The legislature has now mandated the duties of an attorney ad litem for the representation of a child. Section 107.014 provides as follows:

"(a) An attorney ad litem appointed under this subchapter to represent a child may:

(1) investigate to the extent the attorney ad litem considers appropriate to determine the facts of the case;

(2) obtain and review copies of all of the child's relevant medical, psychological, and school records; and

(3) call, examine, and cross-examine witnesses.

(b) An attorney ad litem appointed to represent a child shall within a reasonable time after the appointment:

(1) interview the child if the child is four years of age or older; and

(2) interview individuals with significant knowledge of the child's history and condition."

The comments to §107.014 indicate that this listing of common sense responsibilities was in response to complaints about ad litem representation. Specifically, complaints where the attorney ad litem never met the child he represented. While the Probate Code §647(b) mandates review of relevant medical psychological reports, it is only a discretionary duty under the Family Code. Compare Tex.Prob.Code §647(b) (Vernon 1996) with Tex.Fam.Code Ann. §107.014(a)(3)(Vernon 1995).

3. REQUIREMENTS FOR APPOINTMENT AS ATTORNEY AD LITEM

The legislature has enacted certain mandatory minimum qualification standards for attorney ad litems practicing in certain counties. Section 107.006 lays out these qualifications and provides

in relevant part as follows:

> "(a) The local administrative district judge in each county in a Department of Protective and Regulatory Services region for child protective services that contains a county having a population of 2.8 million or more shall establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of the county. A local administrative district judge in any other county may establish a pool from which guardians ad litem and attorneys ad litem are appointed for proceedings in the district courts of that county. To be eligible for a pool established under this subsection, a person must:
>
> (1) complete training provided by the State Bar of Texas in family law and the responsibilities of ad litems;
>
> (2) complete as part of the person's annual continuing legal education requirement not fewer than three hours in family law issues; and
>
> (3) meet other requirements established by the local administrative district judge.
>
> (b) Before appointment as a guardian ad litem or an attorney ad litem, the person must have read, acknowledge by signing, and filed with the local administrative judge a written statement prepared by the local administrative district judge that lists the responsibilities of an ad litem, some or all of which may be appropriate to the person's specific case. The court shall retain a copy of the acknowledgment for two years. To continue to receive appointments under this section, the person must execute a new statement at least every two years."

The eligibility requirements for a pool are only mandatory with respect to the following counties: Harris, Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Liberty, Magagorda, Montgomery, Walker, Waller, and Whorton. With regard to the rest of the state the qualifications are only applicable if the local administrative judge decides to create a pool from which to draw attorney ad litems.

The specific qualification requirements are similar to those enacted by the Probate Code. However, under the Family Code the local administrative judge is left discretion to establish additional qualifications. Tex.Fam.Code Ann. §107.006(a)(3). Section 107.006(b) appears to require all attorney ad litems, and not just those in Harris and surrounding counties, to sign a written statement prepared by the local administrative judge detailing the responsibilities of an attorney ad litem. This statement must be executed every two years and is similar to the Probate Code requirement that an attorney ad litem be recertified every two years.

V. CONCLUSION

In examining any jurisdictional conflict between the probate and family courts, the practitioner

must have a clear grasp of the relevant statutes of both codes. Although jurisdiction may often overlap, it appears that the courts and the legislature intend for contested guardianship issues to be litigated in the family law courts. However, courts which obtain jurisdiction first are often seen as the proper forum.

Because issues can overlap between the two courts, attorneys who function as attorney ad litems need to be familiar with the requirements of both codes as they relate to attorney ad litems. Although similar in nature the practitioner needs to be aware of the subtle but important differences between the requirements.