

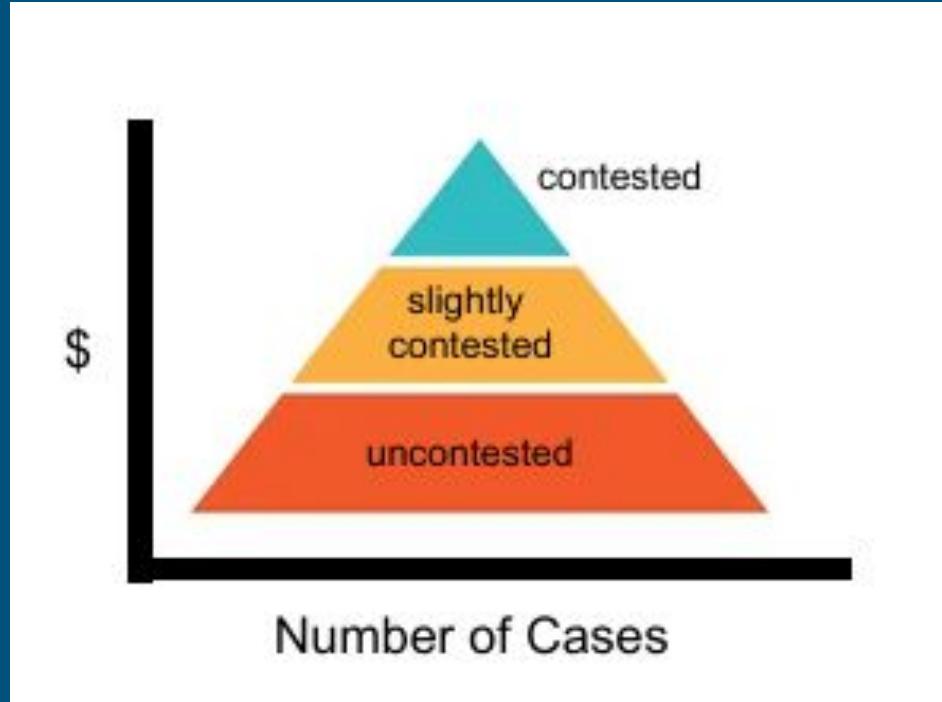
Probate Litigation

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General Concepts

- About Probate Litigation
- The Rules
- Types of Cases

About Probate Litigation



The Rules

- Texas Estates Code / Property Code / Health & Safety Code / etc.
- Texas Rules of Civil Procedure
- Texas Rules of Appellate Procedure
- Texas Rules of Evidence
- Local Court Rules

Types of Cases

Will Contest

Invalid Will:

- Forged will
- Missing formality
- Lost will

Maybe Valid Will:

- Undue influence
- Lack of capacity

Heirship

Common law spouse, double marriages, adopted/missing child

Will/Trust Reformation

Fraudulent Transfers

Deeds, benef. designations, gifts, advancements

Trust/Fiduciary Litigation

Severe:

- Theft, conversion

Less Severe:

- Failure to file acct, inventory, etc.
- Failure to make distributions
- Fail to invest/insure

Before We Take a Case / As Case Progresses

1. Winner, loser, not sure
2. Common court remedies
3. Expected outcome
4. Plan / approach

Winner, Not Sure, Loser

1. **Money/Assets:**

- a. What can the client get? Must either have assets our client gets or damages (and assets to pay damages)
- b. Will we get paid? Must either be able to afford to pay or recovery of attorneys fees probable (see next section on attorneys fees)

2. **Is the case a sufficiently decent case?**

- a. Do we have good facts? Being on the “right side” isn’t always possible, but often the “right side” wins in disputes
- b. Do we have good evidence? Actual evidence for the elements we have to prove, plus posturing evidence; see pattern jury instruction
- c. Is the law on our side?
- d. Is there a known remedy? We’ll address this next

Winner, Not Sure, Loser

3. Other factors:

- a. Are they a good client? Expectations reasonable, respectful, and responsive
- b. Is the attorney on the other side a problem? Life is too short....
- c. Is there a short deadline?

4. What is the expected outcome and plan/approach and how does that fit within your schedule?

We'll address these later

Attorneys Fees & Costs

- We should always be mindful of whether our client and the other side can or cannot get an award of attorneys fees and costs.
- Attorneys fees and costs have to be listed in the pleading.
- For most probate cases, the executor or direct beneficiary named in the will (not a remote or contingent beneficiary) usually gets attorneys fees and costs if they win or lose as long as brought in good faith. The fees are payable by the estate, not the loser. TEX. EST. CODE § 352.052. If not in good faith, then the executor may not get attorneys fees.
- Attorneys fees are Class 2 claims, so there have to be non-exempt assets in the estate to pay them (funeral/last illness, family allowance, and exempt property setasides come first).

Attorneys Fees & Costs (Continued)

- Those who are omitted from the will may not get an award of fees. However, if they prevail, the fees can still be an estate administration expense.
- If you have a declaratory judgement claim, the court has broader discretion to award attorneys fees. See TEX. CIV. PRAC. & REM. CODE § 37.009. Goal is often to try to make a claim look like a declaratory judgment claim for this very reason (add this as an additional cause of action in your pleading).
- Question: Can you also file an application for a competing will that names the executor or beneficiary that is omitted from a later will with the intent of getting an award of attorneys fees? As long as good faith met, maybe....

Recovering Costs

- One of the issues that comes up is whether the surviving spouse or child who exercises their homestead rights have to pay rent or expenses for the property.
- I always have to look this up, so I thought I'd list it here.
- Generally, the surviving spouse or child pays for repairs, property taxes, and mortgage insurance. The owners pay the mortgage principal and insurance.
- So if the surviving spouse is a 50% owner, he or she pays the repairs, property taxes, and mortgage insurance PLUS one half of the mortgage principal and insurance.
- Question: Can a no-administration order to avoid this?

Common Court Remedies

1. No admin or set aside
2. Temporary admin - emergency, such as SOL on creditor claim about to expire
3. TRO/RO - emergency, such as theft / pre-foreclosure remedy
4. Show cause hearing / turnover order - either in existing probate or stand alone action
5. Application to remove / for accounting or inventory or distributions
6. Claims - ability to file into existing probate (or creditor files for probate)
7. Declaratory judgment - have the judge construe a will or trust
8. Will or trust reformation - state statute and common law
9. Interpleader / excess proceeds
10. Lawsuit - such as competing wills, will contests, fiduciary litigation, partition suit, etc. Can name any claim, such as fraud, theft, conversion, wrongful death, etc. -401

Expected Outcome

1. Settlement
 - a. Pre-filing
 - b. Pre-discovery
 - c. Post-MSJ
 - d. Eve of trial
2. Dismissal/Summary Judgment
3. Default Judgment
4. Trial
5. Appeal / Post Appeal

Note: Find a court case that shows you the procedure to get to your outcome

Plan / Approach

Depending on our role in the case, we may set the pace and approach or have to react.

The question you have to think about is what pace or approach to take for the case.

This usually involves timing, i.e., slow and steady, push it ahead as fast as you can, or a combination.

Common reasons to go slow or fast (depending on our side of it): client or other side needs time to pay attorneys, evidence may spoil or disappear / time to create additional evidence/history, witnesses may die, time may provide a solution, judge may retire or case law expected to change

The Actual Case

- Typical Probate Dockets
- Pleadings
- Discovery
- Common Steps
- Templates/Documents
- The Bench Trial
- The Jury Trial
- After the Trial

Typical Probate Dockets

- Submission docket
 - For uncontested motions and applications, such as substitute attorneys, small estate affidavits, etc.
- Uncontested docket
 - Such as heirship/intestate, testate, etc.
- Ancillary docket
 - For hearings that will last ~1 hour or less generally
 - Such as show cause hearings, applications to remove or appoint successor, applications for accountancy and update inventories, discovery disputes, etc. Also used for pre-trial scheduling, such as pre-trial motions, scheduling, etc.
- Trial dockets
 - Bench and jury trials.

Pleadings

- Who is the plaintiff, who is the defendant?
 - Plaintiff goes first and closes at trial
 - Plaintiff usually has the burden, but not always....
 - Generally the party that pays the fee, but not always....
- What is filed?
 - Application vs. Complaint
 - Opposition vs. Answer
- The standard response:
 - General denial
 - Affirmative defenses
 - Special exceptions
 - Counterclaim/cross claims

Discovery

- Discovery Control Plan
- Rule 11 Agreement(s)
- Discovery Level
 - Level 1 now
 - Limited to 15:
 - Interrogatories
 - Requests for Production
 - Requests for Admissions
 - Limited to 180 day discovery period
 - Max 20 hours of depos
- Be sure to file the Certificate of Discovery into the record

Common Steps in Probate Litigation

See chart

Templates/Documents

- We should start saving documents as templates in Google Docs
- The URL is docs.google.com, click on “template gallery” and “submit template.” Add it as a copy. Save the original in the Admin folder in Google Drive.

docs.google.com/document/u/0/?tgif=d&ftv=1

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The Bench Trial

The Pleading

- The party who files first and pays the filing fee is the Plaintiff, other side is the Defendant. We prefer to be the Plaintiff.
- If challenging a will, try to file first and get the will admitted. This puts the burden on the other party to overturn it. They usually have 2 years to do so.
- The courts treat competing applications for probate as contests.
- If we are the contestant for a will, challenge the validity of the will itself and, if possible, challenge the terms of the will in a separate claim. That way if you lose the will contest, maybe you can win the challenge as to the terms.

The Bench Trial

The Pleading

- When preparing the pleadings, start with the pattern jury instruction if you can find it. That provides the elements that have to be proven/disproven. If you cannot find that, you should write out the elements of the law for each claim/issue and use that as the basis for your pleading.
- Be sure to request attorneys fees, costs and pre-judgment interest (available for wrongful death, personal injury, or property damage case - Tex. Fin. Code Ann. § 304.102) and post-judgement interest.

The Bench Trial

The Pleading

- What is filed?
 - Application vs. Complaint
 - Opposition vs. Answer
- The standard response:
 - General denial
 - Affirmative defenses
 - Special exceptions
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The Bench Trial

Trial Notebook

- It is advisable to start your trial notebook.
- Since we are paperless, this usually has two parts:
 - Drive folder to start ordering and numbering exhibits. Start putting things you are going to admit into evidence into a folder so that you have them organized.
 - Google Doc with the facts and events in chronological order - much easier to keep as you go. This includes facts, such as statements made by the parties and and other important dates. This also includes things that are happening now, such as dates of responses, filings, etc. Create a log now and keep it updated as you learn more about the case.

The Bench Trial

Discovery

- You have to have a plan. Actually write it down. I use a Google sheet for this. Look at the pattern jury instruction. Write out each element you have to prove and then come up with a plan for how you are going to establish each element. What discovery tool gets you each element?
- What order will get you the best evidence?
- What is your timing?
 - Send all together to overwhelm
 - Send separately over time
- Start with requests for admission. Get them to admit every element, even though it seems silly to ask what you know the other side will deny. Do it anyway. They may miss the deadline to respond (i.e., deemed admission) or admit things they shouldn't.

The Bench Trial

Discovery (continued)

- Interrogatories
 - Note: Preferred method is to ask the same questions posed to us, but in reverse (i.e., the everything you just asked approach)
- Depositions
- Subpoenas

The Bench Trial

Pre-Trial Prep

- Just before the trial, you need to prepare orders you want the judge to sign (we'll come back to this)
- Have your evidence organized, marked as exhibits, and check the timing of when you have to have it to the court (email the court staff attorney)
- Write out your opening and close
- Have your bullet points of the elements you have to prove
- Plan your traps
- Plan your objections to evidence you want or need to exclude
- Anticipate the other side's points
- Go over it from start to finish at least twice in the days leading up to the trial

The Bench Trial

The Actual Trial

Evidentiary issues

- Invoke the Rule
- Consider request to seal / confidentiality - don't broadcast on youtube if minors, tax problems, etc.
- Try to get our evidence admitted by agreement (preferably worked out with opposing counsel in advance)
- Raise any objections to evidence or proceeding, or likely waived

Dead man's rule - exception to hearsay rule. Can get in testimony about what the decedent said if you call the other party to the conversation to testify or you can corroborate the statement (i.e., two witnesses or one plus a written record/document).

Note: often best to prepare a short bench brief and have it ready to hand to the judge for any novel evidentiary issue

The Bench Trial

The Actual Trial

Opening

Plaintiff first, then Defendant

Usually goes like this:

1. State theory of case,
2. Then “the evidence will show....”,
3. Then “the other side will try to argue... which is wrong because...,”
4. Tell the court how to rule, e.g., “as such, the court should...,”
5. Remind the court you don’t have the burden (if true).

The Bench Trial

The Actual Trial

Plaintiff's case in chief

- Call witnesses and admit evidence,
- Present witnesses in a chronological order (usually),
- End on a high note (what is your best argument/evidence—put it on again...)

What you have to do:

- Solicit helpful testimony (make clients repeat helpful testimony more than once)
- Solicit testimony to lay foundation (write out the script for each type....)
- Get evidence admitted into record (ask the court to admit the record, don't forget)

If you are the defendant, you need to scribble notes as this progresses and be prepared to object (relevance, foundation, and hearsay/dead man's rule)

The Bench Trial

The Actual Trial

Defendant's cross

- This is where your notes come in...
- You need to tell a story with the cross, i.e., the witness isn't credible, the witness isn't telling the truth, etc.
- Do lead the witness
- If appropriate and possible, do make their memory look questionable
- Do not be afraid to ask uncomfortable questions to impeach, such as criminal history (I usually start with this if there is a criminal history)

The Bench Trial

The Actual Trial

Defendant's case in chief

- Same as above

Plaintiff's cross

- Same as above

The Bench Trial

The Actual Trial

Closing arguments

- Plaintiff first, Defendant second,
- If you have a case on point, it is often helpful to add that in here (have copy ready to hand judge), say why your case is like that other case and that the other case was decided in your favor,
 - Note: it is always advisable to have a court case to hand to the judge if possible.
- State the theory of the case,
- State what the evidence showed,
- Dismiss the evidence/theory from the other side,
- Mention other side has burden (if true)

The Bench Trial

The Actual Trial

Present order to judge to sign

The court will usually take the case under advisement or rule right there on the spot. Be mentally prepared for a win/loss right there....

If you win:

- have at least one version of the order ready for the judge to sign
- in the order: list everything you want vs. what the judge will sign?

If you lose, review the other side's order and be prepared to say that items should be removed/re-worded. Make sure the order says it is a final judgment so you can appeal.

If we win, get other side to sign agreeing as to form.

The Bench Trial

The Actual Trial

Request attorneys fees

- Don't forget these
- If you get to the end and this isn't addressed, ask the court if it would like you to submit a motion and support for our fees (all the judge can do is tell you "no," so might as well ask)

The Jury Trial

Same as bench trial, except....

- Have proposed jury charge ready for judge prior to trial
- Voir Dire before trial
- Verdict and Motion for Judgment Non-obstante Veredicto or Motion to Disregard Jury Findings

After the Trial

- Make sure the Order or Judgment is filed and the other party notified of it
- For jury trials, consider:
 - Motion for Judgment Non-obstante Veredicto or
 - Motion to Disregard Jury Findings
- Motion for Attorney's Fees and Costs (this is usually a Motion to Modify, Correct, or Reform the Judgment if court omitted fees)
- Request for New Trial
- Request for Findings of Fact & Conclusions of Law
- Notice of Appeal / Mandamus / Bill of Review
 - Final Judgment
 - Interlocutory Appeal