STANDING: HOW MUCH IS A TICKET TO THE DANCE?

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LAW-RELATED SPEAKING ENGAGEMENTS AND PUBLICATIONS

Numerous articles and speeches on estate planning and probate topics for the State Bar of Texas and other organizations

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STANDING: HOW MUCH IS A TICKET TO THE DANCE?

The purpose of this article is to explain the concept of "standing" in probate and guardianship actions, to discuss how the topic should be raised, and to provide some specific examples of situations where the standing of a potential party must be addressed.

The Estates Code replaced the Probate Code on January 1, 2014, and that poses a major problem when writing about probate topics. Almost all of the cases cited below were decided prior to January 1, 2014, and that means that all internal citations in those cases are to the now-repealed Probate Code. Because of that issue, quotes from those older cases have been updated in this paper to refer to the new Estates Code. It should be noted, however, that an examination of the old case beyond what is described in this paper will obviously reference the Probate Code. In other words, all probate practitioners will be dealing with intense "translation" problems for many years to come.

This topic will discuss the two-step tests that should be used by a court in probate and guardianship cases when a challenge to a party's standing is raised. The second step in each area – whether a person is disqualified to serve as either executor or guardian – will be mentioned only in passing. Instead, this paper will focus on the first step in each area – whether an action has been filed/contested by an "interested person" in a probate matter or by a person with an "adverse interest" in a guardianship matter.

I. DEFINITION OF "STANDING"

In general, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. *Heckman v. Williamson County,* 369 S.W.3d 137, 154 (Tex. 2012). Standing is a constitutional prerequisite to suit. *Heckman*, 369 S.W.3d at 150.

A party must have both standing and capacity to bring a lawsuit. *Austin Nursing Center, Inc. v. Lovato,* 171 S.W.3d 845, 848 (Tex. 2005). "A plaintiff has *standing* when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Nootsie, Ltd. v. Williamson County Appraisal District,* 925 S.W.2d 659, 661 (Tex. 1996).

The issue of a party's "standing" can arise in probate and guardianship actions. Often, a beneficiary whose entitlement to an inheritance is questionable might file a will contest action or attempt to intervene in an action that is already in progress. In the guardianship context, a person whose relationship to the proposed ward is doubtful, or who has an antagonistic relationship to the proposed ward, might seek guardianship over that proposed ward. In either type of action, a creditor with a dubious claim might attempt to involve itself.

To challenge the standing of a party in a probate or guardianship action, a party should file a motion in limine. A motion in limine is the name commonly given a pretrial motion that attempts to prevent the offer of, or reference to, specific evidence or other matter in the presence of the jury. *See Bridges v. City of Richardson*, 163 Tex. 292, 354 S.W.2d 366, 367 (Tex. 1962) (purpose of motion in limine). A proceeding challenging standing in probate is sometimes

referred to as an "in limine proceeding," because it is a threshold or preliminary proceeding before the trial. *See, e.g., Edwards v. Haynes,* 690 S.W.2d 50, 51 (Tex. App. – Houston [14th Dist.] 1985), *rev'd on other grounds,* 698 S.W.2d 97, 98 (Tex. 1985) ("The proper procedure to follow on the issue of a contestant's interest is to try the issue separately in an in limine proceeding and in advance of a trial on the issues affecting the validity of the will.") A motion to dismiss for lack of standing, however, is properly called a motion to dismiss for lack of standing, rather than a "motion in limine." To avoid ambiguity, if the motion to dismiss is granted, the order should reflect that the claim is dismissed. *Estate of Chapman,* 315 S.W.3d 162 (Tex. App. – Beaumont 2010, no pet.).

II. HISTORY OF "STANDING" AS AN ISSUE

There are two primary court decisions which established "standing" as an issue, and both dealt with probate matters. In addition to defining the issue, these cases further established the method and timing of raising the issue before the court. The first case was decided by the Supreme Court in 1947, and the other was decided by the same court in 1960. Obviously, both decisions occurred long before the advent of the no-evidence summary judgment rule.

A. *Logan v. Thomason*

In *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212 (1947), the Texas Supreme Court held that the son of a named beneficiary who predeceased the testator had no right to contest the will. The father of the contestant had predeceased the testator, and the court ruled that the timing of the death caused the gift to lapse. The Court cited a predecessor statute to Estates Code §55.001, which authorized only "persons interested in an estate" to contest a will. The opinion includes an extensive discussion of the "interested person" concept, including the following observations:

> The interest referred to must be a pecuniary one, held by the party either as an individual or in a representative capacity, which will be affected by the probate or defeat of the will. An interest resting on sentiment or sympathy, or any other basis other than gain or loss of money or its equivalent, is insufficient. Thus the burden is on every person contesting a will, and on every person offering one for probate, to allege, and, if required, to prove, that he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, or in some manner materially affected, by the probate of the will.
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> . . .
>
> It is contrary to the policy of the state to permit the machinery of its courts to be set in motion at the instance of one who can in no event be profited thereby.
>
> . . .
>
> "In the absence of such interest a contestant is a mere meddlesome intruder." [Citation omitted.]

Logan at 215-216. The "mere meddlesome intruder" quote was echoed thirteen years later in the *Womble* decision, below.

B. *Womble v. Atkins*

With *Womble v. Atkins*, 331 S.W.2d 294 (Tex. 1960), the Supreme Court again had the opportunity to review a probate matter where the principal issue was the entitlement of one of the parties to participate in the proceeding. The court was faced with a person who had signed a release regarding all claims against the estate. The court determined that she was not an "interested person," that she lacked standing to contest the will, and that she had no legal right to later file suit to invalidate the release. Echoing its holding in *Logan,* the Court provided the following guidelines regarding "standing" in probate matters:

> It is not the policy of the State of Texas to permit those who have no interest in a decedent's estate to intermeddle therein. Accordingly, it has long been the established practice, where proper demand is made, to require one asserting a right to probate a will to first establish an interest in the estate which would be affected by the probate of such will.
>
> . . .
>
> It is too well settled to admit of argument that before one may prosecute a proceeding to probate a will or contest such a proceeding he must be, and if called upon to do so, must prove that he is a person interested in the estate.
>
> . . .
>
> The proper procedure is to try the issue of interest separately and in advance of a trial of the issues affecting the validity of the will.
>
> . . .
>
> But the trial is nonetheless a trial on the merits of the issue of interest. A judgment of no interest and consequent dismissal of an application for probate, or contest of, a will is in no sense interlocutory.
>
> . . .
>
> Unless and until the party against whom the judgment is rendered acquires a new status of interest which was not and could not have been adjudicated, the judgment is a final judgment. If it were otherwise one could continue to refile and retry the issue of interest until he prevailed.

Womble at 297-298.[1]

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[1] Although the language in *Womble v. Atkins* is the most frequently quoted language on standing and probate matters, it was actually the case of *Atkins v. Womble,* 300 S.W.2d 688 (Tex. Civ. App.- Dallas 1957, writ ref'd n.r.e.), which involved the standing issue. The Dallas Court of Appeals held in *Atkins v. Womble* that Mrs. Womble was not an "interested person" entitled to seek probate of a later will because she had accepted benefits under the earlier probated will and she had signed a release with respect to any and all claims against the estate. *Womble v. Atkins* involves a subsequent suit filed by Mrs. Womble to invalidate the release, which was dismissed based on the determination of that issue in *Atkins v. Womble.*

The *Womble/Atkins* dispute cemented the procedure for attacking and measuring standing in probate actions. In summary, the following lessons can be pulled from those cases:

1. To participate in a probate action, a party must meet the Estates Code's definition of "interested person."
2. If the standing of a person is challenged, the burden of proof falls upon the challenged party to prove that he has a legal right to participate in the suit.
3. If a challenge is made, the trial court must hear and determine the challenge in advance of the trial on the merits.
4. If a judgment is rendered that a party lacks standing, the judgment can be immediately appealed.

C. Remaining Questions

Both *Logan* and *Womble* dealt with decedent's estates, so as of 1960 there was still no standing case that involved guardianships . Further, neither case dealt with whether a particular person might be disqualified from serving as an executor in a probate case. There remained two separate layers to a probate case – whether someone had standing to file or defend an action ("interested person" test") and whether someone could file/defend an action but nevertheless not be able to serve as executor ("disqualification" test).

III. PROBATE STATUTES IMPACTING THE "STANDING" ISSUE

There are numerous statutes in the Estates Code dealing with probate cases which emphasize that "standing" is a prerequisite to participation. Many of these statutes have changed significantly (or been added) since *Logan* and *Womble* were decided. However, all of these statutes measure a litigant against the "interested person" test. These statutes mandate that a party be an "interested person" or a "person interested" in the estate.

Section 22.018 defines an "interested person" as heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of a minor or incompetent ward.

1. Section 55.001 - Any **person interested** in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits.

2. Section 55.151 – A judge may direct a sheriff or constable to seize that portion of an estate of a decedent that the executor or administrator is about to remove from the state upon the written, sworn complaint of a **person interested** in the estate.

3. Section 55.251 – Any **person interested** in an estate can file a bill of review to have a decision, order, or judgment rendered by the court revised and corrected upon the showing of an error.

4. Section 256.051 – An **interested person** may apply for an order admitting a will to probate, and for the appointment of an executor or administrator if no executor is named in or able to act under the will.

5. Section 256.204 – This bill of review statute allows an **interested person** to contest the validity of a probated will.

6. Section 301.201 – An **interested person** who does not desire an administration of an estate applied for by a creditor can defeat the creditor's application by paying the creditor, by proving that the claim is not valid, or by executing a bond.

7. Section 362.002 – A **person interested** can compel settlement of an estate after a "lapse of time" when it does not appear that the administration has been closed.

8. Section 404.001 - An **interested person** can demand an accounting in an independent administration after the expiration of fifteen months from the date the administration was created.

9. Section 404.0035(b) – An **interested person** can file a motion to remove an independent executor on several different grounds.

10. Section 405.001 – A **person interested** in an estate can petition the court for an accounting and distribution in an independent administration.

With the emphasis on "interested person" and "person interested" throughout the Estates Code, it is clear that the Texas Legislature intended to discourage "mere meddlesome intruders" from injecting themselves into probate actions.

IV. PROBATE CASES - APPLICATION OF STATUTES BY COURTS

The courts have given standing to some persons not listed in §22.018 and denied standing to persons technically falling within a classification listed in §22.018. The courts have not applied §22.018 "in a vacuum," but have "somewhat restricted the application of the term." *In re: Estate of Hill*, 761 S.W.2d 527, 528 (Tex. App. - Amarillo 1988, no writ); *Sheffield v. Scott*, 620 S.W.2d 691, 693 (Tex. App. - Houston [14th Dist.] 1981, writ ref'd n.r.e.). Cases considering the meaning of "interested person" are discussed below.

A. Heirs

A person claiming to be an heir of an intestate decedent leaving a surviving spouse has standing to contest a will only if the decedent had separate property. If standing is challenged, the alleged heir must prove that the decedent had separate property. *Earles v. Earles*, 428 S.W.2d 104, 107 (Tex. App.—Amarillo 1968, no writ).

Will contestants claiming to be heirs are not required to prove heirship as required by Estates Code §§202.001-202.056 in order to establish standing, but only must present sufficient evidence of their relationship to decedent. *Jones v. La Fargne*, 758 S.W.2d 320, 323 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

A person claiming to be an heir solely on the basis of adoption by estoppel must provide proof of adoption by estoppel to have standing to contest a will. *Edwards, supra.*

B. Acceptance of Benefits

A person who has accepted benefits under a will is estopped from making any claim that would defeat or in any way prevent the full effect and operation of every part of the will. *Trevino v. Turcone*, 564 S.W.2d 682, 685 (Tex. 1978). Thus, any person who has accepted benefits under a will lacks standing to contest that will. *Sheffield* at 693; *In re Estate of McDaniel*, 935 S.W.2d 827, 829 (Tex. App. - Texarkana 1996, writ denied). Estoppel based on acceptance of benefits is an affirmative defense that must be plead or it is waived. *In re: Estate of Davis*, 870 S.W.2d 320 (Tex. App. - Eastland 1994, no writ).

C. Creditor of Decedent

The court in *Logan* indicated that a creditor is not an "interested person" with standing to contest a will because "it is immaterial by whom his claim is paid, or whether the assets of the estate are administered under the will, or as in case of intestacy." *Logan,* at 217. *See also Daniels v. Jones*, 224 S.W. 476 (Tex. Civ. App.—San Antonio 1920, writ ref'd) (creditor's status not affected by whether estate is administered under will or by intestacy). However, Estates Code §22.018, enacted subsequent to the decision in *Logan*, includes "creditors" within the definition of "interested person." *See A & W Industries, Inc. v. Day*, 977 S.W.2d 738 (Tex. App. - Fort Worth 1988, no writ).

D. Creditor of Beneficiary or Heir

In *Allison v. FDIC*, 861 S.W.2d 7, 9-10 (Tex. App. - El Paso 1993, writ dism'd by agr.), the FDIC, a creditor of certain beneficiaries of the estate, sued to remove the Independent Executor and for other relief under §§404.001, 405.001, and 404.0035, all of which required "interested person" status. The Independent Executor had transferred assets to the Republic of Liechtenstein in an effort to protect them from the beneficiaries' creditors. The Independent Executor contested the FDIC's standing as an "interested person." The FDIC claimed that it had standing, relying on the rules expressed in *Logan* requiring only that a party have a monetary interest that would be affected by the proceeding. The court declined to expand the definition that far and held that a creditor of a beneficiary is not covered by §22.018 because it is not a "creditor . . . having a . . . claim against the estate being administered," thereby limiting the term "creditors" to creditors of the decedent. *Allison* at 10.

E. Alternate Life Insurance Beneficiary

Decedent's sister, who was the alternate beneficiary under a life insurance policy that named a trustee of a testamentary trust named in the document offered as the decedent's Last Will and Testament, is an "interested person" because she has a pecuniary interest affected by the probate or non-probate of the will. *Maurer v. Sayer*, 833 S.W.2d 680 (Tex. App. - Fort Worth 1992, no writ). If the will is not valid, then the testamentary trust would not exist and the insurance proceeds would be payable to the decedent's sister. The court found that her interest was not "based on sentiment or sympathy, but on the gain or loss of money." The court rejected the argument that she lacked standing because her only interest was in a nonprobate asset.

F. Representative of Deceased "Interested Person"

The decedent's mother died after filing an opposition in an heirship proceeding filed by an alleged non-marital child. The executor of the mother's estate was an interested person with standing to contest the heirship proceeding. Also, since the mother's will left her estate to a charitable testamentary trust, the attorney general had standing on behalf of the charitable trust. *Estate of York*, 951 S.W.2d 122 (Tex. App. - Corpus Christi 1997, writ denied).

G. Grantees, Assignees, Beneficiaries or Devisees of a Deceased Heir or Beneficiary

Grantees, assignees, beneficiaries and devisees of an heir (or beneficiary) generally have standing as an "interested person." *Estate of York*, 951 S.W.2d 122 (Tex. App. - Corpus Christi 1997, writ denied); *Trevino v. Turcotte*, 564 S.W.2d 682, 687 (Tex. 1978) (absent some inequitable purpose in the assignment, an assignee generally acquires standing as an "interested person" under §22.018); *Dickson v. Dickson*, 5 S.W.2d 744, 746 (Tex. Comm'n App. 1928, judgm't adopted) ("person interested" includes the devisee of a devisee); *Oldham v. Keaton*, 597 S.W.2d 938 (Tex. Civ. App. - Texarkana 1980, writ ref'd n.r.e.) (purchasers of remainder interest had standing to bring action against independent executor accused of committing waste).

H. Remainder Beneficiary of a Testamentary Trust

A person named as a remainder beneficiary of a testamentary trust has standing to contest the probate of another will. *Schindler v. Schindler*, 119 S.W.3d 923 (Tex. App. - Dallas 2003, no pet.).

I. Executor/Administrator

In *Muse, Currie and Cohen v. Drake*, 535 S.W.2d 343 (Tex. 1976), the Texas Supreme Court held that an Administratrix was not an interested party in a will contest because it would result in no pecuniary benefit to the estate. Once a will has been admitted to probate, the Independent Executor has standing pursuant to §243 to defend the will as against any subsequent will or codicil. *Travis v. Robertson*, 597 S.W.2d 496 (Tex. Civ. App. - Dallas 1980, no writ).

Similarly, a person designated as an executor of a Will which is denied probate lacks standing to later file challenges regarding aspects of the Will that is admitted to probate. *Estate of Bendtsen*, 230 S.W.3d 832 (Tex. App. – Dallas 2007, no pet.).

J. Former Beneficiary of Life Insurance Policy

A former beneficiary of a life insurance policy has standing to contest a change of beneficiary on the ground of undue influence. *Cobb v. Justice*, 954 S.W.2d 162, 168 (Tex. App. - Waco 1997, writ denied); *Tomlinson v. Jones*, 677 S.W.2d 490, 492-93 (Tex. 1984) (incapacity); *Westbrook v. Adams*, 17 S.W.2d 116 (Tex. Civ. App. - Fort Worth 1929), *aff'd on other grounds sub nom*; *Adams v. Bankers' Life Co.*, 36 S.W.2d 182 (Tex. Comm. App. 1931, holding approved) (incapacity and undue influence).

K. Appointee Under Power of Appointment

An appointee under the exercise of a power of appointment was an interested person with standing to challenge distribution of assets under the will. *Foster v. Foster*, 884 S.W.2d 497 (Tex. App. - Dallas 1993, no writ).

L. Alleged Common Law Spouse

An alleged common law spouse lacked standing to object to temporary administrator's applications to expend funds because she failed to prove a common law marriage in an *in limine* hearing. *In re: Estate of Armstrong*, 155 S.W.3d 448 (Tex. App. - San Antonio 2004, no pet.).

M. Alleged Beneficiary Under "Lost" Will

A person contesting a will claiming to be a beneficiary under a "lost" will must, if her standing is challenged, offer evidence to show that she is a named beneficiary in a testamentary instrument executed with the formalities required by law. *Hamilton v. Gregory*, 482 S.W.2d 287, 288 (Tex. App. - Houston [1st Dist.] 1972, no writ) ("merely alleging the existence of a prior lost will is not sufficient to show a 'legally ascertained pecuniary interest, real or prospective, absolute or contingent' which will be materially affected by the probate of a later will").

V. STANDING IN GUARDIANSHIP PROCEEDINGS

The "standing" rule for guardianship proceedings is entirely different from the rule applicable to probate matters. The primary focus in a probate case is whether the person has a pecuniary interest that would be affected by the particular action being pursued – the "interested person" test. However, in guardianship proceedings, the emphasis is on the "well-being" and best interests of the proposed ward. This is consistent with the stated legislative policy underlying guardianships to limit the rights of wards "only as necessary to promote and protect the well-being of the person." Estates Code §1001.001(a).

As in probate cases, there are two levels of potential "standing" challenges in guardianship cases. The first deals with who can or cannot file the action, and the second deals with who can and cannot be appointed as guardian. Unfortunately, the first level measures the challenged party as to whether he has an "adverse interest," not whether the challenged party is an "interested person." To make these cases even more difficult, the Estates Code does not contain a definition of "adverse interest."

A. Estates Code §1055.001 "Standing" Rule

The statutes dealing with guardianship cases include a definition of "interested person" which is similar to the statute for probate cases. Estates Code §1002.018 defines an "interested person" for guardianships to mean "an heir, devisee, spouse, creditor or any other person having a property right in, or claim against, the estate being administered or a person interested in the welfare of an incapacitated person, including a minor." However, "standing" in most guardianship matters is not gauged by an "interested person" test. Instead, a court hearing a standing challenge in a guardianship case must use the "adverse interest" test.

Estates Code §1055.001 expressly addresses standing in certain guardianship proceedings as it relates to the filing of the action:

> (a) Except as provided by Subsection (b) of this section, **any person** has the right to:
>
> (1) commence any guardianship proceeding, including a proceeding for complete restoration of a ward's capacity or modification of a ward's guardianship; or
> (2) appear and contest any guardianship proceeding or the appointment of a particular person as guardian.
>
> (b) A person who has an interest that is **adverse** to a proposed ward or incapacitated person **may not**:
>
> (1) file an application to create a guardianship for the proposed ward or incapacitated person;
> (2) contest the creation of a guardianship for the proposed ward or incapacitated person;
> (3) contest the appointment of a person as a guardian of the person or estate, or both, of the proposed ward or incapacitated person; or
> (4) contest an application for complete restoration of a ward's capacity or modification of a ward's guardianship.
>
> (c) The court shall determine by motion in limine the standing of a person who has an interest that is adverse to a proposed ward or incapacitated person.

See also Estates Code §1101.001 ("any person may commence a proceeding for the appointment of a guardian, . . ."); §1202.051 ("any person interested in the ward's welfare" may file an application for restoration of the ward's capacity); and *Hagan v. Snider*, 44 Tex.Civ.App. 139, 98 S.W. 213, 214 (Tex.Civ.App. 1906, writ ref'd) (any person has the right to commence any proceeding which he considers beneficial to the ward).

B. "Adverse Interest"

As stated above, the Estates Code does not contain a definition of "adverse interest" in the definition sections (Estates Code §§102.001-1002.030.) Further, there is little case law on the definition of an "adverse interest." The case of *Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App. - El Paso 1991, orig. proceeding)[2] was decided prior to the enactment of Estates Code §1055.001 (and prior to its predecessor section in the Probate Code). The issue in that case was whether plaintiffs in an underlying lawsuit against the proposed ward had standing to contest the appointment of a limited guardian for the proposed ward. The contestants argued that under former Probate Code §130A (repealed in 1993), the rules applicable to decedent's estates apply

[2] The trial court in *Allison* denied Mrs. Allison's motion to strike the pleadings of her opponents though she alleged that they lacked standing. Contrary to conventional wisdom and the Supreme Court's holdings in *Edwards, supra,* and *Fischer, supra*, Allison filed a mandamus proceeding against the trial judge. On November 6, 1991, the El Paso Court of Appeals conditionally granted the mandamus and ordered the trial judge to grant Allison's motion to strike. The opinion was released for publication on January 8, 1992. On February 14, 1992, the El Paso court reversed itself, without issuing another opinion, and overruled Allison's petition for leave to file her mandamus action.

to guardianships, that they were "interested persons" within the meaning of Estates Code §22.018 and *Logan* because they had a claim against the proposed ward and the guardianship could affect their claim, and that they had a right to contest the guardianship under Estates Code §55.001.

The court rejected their position, finding that the guardianship act was intended to "'protect the well-being of the individual' and those with an adverse interest can hardly qualify as being persons interested in protecting his well-being." *Id.* at 627. The court also relied on the notice provisions, concluding that since contestants were not entitled to notice of the guardianship application, they had no right or standing to contest the application. *Id*. at 627. While the court did not acknowledge the fact, it is nevertheless clear that the "standing" of the contestants was measured by the "disqualification" test (contestants had sued the proposed ward).

Following *Allison,* the standard in guardianship cases was muddled. While the court rejected a pure "interested person" test as was used in probate cases, it failed to fully explain how the "well-being" standard should be used. Instead, it apparently decided that the definition of "adverse interest" should coincide with the various measures of the "disqualification" test.

1. ***Betts v. Brown***

The first case to specifically address the issue of what constitutes an interest adverse to the ward under Estates Code §1055.001 is *Betts v. Brown,* 2001 Tex. App. LEXIS 329 (Tex. App. – Houston [14th Dist.] January 18, 2001, no pet.) (not designated for publication). (The court noted that the issue was one of "first impression" in Texas.) In the case, the proposed ward's two daughters each sought to be appointed as their mother's guardian and contested the standing of the other. Betts contested Brown's standing on the basis that Brown had expended the proposed ward's funds and was unable to fully account for the expenditures. Brown challenged Betts' standing because the proposed ward had guaranteed a loan to Betts.

The Court found that the Texas Legislature adopted the "well-being" language found in *Allison* in Estates Code §1001.001 under which "a court may appoint a guardian . . . only as necessary to promote the well-being of the person." The Court then created the following definition of an "adverse interest":

> Given the rationale used in *Allison*, and the language found in [Section 1001.001], an interest is adverse to an interest of a proposed ward under [Section 1055.001] when that interest does not promote the well-being of the ward. Said another way, the interest must adversely affect the welfare or well-being of the proposed ward.

Betts at 10.

Applying this definition, the Court concluded that neither party had an interest adverse to the proposed ward. The Court held that, although the facts might support the disqualification of either daughter under Estates Code §1104.351-358, they were not sufficient to constitute an "adverse interest" on behalf of Betts or Brown under §1055.001 "that would be contrary to promoting the well-being" of their mother." *Betts,* at 13.

Distinguishing the daughters (Betts and Brown) from the contestants in *Allison*, whose sole interest in contesting the guardianship was against the well-being of the proposed ward, the Court cited specific instances of conduct of both Betts and Brown which demonstrated that both actively worked to promote their mother's well-being. Thus, the 2001 decision of the Court in *Betts* used a subjective test to measure "adverse interest" – whether the challenged party had done something which was contrary to the ward's well-being.

2. ***Guardianship of Valdez***

Only one subsequent guardianship case has been located which cites *Allison* in a guardianship context. However, it sheds very little light on the meaning of "adverse interest." In *Guardianship of Valdez*, 2008 Tex. App. LEXIS 4018 (Tex. App. – San Antonio June 4, 2008, pet. denied) (mem. op.), one of the proposed ward's children filed a contest to an application to appoint another person as permanent guardian. The court ruled that the son lacked standing to file the contest because he was suing his mother in another case. Therefore, rather than using the subjective test for "adverse interest" set out in *Betts,* the San Antonio court defined the term by applying the test regarding who is disqualified from serving as guardian (Estates Code §1104.354, *see below*). However, it is not known if the same test would have been applied if the son had been the person who filed the application to appoint a permanent guardian. Moreover, the San Antonio court failed to recognize that it was basically adding language to §1055.001 by using the "disqualification of guardian" statutes to define "adverse interest."

3. ***Guardianship of Olivares***

In the same year as *Valdez,* the Amarillo court issued its decision in *Guardianship of Olivares,* 2008 Tex. App. LEXIS 9232 (Tex. App. – Amarillo December 12, 2008, pet. denied) (mem. op.). In *Olivares,* the Amarillo court determined that a son who initiated a guardianship proceeding against his mother had an "adverse interest." The Court used the "disqualification" statutes and said the son could not bring the proceeding because he owed money to her; it did not apply the subjective "well-being" test from *Betts*.

4. ***Guardianship of Miller***

In 2009, the Dallas Court of Appeals issued its decision in *Guardianship of Miller*, 299 S.W.3d 179 (Tex. App. – Dallas 2009, no pet.). *Miller* is a lengthy case which involved an underlying divorce action brought by a wife who then filed an application to have a guardian appointed for her soon-to-be-ex-husband. Challenges regarding standing were filed against several parties, and the trial court issued a vague ruling which seemed to grant the challenge as against one of the parties. On appeal, the Court of Appeals looked at the "adverse interest" issue. Without citing any of the cases in this paper, the Court stated:

> The [Estates] code does not define an interest adverse to the interest of a ward or proposed ward under [Estates Code §1055.001]. Nor is there published case law analyzing or defining such an interest. Without attempting to fully define an adverse interest under [§1055.001], we decline to conclude that evidence of a debt alone automatically rises to the level of an adverse interest sufficient to divest a person of standing under [§1055.001].

> Section [1104.354(2)] itself allows for a person who is indebted to the proposed ward to pay the debt and be appointed as guardian. Without evidence of the amount of the debt in relation to the estate of the ward or proposed ward, the ability or inability of the proposed guardian to repay the debt, or some other evidence such as misuse of funds to the detriment of the ward or proposed ward, we cannot conclude evidence of a debt alone automatically creates an interest so adverse to the ward or proposed ward that it would divest a person of standing to file an application to create a guardianship or to contest the creation of a guardianship, the appointment of a person as a guardian, or an application for restoration of a ward's capacity or modification of a ward's guardianship. In reaching this conclusion, we are not suggesting that a debt can never rise to the level of an adverse interest under section [1055.001], only that it does not automatically do so.

Even though the *Miller* court failed to cite the decisions in *Valdez* or *Olivares,* the *Miller* decision would seem to be a significant effort to recognize that the "adverse interest" statute requires a different analysis than the "disqualification" statute. Further, and without citing *Betts,* the *Miller* court implied an analysis based upon the "well-being" standard described by the *Betts* court.

5. ***Guardianship of Benavides***

In the only post-January 1, 2014 case (so far) that discusses the standing issue, the San Antonio Court of Appeals decided *Guardianship of Benavides*, 2014 Tex. App. LEXIS 1747 (Tex. App. – San Antonio February 19, 2014, no pet. h.). Unfortunately, the Court cited its own prior decision in *Valdez* rather than looking to the Dallas court's decision in *Miller.* In *Benavides,* the Court ruled that a wife had an adverse interest and therefore lacked standing to pursue guardianship for her husband since she had filed suit against him to invalidate both a premarital agreement and a separate property agreement. This decision again blended the "adverse interest" statute with the "disqualification" statute.

C. Distinguish "Adverse Interest" from Disqualification to Serve as Guardian

An "adverse interest" that precludes standing in certain guardianship proceedings is legislatively distinct from the provisions that may disqualify a person from serving as guardian of the person and/or estate. In summary, Estates Code §§1104.351-358 provide as follows:

A person may not be appointed guardian if the person:

(1) Is incapacitated or inexperienced;
(2) Is unsuitable;
(3) Has notoriously bad conduct;
(4) Has a conflict of interest;
(5) Has been disqualified in a Declaration of Guardian;
(6) Lacks the required certification;
(7) Is a nonresident without a resident agent; or
(8) Is subject to a protective order for family violence;

If there is a fact question as to whether a person is disqualified under §1104.351-358, it may be decided by a jury. *See In Re Guardianship of Norman*, 61 S.W.3d 20, n. 5 (Tex. App. - Amarillo 2001, pet. denied) (contention that a person is disqualified from serving as guardian is an issue proper for a jury to decide, citing *Chapa v. Hernandez*, 587 S.W. 778, 781 (Tex. Civ. App. - Corpus Christi 1979, no writ) and *Ulrickson v. Hawkins*, 696 S.W.2d 704 (Tex. App. - Fort Worth 1985, writ ref'd n.r.e.)). On the other hand, if an allegation of a party's adverse interest is raised by a motion *in limine* under §1055.001, there is no right to a jury trial. *See Sheffield, supra.*

VI. PROCEDURE TO CHALLENGE STANDING

A. Motion In Limine

As many of the above cases suggest, the proper way to challenge standing is through a motion in limine (sometimes referred to as a request for an *in limine* hearing). The motion in limine is to be heard separately by the judge in advance of a trial on the merits. *Newton v. Newton*, 61 Tex. 511 (1884); *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923); *Chalmers v. Gumm*, 137 Tex. 467, 154 S.W.2d 640 (1941); *Womble, supra; Sheffield, supra.*

> The proper procedure to follow on the issue of a contestant's interest is to try the issue separately in an *in limine* proceeding and in advance of a trial on the issues affecting the validity of the will.

Sheffield at 693.

The motion in limine is not the only method by which standing can be challenged. The challenger might also include in its answer a verified denial under TEX. R. CIV. P. 93. Once that is done, the challenger can file a motion for summary judgment or a pre-trial motion to dismiss. *See Schoellkopf v. Pledger*, 739 S.W.2d 914 (Tex. App. - Dallas 1987), *rev'd per curiam on other grounds*, 739 S.W.2d 914 (Tex. 1988), *on remand*, 778 S.W.2d 897 (Tex. App. - Dallas 1989).

A court's refusal to conduct an *in limine* hearing on a proper and timely challenge to a litigant's standing is reversible error, although it is not subject to mandamus relief. *Hamilton v. Gregory*, 482 S.W.2d 287 (Tex. App. - Houston [1st Dist.] 1972, no writ).

B. Comparison to Evidentiary Motion In Limine

In most any civil case which will be tried to a jury, the parties will file motions in limine. Though such motions are not discussed in any section of the Texas Rules of Civil Procedure, they nevertheless are used to prevent certain testimony or evidence from being heard by the jury without specific court approval. *See Dove v. Director*, 857 S.W.2d 577, 579-80 (Tex. App.—Houston [1st Dist.] 1993, writ denied). The "standing" motion in limine has nothing to do with a jury or evidence; it is aimed solely at a party's right to participate in the case.

C. Hearing "In Advance of" Trial on Merits

The question of a party's standing must be tried separate from, and in advance of, a trial on the merits of the case. *Sheffield, supra. Chalmers, supra.* The meaning of "in advance of a trial" was addressed in *In re: Estate of Hill*, 761 S.W.2d 527 (Tex. App. - Amarillo 1988, no writ). This case involved a will contest after probate. The executor had affirmatively plead that the contestant lacked standing. The parties were in the middle of *voir dire* when the will contestant objected to the executor's *voir dire* questions regarding the contestant's standing, claiming the objection had been waived. The executor immediately requested an *in limine* hearing on the issue of the contestant's standing. The trial court allowed the *voir dire* examination to be completed, jury strikes were made, and the jury was chosen, but not sworn. The court then conducted the *in limine* hearing and found that the contestant lacked standing.

The contestant claimed on appeal that the issue of standing was waived because the *in limine* hearing was not held in advance of the trial. The appellate court concluded that a hearing on a motion in limine will be considered held in advance of trial if it is heard before the swearing in of the jury in the trial on the merits. *Hill* at 530.

D. No Right to Jury

In *Sheffield,* the will contestants argued that Estates Code §55.002, which provides that parties shall be entitled to a jury trial in all contested probate proceedings, gave them a right to have a jury determine the question of the contestant's interest in the decedent's estate. The Court of Appeals stated that the issue of a litigant's interest in a decedent's estate must be tried without a jury in advance of a trial of the issues affecting the validity of the will. Though not stated in the court's decision, one rationale for the court's conclusion can be found in the reference in §55.002 to "parties" having a right to a jury trial. Technically, the motion in limine is to determine whether a litigant may be a "party" in a probate proceeding. Until the litigant's interest in an estate and hence standing to participate in the probate proceeding is determined, the litigant arguably is not a party entitled to a jury trial.

E. Burden of Proof

Generally, when the issue of standing goes unchallenged, the trial court looks only to the pleadings to determine whether the jurisdictional facts are alleged. If the issue of a litigant's standing is raised in a motion in limine before the trial, the burden of proof is on the person whose interest is challenged to present sufficient evidence that the person is interested in the decedent's estate. *A & W Industries* at 741. Whether a person has standing or not is a question of law. *Cleaver v. George Stanton Co.*, 908 S.W.2d 468, 472 (Tex. App. - Tyler 1995, writ denied).

F. Notice of Hearing

In *Womble*, the Court characterized the *in limine* hearing as a "trial on the merits of the issue of interest." However, the cases indicate that most courts appear to require minimal notice for a hearing on a motion in limine. This practice presumably is based on the view that a motion in limine is a procedural matter rather than a "trial" even if contested. Although it has been argued, no case has held that TEX. R. CIV. P. 245 applies to a contested motion in limine. *See Betts v. Brown*, 2001 Tex. App. LEXIS 329 (Tex. App.—Houston [14th Dist.] January 18, 2001)

(not designated for publication). (Rule 245 requires at least forty-five (45) days notice of the setting of a trial on a contested case, and failure to provide the required forty-five (45) days notice under Rule 245 entitles the opposing party to a new trial.); *Hardin v. Hardin*, 932 S.W.2d 566, 567 (Tex. App. - Tyler 1995, no writ); *Carson v. Hagaman*, 824 S.W.2d 267, 269-70 (Tex. App. - Eastland 1992, no writ). Although it is clear that a contested probate proceeding is subject to Rule 245, it is not clear whether that rule applies to a hearing on a motion in limine contesting a litigant's standing to participate in that probate proceeding. *See In re: Estate of Crenshaw*, 982 S.W.2d 568, 571 (Tex. App. -Amarillo 1998, no pet.). (Rule 245 applies to contest to appointment of executor).

G. Appeal of Order on Standing

Section 32.001(c) of the Texas Estates Code states that "[a]ll final orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals." In a probate matter, it is not necessary that the order fully dispose of the entire probate proceeding. The order need only conclusively decide the controversy for which that particular proceeding was brought. *Crowson v. Wakeham*, 897 S.W.2d 779, 781-82 (Tex. 1995). Because an order that a litigant lacks standing disposes of all the issues in the proceeding for which it is brought, such an order is a final judgment that may be appealed. *A & W Industries, Inc.* at 740 (relying in part on the court's decision in *Womble* which stated that a judgment holding that a person has no interest in an estate and a consequent dismissal of an application for probate, or contest of, a will is a final judgment and appealable). On the other hand, an order denying a motion in limine is considered interlocutory and, therefore, not appealable. *Edwards v. Haynes*, 698 S.W.2d 97 (Tex. 1985); *Fischer v. Williams*, 331 S.W.2d 210, 213-14 (Tex. 1960).

Since the *Crowson* decision in 1995, the Legislature has given litigants seeking immediate appellate review another option. For cases filed on or after September 1, 2001, and if the parties and the trial court agree, the parties may seek a permissive interlocutory appeal under certain circumstances. TEX. CIV. PRAC. & REM. CODE §51.014(a)(2). The trial court can now order an interlocutory appeal if (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order.

H. Effect of Standing Decision

In some cases, the status that would give a person standing is itself a separate, contested issue. In these circumstances, the issue that may arise is whether a ruling on the standing issue is binding for purposes of all subsequent estate proceedings. For example, assume that an alleged common-law spouse files a contest to the probate of a will and the proponent objects to her standing. At the hearing on the motion in limine, the contestant will be required to prove her common-law status in order to maintain her standing to contest the will. If the court determines that she is not the common-law spouse at the conclusion of the hearing on the motion in limine, does that order preclude her from making any further claim to be the common-law spouse? The answer is not clear.

1. **Conclusive**

In *Womble*, the Supreme Court held that the standing judgment was binding to prevent further litigation on any issue on which the standing question was determined. As previously discussed, Mrs. Womble had filed a will contest. The executors filed a motion to dismiss her will contest objecting to her standing on the basis of the release. The Court of Appeals held that the release barred her right to contest the will and that her contest was dismissed. Mrs. Womble then filed suit to set aside the release, and this suit was dismissed based on the judgment in the prior suit.

The Supreme Court stated that the decision in the first suit involved a determination of whether or not Mrs. Womble had an interest in the estate, which turned upon the issue of the validity of the release that she signed. In that suit, when the executor's motion to dismiss was presented and the release was introduced in evidence, the burden shifted to Mrs. Womble to provide evidence, "then and there," to show that the release was not valid. Since she did not meet that burden, the court held that she could not thereafter relitigate the validity of the release:

> Under the established rule of *res judicata* such judgment operated as a collateral estoppel against the relitigation of the validity of the release in this suit between the same parties, even though this suit may be upon a different cause of action. [citations omitted]. This judgment of the Court of Civil Appeals was in no sense an interlocutory judgment. It finally adjudicated two matters, namely that the release executed by Mrs. Womble was a valid release, and that Mrs. Womble had no such interest in the estate of [the decedent] as to entitle her to prosecute an application to probate [a later] will.
>
> . . .
>
> Unless and until the party against whom the judgment is rendered acquires a new status of interest which was not and could not have been adjudicated, the judgment is a final judgment. If it were otherwise one could continue to refile and retry the issue of interest until he prevailed.

Womble at 297-98. The Court specifically rejected the following American Law Institute Restatement rule:

> Where a court has incidentally determined a matter which it would have no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action to determine the matter directly.

Womble at 298.

2. **Not Conclusive**

The case of *In re: Estate of Armstrong*, 155 S.W.3d 448 (Tex. App. - San Antonio 2004, no pet.) reaches a contrary result. The decedent's daughter filed an Application for Independent Administration. Debra Schumann, the alleged common law-spouse, also filed an Application for Independent Administration. The court appointed a Temporary Administrator during the contest. The daughter filed an Application to Determine Heirship, and Ms. Schumann filed an answer

claiming to be the common-law spouse and filed a jury demand. The Temporary Administrator filed several applications to expend funds, to which Ms. Schumann objected. The daughter contested Ms. Schumann's standing to object to the Temporary Administrator's applications.

The court conducted an *in limine* hearing on the issue of Ms. Schumann's standing and found that she failed to prove a common-law marriage. Therefore, the court held that she was not an interested person for purposes of objecting to the Temporary Administrator's applications and, further, had no standing to pursue discovery in the case. The trial court also denied her plea in intervention filed in the heirship proceeding on the basis that the standing judgment was conclusive on the common-law marriage issue.

The Court of Appeals disagreed with the trial court as to the conclusive effect of the standing decision. It distinguished *Womble* because it did not involve an heirship proceeding. However, the court does not properly set forth the procedural posture or the holding of *Womble*. The court states that the issue in *Womble* was whether the release barred her attempt to probate a different will. The court failed to recognize that the real issue in *Womble* was whether the denial of standing on the basis of the release in a prior suit barred the subsequent suit regarding the validity of the release.

After a lengthy discussion, the Court found that in the estate administration proceeding concerning payment of the Temporary Administrator's expenses, the issue of whether Schumann had standing to contest the payment was a collateral issue. "To hold otherwise would deprive Schumann of her right to a jury trial on the contested issue of the existence of her common-law marriage." *Id.* at 455. The Court noted that a different approach could force Schumann to forego objections to administration expenses in order to preserve her right to a jury trial in a subsequent proceeding. "Given the unique posture of this case, we hold that the Probate Court's determination of Schumann's standing in the *in limine* hearing was a collateral matter and was not conclusive for purposes of the heirship proceeding." *Id.* at 455.

If the *Womble* analysis is correct, a motion in limine presents an opportunity to quickly and cost-efficiently defeat a contested status claim. If the contested status upon which standing is alleged appears to be weak or even frivolous, filing a motion in limine and setting a hearing thereon as soon as possible after the contested pleading has been filed is advisable. At the hearing, the burden of proof will be on the person claiming standing to prove the alleged basis for standing. If this burden cannot be met, then not only will the party lack standing to proceed with the particular action involved, but the contested status question will be resolved. This approach can be particularly effective in connection with persons alleging common-law spouse status and in "lost" will cases. However, if the contested status claim appears to have some merit, it may be dangerous to file a motion in limine quickly before having an opportunity to conduct adequate discovery to defend the claim. As soon as reasonable discovery can be completed, proceeding with a hearing on a motion in limine may still be advantageous since it will deny the contestant the opportunity to have the issue determined by a jury.

VII. SPECIFIC SITUATIONS INVOLVING STANDING

A. Applicant or Witness

As most probate practitioners know, anyone who knows the facts of death can offer testimony at a routine "prove-up" hearing on a decedent's estate. Often, the attorney who drafted the Will, who obviously knew the decedent prior to death, can go to court and offer the needed testimony and therefore save the client a trip to the courthouse. Nevertheless, the preferred witness at the hearing should not be confused with the applicant in the application to probate.

Under any of the sections used to initiate probate proceedings (§§202.001, 256.052, 257.051 or 301.052, etc.), the applicant must be an "interested person" within the meaning of §22.018. This generally means that even though the attorney can be the witness, the attorney cannot be shown as the applicant on the initial filing. As another example, while a beneficiary named in a Will can be the applicant, the spouse of the beneficiary may not be an "interested person" even though the spouse could testify at the hearing.

B. Beneficiaries in Will Contests

To have standing in a will contest, a party must either be a beneficiary under a will that has been offered for probate or an heir of the Decedent (under the assumption that the Court will eventually rule that the Decedent died without a valid will). Therefore, if the party is claiming entitlement under a will of the Decedent, either the party or someone else must file the document with the Court.

In the case of a pour-over Will, there is normally a bequest of the residuary estate to a living trust which was created (and perhaps funded) during the Decedent's lifetime. Estates Code §254.001 allows a bequest to a trust which was established during the Decedent's lifetime. However, if the trust has been revoked at the time of death, or if the Decedent never executed the trust document prior to death, it would appear that the bequest is void. If that is the case, a beneficiary under the unexecuted trust would have no standing to participate in the will contest.

The case of *Hardy v. Robinson,* 170 S.W.3d 777 (Tex. App. – Waco 2005, no pet.) spoke to this issue. The court said that while TEX. PROP. CODE §112.004 allows the enforcement of an oral trust for personal property, there must have been a transfer by the settlor/decedent of the trust property to a trustee who is neither the settlor nor the beneficiary AND the settlor must have expressed his intention to create a trust either simultaneously with or prior to the transfer.

C. Fraudulent Transfers by Decedent

If the Decedent fraudulently transferred property during her lifetime, the executor might think that he can sue to recover that property after the Decedent's death. However, in *John Hancock Mutual Life Insurance Company v. Morse*, 132 Tex. 534, 124 S.W.2d 330 (Tex. 1939), the Supreme Court stated that "a conveyance made in fraud of creditors passes title to the vendee, and is defeasible only at the instance of the creditors." Since the title to the property passed from the Decedent during her lifetime, the Court reasoned that the property cannot form part of the estate in the hands of the administrator. Therefore, the administrator cannot maintain an action for the recovery of the property since he administers the property as it existed at the time of death.

There may be another party who has standing to sue to recover the transferred property. In an unpublished opinion, the Dallas Court of Appeals was faced with the issue of whether an administrator could "undo" a fraudulent transfer within the meaning of the Fraudulent Transfer Act which was completed by the Decedent prior to death. *Skelley v. Hayden*, No. 05-99-00802-CV (Tex. App. – Dallas 2001, no writ) (not designated for publication). The Dallas court cited the *Morse* case for the proposition that neither the estate nor the heirs could assert the fraudulent transfer allegations because they were not "creditors." Therefore, it would appear that the only party who can pursue a pre-death fraudulent transfer is a pre-death creditor.

VIII. CONCLUSION

Standing is a difficult and confusing concept. Nevertheless, before any person can participate in a probate or guardianship proceeding, he or she must purchase a ticket to the dance and prove that they have a legal right to participate. If standing is challenged, the ticket to the probate/guardianship dance can become very expensive. However, from the challenger's perspective, a challenge to standing can be an efficient way to dispose of the "mere meddlesome intruder."