**[Ex 2-3j] 2006-10-11 791072a October 11 2006 Texas Senate Hearing on Jurisprudence**

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A final judgment in the case, so I know there was a summary judgment as to who the trustee was in his case in the fall of 2003. The final judgment in the case was not entered until I think January of 2006, June 2006, so he couldn't appeal that summary judgment that was issued three years ago until just recently. So if I can summarize your suggestions to this committee, number one is we ought to have juries involved earlier, and second we ought to have more than just one judge ruling on motions for summary judgment.

Yes. And you have any other suggestions that this committee can consider for improving the system? I do real quickly. I think with respect to court appointees in the probate courts in trust litigation, when you have people who are appointed and who are going to be hiring lawyers, spending money, taking the assets of a trust and using those assets, I think that those court appointees need to put up some sort of bond or security so that to the extent they are paid before any kind of final judgment, before any kind of final decision determining whether there has been a benefit to the estate, there is money available to return if somebody later finds that their actions were inappropriate or that they should have been paid less than what they've actually been paid.

And I think I can't emphasize enough because it was one of the constant battles in our case. I believe that these people have to show a measurable benefit to the estate that they are representing. It's not a question of them coming into court and saying I billed 20 hours and here's my rate for every hour I spent on this case.

And I say it's reasonable and so therefore I get my 20 times $200. And I think there is a tendency to accept that kind of logic and, for example, with this trustee. She was charging her legal rates as a lawyer for all of her actions as a quote receiver.

She hired her law firm from the get-go immediately to help her to administer this trust estate and they were being paid for reviewing pleadings but she wasn't even in the litigation. I mean they were doing things that lawyers do but she wasn't even involved in the litigation at that point. Judge Wood mentioned that he scrutinizes these bills that are presented to him for approval on an interim basis.

You know I was involved in several of these fee applications not only by the receiver but by others as well. I never saw a single dime disapproved for any of those court appointees. I objected to many of those applications.

The receiver case, for example, I was I was not permitted once I started asking the receiver about her handling of the stock portfolio. My cross-examination was stopped. I was told to stop cross-examining her about that.

We would not go into that. And at the end of the day, well, you know the result. I appreciate the opportunity. I know there's been a long day for you guys and I appreciate the opportunity. I appreciate your being here Mr. Hardy. Chair calls Gus Tamburello.

Is it Tam or Tam? Tam. T-A-M. I'm Gus Tamburello from Houston, Texas.

I'm a probate attorney. I was a 1987 graduate of the University of Houston Law School and I've been practicing in Harris County and the surrounding counties almost all of my career. I was a member and have been a member of the probate section of the State Bar and in fact have worked on the committee this year that's submitting to the legislature suggestions for changes in the guardianship code.

However, there were some recent developments and I felt compelled to be here today and I'm really glad that I was here this morning because you have heard such blatant misrepresentations about what the probate code says from probate for people who don't practice probate that I feel compelled to make a statement. First of all, I realize the nature and the scope of the charge and I want to keep my remarks to that but I want to state first of all that under 665 which seems to have been the most popular section touted today having to do with compensation of guardians, that section does not need to be changed. I do not agree with the $50 an hour suggestion with all due respect to Judge Herman.

The fact of the matter is this statute sets out that first of all it starts out the court may authorize compensation. You already have given the judge discretion whether to or not. It gives a judge the formula by which to work with and it lets any interested person or the court on its own motion to review the compensation.

So in each of the four courts that I can speak for in Harris County, we file itemized bills whether we're serving as the attorney for the applicant, whether we're serving as the guardian, whether we're serving as an ad litem, whether it be guardian ad litem or attorney ad litem. We file detailed fee applications that are scrutinized by the courts and if found to be inappropriate they're cut. The statute already says the court may deny any fee authorized under this section in whole or in part and it goes on to state the reasons.

And it says a guardian if they haven't adequately performed their duties, their fee can be denied. These courts review, they have particular staff members. Their staffs are larger than every district court.

They have particular staff members that review these bills and they are routinely cut and a lot of times the attorneys know what they can and can't bill for and so if you bill for taking a ward to the doctor and you bill your rate, well it might be cut. But as Judge Wood said earlier with the example of a bank, I will tell you right now, as scary as it may seem, there are banks in this state where their personnel do not even know what a letter of guardianship is. In fact, sometimes they look at you like you're robbing the bank when you go in there.

Not only do they demand that I be there as the court-appointed guardian, they want to see the court order appointing me and a lot of times we're appointed or our client is appointed. We order the letter of guardianship which is your essentially your marching order and you go present it and they want to see more than that. Sometimes the guardian, if they're the attorney, is still required to do certain things.

So I hesitate and it makes me very nervous to follow Judge Herman's suggestion about saying well it's got to be legal services. Guess what folks, it already is. We only get paid for doing legal services and that's what 666 says.

It's already in here. As Judge Wood said, this is one of the finest guardianship codes around. It addresses things from start to finish and I want to say you know.

Let me just respectfully recall some of the testimony we've heard earlier today. The complaint is that although you may not have been paid for anything but legal services, other lawyers in other cases have been paid the legal rate for non-legal services and that's the complaint and that's what they people have been testifying today that they'd like fixed. Well and here's the problem with what a lot of people have testified to today.

They all had the opportunity to object and you know what 665 gives them. It says on an application of any interested person or on the court's own motion that they can review the compensation and another very grave inaccuracy by counsel who admitted that he wasn't a probate lawyer was about the whether or not you can address the issue of guardian accountings at the end of the case and in fact if you Professor Johansson from this great city and a professor at University of Houston Law School cites right in under section 749. The probate code, this is a Deportanova case, the probate code requires strict responsibility and accountability by a guardian for the period of the guardianship and does not excuse older transactions for reasons of convenience.

Thus previous accountings can be re-examined on final accounting even if prior accountings were approved by the court. We already have the law that says that so you've got people coming up here and saying legislature you need to change these things. There is no need to change it.

It's here. There is accountability. Let me ask you since you are more intimately familiar with the probate code than some other witnesses we've had today, what changes do you believe need to be made by this legislature in the next regular session to improve the probate code? As I said earlier Senator I was part of a committee that is submitting some recommendations through our real estate and probate section and those I don't have in front of me but those will be submitted in due course.

With respect though to the issue of fiduciary oversight my recommendation is really to make there is no change necessary as far as the compensation section is concerned because it's already addressed in the statute. That's the short answer but if the panel would indulge me for just a few more moments one thing that's been sorely overlooked today is the fact that where is the responsibility of these parties who come in and bring these contested matters. They are the ones who initiate these things and require ad litems to be appointed and every one of these cases it was a contested matter and in some of Mrs. Taub's case.

That was an exception Senator. I mean all of these people had contested cases. But in Mrs. Taub you weren't dealing with an attorney ad litem situation it was a it was an independent administration and you were dealing with a court-appointed appraiser and I believe the change made by the legislature requiring good cause was a good one but the fact of the matter is you don't I can't remember an independent administration in all the years I've practiced where any of the probate judges required an appraisal.

This was one instance that came out and in fact because it was something that that caused a lot of people to be upset about and because there was some merit to changing or tweaking that language we did it and I think that problem is fixed but what we have here is a really very small number of people who are disgruntled and who run to the media or who run to a committee like this and say oh we have this horrible broken problem. We don't. It's a beautiful system.

It works. It works well but what happens is you get into contested matters and as Judge Wood said I believe 90% or more maybe 95 98% of all probate matters are not contested and the attorney's fees are reasonable. Well why is that? Because there are there is no contest going on.

Daddy has died. Mama wants to go probate daddy's will. I feel bad about what happened to Miss Taub.

I don't like that that she had to be put through that but that's an aberration and that is not what happens on a routine basis and you know you have folks that that come in and want to change the law based on a specific case that had specific facts that were really limited to that particular case and what bothers me is we never make good decisions based on emotion you know that's why you know you shouldn't you know have a gun nearby you know if you're having an argument with somebody we don't want to place people in a situation where we we do major things while we're in a state of anger or excitement or whatever we do stupid things when we do that and what happens in these cases is you have litigants who don't like the result and most of the time it was their own actions that led to the result coming down and complaining and want to change the law when it 98% of the people are not affected by it where 98% of the people get through the system without any problem and judge what is correct about the decedent side of Texas probate it's got to be one of the most inexpensive in the nation people are really surprised at how easy it can be and in guardianship well we've got a nice thing right in here called the durable power of attorney act you know a person in this state can write a durable power of attorney over their their finances and over their health care and guess what they don't ever have to go through guardianship but what happens when one of two siblings shoves a power of attorney under mama when she may not have her mental capacity when mama had already named some one of her other siblings as the power of attorney well what happens then the bank won't honor it because I've got two competing powers of attorney the doctor doesn't want to honor it because they're scared to death which one of you has authority so guess where it ends up in probate court and so there have to be ad litems appointed because somebody has to figure out what is in the best interest of this person and who is most qualified if either to serve you get third party attorneys why senator because either the party the family members are disqualified or they're unsuitable or they can't get along and so a court has to put a third party in charge to handle the affairs I've been appointed that way there's hundreds of people appointed you would act you would think by hearing this testimony today that there's about a handful of lawyers in Harris County that are just names or it's like a printing press of appointments that's just false that is a false because every attorney as the judge says he has got to be confident that the person he appoints is qualified to do the job of course these gentlemen would love first-year lawyers or our social workers to be guardians so we could run roughshod over them we don't want an experienced lawyer God help us if we have an experienced lawyer as an ad litem you know we might actually have to answer for our conduct and that's what experienced ad litems do they bring to the court's attention problems and they they are they're bound by their ethical duty they have to have every dime of their fee approved this code already allow scrutiny this code in fact has a section that says that the judge is supposed to look under section 602 at less restrictive alternatives but we have two beautiful ones in the state of Texas called a durable power of attorney and a medical power of attorney now that prevents guardianships period unless why abuse somebody gets mom to sign it when she didn't have capacity somebody decides I want control over the estate and when you have a living breathing human being this this person that's incapacitated it's their money I heard one gentleman say well somebody has to protect the money for this person and their heirs no no sir not for their heirs for mama and daddy not for your heirs a will takes effect when they die airships are had when they die it's mama's money not you daughter not you son you can fight all you want over control and the judges see both sides and I'd like the committee to understand this what you see on the news is not both sides of the story it's the disgruntled one the one who lost and you don't hear the evidence of both sides and so what happens is if you're well-financed you can continue to complain you can move to Arizona and then try to change Texas law if you have the money that's not what we need to be doing there is a section I'd like to point out that maybe we want to put some teeth into and a little more teeth at section 622 called security for all general since you brought up that particular case let me ask you do you think it's appropriate for us to have a situation exist in Texas where all the beneficiaries of the trust oppose litigation and want to fire the trustee but the trustee is allowed to continue a lawsuit that lasts over several years and has apparently looted the three and a half million dollar asset does that sound fair to you I mean I'm not a judge and I haven't heard both sides but it seems to me there's something not quite right about a situation where all the beneficiaries unanimously say we don't want to go through this litigation and the trustee who they want to fire is given standing in court right well what's fair about that well senator put in those terms you know we neither you nor I have heard the other side of the story we weren't sitting with the robe on hearing why this trustee may have had the trustee of course is entitled to representation whether whether he or she did something wrong is for the court to decide but the trustees attorneys fees are being paid out of the beneficiaries assets that's right and the beneficiaries don't want the litigation I understand animously do not want to litigate well but what has to be examined is what are what are all of the facts to the situation that's the thing that you and I don't know and I'm not as versed on that case all I heard was I know of I'm concerned about our Texas laws being changed because of somebody's disgruntled over a result in one case or they're upset and really want to be vengeful about it and mr. Tambrillo that's that is not a good argument yeah you just said that mrs. Taub had a good a good argument and we changed the law based on her case alone and that was an improvement that I agree with you on that okay okay okay there's there's a case that's brought to us it's clearly unfair I don't understand how a judge either to be perfectly candid I don't see how a judge can can give to an unlicensed appraiser approve a fee of nearly $80,000 when a licensed appraiser will do it for less than 10 I mean that is too disproportionate to me there's something not right here and you don't have to be a lawyer or on the jurisprudence committee to figure that out I agree with you senator but that the system in that case the the probate code has been tweaked to add the good cause language I think that was a good change but under the facts of that case it went to the Court of Appeals and then it came back and then it went to a jury trial and while on the subject of jury trials I'm not sure what world the other counsels living in but if you pulled section 21 of the probate code it says and I'll just read it in all contested probate and mental illness proceedings in the district court in the county court or the statutory probate court the county court at law or any other statutory probate court exercising probate jurisdiction the party shall be entitled to a trial by jury as in all other civil cases trial juries at the beginning of a guardianship will demand one because it's allowed but as can you imagine every party should have demanded one and didn't if the complaint is we don't have a system that allows for a jury to look at a contested issue I believe that's an erroneous statement of the law based on section 21 and based on the on the rules of civil procedure now do we need a jury there's a question for yes mr. Tamarillo I know we've had several people testify up here miss Tobb I don't know her but I know of her family miss Conti I don't know her either mr. Alpert I don't know him and I will tell you miss Tobb I know that my folks in my district is poor to moderate if they get shot or in a bad car wreck and it's life or death I'm going to bend top hospital that's what they know that's what they do know now as far as what you said that what's in in law and and these are disgruntled people what about what I'm done I'll go back to my example a little old lady on Avenue K what if she has a case but she didn't have money to hire a high probate lawyer and all that even though she might be right and she's not and she's not disgruntled let's say she is disgruntled but we can't hear her because she didn't have money to hire one of these lawyers that we've been talking about or or the lawyer that gets picked by the judge that's that's that's a trustee you know and and and and and if you're the same Tamarillo family that I know of in Houston Texas y'all are respected in especially in the fire department area where I come from but what I'm saying is that these people that you're not hearing from here that don't have a voice or today that these people just come up here and on their own time and obviously they're just they're disappointed and they're frustrated in the disgruntled and I've heard that in their testimony they have a right just like that lady that I represent down the street has a right if she has the money some of them don't have the money we don't hear their stories we don't hear their stories but but I bet you a million to one it's it's it's not might not be it isn't the money amount but it's the same that they feel just as strong about their case as as the poor lady down the street that doesn't have the money to hire one of these lawyers that gets picked a trustee and then let me give you an example my own case and it's it really wasn't my own my father had meso cancer okay I wouldn't even the legislature I was still in the fire department didn't know about meso specialist attorneys that can get you the world and all this it didn't care all I cared is about my loved one that's all I did and then later on to get in the legislature and Lord behold you got a sea of experts that could have got you it could have gotten not me but my mother 20 times the amount that we didn't care about amount of money all we cared is about is about his care is about his care we didn't care about money that that never entered in into the formula into the formula just you know taking care of my of my father in his last days on this earth and I think that the chairman is right you know I mean I hear what you're saying as far as law and all that these people have voices like anybody else and and quite frankly they put it with their testimony has been thorough and specific and to the point and if I was in the jury not knowing any of not knowing any of them you know I'd probably vote their way you know I'm just saying that you know I'm not a lawyer I just call it like I see him you know and and I mean your your zeal is well taken on the law and I understand your specifics and there's case in the case and that's good but these people you know what the testimony that I've heard and and the chairman saying all we're looking is for recommendations and you're saying that you know whatever the recommendations you have you know I haven't heard nothing that it's gonna satisfy these people that have testified before us well senator if I may respond first of all to your person on Avenue K I've rep if her husband died and needed to probate a will there's lawyers who will probate that will for free in Harris County the question is does that client of yours need the probate system and if they do we have a program in Harris County if she's indigent call the Harris County guardianship program where if a person is indigent they can have the guardianship program appointed their guardian and and one thing that's been overlooked because we've been talking about fees and everybody's complaining about fees you know you take the good with the bad as a court-appointed lawyer and granted my practice isn't limited it's limited to probate and guardianship but a lot of times I'm representing the disgruntled person who's filing the application because some one of their siblings is trying to take advantage of mama I'm a lot of times in the person who's who's whose action is necessitating the appointment of an ad litem but some of the times I am that ad litem and some of the times I am that guardian and guess what it is the person not even as rich as the lady on Avenue K and I mean that not disrespectfully but they have nothing and I serve for free a lot of us do and the understanding is it's not in this code because everybody wants to look at well look how much this lawyer made in this case what we have to look at is the judges know that if it happened to be a case where it was you were appointed the administrator and there was money in there to pay you your fees were approved and it was is one of those where you didn't have to take a hit on that you might get one later where the person has no money I've got one right now a lady in Deer Park her son has a serious drug problem took over her house she's in a nursing home they were about to throw her out she owed $11,000 Medicaid is expecting the house to be sold because under the Medicaid law if you own this asset and you have no intent to return to the house it doesn't belong to the kids that's that's what's so frustrating to hear it belongs to mama but guess what we have to sell that and I've been working essentially you know for for next to nothing because I have to take the action as her guardian and get her house sold get her bills paid and if at the end of the day I may or may not get paid and you know the problem with putting numbers and splashing them on the TV camera is a lot of times you were never paid the court might approve certain fees in a case and based on the standards set forth in the code the judges routinely will approve fees they find to be reasonable but the estate has to be able to support it so you don't get into situations where if there's no money to pay the lawyer they are not paid that this code says that the county can pay a lawyer here at a reduced rate is what happens if there is no fee counselor counselor I'm not I'm not here you know to debate you but but wouldn't you agree with me if you've heard this testimony that I've heard and whether you're right or whether they're right okay you're citing law and I understand that but wouldn't you agree with me that after testimony that well that I've heard okay I don't know if you were here if you heard their testimony that you know we got a problem there's that I mean we have a problem regardless of if it sets in stone we still have some kind of a problem here I respectfully disagree senator because there's in each one of these cases aside from this Taubes case you had a contested matter a family dispute and or a lawsuit that by its nature of course is a contest and that's what lawyers do is they put on their armor and they go represent the client what happens though later down the road is that the clients and realize

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