**[Ex 2-3e] 2006-10-11 791069b October 11 2006 Texas Senate Hearing on Jurisprudence**

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When a fiduciary may bring litigation against somebody who they believe has done something wrong, and that's going to cost money. And then if the person that loses appeals, that's going to cost the estate money. Not any different than any other type of litigation.

And so it's hard to say, well, they spent a lot of money in a particular case, yes. But to lay the blame on the fiduciary, because it may be it's the duty of the fiduciary to proceed against somebody. Just like I've had cases in front of me where the fiduciary who was not named by the court, they wouldn't proceed against a wrongdoer because they were doing something wrong themselves.

But I've made these suggestions. And I will say one thing about another change. We want to talk a little bit about changing the recusal statute.

I don't think there's anything wrong with our recusal statute other than we have some litigants who now have figured out, and this can happen under Chapter 74, Chapter 25, or any recusal provision, that what they will do is any judge assigned gets a recusal, to hear a recusal, gets a recusal filed against them. And that can go on and on and on. Because the tertiary recusal provision that you all set up under the Practice and Remedies says that if a person files against one judge, or it says a judge, it doesn't say one judge, but it says if a person files the third recusal against a judge, that's tertiary.

And that judge can proceed onward. And on appeal, if the judge is wrong, should have been recused or disqualified, then everything is set aside. But if you think about that under Chapter 74 or Chapter 25, presiding judge assigns a judge.

She goes down to hear it. She has got a motion to recuse her. We send another judge down there to hear the recusal on the recusal judge.

She gets a recusal filed against her. We send a third judge down to hear that recusal. Now we're hearing the recusal on the recusal on the recusal judge.

They file a recusal on that. And you just keep going snowballing over the situation. We've had non-parties.

Recusal statutes are filed by parties, not by the lawyer. I mean, the lawyer can do it on behalf of the client. But in a particular case that I delivered to you, the one that I say all the remands, you will find that individuals who are lawyers have, on their own behalf, filed a motion to recuse.

And under 74, under 25, there is no provision for a lawyer to say, I want to recuse the judge on my own behalf. It's just not there. You all have never authorized that.

If you want to do that, that's fine, but you're not doing that. But that's the kind of recusals that we're seeing in some areas. And then when I send someone down to go hear that, they got a motion to recuse them.

And so there are some problems. I think I've made some recommendations as to how to solve those problems. But a lot of the problems.

I don't think we have those up here. I handed them. They're the legislative changes.

For recusals? No, not on the recusals. What I would do on recusals would change the business of, whether it be in 74 or in 25, is to say that, and it actually would have to be changed in the tertiary recusal motion in section 31 of the Practice and Remedies Code, say that the third motion to recuse against any judge in a case, not one judge, but any judge, is tertiary. And then that judge can proceed.

Obviously, if they're wrong on appeal, it'll be reversed. But when you have a situation where it's individually a single judge, and then you bring a judge in to hear that, you'll just run out of judges, ultimately, and have an absurd result. Questions? Senator Gidegos? Judge, let me ask you.

You've already given me a headache on recusals. And I'm not a lawyer. But when you go into a case like this, whether it be $250,000, whether the estate or, let's say, $100 million, and then whoever picks the guardian or administrator, whatever he or she is called, that the judge would look at the entire amount involved and then pick the guardian overseeing the case.

And first of all, I have a few questions. Number one, if the other side or whoever continues to make these recusals, I mean, is there a stopping point on recusals? And I would anticipate there's money involved in each motion for recusal. Is that correct? Yes, sir.

It's two sets of money. Then why so many, in a certain case, recusals? If one party is continuing to recuse, whether they recuse where they feel strong about their side or there's something wrong with the bench or the money involved, as opposed to whoever they hire as the guardian, that there's going to be money left at the end of the argument. First of all, let's go to on recusals.

Is there a limit on recusals? Current statute says that if a party files three recusals against a judge, then the judge, who had on the third time, can continue hearing the underlying case. But if the court of appeals on appeal thinks that that was a good recusal or disqualification motion, it could reverse the result. Well, under that scenario, let's say I'm the judge.

Judge A, let's say Judge A picks a guardian. And all of a sudden, recusals start. And you're looking, and the judge overseeing the umbrella of the estate, seeing that recusals alone are going to exhaust the funds in the kitty.

And whatever lawyers charge on recusal, whatever the court charges are, or total charges on a motion to recuse, that the presiding judge is looking. I mean, he or she knows what's involved as far as funds, I would guess. And or a window, let's say a window.

Or if it's an oil well, the interest up on that daily. Or I'm sure a CPA can find out how much that thing is going to be worth, whatever they're fighting over. The estate's going to be worth in 10 years.

What I'm saying here is that you're in a courtroom. The recusals are being, the motions are being put out in front of the court. And you're looking at a set of funds in a certain window.

And all of a sudden, those funds are exhausted just on recusals alone. You never get to the case. And I'm talking about from, like I said, I'm not a lawyer.

I'm talking about a layman. Let's say fighting over $200,000 as opposed to $200 million. And court transactions are, I was looking at an article where, and don't get me wrong, I like lawyers.

As the, John's not a lawyer. John, are you a lawyer? You're not a lawyer. OK, as one of the only two non-lawyers on this committee sitting down right now, is that I understand that attorneys have fees to be charged and all that.

But when I see $50 a sentence, and then sometimes they forget what they charged $25,000 for, I forget what I charged this for. And it's not in the statement or anything. That $200,000 family that's going into a probate case like this is going to start worrying once recusals start being motioned.

And then all of a sudden, at the end of the day, there's nothing to fight over. And your question for Judge Herman is? Is why, number one, why so many recusals, number one? Well, I'm only aware, as presiding judge, I've had two cases in this term. It's been since January, where there's an inordinate number of recusals.

One that you heard Ms. Norman speak about in Houston, and then I've got one up out of Dallas County. And you assign a judge to go hear the recusal. And in one case, it's, I want to recuse that judge.

You send another judge in, I want to recuse that judge. And bear in mind, this is the family, or some members of the family. I mean, if you're talking about a guardianship, in order to even get to a point of a guardianship, there's an allegation, a sworn allegation, and a sworn medical certificate alleging that someone is incapacitated.

And generally speaking, what you're going to see, they're incapacitated, and somebody is doing something wrong with them. Their money, their property, or whatever. And I've got one out of Dallas, where it's a decedent's estate.

We're not dealing with an incapacitated person. But we've got an administrator. The rest of the family wants to remove that administrator for wrongdoing.

And that administrator files motions to recuse. First, the judge, that being heard. It's denied, then files a motion for new trial, and has a motion to recuse.

The judge coming down to hear that, has a motion to recuse any assigned judge. And every time you turn around, there's a motion to recuse somebody. All of that is going to cost that family money.

But you're in a situation, even in many instances, if that judge up in Dallas recused himself, the next judge there would have the same motion to recuse filed against them. And that's what we're seeing down in Harris County. And that's why I think that the tertiary recusal motion provision, and this would apply to any recusal, it shouldn't be based on just three against a particular judge.

Because I assign a judge to go hear it, and then that one gets one. Then I have to sign another one. That one gets one, a third one.

That one gets one, a fourth. And those aren't tertiary. Or you have, in this particular case, we have a person who, the spouse, who's opposed to a guardianship.

She's filing motions to recuse. We've got somebody who's an intervener. He's filing motions to recuse.

Then we have someone who claims to represent the alleged ward filing motions to recuse in the same case. And each of them, under the statute, would be entitled three against one judge. And what you see is, I've got one.

Then it's denied. You've got one. Then it goes down.

And then here comes the judge to hear the recusal. It's denied. It's denied.

I mean, it's just continual recusal. And that's the problem in a case. And you get situations where a person who's alleged to have mental incapacity and who's alleged to have been taken care of, we never see in court.

We have not seen this person in court in a long time. Doesn't show up. Can't find him.

And everyone knows that there is a large sum of money. And that money is dwindling. It's dwindling in legal fees.

It's dwindling in court costs. Harris County taxpayers are paying money for judges to come down there and hear recusals. All right, Judge.

My second question would be, I guess, that whether it be $1 or $1 billion, that, and I have not seen your proposals, but that a judge could pick a guardian with a budget. And they say, you can't go over this budget as far as a limit. That way, some of the parties that are fighting, there's going to be some money left for somebody.

And I haven't heard, I don't know if that's in your proposal. Well, it's setting fees. I mean, there's restraints on courts to set lawyers' fees to be reasonable and necessary.

Those things we look at. And lawyers are to be setting their fees based upon a lot of different criteria. The difficulty of the case, the going rate in the community.

I'll be real frank. I'm shocked when I see the hourly rates in Harris County or in Dallas County, but compared to Austin. Although Austin is slowly but surely getting that way.

But if I look down in Bexar County, the rates in Austin and Bexar County have historically been somewhat similar. Tarrant County is lower than in Dallas. But those seemingly are, it's not just in probate they're high rates.

In Harris County, they have hourly rates that are higher than they are out in the rural areas and certainly higher than they are in other urban areas. And there's a lot, you know, Harris County is big. It's hard to get across.

Lots of different things going on. But we do look at those things. Senator Harris has a question.

Senator Harris. Judge, help me. I'm not much good on appellate work.

Whenever it's appealed, you get the case reversed as far as the judge and get the court to find that that judge should have been recruits and thereby void the orders of that judge. But the standard on that is, what's the standard? On appeal? Honor recusal. What's the standard for recusal? No, no, because after the third recusal, third judge goes ahead and hears it, if I understood you.

It would be the same standard. You know, it's not, I don't think it's abuse of discretion. It's just that, was the judge recusable? Should he have been recused? But that's not by preponderance of the evidence.

Well, it would be. I mean, I go and hear a recusal motion. People put on evidence.

And sometimes you get people, I've been in a couple of cases recently, they don't put on appeal. Well, they're just going to look. What is the appellate court? What is the standard that the appellate court uses to determine that? Doesn't it almost have to be abuse of discretion? Would have to be, wouldn't it? You know, I really can't say, because I never pay that much attention to the appellate courts.

They, you know, one thing you're supposed to come up with. I do pay attention to them. I didn't mean it that way.

I don't read the, you know, one thing is, is that most of your mandamus cases, most of your recusals are done with the appeal. That it was an error not to recuse the judge. And, but it can be done on mandamus, although it's usually not done on mandamus.

And I just haven't looked at the opinions that have, it's usually mandamus is denied. And I, they don't come out and say, well, we decided that didn't meet a burden of proof. It just said it's denied.

I have seen, you know, I can tell you, and I've given you, in a particular case, there was a, the day of the recusal hearing, the recusal judge had a motion to recuse filed against him. That judge took the position, and after it's been on appeal, it was found by at least the courts over in Harris County to be incorrect, was that if you file it on the day of the hearing, that I can, it's untimely filed, and I can proceed. That was the judge's view.

The Court of Appeals. It's supposed to be three days, isn't it, at least? Well, actually, what the Court of Appeals said, that there is a 10-day rule. You have to file it 10 days before a hearing, but once a recusal motion is filed, you need to refer it to the presiding judge, period.

No and ifs or buts about it. You can't, you don't get to decide whether it was untimely. The presiding judge gets to decide whether it's untimely or not.

And so, that judge, there was a mandamus issued against that judge. Now. So, Judge, are we getting down to that we don't, that those of us on the committee and yourself are not familiar with the standard that the appellate court uses to make its ruling? And, Mr. Chairman, could I ask that one of the committee, one of your committee lawyers researches that? We only have one committee lawyer, but I'll ask her.

And there, and Senator Harris, there may be some, there's some lawyers here, and they may know what, how the courts of appeals look at that. Well, the way sides seem to be divided up, I don't know that I'd trust either side to tell me. One more question.

Senator Gallegos has one last question. Yes, sir. Judge, let me ask you.

You said things are different from Travis or Amarillo, Harris. I mean, don't, in law, doesn't law apply to. He's talking about the legal fees.

He's talking about the charges that lawyers charge, not the law. Reasonable customary fees. So in Dallas and Harris County, lawyers charge more than.

That's the general, I think, I think people would generally agree that in Dallas and Harris County, the legal fee per hour is higher than it is in Travis, Bexar, Tarrant, and out in Potter. Or Amarillo, Lubbock. Amarillo.

Although I must say that when the first time I can remember, 15 years ago, when the Harris County and Dallas law firms came in here, our fees were much lower than they are today. And our fees have gradually gone up to where they are closer and bumping, you know, near the Dallas and the Harris County. And I think probably Tarrant County has kind of crept up in that same guard as these law, as these law firms have come here.

Because that, you know, the market bears those fees. But in probate law in the state of Texas, they're all under the same umbrella. Is that correct? Other than the fees.

Statewide. Statewide. Yes.

Is that correct? Yes. Okay. Probate law doesn't change from county to county.

Any more questions for Judge Hartman? Thank you very much, Judge. Appreciate your being here. Senator Harris would like you to get a haircut.

Mr. Epstein. And Mr., how do you pronounce that? Wilkerson as well. You wanna appear together? Please.

Welcome to the committee. Good morning. Good morning.

You can identify yourself and proceed. Senator, my name is David Wilkerson. I'm here on behalf of my client, Mr. J. Mike Webstein, as well as myself.

Thank you, sir. I'm Mike Epstein on behalf of myself. Thank you, sir.

Senators, good morning. You should have before you a report which we have prepared, Mr. Epstein and I, over the course of some time. Mr. Epstein is not only my client, he's my dear friend.

And during the course of this, hopefully, discussion, we will talk about some of the facts that we have seen. Our intent has been to be objective. We're not here to talk about any one particular judge or any one particular lawyer.

In your report, you will find that we have assembled information which has been promulgated and given to the Supreme Court. As most of you are aware, there's a Supreme Court order that says that when you are a court appointee, your fees must be gathered by the county or the district court clerk and sent to the Supreme Court once a month. We have tried to take that information and provide that information to you here today.

We'll also talk a bit briefly about my client's mother, Mrs. Alta Epstein. Mrs. Alta Epstein is an elderly Alzheimer's patient and has been unable to care for herself. Again, our goal is not to talk about any one particular aspect of a case.

It's just that we are more familiar with Mrs. Epstein's case and we'll give you some examples today. During the course of our discussion, I'd like to review some of the particular provisions contained with our report. If any of you don't have it, we have extras with us if you need them.

I think we all have copies. Is it a loose-leaf binder? You're talking about this one? Yes, sir, it should be a one-inch binder, white. Now, before you get too far down the road, we really are interested in your recommendations of ways to improve the system and not go into a lot of detail about your specific case, which I understand is still pending.

It is pending and we really don't want to do that either. We're not here to talk about the case. Kindly, we think that's improper.

We're here primarily to talk about section 665 of the Texas Probate Code and section 666 of the Texas Probate Code. They are contained within the appendix contained within the binder. And I am not a probate lawyer and I'm not an appellate lawyer, so I can't answer those questions.

I primarily do civil trial and family work. One thing to please be aware, when Mrs. Epstein started her guardianship, she had about $1.2 million. She had an annual income of approximately $100,000 per year.

Today, she lives on Social Security and she has about $300,000 in assets. She has what? About $300,000 in assets left. She had $1.2 million.

During the course of her guardianship proceeding, she had income of over $2 million. Over what period of time are you referring to, sir? Sir, it's about 10 years. 10 years? Yes, sir.

And it had been growing, the estate had, if I understood you correctly, what, about a 5% return? A little bit better than that. She had one asset that was sold for $800,000 that was generating over $100,000 a year in income. Which we'll talk a bit about that asset.

Net income? Gross income, sir. Gross before taxes. Okay.

So it was net income? Yes, sir, it was income. Okay. We think it's too late for Mrs. Epstein's mother.

We're not here to talk about a relief for her. But this report hopefully will delve into many people and many aspects of the law for which it's not too late. There are situations that you may have the ability to change certain aspects of the law to prevent what we have seen to be a problem in the way attorney-guardian appointees are paid.

The primary reason Mrs. Epstein's estate has been diminished to the extent it has has been that the payment of attorney-appointee guardians has been just simply outrageous. As Judge Herman says, he has standards which he has promulgated and which are on his website. You can go to his court and their handouts.

Judge Herman in his standards says that in the rare situation that he appoints an attorney as a fiduciary and they serve in a dual capacity, he pays them no more than $50 per hour. Attorney's fees have decimated Mrs. Epstein's estate. The report shows, beginning under tab three, we took the information that was given to the Texas Supreme Court and we got it in soft copy.

We made no independent analysis of the information. The shocking number is that court appointees in the four probate courts in Harris County, Texas in an 11-year period of time have been awarded $87 million in court appointee fees. Of that sum, $64 million went to court appointee guardians.

We're talking one county in this state. We've given you graphs to show how that money has been spent. We've shown you to whom it's been awarded.

It is a large number. Judge Herman talked a bit about the statutory compensation guidelines. That's section 665 of the Texas Probate Code.

Generally, it says that a guardian should be awarded 5% of the income and 5% of the expenses of the ward's estate on an annual basis. If there is a guardian of the person who's also been appointed, that guardian shares in that statutory calculation. Sometimes 5% is just too low.

We do agree with Judge Herman. If you have a small estate and a lot of work, it just seems to us that's just too low. Regrettably, our analysis has been that it's not the statutory fee that gets paid.

It is the payment of attorney appointee guardians who charge their regular hourly rates. For example, in Mrs. Epstein's case, she is on her second court-appointed guardian. Each court-appointed guardian has been a lawyer.

Each court-appointed guardian has charged attorney's fees. There has never been a motion nor an order determined that the 5% in and 5% out was too low. All this happens, they simply charge their attorney's fees.

The shocking part is that each court-appointed guardian has also had his or her own lawyer to represent them. So when you go to a hearing, you have the court-appointed guardian charging an hourly rate, as well as his attorney charging an hourly rate. This can be cured.

We have offered some suggestions for curing, and we're not trying to be presumptive. It's just that we've seen this, and we think that section 665 and section 666 of the Texas Probate Code can be modified so that court-appointed guardians get paid a reasonable sum. They should be entitled to have a lawyer represent them.

And by the way, when a court-appointed guardian hires a lawyer, it is my understanding that lawyer represents the guardian and not the ward. We just don't think that's right. Another one of the suggestions we make, and Senator Harris, I understand you're a family law lawyer.

You understand the best interest test probably better than anybody in this room. There's no best interest test in the Probate Code when it comes to determining what is good for the ward. There are talks about some best interest there and there about things, but it really isn't important.

You will find, for example, that when the court orders a sale of property, the only issue is whether or not a fair value for that property was received, and not whether or not the sale was in the best interest. For example, we have found that income-producing property, which yields a fine return, can be sold, but yet it's only the value that's determined, not whether it's really good for the ward to sell it or not. I'm sorry, you trailed off in your last- Have a tendency to do that.

Sir? I have a tendency to do that. I'm trying to avoid specifics. What we have discovered, sir, is that there is no best interest test in the Probate Code.

Understood that. We would suggest that there be simply- Understood that. Okay.

In our particular circumstance, a piece of property was sold for $800,000- Understood, it was income-producing. And you know it only was sold for $850,000 after the payment of taxes, attorney's fees, $300,000-

**This file is longer than 30 minutes.**

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