* Sumaruk v. Todd, 560 S.W.2d 141 (Tex. Civ. App. 1977)

We are not in accord with defendant's interpretation. The motivation behind the enactment of this section was to increase the powers of the probate court so that it could more fully and ably settle decedent's estates in the one proceeding. See Schwartzel Wilshusen, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Texas L.Rev. 372, 382-3 (1976). **Therefore, we interpret this section dealing with "matters incident to an estate" to apply only to those matters in which the "controlling issue" is the settlement, partition or distribution of an estate**. Schwartzel Wilshusen, 54 Texas L.Rev. 372 at 383, supra. If a probate proceeding, such as the administration of the estate, were pending in the statutory probate court at the time this suit was filed, section 5 of the Probate Code would apply to allow the claim by the estate to be filed in the statutory probate court in which such probate proceeding was pending. The record does not reveal that any probate proceeding was taking place or pending at the time the instant suit was filed. Since no administration of the estate was taking place, sec. 5 of the Probate Code dealing with matters incident to an estate does not come into play. Boyd v. Ratliff, [541 S.W.2d 223](https://casetext.com/case/boyd-v-ratliff) (Tex.Civ.App. Dallas 1976, no writ). See also Cowgill v. White, [543 S.W.2d 437](https://casetext.com/case/cowgill-v-white) (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.); Parr v. White, [543 S.W.2d 440](https://casetext.com/case/white-v-parr) (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.).

* [Bell v. Hinkle](https://casetext.com/case/bell-v-hinkle?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p38)

562 S.W.2d 35 (Tex. Civ. App. 1978)[Cited 8 times](https://casetext.com/case/bell-v-hinkle/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Tex.Prob. Code Ann. § 5(c)-(d) (Supp. 1978). Section 5 of the Probate Code increased the powers of the probate court so that it could more effectively settle decedents' estates in one proceeding. Sumaruk v. Todd, 560 S.W.2d 141 (Tex.Civ.App. Tyler, 1977) (not yet reported); see Schwartzel Wilshusen, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Tex.L.Rev. 372, 382-83 (1976). But this section does not affect the district court's jurisdiction where there is no administration pending and none is necessary. See M. Woodward E. Smith, Texas Practice, Probate and Decedents' Estates, Ch. 1, § 10 at 16, and Ch. 2, § 23 at 20 (Supp. 1975). **Matters incident to an estate which give the statutory probate courts exclusive jurisdiction apply only to those matters in which the controlling issues are the settlement, partition or distribution of an estate. Sumaruk v. Todd, supra; Schwartzel Wilshusen, supra at 383; see Cowgill v. White, 543 S.W.2d 437 (Tex.Civ.App. Corpus Christi 1976, no writ); Elliott v. Elliott, 208 S.W.2d 709 (Tex.Civ.App. Fort Worth 1948, writ ref'd); Zamora v. Gonzalez, 128 S.W.2d 166 (Tex.Civ.App. San Antonio 1939, writ ref'd)**. Thus the district court's jurisdiction cannot be exercised so as to defeat the jurisdiction of the county court "to probate wills and grant letters testamentary to executors and to administer estates in accordance with the terms of a legal and valid will." Buchner v. Wait, 137 S.W. 383, 388 (Tex.Civ.App. Galveston 1911, writ ref'd). Here the time for administration had long passed and none was pending.

* + [Farah v. Fashing](https://casetext.com/case/farah-v-fashing?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p343)

666 S.W.2d 341 (Tex. App. 1984)[Cited 5 times](https://casetext.com/case/farah-v-fashing/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Relator's own cited case authorities support the foregoing conclusion. In English, supra, and Drake v. Trinity Universal Insurance Company, 600 S.W.2d 768 (Tex. 1980), the more remote defendants (a converting sister of the deceased and a former estate attorney) were brought into the suit by the plaintiffs, not as third party defendants. Recovery from those individuals would flow directly into the estate and then to the beneficiaries. Cowgill v. White, 543 S.W.2d 437 (Tex.Civ.App. — Corpus Christi 1976, writ ref'd n.r.e.) and Thomas v. Tollon, 609 S.W.2d 859 (Tex.Civ.App.-Houston [14th Dist.] 1981, writ ref'd n.r.e.) also present cases where the interests of the ancillary parties would directly affect the coffers of the estate and not the pockets of the administrator. The malpractice indemnification action filed by our Relator, not being to the direct benefit of the estate or its beneficiaries, was, therefore, not within the Section 5 jurisdiction of the probate court. See: Parr v. White, 543 S.W.2d 440, 444 (Tex.Civ.App.-Corpus Christi 1976), writ ref'd n.r.e., 559 S.W.2d 344 (Tex. 1977).

* + [Seay v. Hall](https://casetext.com/case/seay-v-hall-1?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p22)

677 S.W.2d 19 (Tex. 1984)[Cited 94 times](https://casetext.com/case/seay-v-hall-1/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Realizing that there was uncertainty among the bench and bar as to what were matters incident to probate, the Speaker of the Texas House, in 1977, charged the House Judiciary Committee to return to the 66th Legislature recommendations for changes in the probate code. That committee did report and made as its third recommendation that there be "clarification of the phrases 'appertaining to estates' and 'incident to an estate' in Probate Code Sections 4 and 5(d)." Interim Report, Tex. House Judiciary Comm.: Proposed Revision of the Texas Probate Code 13, 66th Leg. (1978). The committee report observed "the question of jurisdiction 'incident to probate' is still an unsettled one in the Texas legal community." Id. at 15. In making its recommendation the committee relied almost exclusively on two law review comments, written by the same authors, B. Schwartzel D. Wilshusen. Comment, Texas Probate Jurisdiction — There's a Will, Where's the Way, 53 Texas L.Rev. 323 (1975) and Comment, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Texas L.Rev. 372 (1976). These authors advocated that probate jurisdiction be limited to actions in which the principal issue concerns validation of the testator's will and the assimilation, management, and distribution of his property in accordance with his will. They further stated that issues not falling within this definition of probate jurisdiction should be determined independent of probate jurisdiction. 53 Texas L.Rev. at 336. This language was set out verbatim in the committee report. In their second law review comment, Schwartzel and Wilshusen stated that while the statutory list of probate court powers was increased, the general scope of probate jurisdiction had not changed. They also observed that matters incident to an estate had been held to be those **in which the "controlling issue" was the settlement, partition, or distribution of an estate. 54 Texas L.Rev. at 383.** This observation, likewise, was incorporated in the judiciary committee interim report. Indeed, the "controlling issue" definition has long been approved by this court. See Zamora v. Gonzalez, 128 S.W.2d 166, 168 (Tex.Civ.App. — San Antonio 1939, writ ref'd).

* + [McPherson v. Judge](https://casetext.com/case/mcpherson-v-judge?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p410)

592 S.W.2d 406 (Tex. Civ. App. 1979)[Cited 5 times](https://casetext.com/case/mcpherson-v-judge/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Judge relies upon Cowgill v. White, 543 S.W.2d 437 (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.) and Parr v. White, 543 S.W.2d 440 (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.) to support his contention that the county court has exclusive jurisdiction. We do not regard those decisions as authoritative in this case. They involved jurisdictional problems between a district court and a statutory probate court and are based upon a construction of Section 5(c) of the Probate Code. Also, the causes of action held to be within the exclusive jurisdiction of the probate court concerned the settlement, partition and distribution of the estate in question. The primary disputes were between the husband of the decedent and others over ownership and control of property which the husband sought to exclude from estate control. Although the court makes reference to matters incident to an estate, it is obvious that the court considered the causes of action to involve probate matters directly affecting the administration of the estate. This case, however, is a personal injury action based upon an automobile collision allegedly caused by the negligence of Brown prior to his death, and it cannot be equated with a dispute over ownership and control of the property in an estate.

* + [Huston v. Federal Deposit Ins. Corp.](https://casetext.com/case/huston-v-federal-deposit-ins-corp?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p848)

800 S.W.2d 845 (Tex. 1990)[Cited 53 times](https://casetext.com/case/huston-v-federal-deposit-ins-corp/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The order rendered by the trial court in this case is comparable to final orders rendered by any court exercising original probate jurisdiction. A probate order or judgment is final if it conclusively disposes of and is decisive of the issue or controverted question for which that particular part of the proceeding was brought, even if the decision does not fully and finally dispose of the entire probate proceeding. Fischer v. Williams, 331 S.W.2d 210, 213 (Tex. 1960). See also Rodeheaver v. Alridge, 601 S.W.2d 51, 54 (Tex.Civ.App. — Houston [1st Dist.] 1980, writ ref'd n.r.e.); Estate of Wright, 676 S.W.2d 161 (Tex.Civ.App. — Corpus Christi 1984, no writ); and TEX.PROB.CODE § 5(e). A probate order is appealable if it finally adjudicates a substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory. Parr v. White, 543 S.W.2d 445, 449 (Tex.Civ.App. — Corpus Christi 1976, writ ref'd n.r.e.); White v. Pope, 664 S.W.2d 105 (Tex.Civ.App. — Corpus Christi 1983, no writ). The same standards apply to orders rendered during a receivership proceeding.

* + [White v. Pope](https://casetext.com/case/white-v-pope?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p107)

664 S.W.2d 105 (Tex. App. 1983)[Cited 17 times](https://casetext.com/case/white-v-pope/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

At the outset, we must first determine whether this is an appealable order of the probate court. All "final orders" of the probate court are appealable to the Court of Appeals. TEX.PROB CODE ANN. Sec. 5(e) (Vernon 1980). A probate order is final if it finally disposes of and is conclusive of the issue or controverted question for which that particular part of the proceedings was brought. Fischer v. Williams, 160 Tex. 342, 331 S.W.2d 210 (1960); Rodeheaver v. Alridge, 601 S.W.2d 51, 54 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.); Parr v. White, 543 S.W.2d 445, 449 (Tex.Civ.App.-Corpus Christi 1976, writ ref'd n.r.e.); Cherry v. Reed, 512 S.W.2d 705, 706 (Tex.Civ.App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.). In other words, "an order is appealable if it finally adjudicates some substantial right, whereas if it merely leads to further hearings on the issue, it is interlocutory." Parr v. White, supra, at 449; Meek v. Hart, 611 S.W.2d 162, 163 (Tex.Civ.App.-El Paso 1981, no writ). An order may be final and appealable even though the decision does not fully and finally dispose of the entire probate proceeding. Kelly v. Barnhill, 144 Tex. 14, 188 S.W.2d 385, 386 (1945); Mossler v. Johnson, 565 S.W.2d 952, 954 (Tex.Civ.App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.); Cherry v. Reed, supra.

* + [Novak v. Stevens](https://casetext.com/case/novak-v-stevens?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p851)

596 S.W.2d 848 (Tex. 1980)[Cited 125 times](https://casetext.com/case/novak-v-stevens/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The phrase "incident to an estate" has been given a broad meaning. In English v. Cobb, 593 S.W.2d 674 (Tex. 1979), we held that a county court at law which now has concurrent jurisdiction with that of a district court in probate matters could adjudicate an estate's rights to a savings account in the sum of $15,900.44 because it was a matter incident to an estate. In Lucik v. Taylor, 596 S.W.2d 514 (Tex. 1980), we approved as an incident to an estate, a probate court's injunction which preserved and protected an estate during the pendency of the probate proceedings. See also, Parr v. White, 543 S.W.2d 440 (Tex.Civ.App. Corpus Christi 1976), writ ref'd n.r.e. per curiam, 559 S.W.2d 344 (Tex. 1977); Gordy v. Alexander, 550 S.W.2d 146 (Tex.Civ.App. Amarillo 1977, writ ref'd n.r.e.); Potter v. Potter, 545 S.W.2d 43 (Tex.Civ.App. Houston (1st Dist.) 1976, writ ref'd n.r.e.).

* + [Christensen v. Harkins](https://casetext.com/case/christensen-v-harkins?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p73)

740 S.W.2d 69 (Tex. App. 1987)[Cited 18 times](https://casetext.com/case/christensen-v-harkins/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Our research has revealed probate cases which support both appellants' and appellee's positions. The trial court's order in the following types of probate cases was held to be final and appealable: declaratory judgment in probate administration determining whether administratrix was exempt from paying certain filing fees, Rodeheaver v. Alridge, 601 S.W.2d 51, 54 (Tex.Civ.App. — Houston [1st Dist.] 1980, writ ref'd n.r.e.); summary judgment denying probate of one will, and expressly not ruling regarding probate of second will, Cherry v. Reed, 512 S.W.2d 705, 706-07 (Tex.Civ.App. — Houston [1st Dist.] 1974, writ ref'd n.r.e.); order setting aside appointment of administratrix, and reinstating appointment of prior administratrix, Stevens v. Douglass, 505 S.W.2d 532 (Tex. 1974) (per curiam); order requiring independent executrix to file a current accounting, Gonzalez v. Gonzalez, 309 S.W.2d 111, 114 (Tex.Civ.App. — Fort Worth 1958, no writ); order approving a claim against the estate, Reynolds Mortgage Co. v. Smith, 280 S.W. 879, 881 (Tex.Civ.App. — Texarkana 1926, no writ); order requiring liquidation of estate assets to satisfy claims of estate's attorney, White v. Pope, 664 S.W.2d 105, 106-07 (Tex.App. — Corpus Christi 1983, no writ). See also Estate of Wright, 676 S.W.2d 161, 163-64 (Tex.App. — Corpus Christi 1984, writ ref'd n.r.e.); Mossler v. Johnson, 565 S.W.2d 952, 954 (Tex.Civ.App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.); Currie v. Drake, 550 S.W.2d 736, 739 (Tex.Civ.App. — Dallas 1977, writ ref'd n.r.e.); and Bergeron v. Session, 554 S.W.2d 771, 773-75 (Tex.Civ.App. — Dallas 1977) (appeal filed), 561 S.W.2d 551 (Tex.Civ.App. — Dallas 1978, writ ref'd n.r.e.).

* + [Nolan v. Bettis](https://casetext.com/case/nolan-v-bettis-1?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p522)

562 S.W.2d 520 (Tex. Civ. App. 1978)[Cited 29 times](https://casetext.com/case/nolan-v-bettis-1/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

**The Tyler Court of Civil Appeals held that matters or proceedings "incident to an estate," under § 5, apply to those matters or proceedings in which the controlling issue is the settlement, partition, or distribution of an estate. Sumaruk v. Todd, 560 S.W.2d 141 (Tex.Civ.App. 1977)**; see Schwartzel Wilshusen, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Texas L.Rev. 372, 382-83 (1976). In the case at bar appellees sued appellant for fraud. In their suit, appellees sought recovery of $250,000 in actual and exemplary damages and an order canceling the trustee's deed to the acreage.

* + [Coble Wall Trust Co. v. Palmer](https://casetext.com/case/coble-wall-trst-co-inc-v-palmer?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p702)

848 S.W.2d 696 (Tex. App. 1991)[Cited 5 times](https://casetext.com/case/coble-wall-trst-co-inc-v-palmer/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

In Cowgill v. White, 543 S.W.2d 437, 439 (Tex.Civ.App. — Corpus Christi 1976, writ ref'd n.r.e.) the court held that an interpleader action to determine right of possession to certain property in an estate was incident to the settlement, partition and distribution of the estate in the probate court and was not a suit in which the district court had concurrent jurisdiction. It was not a cause that fell within the general jurisdiction of the district court. Under the same reasoning and procedure, the suit by these same plaintiffs against SASA to set aside the foreclosure on the land which comprised the bulk of the estate of Booney Moore and return title to the estate was properly transferred from the district court to the probate court where probate proceedings of the estate were then pending. This was because the action was incident to the ultimate settlement, partition and distribution of the estate.

* + [Texas Comm. Bk. v. Correa](https://casetext.com/case/texas-comm-bk-v-correa?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p727)

28 S.W.3d 723 (Tex. App. 2000)[Cited 87 times](https://casetext.com/case/texas-comm-bk-v-correa/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)[2 legal analyses](https://casetext.com/case/texas-comm-bk-v-correa/analysis?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

However, we hold that the Estate's administration was closed when the foreclosure suit was filed. "A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate matter proceeding related to such matter is already pending." Bailey, 862 S.W.2d at 585; Estate of Hanau, 806 S.W.2d 900, 904 (Tex.App.-Corpus Christi 1991, writ denied). **Where the record does not reveal that a probate proceeding was taking place or was pending when suit was filed, section 5 of the probate code dealing with matters incident to an estate is not triggered**. Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex.App.-Dallas 2000, no pet.); Qualia v. Qualia, 878 S.W.2d 339, 341 (Tex.App.-San Antonio 1994, writ denied); Sumaruk v. Todd, 560 S.W.2d 141, 144 (Tex.Civ.App.-Tyler 1977, no writ). Hence, because no probate proceeding was ongoing or pending when TCB filed its foreclosure proceeding, the county court at law did not have exclusive jurisdiction over matters incident to Shwery's estate.

* + [Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.](https://casetext.com/case/lee-v-ronald-e-lee-jr-katherine-lee-stacy-legacy-trust-co-1?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p213)

528 S.W.3d 201 (Tex. App. 2017) [Cited 19 times](https://casetext.com/case/lee-v-ronald-e-lee-jr-katherine-lee-stacy-legacy-trust-co-1/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

See, e.g., Tex. Est. Code Ann. § 36.001 (defining the term "probate proceeding"); Valdez v. Hollenbeck, 465 S.W.3d 217, 224 n.8 (Tex. 2015) (explaining that "[t]he heirs initially filed their lawsuit in the original probate proceeding as a suit appertaining and incident to a probate estate under [the predecessor statute] section 5A of the Probate Code," under which "a probate proceeding must be pending for a probate court to exercise jurisdiction over matters related to that proceeding"); Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 506 (Tex. 2010) (holding that a probate court lacked jurisdiction over a proceeding to declare heirship because a "court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court" (emphasis added) (quoting Bailey v. Cherokee Cty. Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993) )); In re John G. & Marie Stella Kenedy Mem'l Found., 315 S.W.3d 519, 522 (Tex. 2010) (orig. proceeding) (quoting the same language from Bailey ); Goodman v. Summit at W. Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.) (citing Bailey ); In re Estate of Hanau, 806 S.W.2d 900, 904 (Tex. App.—Corpus Christi 1991, writ denied) ("The trial court has power to hear all matters incident to an estate only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." (emphasis added) (citing Interfirst Bank–Hous. v. Quintana Petroleum Corp., 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) )); Pullen v. Swanson, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (stating that a statutory probate court's jurisdiction "to hear all matters incident to an estate necessarily presupposes that a probate proceeding is already pending in that court" (emphasis added)).

* + [Speer v. Stover](https://casetext.com/case/speer-v-stover?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p739)

711 S.W.2d 730 (Tex. App. 1986)[Cited 12 times](https://casetext.com/case/speer-v-stover/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The correct rule of law is stated in Hughes v. Atlantic Refining Co., 424 S.W.2d 622 (Tex. 1968), wherein the court stated, "jurisdiction is acquired at the time of filing the petition where the subject matter of the suit is within the jurisdiction of the court." In a probate matter, the probate court acquires jurisdiction over the deceased's property upon the opening of probate. Parr v. White, 543 S.W.2d 445 (Tex.Civ.App.-Corpus Christi 1976, writ ref'd n.r.e.). Thus, the county court sitting in matters probate acquired jurisdiction of the estate of Melba Imogene Stover on May 13, 1982, when the application for letters of administration was filed and not when an administrator was qualified.

* + [Schuld v. Dembrinski](https://casetext.com/case/schuld-v-dembrinski?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p487)

12 S.W.3d 485 (Tex. App. 2000)[Cited 17 times](https://casetext.com/case/schuld-v-dembrinski/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)[1 legal analysis](https://casetext.com/case/schuld-v-dembrinski/analysis?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

However, a court empowered with probate jurisdiction may only exercise its probate jurisdiction over "matters incident to an estate" when a probate proceeding relating to such matter is already pending in that court. Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581, 585 (Tex. 1993) (op. on reh'g). In other words, the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it. See Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex.App.-Austin 1997, no pet.); see also Pullen v. Swanson, 667 S.W.2d 359, 363 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.) (interpreting probate code to mean that statutory probate court has power to hear all matters incident to an estate "only in those instances where a probate proceeding, such as an administration of an estate, is actually pending in the court at the time suit is filed"). Where the record does not reveal that a probate proceeding was taking place or was pending when the instant suit was filed, section 5 of the probate code dealing with matters incident to an estate is not triggered. Qualia v. Qualia, 878 S.W.2d 339, 341 (Tex.App.-San Antonio 1994, writ denied) (op. on reh'g); Sumaruk v. Todd, 560 S.W.2d 141, 144 (Tex.Civ.App.-Tyler 1977, no writ).

* + [Estate of Lewis, in re](https://casetext.com/case/estate-of-lewis-in-re?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p932)

749 S.W.2d 927 (Tex. App. 1988)[Cited 4 times](https://casetext.com/case/estate-of-lewis-in-re/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

In her motion for rehearing Mrs. Rappeport urges that we should dismiss the appeal because the judgment below is not final. We have previously overruled her motion to dismiss on this ground, and we remain convinced that our action was correct. This proceeding was brought under Tex.Prob. Code Ann. § 149B, and is a probate matter within the meaning of Tex.Prob. Code Ann. § 5(e) (Vernon 1980), which provides that all final orders in probate are appealable. A probate order is final if it adjudicates some substantial right. It is interlocutory only if it leads to further hearings on the same issue. White v. Pope, 664 S.W.2d 105 (Tex.App. — Corpus Christi 1983, no writ); Parr v. White, 543 S.W.2d 445 (Tex.Civ.App. — Corpus Christi 1976, writ ref'd n.r.e.). Although the petition here also sought other and alternative relief, its main purpose was to compel an accounting and distribution and to close the estate. Since the judgment below denied all relief concerning a right to accounting and distribution under Section 149B, it was a final and appealable order.

* + [Jansen v. Fitzpatrick](https://casetext.com/case/jansen-v-fitzpatrick?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p432)

14 S.W.3d 426 (Tex. App. 2000)[Cited 45 times](https://casetext.com/case/jansen-v-fitzpatrick/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)[1 legal analysis](https://casetext.com/case/jansen-v-fitzpatrick/analysis?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

In a suit to set aside a deed, the district court has exclusive jurisdiction to hear and determine the matter when the proper allegations as to capacity to sue are made and proven. See Tex. Const. art. V, § 8; Tex. Gov't Code Ann. § 24.007 (Vernon 1988); see also Trevino, 486 S.W.2d at 200. The Texas Probate Code grants exclusive jurisdiction to county courts sitting in probate only when the controlling issues are the settlement, partition, or distribution of an estate. See Bell v. Hinkle, 562 S.W.2d 35, 37-38 (Tex.Civ.App.-Houston [14th Dist.] 1978, writ ref'd n.r.e.). In a non-probate matter, the district court may assume jurisdiction and determine the heirs of the decedent as long as there is no probate proceeding pending in the county court. See Estate of Maxey, 559 S.W.2d 458, 460 (Tex.Civ.App.-Texarkana 1977, writ ref'd n.r.e.); see also Trevino, 486 S.W.2d at 200 (finding the district court had exclusive jurisdiction to determine heirship in suit to set aside a deed). However, for a court to have jurisdiction to determine heirship, the estate must own real property, or if there is none, personal property, in that county. See Tex. Prob. Code Ann. § 48 (Vernon 1980). The definition of personal property includes choses in action. See id. at § 3 (Vernon Supp. 1999). A chose in action is a personal right not reduced to possession, but recoverable by a lawsuit. See Vinson Elkins v. Moran, 946 S.W.2d 381, 389 (Tex.App.-Houston [14th Dist.] 1997, writ dism'd by agr.). A right to set aside a deed is a personal right and therefore a chose in action. See Glenney v. Crane, 352 S.W.2d 773, 777 (Tex.Civ.App. Houston 1961, writ ref'd n.r.e.); see also McMeens v. Pease, 878 S.W.2d 185, 190 (Tex.App.-Corpus Christi 1994, writ denied) (finding a suit to set aside a deed is a suit of a personal nature and not a suit to recover real estate).

* + [Jones v. Davis](https://casetext.com/case/jones-v-davis-20?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

616 S.W.2d 276 (Tex. Civ. App. 1981)[Cited 6 times](https://casetext.com/case/jones-v-davis-20/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

When a person dies intestate in Texas, all of his estate vests immediately in his heirs at law. Section 37, Texas Probate Code Ann.; Parr v. White, 543 S.W. 445, 448 (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.). To determine the persons entitled to share in the estate of a person who died intestate, the court must look to the law in effect at the time of the decedent's death. Ramon v. Califano, 493 F. Supp. 158 (W.D.Tex. 1980); Hanrick v. Hanrick, 61 Tex. 596 (1884).

* + [Estate of Devitt](https://casetext.com/case/estate-of-devitt?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p607)

758 S.W.2d 601 (Tex. App. 1988)[Cited 28 times](https://casetext.com/case/estate-of-devitt/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

We have carefully reviewed the cases relied upon by appellees. Although four of these cases were subsequent to the 1973 amendments to section 5, appellees' reliance on them is misplaced. In Estate of Wright, 676 S.W.2d 161, 164 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.), the action was one to declare heirship and not a will contest. Further, the finding that the summary judgment based thereon was a separate and independent action was dicta. In Estate of Ross, 672 S.W.2d 315, 318 (Tex.App.-Eastland 1984, writ ref'd n.r.e.), cert. denied, 470 U.S. 1084, 105 S.Ct. 1844, 85 L.Ed.2d 143 (1985) and Cherry v. Reed, 512 S.W.2d 705, 707 (Tex.Civ.App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.), there was no statement that a section 93 action was separate and distinct and the latter case deals primarily with the appealability of a probate order. In Rodeheaver v. Alridge, 601 S.W.2d 51, 54 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.), a county clerk and a constable filed a declaratory judgment action against the administratrix of an estate to determine whether she was exempt from paying certain filing and service fees. There, the Court correctly held that the action was a separate and independent proceeding. This is so because the action was not one under the Probate Code and had nothing to do with a contested probate matter by a party interested in the estate. Points three and four are overruled.

* + [First St. Bk. v. Bishop](https://casetext.com/case/first-st-bk-v-bishop?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p735)

685 S.W.2d 732 (Tex. App. 1985)[Cited 6 times](https://casetext.com/case/first-st-bk-v-bishop/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Id. at 363. See also Piper Aircraft Corp. v. Yowell, 674 S.W.2d 447, 459 (Tex.App. — Fort Worth 1984, writ pending) (when proceedings regarding an estate are already pending in statutory probate court, a matter incident to an estate must be brought in the probate court rather than in the district court); Tarrant County Hospital District v. Jones, 664 S.W.2d 191, 196 (Tex.App. — Fort Worth 1984, no writ) (probate court proper forum for action incident to an estate where probate proceedings pending); Seay v. Hall, 663 S.W.2d 468, 472 (Tex.App. — Dallas 1983), aff'd in part and rev'd in part on other grounds, 677 S.W.2d 19 (Tex. 1984); Adams v. Calloway, 662 S.W.2d 423, 427 (Tex.App. — Corpus Christi 1983, no writ) (where administration of an estate is pending, any claim which is incident to the estate shall be brought in statutory probate court); Bank of the Southwest, N.A. v. Stehle, 660 S.W.2d 572, 574 (Tex.App. — San Antonio 1983, writ ref'd n.r.e.) (reversal of district court judgment and dismissal of action where probate court proceeding previously filed); Boman v. Howell, 618 S.W.2d 913, 915 (Tex.Civ.App. — Fort Worth 1981, no writ) (district court had no jurisdiction to construe a will where proceedings were pending in the statutory probate court). It must be noted that in each of the above cases, except Tarrant County Hospital District v. Jones, the opinion showed that a plea to the trial court's jurisdiction was filed. Also, in view of the Supreme Court's holding in Seay v. Hall, the authority in some of the above cases must be questioned or discounted.

* + [In re Estate of Puckett](https://casetext.com/case/in-re-estate-of-puckett-1?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p9)

No. 02-18-00349-CV (Tex. App. Aug. 1, 2019)[Cited 1 time](https://casetext.com/case/in-re-estate-of-puckett-1/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

A probate proceeding encompasses "an application, petition, motion or action regarding . . . an estate administration," "a claim arising from an estate administration," and "any other matter related to the settlement, partition, or distribution of an estate." Tex. Est. Code Ann. § 31.001(4)-(6). By alleging in the pending probate proceeding that the general warranty deed was void based on his lack-of-capacity and undue-influence arguments, Aaron was bringing a claim arising from the estate administration that directly related to the settlement, partition, and distribution of James Sr.'s estate. See id. § 22.012 (broadly defining "estate"); see also In re Frank Schuster Farms, Inc., No. 13-10-00225-CV, 2010 WL 2638481, at \*6 (Tex. App.—Corpus Christi-Edinburgh June 29, 2010, orig. proceeding [mand. denied]) (mem. op.) (noting statutory precursor to section 22.012 broadly defines estate to include property subject to transfer). Therefore, the statutory county court had jurisdiction to determine the validity of the deed as a probate proceeding. See Saenz, 49 S.W.3d at 449 ("Title to the land conveyed both by Jose's will and by subsequent deeds is a matter appertaining to Jose's estate. The jurisdiction of the Jim Hogg county court acting as a probate court over such matters is exclusive while the estate administration is pending in that court."); see also Baker v. Baker, No. 02-18-00051-CV, 2018 WL 4224843, at \*1-2 (Tex. App.—Fort Worth Sept. 6, 2018, no pet.) (mem. op.) (recognizing exclusive probate jurisdiction over related probate matter triggered if probate proceeding already pending); Pullen v. Swanson, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (recognizing jurisdiction over matters incident to estate "necessarily presupposes that a probate proceeding is already pending in that court").

* + [Pullen v. Swanson](https://casetext.com/case/pullen-v-swanson?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p363)

667 S.W.2d 359 (Tex. App. 1984)[Cited 29 times](https://casetext.com/case/pullen-v-swanson/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

We therefore find that the enlargement of the jurisdiction of the statutory probate courts to include the power to hear all matters incident to an estate necessarily presupposes that a probate proceeding is already pending in that court. The grant of power to hear matters "incident to an estate" is contained in § 5(d). That section provides that "all courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate". Before a probate court may hear all matters incident to an estate, that court must first be exercising original probate jurisdiction. A court is not "exercising" jurisdiction unless and until a matter is actually pending in that court. If this were not so, a statutory probate court could arguably assert jurisdiction over any cause of action if the suit fell within the broad definition of "incident to an estate." We believe that the better rule is that the statutory probate court has the exclusive power to hear all matters incident to an estate "only in those instances where a probate proceeding, such as an administration of an estate, is actually pending in the court at the time suit is filed." Wolford v. Wolford, 590 S.W.2d 769 (Tex.Civ.App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.); Sumaruk v. Todd, 560 S.W.2d 141 (Tex.Civ.App. — Tyler 1977, no writ); 17 M. Woodard E. Smith, Probate and Decedents' Estate §§ 9, 10 (Texas Practice Supp. 1981); Seay v. Hall, 663 S.W.2d 468 (Tex.App. — Dallas 1983, writ pending) (not yet reported).

* + [Lucik v. Taylor](https://casetext.com/case/lucik-v-taylor?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p517)

596 S.W.2d 514 (Tex. 1980)[Cited 28 times](https://casetext.com/case/lucik-v-taylor/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Of course, the settlement, partition and distribution of the estate of Lucik will pertain only to the assets comprising his estate. However, under the allegations of the application for preliminary injunctive restraint it was necessary that the assets in question be protected and preserved until their status could be determined. Otherwise, the provisions of the successful will could be frustrated and the enforcement of the jurisdiction of the Probate Court defeated. Indeed, the Court of Civil Appeals wrote in this case (584 S.W.2d at p. 505) that "(s)uits 'incident to an estate' include those specifically mentioned in the statute and also those further seeking to either to recover possession of, clear title to, or collect damage for the conversion of property or to determine whether the property was community." (Italics added). Cited were the cases of Parr v. White, 543 S.W.2d 440 (Tex.Civ.App. 1976), writ ref'd, 559 S.W.2d 344 (Tex. 1977); Potter v. Potter, 545 S.W.2d 43 (Tex.Civ.App. 1976, writ ref'd n.r.e.). In the latter case the court wrote that the amendments adding paragraphs (c)(d) to Section 5 of the Probate Code are remedial and should be liberally construed.

* + [Bowen v. Hazel](https://casetext.com/case/bowen-v-hazel?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p797)

723 S.W.2d 795 (Tex. App. 1987)[Cited 2 times](https://casetext.com/case/bowen-v-hazel/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Appeals in probate matters are distinguishable from the usual appeals in civil cases. Carter v. Carter, 594 S.W.2d 464 (Tex.Civ.App. — San Antonio 1979, writ ref'd n.r.e.). The authority to appeal from an order of a probate court is governed by Tex.Prob. Code Ann. § 5(e) (Vernon 1980), which provides: "All final orders of any court exercising original probate jurisdiction shall be appealable to the courts of (civil) appeals." This has been held to mean that an order in a probate proceeding is appealable if it finally adjudicates some substantial right and the order may be final and appealable even though the decision does not fully and finally dispose of the entire probate proceeding. Kelley v. Barnhill, 144 Tex. 14, 188 S.W.2d 385 (1945); Estate of Wright, 676 S.W.2d 161 (Tex.App. — Corpus Christi 1984, writ ref'd n.r.e.).

* + [Eastland v. Eastland](https://casetext.com/case/eastland-v-eastland?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p821)

273 S.W.3d 815 (Tex. App. 2008)[Cited 27 times](https://casetext.com/case/eastland-v-eastland/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)[1 legal analysis](https://casetext.com/case/eastland-v-eastland/analysis?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

The purpose of section 145 — and of independent administration itself — is to free an independent executor from the expense and control of judicial supervision except where the Probate Code specifically and explicitly provides otherwise. Corpus Christi Bank Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634-35 (Tex. 1969); Bunting v. Pearson, 430 S.W.2d 470, 473 (Tex. 1968); Rowland v. Moore, 141 Tex. 469, 472, 174 S.W.2d 248, 249-50 (1943); Nadolney v. Taub, 116 S.W.3d 273, 283 (Tex.App.-Houston [14th Dist.] 2003, pet. denied); Sweeney v. Sweeney, 668 S.W.2d 909, 910 (Tex.App.-Houston [14th Dist.] 1984, no writ); In re Batsman's Estate, 528 S.W.2d 86, 89 (Tex.Civ.App.-Tyler 1975, writ ref'd n.r.e.).

* + [Lisby v. Estate of Richardson](https://casetext.com/case/lisby-v-estate-of-richardson?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p450)

623 S.W.2d 448 (Tex. App. 1981)[Cited 5 times](https://casetext.com/case/lisby-v-estate-of-richardson/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The issue on appeal is whether there was some evidence of a valid revocation of the 1951 will. If there was, the appellant was entitled to have a jury determination of the issue, and a directed verdict was improper. In determining the question we must consider only the evidence supporting appellant's case, viewing it in its most favorable light and indulging in every favorable inference which may reasonably be drawn from that evidence. Butler v. Hanson, 455 S.W.2d 942 (Tex. 1970); Garza v. Alviar, 395 S.W.2d 821 (Tex. 1965). In a proceeding such as this, where the suit seeks to set aside, on the ground of revocation, a will previously admitted to probate, the burden of proof is upon the party attacking the will, rather than the proponent, as is the case when the will is contested on the original application to probate. Boyd v. Frost Nat. Bank, 145 Tex. 206, 196 S.W.2d 497 (1946); Halamicek v. Halamicek, 542 S.W.2d 246 (Tex.Civ.App.-Corpus Christi 1976, no writ); Baptist Foundation of Texas v. Buchanan, 291 S.W.2d 464 (Tex.Civ.App.-Dallas 1956, writ ref'd n. r. e.); Crane v. Pierce, 257 S.W.2d 510 (Tex.Civ.App.-Dallas 1953, writ ref'd). To carry that burden, the party claiming revocation must show that, subsequent to the execution of the probated will, the testator executed an instrument with the formalities and under the circumstances required by the probate code for valid wills, which instrument expressly or impliedly revokes the former will. Tex.Prob Code Ann. § 63 (Vernon 1980); Brackenridge v. Roberts, 114 Tex. 418, 267 S.W. 244 (1924); Halamicek v. Halamicek, supra; Womack v. Woodson, 169 S.W.2d 786 (Tex.Civ.App.-Beaumont 1943, writ ref'd); Richardson v. Ames, 2 S.W.2d 517 (Tex.Civ.App.-Eastland 1928, writ ref'd). Appellant produced such evidence in this case. Mr. Art Clifton, an attorney, testified that in 1963 or 1964 he drafted wills for Mr. and Mrs. Richardson, by the terms of which they devised and bequeathed their estates to each other; that the wills contained clauses revoking all other wills; that Mr. and Mrs. Richardson were in good health and understood what they were doing in revising their wills; that he had discussed their previous wills with them and had explained fully the revised versions; that the wills were signed by Mr. and Mrs. Richardson, witnessed and notarized with self-proving provisions as authorized by the Texas Probate Code; and that the signing and witnessing process took place in his office and took about 10 to 15 minutes to complete. He further testified that he retained a fully signed, witnessed, and notarized copy of the will, but it was later lost when a number of his law firm files were lost when he moved his office. He could not remember who acted as witnesses, or whether he was a witness himself. There was testimony from other witnesses that Mr. and Mrs. Richardson stated that they had rewritten their wills leaving their estates to each other, and that on her death bed, Mrs. Richardson told Mrs. Lisby that she wanted her husband to have everything.

* + [Frost Nat. Bank v. Fernandez](https://casetext.com/case/frost-nat-bank-v-fernandez?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p507)

315 S.W.3d 494 (Tex. 2010)[Cited 626 times](https://casetext.com/case/frost-nat-bank-v-fernandez/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Moreover, section 48 of the Probate Code provides that a proceeding to declare heirship may be filed in the probate court only when a person died intestate as to some or all of his or her property, when a will has been probated or estate administered but real or personal property was omitted, or when there has not been a final disposition. TEX. PROB. CODE § 48(a) (permitting suit for declaration of heirship "[w]hen a person dies intestate" and "there shall have been no administration in this State upon his estate" or when a will has been probated or an estate administered but property was "omitted from such will or from such administration"); see id. § 3(o) (defining "heirs" as "those persons . . . who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate"). That is not the case here. Because Kenedy left a will that disposed of all his property, as determined by the district court in the Humble Oil suit, and because his estate was fully administered and closed, the Probate Code does not authorize the probate court to determine heirship. See Cogley v. Welch, 34 S.W.2d 849, 853 (Tex.Comm'n App. 1931, judgm't adopted) (holding that court has "absolutely no authority . . . to exercise jurisdiction to declare heirship" when decedent died testate); McMahan v. Naylor, 855 S.W.2d 193, 194-95 (Tex.App.-Corpus Christi 1993, writ denied) (recognizing that issue of intestacy should be determined before heirship); Guajardo v. Chavana, 762 S.W.2d 683, 684-85 (Tex.App.-San Antonio 1988, writ denied) (holding that heirship is not justiciable before intestacy is established); Buckner Orphans Home v. Berry, 332 S.W.2d 771, 775-76 (Tex.Civ.App.-Dallas 1960, writ ref'd n.r.e.) (holding that putative heirs "would first have to annul the wills left by deceased" before they had "such interest as would entitle them to come into the probate court asking for a declaration of heirship, or claiming rights in the estate as heirs"). Authority to decide Fernandez's heirship claims rests solely with the district court as part of its exclusive jurisdiction over the bills of review.

* + [Qualia v. Qualia](https://casetext.com/case/qualia-v-qualia-1?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p341)

878 S.W.2d 339 (Tex. App. 1994)[Cited 10 times](https://casetext.com/case/qualia-v-qualia-1/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

While section 5(d) of the Texas Probate Code gives the county court power to hear all matters "incident to an estate," sections 5A(a) and 5A(b) of the Probate Code define what is included in the phrase "incident to an estate." Mejorada, 663 S.W.2d at 893. It is clear from the definitions of sections 5A(a) and 5A(b) that the language "the interpretation and administration of testamentary trusts and the applying of constructive trusts" only applies to statutory probate courts and district courts and not to other county courts. Id. at 893. Further, where "[t]he record does not reveal that any probate proceeding was taking place or pending at the time the instant suit [is] filed, . . . sec. 5 of the Probate Code dealing with matters incident to an estate does not come into play." Sumaruk v. Todd, 560 S.W.2d 141, 144 (Tex.Civ.App. — Tyler 1977, no writ).

* + [L. J. S., Matter of](https://casetext.com/case/l-j-s-matter-of?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false)

613 S.W.2d 14 (Tex. Civ. App. 1981)

The United States Supreme Court has recognized that juvenile proceedings are quasi-criminal in nature. Application of Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Neither the Texas Family Code Annotated nor the Texas Rules of Civil Procedure govern a situation where a juvenile escapes from custody and remains a fugitive pending an appeal. Noting this, the court in In The Matter of M. A. G., A Child, 541 S.W.2d 899 (Tex.Civ.App. Corpus Christi 1976, writ ref'd n.r.e.), held that Article 44.09 is applicable to proceedings involving delinquent children.

* + [Fleming v. Easton](https://casetext.com/case/fleming-v-easton?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p255)

998 S.W.2d 252 (Tex. App. 1999)[Cited 2 times](https://casetext.com/case/fleming-v-easton/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The district court's acquisition of jurisdiction over the parent-child issues in this case preceded any jurisdiction that could have been acquired by the probate court. This case is distinguishable, therefore, from those in which the probate court acquired dominant jurisdiction by virtue of the administration of the estate being the "first filed action." See Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581, 586 (Tex. 1993). Because jurisdiction vested in the district court before the probate court acquired jurisdiction over Easton's estate, the probate court would have had to divest the district court of its jurisdiction before deciding this case. We see nothing in the record to indicate that a transfer or other form of permissible divestiture took place. See Act of May 26, 1993, 73d Leg., R.S., ch. 970 § 2, 1993 Tex. Gen. Laws 4212, 4231 (amended 1995); Tex. Prob. Code Ann. art. 5B (Vernon Supp. 1999); see also Graham, 971 S.W.2d at 58. Furthermore, we have found no authority that would automatically divest the district court of its jurisdiction over the parent-child relationship upon Easton's death. Indeed, previously decided cases clearly indicate that the district court's continuing jurisdiction over the issues in this case was not affected by Easton's death. See Dohrn v. Delgado, 941 S.W.2d 244, 248 (Tex. App. — Corpus Christi 1996, no writ) (death of one of the parties to a divorce decree does not terminate the continuing jurisdiction of the court rendering the decree over the children, if any, who are still subject to further orders and supervision by the court as long as they are minors); Lewis v. McCoy, 747 S.W.2d 48, 50 (Tex. App. — El Paso 1988, orig. proceeding). We note that the claims brought by Fleming involve obligations allegedly owed by Easton's estate as a result of Easton's former status as a parent. The object of these parental obligations is Easton's child, who is still subject to the exclusive jurisdiction of the district court with respect to all matters pertaining to the parent-child relationship. If Fleming had obtained a judgment in her favor in the district court, she could have presented it to the estate for payment just like any other debt. See Martin v. Adair, 601 S.W.2d 543, 545 (Tex.Civ.App. — Beaumont 1980, no writ). Before her claims are reduced to judgment, however, the probate court has no jurisdiction to consider them.

* + [Lawton v. Lawton](https://casetext.com/case/lawton-v-lawton-13?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p9)

NO. 01-12-00932-CV (Tex. App. Jul. 10, 2014)[Cited 2 times](https://casetext.com/case/lawton-v-lawton-13/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Having concluded that the estate is closed, we consider which of John's claims, if any, survive on appeal. John's first issue concerns the trial court's denial of his motion to remove David as executor. In In re Estate of Hanau, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied), the court of appeals noted that the "trial court has power to hear all matters incident to an estate only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." Id. at 904. The court concluded that once the estate had closed, the trial court lost jurisdiction to remove the executrix and appoint a successor independent executor, and that these issues had become moot. See id. Thus, under Hanau, John's issue concerning the removal of David as executor of the estate under Probate Code section 149C(a) is moot. Moreover, John concedes that if the estate is closed, his claim seeking to remove David as executor is moot.

* + [Lawton v. Lawton](https://casetext.com/case/lawton-v-lawton-10?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p9)

NO. 01-12-00932-CV (Tex. App. Mar. 6, 2014)

Having concluded that the estate is closed, we consider which of John's claims, if any, survive on appeal. John's first issue concerns the trial court's denial of his motion to remove David as executor. In In re Estate of Hanau, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied), the court of appeals noted that the "trial court has power to hear all matters incident to an estate only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." Id. at 904. The court concluded that once the estate had closed, the trial court lost jurisdiction to remove the executrix and appoint a successor independent executor, and that these issues had become moot. See id. Thus, under Hanau, John's issue concerning the removal of David as executor of the estate under Probate Code section 149C(a) is moot. Moreover, John concedes that if the estate is closed, his claim seeking to remove David as executor is moot.

* + [Mendez v. Brewer](https://casetext.com/case/mendez-v-brewer?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p500)

626 S.W.2d 498 (Tex. 1982)[Cited 58 times](https://casetext.com/case/mendez-v-brewer/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

Section 11.03 of the Texas Family Code provides in part that: "A suit affecting the parent-child relationship may be brought by any person with an interest in the child." There has been some confusion in the courts of civil appeals as to the proper construction of this statute. This Court in Durham v. Barrow, 600 S.W.2d 756 (Tex. 1980), held that a natural mother did not have standing to bring a bill of review in an adoption proceeding until a prior judgment terminating the parent-child relationship with her children was set aside. In doing so we cited with approval Rogers v. Searle, 533 S.W.2d 440 (Tex.Civ.App.-Corpus Christi 1976, no writ), wherein it was said: "To entitle a person to intervene in a pending suit, it is incumbent upon the petitioner to show an interest in the subject matter of the litigation `. . . greater than a mere contingent or remote interest . . . .'" The Rogers court held that the natural mother whose parental rights had been terminated did not have a present justiciable interest in an adoption proceeding and that the trial court had correctly granted the motion to strike her petition in intervention.

* + [Qwest Microwave Inc. v. Bedard](https://casetext.com/case/qwest-microwave-inc-v-bedard?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p437)

756 S.W.2d 426 (Tex. App. 1988)[Cited 36 times](https://casetext.com/case/qwest-microwave-inc-v-bedard/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

The administrators' second amended original petition in the underlying litigation asserted causes of action that were expressly for the benefit of the two Qwest corporations, that is, shareholders' derivative actions. The standing of the administrators to bring such actions arose, not simply because they were the administrators of Warren's estate, but also because Warren's estate was itself a holder of shares in the two Qwest corporations. In legal effect, the administrators themselves held the shares of the two Qwest corporations in trust. See TEX.PROB. CODE ANN. Sec. 37 (Vernon supp. 1988); Humane Society of Austin and Travis County v. Austin National Bank, 531 S.W.2d 574, 577 (Tex. 1975), cert. denied, 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976). Their capacity as shareholders, in trust, of the two Qwest corporations was the capacity that enabled them to assert their causes of action in the second amended petition. We conclude, therefore, that section 5A(b) of the Texas Probate Code does not confer jurisdiction upon a probate court to hear claims brought by the administrators in their capacity as shareholders and therefore nominal plaintiffs in a derivative action. We conclude further that Judge Bedard's January 13, 1987 ruling on the motions to dismiss before him was erroneous, as a matter of law. Because the probate court exceeded the limits of its statutory authority, its order overruling the motions to dismiss was completely void, and not merely voidable. City of Houston v. Farris, 695 S.W.2d 780, 782 (Tex.App.-Houston [14th Dist.] 1985, orig. proceeding); City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex.Civ.App.-Beaumont 1973, writ ref'd n.r.e.).

* + [El Paso National Bank v. Leeper](https://casetext.com/case/el-paso-nat-bank-v-leeper?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false#p806)

538 S.W.2d 803 (Tex. Civ. App. 1976)[Cited 8 times](https://casetext.com/case/el-paso-nat-bank-v-leeper/how-cited?jxs=tx&p=1&q=Texas%20Commerce%20Bank%E2%80%94Rio%20Grande%20Valley%20v.%20Correa&sort=relevance&type=case&resultsNav=false" \t "_blank)

When the Appellee filed suit for his attorney's fees, he sued only the El Paso National Bank, both in its individual and in its representative capacity as the Temporary Administrator. That Bank immediately filed a third-party action against the American State Bank of Lubbock as Independent Executor of the Estate, reciting the appointment and qualification of the Independent Executor as of December 21, 1973, and claimed that the liability for the attorney's fees of the plaintiff should only be asserted by the plaintiff against the third-party defendant, and, alternatively, that if the El Paso National Bank was liable that it have judgment over against the Lubbock Bank. Thereafter, the plaintiff added the Lubbock Bank as a direct defendant to its claim, and then non-suited the El Paso National Bank in its individual capacity. In its answer, upon which it went to trial, the El Paso National Bank alleged in detail the appointment and qualification of the Lubbock Bank as Independent Executor on December 21, 1973, and it claimed that this caused the legal termination of the temporary administration resulting in its non-liability in any such capacity to the plaintiff. In effect, the El Paso Bank was pleading that it had no legal capacity to be sued or that it was not liable in the capacity in which it was sued as set out in Tex.R.Civ.P. 93(b) and (c). The answer, while not verified, was adequate to raise the defense as the truth of this matter appeared of record. The El Paso Bank, in asserting that it should have been dismissed, points to the transitory nature of a temporary administration pending a will contest; that all powers of the temporary administration must cease upon the appointment and qualification of an Independent Executor; and that the very nature of the independent executorship requires that it succeed to all the rights, powers and duties ever held by the Temporary Administrator. Tex.Prob. Code Ann. § 132(a); Ex parte Lindley, 163 Tex. 301, 354 S.W.2d 364 (1962). It is further pointed out that there can be no power in the Temporary Administrator as there cannot be two full administrations of the same estate existing at the same time. Corpus Christi Bank and Trust v. Alice National Bank, 444 S.W.2d 632 (Tex. 1969); King v. King, 230 S.W.2d 335 (Tex.Civ.App. — Amarillo 1950, writ ref'd).