

ORAL ARGUMENT – 11-19-03
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HOUSTON NORTHWEST PARTNERS, GONZALEZ\
& RELIANT ENERGY

BARON: In 1984 this court held in *Sea(?) v. Hall* that a statutory probate court lacks jurisdiction to hear a wrongful death and survivor case. Since that time much has changed. The legislature has repeatedly amended the probate code: in 1985; 1989, 1993; 1997; and again in 1999 to make two things clear. First, statutory probate courts do have jurisdiction to hear death and injury actions. And second, statutory probate courts have the power to transfer death and injury actions, and the power to transfer is coextensive with jurisdiction.

The question before the court today is this. Is a statutory probate court's broad authority to transfer barred in death, injury and property damages cases when venue isn't proper in another county by reason of §15.007 of the Civ. Pract. & Rem. Code, which overrides conflicting venue provisions of the probate code.

PHILLIPS: Is it your position that this statutory march has been continually onward and upward towards probate in *Urbana(?)*, or was there a post-*Sea* reaction to say the broadest possible scope of probate court jurisdiction?

BARON: I think the modern era of probate court jurisdiction probably began with changes in 1973, but since that time we've seen...

PHILLIPS: Well 1985 is clearly - it overrules *Sea*. It was clearly an expansion.

BARON: Right.

PHILLIPS: Say in the last 10 years, you say that either didn't affect it or it still a march in that direction?

BARON: You're still marching toward broader statutory probate court jurisdiction. In fact in the 2003 amendments the jurisdiction provisions were amended again to broaden the statutory probate court jurisdiction verses district court jurisdiction. So definitely it has been a trend to broaden. And the jurisdiction of transfer provisions have been in 9 out of the 10 legislative sessions since 1985. So we've seen a lot of changes there.

OWEN: Does the word transfer connote to you that it's talking about venue, because typically when you're talking about transferring you're talking about transferring from one venue to the next?

BARON: I think what you're talking about is moving a case, and you're moving it not

because of venue, but you're moving it because of notions of judicial economy and efficiency. The MDL transfer is not a venue transfer. It's a transfer to bring all kinds of cases that are related to each other into a single court so they can be consolidated, coordinated. People who are interested in it can come only to one place to monitor the litigation. So I think it's a different concept in venue and it may even be a different concept than jurisdiction.

I want to try and talk about two things. I want to first focus on the transfer provisions, because I think there are a number of misconceptions as to their scope and mechanics. Then I want to turn to 15.007 and identify what I think are three logical gaps in the Reliant majority opinion.

I want to start with the transfer statutes and I want to tell you four things those statutes are not. And the first thing they are not is a vehicle limited solely to plaintiffs. By their terms they expressly allow any party to the action to request a transfer. In a recent article in the Advanced Personal Injury Law Journal, the judge in the probate court of Tarrant County, he writes that in his court motions to transfer divide roughly, evenly among plaintiffs and defendants.

And we see this in the cases as well. Greenhouse(?) v. McConnell in the brief, the defendant in a legal malpractice action asked for the transfer. In Citizen Bank & Trust v. Erdle(?), the defendant bank asked for the transfer.

And it's important to remember that estates can be either plaintiffs or defendants. Let's think of some situations. For example, in a large complicated estate with a lot of oil and gas holdings, there may have been a blowout or pollution issue involving a well in West Texas. There may be multiple suits pending in which the estate is a defendant. It would be helpful to be able to move all those into a single court.

I would also note that the statute permits more than just any party to the action to request a transfer. It lets any party interested in the estate. And this includes beneficiaries and includes creditors. And if there are multiple pieces of litigation affecting an estate a creditor will have a great interest in seeing all those moved into a single court so that the creditor only needs to monitor one action to see if there will be adequate assets to satisfy the claim.

OWEN: Is it your position that there aren't any conflicting provisions between ch. 15 and the probate code on venue?

BARON: Yes.

OWEN: So why did the legislature enact 15.007? What's the point?

BARON: I think that's a two party _____. First, we say why did they pick the language that they picked, which is to say conflicting venue provisions. And I think at the time that they adopted that, three years earlier there had been a case Henry v. LaGrone(?), which expressly said the

transfer provisions are not venue statutes. So the legislature was aware that it was not a venue statute at the time it did.

The reason for 15.007 is 15.007 was concerned about parties being able to go out and unilaterally pick a forum and bind everyone else to that forum. You cannot do that under the transfer provisions. A party has no right to a transfer. All you can do is ask for a transfer. Plus 15.007 determines where death, injury and property damage actions have to be initially filed. And in most situations that is where they are going to stay.

OWEN: What provision of the probate code would interact with 15.007? That's my specific question. What's the point of 15.007 with regards to the probate code?

BARON: We have courts with original probate jurisdiction in every county in the state. And they do have jurisdiction over the estate and matters relating to the estate, including claims filed against the estate. I would say that to the extent that you establish venue for your probate proceeding that does not necessarily mean that any suits by or against would be determined under the probate proceeding venue provision.

OWEN: I am a widow, and my spouse was killed in Matagorda county, and I file a probate proceeding in Harris county, and I sue for his death in Harris county. The defendant has a right to move the venue to Matagorda county under 15.007.

BARON: Right.

OWEN: And then you say the probate code has the power to bounce it right back under 5B?

BARON: Well you have to remember that we only have statutory probate courts in ten counties.

OWEN: I'm asking what's the point of 15.007?

BARON: If it were filed in any other probate proceeding - in a constitutional court, in a statutory court or in a district court that has probate jurisdiction, the case would be sent back or to wherever the venue was proper under 15.007 and it would stay there.

OWEN: Under your construction 5B let's the probate court take it back even though 15.007 requires a transfer, but the probate court can transfer it back?

BARON: There are only 10 counties in which there are statutory probate courts that have that option. It's not mandatory. No party has a right to it. And the statutory probate judge makes a decision, kind of like an MDL panel, is it useful to have all these cases together in one

court? And it's a different concept at work. It's a judicial economy efficiency concept that's embedded in the transfer provisions. These cases most of them will stay wherever 15.007 says they have to go, because I don't think that many of them are going to come back, because you only have 10 counties that can do it, and you have to have a party ask to do it, and the court has to allow it.

OWEN: I'm still not understanding your answer. We're talking about 15.007, which specifically talks about venue provisions under the Texas Probate code with regard to personal injury, death, or property damage claims.

BARON: No it doesn't say with regard. It says with regard to those claims 15.007 governs over any conflicting venue provisions.

OWEN: Of the Texas Probate Code?

BARON: Right

OWEN: And you say there aren't any.

BARON: What I'm saying is that the probate court determines where the probate proceeding is proper. It does have jurisdiction over related actions. But just because it can determine venue with respect to the probate proceeding and keep that proceeding in that county does not mean that you can initially file a wrongful death or injury action in that county.

WAINWRIGHT: Is it your position that under 5B that wherever a statutory probate court is taking jurisdiction of a wrongful death case, that 15.007 would never preclude that probate court from doing something in those 10 counties where there are statutory probate courts?

BARON: If all the provisions on the transfer statute are met to bring that case into the court, yes. I would agree with that.

WAINWRIGHT: So for 10 counties in the State of Texas then, it sounds like your position is 15.007 has no effect?

BARON: No. That's not correct.

WAINWRIGHT: What affect would it have in those 10 counties?

BARON: In those counties you have multiple courts exercising probate jurisdiction. But if it's initially filed in that county and that is not a proper county it does have to be transferred as a venue transfer. Then it comes to rest. And at that point...

WAINWRIGHT: Well if venue is improper in the probate court in the first place that's a different issue. Let's assume venue is proper in the statutory probate court in these 10 counties you

talked about. Then in that scenario does 15.007 have any affect on personal injury or wrongful death cases?

BARON: Yes.

WAINWRIGHT: And that is what?

BARON: If it's initially filed in the probate court and the probate court would not have venue over the death or injury case, it would need to be transferred to a county of proper venue. Then a 5B or 608 transfer could be initiated. It might not be. And then the question is whether the probate court transfers it back if all of the five provisions of 5B and 608 are met.

OWEN: Why do you think the legislature didn't amend the wrongful death act at the same time to allow a wrongful death action to be brought directly in a probate court where the estate was pending?

BARON: I don't know that either party, the plaintiff or the defendant, would always want it to be in the probate court. And I think that the concept was under the transfer provisions, the statutory probate judge has very broad discretion in determining whether to transfer these cases, and that's where the decision should lie. It should not lie with a single party to unilaterally bind someone to a particular forum. That's not permitted under the transfer statutes.

Nothing in the transfer statutes limit transfers to counties - within two transfers within the same county. And I would submit to the court that the probate court has always understood these provisions as permitting inter county transfers. And we see that reflected in 25.00221 of the Gov't Code which is in our handout.

In 2001, the legislature amended the Gov't code because a problem had arisen. And that was, statutory probate courts transferring cases in from other counties and they were losing jurisdiction because the estate would be nonsuited or would settle and there was no mechanism for sending those cases back to the transferring court in another county. And so the legislature specifically amended the Gov't code to permit that.

Let me turn to 15.007. I think there are three questions that need to be answered and that the Houston CA opinion does not provide a satisfactory answer to any of these three questions.

The first is what I raised with J. Owen. Why did the legislature pick this language? The language is conflicting venue provisions. Particularly if you look at our handout, what I tried to do was prepare a chronology of what's going on with changes because it's helpful to see all of these things in order. In 1995, the legislature adopts 15.007. Three years earlier the court had held in Henry v. LaGrone that the transfer provisions are not venue statutes. So we assume that the legislature chose its words carefully and that the two in fact do not conflict.

In LaGrone the court held that even if venue were mandatory in another county, nonetheless the statutory probate court could use the transfer provisions to transfer those cases to itself. And that decision has been followed by a number of courts: Lanier v. Stem case; and In re Ramsey case.

The Houston CA Reliant majority fails to provide any reasoned way to distinguish these cases. And I think the concurring justice asked really the key question in this case. How can the transfer provisions be venue statutes for the purpose of 15.007, which is a permissive venue statute, but not be venue statutes for the purpose of mandatory venue. And I think the Austin CA got the answer right. They said, it can't be one thing for one purpose and another for another. It always has to be the same. and it's not a venue statute for the purpose of 15.007.

SCHNEIDER: There is reference to probate code AT, I believe, and I believe the concurrence in that case said that because that is a venue provision that it presents a conflict with 15.007; and, so, therefore, 15.007 preempts. What do you think about that?

BARON: I think that analysis is a little hard to penetrate, but I would argue to you that it's wrong. If you look at that section of the probate code, it deals with concurrent venue. It addresses situations, for example, where a probate proceeding is capable of being filed in more than one county. For example, if the deceased doesn't have a permanent place of residence in the state, dies in the state, you can file a probate proceeding either in the county where the principal property of the decedent is located, or in the county of death. So there's a potential for conflicting venue in a probate situation, and what §8 does is gives the first probate court where the first filing occurs the opportunity to determine venue first. And I think that that's all that that section does. I would not submit that it's a conflicting venue provision particularly given this line of cases.

WAINWRIGHT: If there's a probate proceeding in any of the 10 counties that you mentioned, and then related to that there's a wrongful death action in a different county other than any of the 10, does 15.007 preclude the probate court in any of the 10 counties from transferring if they so decide so a wrongful death action from the other county to the 10 counties under any circumstances?

BARON: No.

* * *

LAWYER: Chief Justice, you were asking about the onward and upward expansion of the probate courts in the last 10 years. And I would refer the court in answer to that question, the bill analysis to the 1999 change to apply B in 608, is attached as ex. 1 to the brief in the mandamus proceeding, and it's also an exhibit to Ms. Baron's briefing. And it makes very clear that, and this is in 1999, that the transfer provisions were expanded to make sure that the transfer authority in the court was coexistent with the jurisdictional provisions. And it actually states, questions have arisen in litigation, and I believe only cases those can possibly refer to are the DB Windell case and the In re Ford case, which is discussed in the briefs.

WAINWRIGHT: The bill analysis you're referring to is ex. H of petitioner's consolidated brief?

LAWYER: That's correct.

WAINWRIGHT: The analysis doesn't say, personal injury, wrongful death or property damages at all. But you conclude that it clearly refers to those types of actions?

LAWYER: Yes. In the sense that it refers to any case that potentially could be filed within a probate proceeding. It makes the transfer power of the court consistent with that and it's clear that wrongful death and personal injury and property damages cases can be filed in probate court and there's jurisdiction in probate court for those. So it expands the jurisdiction so that they are co-equal on transfer. But it does not refer to the three as in 15.007. I agree with you.

J. Owen you asked does the term "transfer" imply or denote venue? I think Ms. Baron answered that correctly and I would refer the court to 15.002(b), which is the discretionary transfer provision in the Civ. Pract. & Rem. Code. And it actually uses the phrase "may transfer an action from a county of proper venue under this subchapter, subchapter (c) to another county of proper venue". So the venue term in that case is built in with the transfer power which is not in 5B or 608. In fact the transfer provisions in 5B and 608 read much more like transfer provisions in multi-district litigation and in bankruptcy court where the bankruptcy courts take cases from all over the US, put them in a single forum without respect to venue.

J. Owen you asked why did they pass 15.007 in the first instance? In the statement of facts of the record before J. Herman in the mandamus proceeding, he discusses that one of the reasons for passing it was to avoid a situation where - and he used the example where a lawsuit was filed in 1990 to start a probate proceeding and the lawyers filed the personal injury, wrongful death case in probate, and claimed that because they had good venue for the probate proceeding they had the right to file the personal injury lawsuit. And what he says is, 15.007 keeps you from filing that lawsuit in the first instance in the probate proceeding and claim that you have good venue there because you have venue over the probate proceeding. That does not answer then the question that becomes can we transfer the case back under 608 and 5B? And the answer is, the statute on its face says you can't.

OWEN: If they want you to file the wrongful death suit in a county of proper venue to start with, and not to file it in the probate court if that's not a county of proper venue, why would they turn around and say well but the probate court can always transfer it right back?

LAWYER: Because the probate court has the right to make that call in deciding how it's going to manage the estate and how it's going to handle issues with regarding an award. And the legislature can come back in and say we don't want you to transfer the cases back. And all they've got to do is amend 5B and 608 and make it real clear in the transfer authority - you do not have the power to transfer these cases back. And that is the remedy. If the legislature really wants to do that they just need to amend the statute and say it, which I think creates the same situation that you have

in Polaris. When you looked at the statute the statute said you could join all these people in Maverick county. We understand the concerns with that, but go to the legislature, have them amend the statute to keep that from happening. And that is what needs to be done if the parties do not want to give the power to the probate court to make that call to bring a case back in to probate.

WAINWRIGHT: In the excerpt from the Senate floor debate that's submitted with petitioner's brief, it's clear that at least some of the senators believed that that's what the 1995 statute did, 15.007. And I understand that that's contrary to your position. Your position seems to be that the legislature since 1995 should amend the probate code to say the same thing. But 15.007 refers to the probate code already. Are you saying they need to act twice, or are you saying 15.007 because it refers to venue provisions is different from the probate code provision, which you think I believe refers to jurisdiction. Is that the sole reason why you think 15.007 doesn't govern these transfers?

LAWYER: The answer I believe is yes. Let me say this about the legislative history.

WAINWRIGHT: So if 15.007 said jurisdiction instead of venue you wouldn't be here?

LAWYER: There is a way to do this to keep these from being transferred. I don't know if you just change the words to do it. But there's a way to do it. You simply take away the transfer power under 5B and 608 as to these three types of cases. Whether you just change the word in 15.007, that doesn't really make sense to me, because we're dealing with venue statutes when we deal with that provision of Civ. Pract. & Rem. Code. But there's a way to do it. I'm not saying it can't be done and if the legislature decides we don't want to give the power to the courts to do this, clearly there's a way to do that.

In terms of the legislative history there's about a 10 page discussion of the legislative history in Ms. Baron's brief. And one of the legislators discussed his opinion about what he thought 15.007 meant. I believe two other of the members during the floor debate felt like that the courts had the power to continue to transfer these cases. And one of the statements is equivocal in that regard. I don't think that that debate can solve the question and does not clearly reflect that the legislature when it enacted 15.007 was intended to prevent transfer under the transfer provisions.

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RESPONDENT

ANAIPAKOS: Under the argument that Gonzalez espouses for 15.007, Gonzalez could not file her wrongful death and survival lawsuit in Hidalgo county initially. But could file it in Harris county and use §5B to transfer it down to Hidalgo county, a county of improper venue where she couldn't file it in the first place.

That backward result is contrary to the legislative intent in 15.007, and it's contrary to the plain language of that anti-forum shopping statute. For that reason, because the legislature meant what it said, and because Gonzalez's conduct in this case was attempting to evade

the important public policy against forum shopping, the anti-suit injunction that the 1st CA granted was proper and should be affirmed.

PHILLIPS: Couldn't the legislature have used some clearer words in light of our LaGrone decision and just other legal concepts than just venue if they truly meant for the probate courts upward march to be detoured here?

ANAIPAKOS: Respectfully, I think 15.007 is clear. And I think that there is some focus misdirected toward 5B as being the source of the conflict. Certainly it has not been our position that 5B is a venue statute in the probate court. It's not the source of the conflict. Section 6 of the probate code, at least with respect to the _____, is the source of the conflict. That's the venue provision that determines where the estate proceeding will be filed initially, and where therefore, the causes of action would be brought under 5B potentially.

That conflict is very clear. Section 6 is denoted as a venue statute, so I think the legislature was clear on that part. With respect to the guardianship proceedings, the venue section again - it's not terribly difficult to spot. It's in §610. That's where the conflict exists.

With respect to the 15.007 point, the conflict is between the sections that I just alluded to. Between §6 and 15.002 in our case. Because under the general rule in our case, it's clear Harris county is the county of proper venue for the wrongful death and survival case, whereas §6 Hidalgo county is the proper venue for the underlying estate proceedings.

Now 5B doesn't do anything to alter that fundamental requirement that a court to exercise its jurisdiction, whether it's a statutory probate court or otherwise, has to have proper venue unless that venue is waived. For everything except for these three cases that are denoted in 15.007 the §5B transfer power will be able to operate whether it's a legal malpractice that was involved in - the Greathouse case that's cited. But in three specific kinds of cases - death, property damage and personal injury, the legislature in its wisdom has indicated those cases will not be subject to probate code venue, that Civ. Pract. Rem. Code venue will trump. The reason I submit is because those types of cases are the ones most likely to be used for forum shopping, which is what the legislature was attempting put a stop to when it passed 15.007. There is not much to administer in the Gonzales estate. And so those kinds of cases the legislature wanted to focus in and prevent this type of forum shopping.

Now the 1999 amendments that we heard some discussion about were housekeeping in nature. They made the ___ jurisdiction in 5A match up with §5B transfer power. But as has been noted, there is nothing in the legislative history of the 1999 amendments to suggest that the legislature was somehow doing an about face, was going back and saying 15.007 should be trumped by 5B. And in fact, the legislative debate with respect to HB 4 suggested that the legislature's intent has been consistent since 1995.

And most importantly, 5B and 15.007 can be read consistently in a way that

makes sense, that affects the legislative intent from the plain meaning. That is, the 5B transfer power, admittedly is broad, has a limit. That limit is in three kinds of cases whether it's a conflict between Civ. Pract. & Rem. Code venue and the probate code venue. That's the limit to §5B. That's what the legislature has told us, and that we submit is certainly the correct way to view the interaction of those two. That's what the 1st CA did, and we suggest that that opinion should be affirmed.

One question that was raised to Ms. Barron, which is essentially how does 15.007 have any meaning to this case? And what Ms. Baron was alluding to was the fact that their position essentially allows 15.007 to function only in nonstatutory probate courts. There's much mention in the briefing about the fact that there are only 10 statutory probate courts. But as a practical matter those 10 statutory probate courts are located in all of the large metropolitan areas.

Petitioners reading of 15.007 would effectively gut it for an enormous percentage of the litigation in the state.

WAINWRIGHT: In 5B, the last sentence, which talks about concurrent jurisdiction between the statutory probate court and a district court, and in that situation any cause of action pertaining to an estate or instant to an estate shall be brought in a statutory probate court rather than in the DC. Were there any changes to that language since 1995, that specific sentence in 5B?

ANAIPAKOS: I don't believe so.

WAINWRIGHT: If you find otherwise could you let us know?

ANAIPAKOS: Absolutely. In fact I believe that language was in there. But I would say that even if there had been changes since 1995, the fact of the matter is, there is no legislative intent that either party has been able to uncover that suggests that any sort of tweaking with what the legislature has done with respect to these provisions was in any way meant to affect what they had very purposefully done in 15.007.

JEFFERSON: What does probate court §AD mean that gives the probate court jurisdiction to determine venue of a proceeding and it shall not be subject to collateral attack? What is that all about?

ANAIPAKOS: That is an excellent question. Admittedly it is the focus of J. Kise's concurrence, and it is a section that neither party has relied on. I think Ms. Baron put it that it is difficult to parse, and I have to concur with that. I am not entirely clear as to what §AE, jurisdiction to determine venue relates to. I can simply say it is obviously in the concurrence venue section of the probate code. I can simply say that is not the source for the conflict that we claim under 15.007. Section AE is not the venue provision that we are relying on for the conflict.

PHILLIPS: Do you have any legislative history as to why §608 was not amended in the session just like so many other sections were?

ANAIPAKOS: Do not. For some reason that was not done.

OWEN: Where do you say the conflict is between 15.007 and the probate code?

ANAIPAKOS: The general venue rule that would apply would be under 15.002. Our principal place of business is Harris county. And the conflict is with §6 in the probate code. Section 6 provides for venue in the county in which the decedent had his domiciled ____ place of residence at the time of his death.

OWEN: What about 5A, B that J. Wainwright just mentioned. Do you see a conflict there?

ANAIPAKOS: No. That talks about concurrent jurisdiction. It certainly doesn't do anything other than reiterate that there is concurrent jurisdiction between the two, and where consistent with other law the cause of action can be filed in statutory probate court. It should be brought there rather than the DC. But it doesn't in and of itself weed out the requirement of §15.007. For those three types of cases venue has got to be proper under the general rule.

This is an issue that has not received much attention in the 1st CA's opinion. It is also the position of Reliant that Gonzalez's conduct in this case, which admittedly is a unique set of circumstances, caused dominant jurisdiction to vest in the Harris county court, and that as a result of dominant jurisdiction vesting in the Harris court, the _____ injunction that was granted was proper to address the threat in Harris county courts. Dominant jurisdiction. Typically of course the first filed case would have dominant jurisdiction, but there are exceptions to that, particularly where a party's conduct is such that it estopps the party from asserting the dominant jurisdiction of the first filed case. Here the record is replete with evidence both in terms of admissions from counsel as to why this whole procedure was done, which was specifically to deprive Reliant of an ability to appeal or argue venue on appeal.

The duplicative lawsuit in Harris county is no intent to prosecute. That record which was before the Harris county judge was more than enough to justify the anti-suit injunction. And we believe and submit that the CA acted properly on that basis as well, and that the anti-suit injunction can be affirmed on that basis, separate and apart from the §5B and 15.007 issue. Admittedly that's unique to this case.

I am not suggesting that this was sanctionable conduct. I think the court's point is well taken that if there's some ambiguity and if it's in the client's best interest, you know zealous advocacy. I guess what I'm simply saying is that there is a basis for affirming the anti-suit injunction that deals with dominant jurisdiction principles, and those going to Harris county. That is separate and apart from this issue of §5B and 15.007.

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RELATOR

WILEY: Much of the discussion this morning and in the briefing of course has been jurisdiction, jurisdiction, jurisdiction. And as we know jurisdiction goes to the power of the court and we've talked about the expanding jurisdiction of the probate courts. And notably absent from all that discussion is well what about venue?

Let's pretend 15.007 doesn't exist for a moment, and we look just at the broad statutory grant of jurisdiction in the probate code provisions, including the transfer provision. Well I've been _____ to figure out where has this notion come about exactly, that jurisdiction can be so broad and judicial efficiency so important that that's the _____ that automatically equals venue are relevant.

And frankly none of those cases talk about this. There are lots of rules that we know as civil law practitioners that are over layed into a court that has power to operate rules of procedure, rules of evidence. We don't presume to see each and every stratagem available mentioned to be applicable in a jurisdiction statute. Yet, for some reason that does seem to be the crux of this argument, that we would like to see venue specifically mentioned in the transfer provisions in order for it to apply. But we sure don't expect that in any other basic jurisdiction provision. We know that such basic procedures so endemic to Texas civil law apply no matter where we are.

So to think that venue is irrelevant just because of jurisdiction being broad, for whatever reason, I think gets us off on the wrong track. And none of the cases really hit it hard to see where has this come about. They just seem to repeat each other, this venue provision in the transfer authority is broad for judicial efficiency, therefore, we have to apply it as written.

PHILLIPS: I'm intrigued by your argument, but part of the reason we may be focusing on this is that we treated probate court jurisdiction as to trumping normal venue of the courts of past decisions.

WILEY: I believe you're speaking about In re Graham, or In re Sweppy(?).

PHILLIPS: I was thinking of Henry, but maybe Sweppy(?) too.

WILEY: In those two cases the court has addressed - the venue issue was not addressed. I believe in Sweppy(?) it was whether the claim regarding the partnership interest and the royalties, and that Bailey, Austin and Harris County was appertaining to. That was the only issue there. In Graham, the divorce proceeding, whether that could be transferred. In fact in the same county, whether that could be transferred.

PHILLIPS: We have allowed probate courts to trump the normal rules of venue for a long time. We've had an overlay of what venue is, and then we have had probate with some centralizing authority, and the legislature has given a lot more authority to the statutory probate courts than to a normal court, probate jurisdiction.

WILEY: That brings up the point that that discretionary may as in that transfer authority in 608. With that ____ in 15.007 mentioned that now we do have a statute that, as J. Owen was pointing out, does envision pre-suppose a conflict with something in the probate code. It mentions conflict. Conflict presupposes two different things. It envisions the fact that you could have a case with a personal representative as a party, that's a personal injury case, and that for whatever reason and whatever forum, it might be subject to a probate code provision. Hence the conflict language or given the nature of the case it could be subject to a different general venue rule provision. It envisions that conflict. It envisions that there would be competing policy concerns. Obviously to make that be a different result in those two different cases - probate code venue verses personal injury maybe venue. And it addressed that.

Of course it does not seem crystal clear. I admit the legislature does not speak with such crystal clear clarity at all times. We do have some basic rules of statutory interpretation that filled the digest to help us out when the language there doesn't perhaps that the conflict of venue provision language people have stumbled over. But there's some pretty basic ones. We don't have to dig very deep into some basic statutory principles. And as J. Owen had mentioned, we sure don't want to read it out of existence. We talked about some instances it could be applicable.

OWEN: Where do you say the conflict is?

WILEY: Our conflict would be the fact that that guardianship proceeding venue was established in the Travis county probate court under §610 of the probate code. Indeed, the application for the permanent guardianship of the estate (I believe it's ex. 1 to that supplemental mandamus record) shows that statement that venue is good in Travis county because the ward resides in Harris county.

It makes perfect sense that due to the very _____ worthy goals of why we have guardianships and lose venue provisions for those - if you need a guardianship you want to make sure we can do it handily wherever the ward might be to get that protection in place.

O'NEILL: How does that conflict with 15.007?

WILEY: I don't think it necessarily conflicts with 15.007. It's that 15.007 tells us, gives us some instruction what do we do in this instance? We're in one court with on type of proceeding, the guardianship proceeding here, yet conflict envision that there's going to be a different type of lawsuit: one for personal injury, death or property damage. And what do we do when we have two possible venue schemes implicated by this type of pace? So I would say that 15.007 doesn't per se conflict. It just tells us where to go in the case of a tie or some competing policy concerns between a probate code determination for venue in a particular case and how venue might otherwise be determined. In this instance a personal injury case in which general venue rules.

HECHT: Reliant has raised a question of whether there was forum shopping involved in its litigation. But you don't take that position in this case?

WILEY: Not so much. I think it's unfortunate the choice of language the CA used in their decision and they suggested that there is no evidence of forum shopping in this record. And I would suggest that that's an improper hurdle to hold up if that's how they meant it in order for 15.007 to kick in. The forum shopping emphasis in our briefing picks on the legislative purpose of those 1995 venue reforms. And as we were mentioning those reforms were based on let's look at a way of determining venue that can't be unilaterally changed by anyone at all - plaintiffs or defendants. Let's keep it focused on some basic facts that can't change. So when you have that, the opportunity to pick a more favorable venue is taken away to some extent. We still have some objective facts that the legislature was trying to take out of play any sort of after the fact changes for suspect reasons or not.

Forum shopping is not necessarily a pejorative term. They were just trying to make it more fair and objective, and not have people changing the rules of the game, getting suits at different places with no factual _____ to the actual cause of action.

So to say that that was an improper suggesting we need some kind of evidence, and I don't know what that evidence would be honestly. It would be hard to get some direct evidence. Some cases might do it. In our case we have the fact that there is nothing in that guardianship estate at all. As the application shows the only property for that guardianship estate is the actual claim, is the cause of action. There are no funds. It needs to be set up in order to manage any settlement or funds in the judgment. But there is no judgment.

I disagree that there is some sort of evidentiary hurdle of forum shopping hearing that one has to go through to get more concrete evidence.