WHO HAS STANDING IN PROBATE COURT?
(A/K/A WHAT BUSINESS IS IT OF YOURS?)

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I. Introduction:

"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." *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294, 296 (1960).

This quote is revealing in describing how protective Texas courts have historically been in determining who can participate in probate proceedings. The cases dealing with this issue often refer to a person's right to be involved in a probate court proceeding as "standing," although the concept of standing in a probate proceeding differs from that found in other civil court actions.

For most civil proceedings, standing is essential for subject matter jurisdiction. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Standing cannot be waived and the issue of standing may be raised for the first time on appeal by a party or by the court *Texas Ass'n of Business*, 852 S.W.2d at 445. If the party bringing the action does not have standing, the court does not have jurisdiction. *Texas Ass'n of Business*, 852 S.W.2d at 443-44.

In a probate proceeding involving a decedent's estate, the general rule is that a litigant has "standing" if the litigant has an interest in the estate. For guardianship purposes, since the emphasis is on the best interests of the incapacitated person, standing is conferred on any person except a person who has an interest adverse to the incapacitated person. If a person's interest in a decedent's estate or guardianship matter is not challenged at the appropriate time, any objection to the litigant's "standing" to participate in the proceeding is waived. The court does not lose jurisdiction as it would in any other civil case where it was found that the litigants did not have standing. As one court explained in a case involving a decedent's estate, a person's interest in the estate is ". . . a question of standing to assert his rights under the probate proceedings and not a question of the court's powers to adjudicate the matters in controversy. [A person's] interest in the estate has no bearing on the court's subject matter jurisdiction to consider and determine issues of distribution of estates." *Abbott v. Foy*, 662 S.W.2d 629, 632 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.).

Because of the particular nature of probate proceedings, a doctrine of standing has been developed in probate decisions which is not seen elsewhere in Texas jurisprudence. This article will explore the concept of standing as it evolved through court decisions relating to decedent's estates. It will also examine the changes in Texas guardianship law which redefine the concept of standing for guardianships. The article also addresses how these changes could result in a confusion of terms and in removing the safeguards of the Constitution and procedural rules from some of the most fundamental questions involved in guardianship proceedings.

II. Standing in Proceedings Involving Decedent's Estates.

A. Establishing the Process for Determining Standing.

The early case of *Newton v. Newton*, 61 Tex. 511 (1884) relied on an even earlier case, *Davenport v. Hervey*, 30 Tex. 327 (1867), in setting forth the procedure for determining a party's right to contest a probate proceeding involving a decedent's estate:

> ...[A] party contesting an application in the county court might be required

> by the applicant to state his interest in the estate; but that this must be done by a precise exception taken to his appearance in the case. . .[T]his exception must be taken *in limine,* and could form no part of the inquiry after an issue had been made upon the merits. *Newton,* 61 Tex. at 522.

The procedure for challenging a litigant's interest in an estate was further clarified in *Abrams v. Ross' Estate*, 250 S.W. 1019, 1021 (Tex. Comm'n App. 1923), when the court held that "...the burden is on every person appearing to oppose the probate of a will to allege, and if required, to prove that he has some interest in the estate of the testator which will be affected by such will if admitted to probate." The court then characterized a contestant who did not possess an interest in an estate as a "mere meddlesome intruder." *Abrams*, 250 S.W. at 1021.

B. Hearing to Determine Litigant's Interest in Estate Should Take Place Before Trial.

The Texas Supreme Court in *Chalmers v. Gumm*, 137 Tex. 467, 154 S.W.2d 640, 641 (Tex. Comm'n App. 1941) emphasized the requirement that the challenge to a party's interest in an estate take place before the trial on its merits. In *Chalmers*, at the end of the trial, the lower court concluded that an application to set aside the probate of a will should be dismissed because, among other things, the contestant did not have the requisite interest in the estate to authorize him to prosecute the suit. Apparently the issue of the contestant's interest in the estate was included in matters on trial in the lower court. The Supreme Court held that any question as to a will contestant's entitlement to prosecute a suit should have been settled by a motion in limine before the trial. *Chalmers*, 154 S.W.2d at 643.

It was the case of *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294 (Tex. 1960) which elevated the motion in limine proceeding to the status of a trial. The *Womble* court recognized, as earlier decisions had, that the issue of a party's interest in an estate should be addressed in advance of the trial on the validity of the will, but, as the court emphasized, the motion in limine is "nonetheless a trial on the merits of the issue of interest.." *Womble*, 331 S.W.2d at 298.

There was some controversy over what exactly constituted "in advance of a trial" in the case, *In Re Estate of Hill*, 761 S.W.2d 527 (Tex. App. – Amarillo, 1988, no writ). In this case, the executor of the probated will affirmatively plead that the contestant to the will lacked standing. The will contest was scheduled for a jury trial and 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. 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 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 the trial, as long as the motion is heard before the swearing in of the trial jury. *In re Estate of Hill*, 761 S.W.2d at 530.

C. No Jury Allowed for Motion in Limine.

In *Sheffield v. Scott,* 620 S.W.2d 691 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.), the trial court had denied the will contestants a jury trial for the motion in limine. The appellants argued that §21 of the Texas Probate Code, which provides that parties shall be entitled to a jury trial in all contested probate proceedings, conferred upon the appellants a right to have a jury determine the question of the contestants' interest in the decedent's estate. The appellate court affirmed the trial court stating 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 §21 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 should probably not be considered a party who is entitled to a jury trial.

D. Burden is on One Whose Interest is Challenged to Prove Existence of Interest.

Generally, when the issue of standing goes unchallenged, the trail court looks only to the pleadings to determine whether the jurisdictional facts are alleged. However, 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 Indus., Inc. v. Day,* 977 S.W.2d 738, 741 (Tex. App. – Fort Worth 1998, no writ). Whether a person has standing or not is a question of law. *Cleaver v. George Staton Co.*, 908 S.W.2d 468, 472 (Tex. App. – Tyler 1995, writ denied).

E. Order Dismissing Action for Lack of Standing is Appealable.

Section 5 of the Texas Probate Code states that "[a]ll final orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals." Tex. Prob. Code Ann. §5(g) (Vernon 2001) (formerly §5(f)). 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 Indus.*, 977 S.W.2d at 740 (relying in part on the court's decision in *Womble v Atkins,* 160 Tex. 363, 331 S.W.2d 294 (1960), 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). An order denying the motion in limine is considered interlocutory and therefore not appealable. *Fischer v. Williams*, 160 Tex. 342, 331 S.W.2d 210, 213-14 (1960); *But see, Allison v. Walvoord,* 819 S.W.2d 624 (Tex. App. – El Paso 1991, orig. proceeding [leave denied])(mandamus granted after motion to strike pleadings for lack of standing was denied). Similarly, if all parties and issues are not disposed of in the order and the order is not severed, it is interlocutory although it may grant the motion in limine. *Forlano v. Joyner,* 906 S.W.2d 118 (Tex. App. – Houston [1st Dist.] 1995, no writ).

F. Exceptions to Rule – Opposition to Grant of Letters of Administration and Application for Appointment of Temporary Administrator

Texas Probate Code §179 provides that "[w]hen application is made for letters of administration, **any person** may at any time before the application is granted, file his opposition thereto in writing, and may apply for the grant of letters to himself or to any other person..." (emphasis added).

This provision has been construed as setting forth an exception to the rule that a person must have an interest in an estate before commencing a proceeding involving the estate. In *Balfour v. Collins,* 119 Tex. 122, 25 S.W.2d 804 (Tex. Comm'n App. 1930, judgm't adopted), the question presented to the Texas Supreme Court for certification was whether the phrase "any person" should be taken literally, or whether, as in the case of a contest of letters testamentary, a person would be required to have an interest in the decedent's estate to have standing to contest an application for letters of administration. The Texas Supreme Court concluded that, because there was statutory authority for a person interested in an estate to file a contest in a probate proceeding (currently §10 of the Probate Code), §179 should be construed as allowing a person who had no interest in an estate to contest the appointment of an administrator. The court noted that the specific language of §179 superseded the more general language in the statute requiring a litigant to have an interest in a decedent's estate in order to bring a contest in a probate proceeding. The court concluded that to require a person contesting the grant of letters of administration to have an interest in the estate would render § 179 superfluous and unnecessary, which is contrary to the rules of statutory construction. *Balfour*, 25 S.W.2d at 807.

It should also be noted that §131A(b) of the Texas Probate Code states that **any person** may file an application for the appointment of a temporary administrator of a decedent's estate, but only an "interested person" may contest the appointment.

G. What Constitutes an Interest in a Decedent's Estate Sufficient to Confer Standing?

1. "Interest" As Defined In Early Case Law

It was stated in *Logan v. Thomason*, 146 Tex. 37, 202 S.W.2d 212, 215 (1947) that the interest in an estate required of a person who wishes to contest a will must be a pecuniary interest which would be affected by the probate or defeat of the will. The court expanded on that idea, when it declared:

> "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." *Logan*, 202 S.W.2d at 215.

This definition of the necessary pecuniary interest in an estate was the primary authority cited by court decisions determining the interest of a litigant in a decedent's estate until the definition of

"interested persons" or "persons interested" became part of the Texas Probate Code. *See* Tex. Prob. Code Ann. §3(r).

2. "Interested Person" as Defined in the Texas Probate Code.

The Texas Probate Code defines "interested persons" or "persons interested" 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. Tex. Prob. Code Ann. §3(r) .

This definition is a standing requirement in many Texas Probate Code sections, including by example, the following:

(i) Section 26 – Attachments for Property (allowing a judge to 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);

(ii) Section 31 – Bill of Review (allowing any person interested to 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);

(iii) Section 76 – Persons Who May Make Application (allowing an interested person to 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);

(iv) Section 80 – Prevention of Administration (allowing an interested person who does not desire an administration of an estate applied for by a creditor to defeat the creditor's application by paying the creditor, proving that the claim is not valid, or executing a bond);

(v) Section 92 – Period for Probate Does Not Affect Settlement (allowing a person interested to compel settlement of an estate after the lapses of time when it does not appear that the administration has been closed);

(vi) Section 93 – Period for Contesting Probate (allowing an interested person to contest the validity of a probated will);

(vii) Section 149A(a) – Interested Person May Demand Accounting (allowing an interested person to demand an accounting in an independent administration after the expiration of fifteen months from the date an independent administration was created);

(viii) Section 149B – Accounting and Distribution (allowing a person interested in an estate to petition the court for an accounting and distribution in an independent administration);

(ix) Section 149C – Removal of Independent Executor (allowing an interested person to file a motion to remove an independent executor on the grounds enumerated in the statute).

A difference between the general concept of a pecuniary interest as set forth in the *Logan* case and the definition of an interested

person under §3(r) of the Texas Probate Code was pointed out by the court in *Allison v. FDIC*, 861 S.W.2d 7, 10 (Tex. App. – El Paso 1993, writ dism'd by agr.). The *Allison* court was asked to determine whether a judgment creditor of the beneficiary under a will had standing to request the removal of an independent administrator. The *Allison* court noted that, despite the broad language defining "interested persons" in the *Logan* case, the Texas legislature, in arriving at the definition of "interested person" in the Probate Code, ignored the *Logan* definition and chose instead to include some creditors, while leaving other creditors out. *Allison*, S.W.2d at 10. In arriving at this conclusion, the *Allison* court relied on the language in §3(r) which states that "interested persons" are those who have a property right in, or a claim against, the **estate being administered** (emphasis added). The court concluded that the creditor of an estate's beneficiary did not have a claim against the estate being administered. *Allison*, 861 S.W.2d at 10.

3. Expanded Definitions of an Interested Person.

Though the *Allison* court found that, in the case of a creditor, the status of an "interested person" is confined to creditors who have a claim against the estate of the decedent being administered, the court acknowledged that there were other court decisions expanding the definition of an "interested person" for standing purposes. *Allison* 861 S.W.2d at 9. For example, a surety for a guardian has been found to be an interested person for the purposes of challenging a final accounting. *In re Rasco*, 552 S.W.2d 557 (Tex. Civ. App. – Dallas 1977, no writ); and an assignee of an interested person may also be entitled to the same standing the interested person would have had. *Dickson v. Dickson*, 5 S.W.2d 744 (Tex. Comm'n App. 1928, judgm't adopted). The *Allison* court distinguished the *Rasco* and *Dickson* decisions by recognizing that an assignee essentially steps into the shoes of the interested party who conveyed the interest, while a surety should be considered an interested person because it would be bound by a judgment entered against a guardian. *Allison*, 861 S.W.2d at 9. A creditor of an estate's beneficiary does not have that kind of connection to the decedent's estate.

Another court decision broadly interpreting the definition of "interested person" is *Maurer v. Sayre*, 833 S.W.2d 680-81, (Tex. App. – Fort Worth 1992, no writ), which dealt with the issue of whether a contingent beneficiary on a life insurance policy had standing to contest a will. The primary beneficiary was "the trustee in document probated as last will and testament of insured." If the will were denied probate, the contingent beneficiary would receive the life insurance proceeds. The *Maurer* court determined that the contingent beneficiary had sufficient interest in the decedent's estate to be accorded standing to contest the will. *Maurer*, 833 S.W.2d at 683.

In *Foster v. Foster*, 884 S.W.2d 497 (Tex. App. – 1993, writ denied), the court held that an appointee under a testamentary power of appointment was an interested person with standing to request a partition and distribution of the decedent's estate; and in *Fortinberry v. Fortinberry*, 326 S.W.2d 717, 719 (Tex. Civ App. – Waco 1959, writ ref. n.r.e.), the court found that a purchaser from a devisee was entitled to apply for the probate of the will to clear title to the property purchased.

4. Interest in Estate Can Change.

One should be mindful that a person's status as an "interested person" can change with

the circumstances and the timing of the proceedings. A beneficiary named in a will who has entered into a release of all claims relating to the estate will have no standing to contest the will unless the beneficiary can show that the release was invalid. *Womble* 331 S.W.2d at 297 (1960). A creditor who has been paid should have no interest in whether or not a will is probated. *Logan*, 202 S.W.2d at 217 (1947). A beneficiary under a will who might otherwise be an interested person, but who has accepted benefits under a will may be estopped from contesting the will, and thus would not be considered an interested person. *Trevino v. Turcotte*, 564 S.W.2d 682 (Tex. 1978).

H. Issues Presented in Motion in Limine Should Not Be Confused With Issues to be Tried on the Merits.

With all of the circumstances which must be examined to determine whether a person is interested in an estate so as to have standing to participate in a proceeding involving the estate, the court and litigants must keep in mind that the issues to be tried in limine are not those that go to the merit of the case. The court in *Baptist Foundation of Texas v. Buchanan*, 291 S.W.2d 464, 469 (Tex. Civ. App. – Dallas 1956, writ ref'd n.r.e.) cited several cases from across the country as a warning that courts, when hearing a motion in limine to determine a person's standing, should not confuse the issue of the person's standing with the degree of success the person would have in the trial on the merits of the case. In other words, "...the issues in limine...are different and not to be commingled with those triable on the merits..." *Baptist Foundation*, 291 S.W.2d at 469. The cases the *Baptist Foundation* Court cited include *In re Witt's Estate*, 198 Cal. 407, 245 P. 197 ("In contest by heir of probate of will devising all testatrix's property to a third party, it was not duty of trial court, before submitting contest to jury, to determine whether contestant had any interest in estate entitling him to contest will because of agreement of testatrix whereby she agreed to will all of her property to sole beneficiary named in will, since court's decision on validity of such agreement would be a determination of question which contestant, under Code Civ. Proc. §1312, is entitled to have jury determine."); *Werner v. Frederick*, 94 F.2d 627 ("One whose interest in contesting a will is based upon an asserted right arising under a prior will, which right has been reduced or destroyed by the will attacked, is not required to prove, under the preliminary issue as to his interest, that the later will did not revoke the earlier will, as the revocatory effect of the later will is dependent upon its validity and its validity is the ultimate issue.").

I. Miscellaneous Standing Issues.

1. Standing of Executor.

An executor appointed by a will has standing to offer the will for probate. Tex. Prob. Code Ann. §76 (Vernon 1999); however, an executor who has no interest in the decedent's estate may not insist that the will be probated. *In Re Estate of Hodges*, 725 S.W.2d 265, 268-69 (Tex. App. – Amarillo 1986, writ ref'd n.r.e.).

Section 243 of the Texas Probate Code allows an executor who defends a will in good faith to receive reasonable expenses and attorney's fees. As a result, an executor should have standing to contest the probate of another will or a codicil which would destroy the effect of the probated will.

An administrator is not authorized to seek probate of a will. *Aaronson v. Silver,* 304 S.W.2d 218, 219-20 (Tex. Civ. App. – Austin 1957, writ ref'd n.r.e.).

2. Claims on Behalf of Estate in Administration.

While an administration of an estate is pending, it is the estate's personal representative who has the standing to pursue claims and property of the estate. *Burns v. Burns*, 2 S.W.3d 339 (Tex. App. – San Antonio 1999, no writ). An exception may be recognized when it appears that the personal representative will not or cannot act in the best interests of the estate. In that case the heirs would have standing to bring a claim on behalf of the estate, but not in their individual capacity, against the personal representative. Once a successor personal representative is appointed, standing reverts back to the personal representative. *Burns*, 2 S.W.3d at 343.

III. Standing in Guardianship Proceedings.

A. Comparison to Standing in Decedent's Estates.

The primary focus on whether or not a litigant has standing in a proceeding involving a decedent's estate depends on whether the litigant is a person interested in the decedent's estate. In guardianship proceedings, the emphasis is on the well-being of the proposed ward. *See* Tex. Prob. Code Ann. §602, entitled "Policy: Purpose of Guardianship" ("A court may appoint a guardian . . . with full authority over an incapacitated person . . . only as necessary to promote and protect the well-being of the person."). It is for that reason that many guardianship proceedings may be initiated or contested by **"any person".** *See* Tex. Prob. Code Ann. §682 which states that "[a]ny person may commence a proceeding for the appointment of a guardian." *See also Hagan v. Snider,* , 98 S.W. 213, 214, 44 Tex. Civ. App. 139 (1906, writ refused)(any person has the right to commence any proceeding which he considers beneficial to the ward). Standing in most guardianship matters is not limited to "interested persons" or "persons interested" as defined in §601(14) of the Texas Probate Code. (§601(14) of the Texas Probate Code defines an "interested person" when that phrase is used in a guardianship provision and is very similar to §3(r) of the Texas Probate Code which defines an "interested person" for proceedings involving decedent's estates.)

Examples of guardianship proceedings which are exceptions to the general rule and which require a person to be an "interested person" include the following:

1. Section 622 which deals with costs and security and which provides that a **person interested** in the guardianship or in the welfare of the ward may request the court to order another party to give security for the costs of the guardianship proceeding.

2. Section 694A which relates to the restoration of the ward's capacity and which provides that a ward or **any person interested in the ward's welfare** may file an application for an order finding that the ward gained or regained total or partial capacity. (*But see*, §642 which states that **"any person,"** subject to the limitations contained in that section, has a right to commence a guardianship proceeding for the restoration of the ward's capacity.)

Although the Code starts with the proposition that "any person" may have standing to participate in most guardianship proceedings, this does not mean that "any person" is entitled to be a guardian. Section 681 of the Code sets forth those situations

and circumstances which may disqualify a person from being a guardian. Sections 676 (dealing with guardians of minors) and 677 (relating to guardians of persons other than minors) of the Code list an order of priority of those who may serve as guardian.

B. Narrowing the Concept of Standing: Section 642 of the Texas Probate.

Though the starting point for determining standing in a guardianship proceeding is "any person," §642 of the Code has been amended several times in the recent past to enumerate certain circumstances and situations which would cause a person to lose standing in a guardianship proceeding. It is interesting to note the progression of §642.

The predecessor to §642 was §113 of the Texas Probate Code as it existed before the introduction of the new Guardianship Code in 1993. Section 113 simply stated that "[a]ny person has the right to appear and contest the appointment of a particular person as guardian, or to contest any proceeding which he deems to be injurious to the ward, or to commence any proceeding which he deems beneficial to the ward." Tex. Prob. Code Ann. §113 (Vernon 1992).

Before the addition of §642 to the Texas Probate Code, the case of *Allison v. Walvoord,* 819 S.W. 2d 624 (Tex. App. – El Paso 1991, orig. proceeding [leave denied]) was decided. In *Walvoord*, the court was asked to determine whether creditors of the proposed ward had standing to contest the application of the proposed ward's wife to be appointed her husband's limited guardian. The creditors, who were in the middle of litigating their claim against the proposed ward, relied on §10 of the Texas Probate Code (any person interested in an estate may, at any time before an issue in any proceeding is decided upon by the court, file opposition thereto in writing) and the Probate Code's §3(r) (which includes creditors in the definition of "person interested") in maintaining that they had standing to object to the creation of the guardianship. They also asserted that they had a pecuniary interest because the appointment of a limited guardian could adversely affect their right to additional discovery and their right to exemplary damages because a jury would be less likely to award such damages against a person found by the court to be incapacitated.

It is puzzling as to why the court did not cite §113 (the predecessor of §642), which provides that any person has the right to contest a proceeding that the person deems to be injurious to the ward, in denying the creditor's standing. It would be easy enough to find that the injuries complained of by the creditors affected them and not the proposed ward. But the court, instead, stated that since the creditors were not entitled under Probate Code §130E(a)(which provided for notice to "all persons interested in the welfare" of the person for whom a guardian is sought) to notice of the guardianship application, they had no standing to contest the application. *Walvoord*, 819 S.W. 2d at 627. The court basically held that those persons who were not entitled to notice of the guardianship had no right to contest the guardianship. This opinion seems to comingle the principles of "interest" for standing in a decedent's estate and the proposed ward's welfare which is the deciding factor when considering standing in a guardianship proceeding.

In 1993, the new Guardianship Code's §642 removed the language regarding any proceeding deemed to be injurious or beneficial to the ward and added the

following exceptions to the right to participate in a guardianship proceeding:

> (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; or
> (3) contest the appointment of a person as a guardian of the person or estate, or both, of the proposed ward or incapacitated person.

The change in the statute shifted the focus from the effect of the proceeding on the ward to reviewing the qualifications of the one commencing or contesting a proceeding.

An article describing the transition to the new Guardianship Code and the reason for changes made to previously existing provisions of the Probate Code explains that §642 is a "slight variation from repealed Probate Code §113" which was thought to be too broad ..." The article continues by stating that the anticipated way to challenge standing in a guardianship proceeding is through a motion in limine similar to the one used in will contests. Gardner, Smith, *The New Texas Guardianship Code Sections and Other Legislative Developments*, 1993 Advanced Drafting: Estate Planning and Probate Course, Tab B.

In 1995, §642 was amended again to add subsection (c) as follows:

> (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.

In 1999, §642 was further amended to read as it does today (1999 amendments are in bold):

> **§642. Standing to Commence or Contest Proceeding**
>
> (a) Except as provided by Subsection (b) of this section, any person has the right to commence any guardianship proceeding, **including a proceeding for complete restoration of a ward's capacity or modification of a ward's guardianship,** or to 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.

C. Open Issues Created by §642.

When §642 changed the concept that "any person" had the right to commence a guardianship proceeding he deemed beneficial to the ward and to contest any proceeding he deemed injurious to the ward, and denied standing to any person with an interest adverse to the proposed ward or incapacitated person, it created questions in several areas which will require future judicial interpretation or amendments to the statute.

1. Has the Idea of Standing Been Confused With Disqualification?

Section 681 of the Texas Probate Code describes the kinds of persons who may not be appointed guardian and enumerates the those situations in which a person may be involved which would disqualify that person as a guardian. The text of §681 follows:

> **§681. Persons Disqualified to Serve as Guardian**
>
> A person may not be appointed guardian if the person is:
>
> (1) a minor;
>
> (2) a person whose conduct is notoriously bad;
>
> (3) an incapacitated person;
>
> (4) a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward, unless the court:
>
> (A) determines that the lawsuit claim of the person who has applied to be appointed guardian is not in conflict with the lawsuit claim of the proposed ward; or
> (B) appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit claim;
>
> **(5) a person indebted to the proposed ward unless the person pays the debt before appointment;**
>
> **(6) a person asserting a claim adverse to the proposed ward or the proposed ward's property, real or personal;**
>
> (7) a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward's estate;
>
> (8) a person, institution, or corporation found unsuitable by the court;
>
> (9) a person disqualified in a declaration made under Section 679 of this code; or
>
> (10) a nonresident person who has not filed with the court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship.

Some of the same reasons for defeating a person's standing under Section 642 are included in Section 681 as conditions which would disqualify a person from being

appointed guardian. For example, a person indebted to the proposed ward (Section 681(5)) and a person asserting a claim adverse to the proposed ward or the proposed ward's property (§681(6)) could be considered a person with an interest adverse to a proposed ward under §642. Yet, if there is a fact question as to whether a person is disqualified under §681, it may be decided by a jury. *See In Re Guardianship of Norman,* ____ S.W.3d _____, 2001 WL 128010, fn. 5 (Tex. App. – Amarillo 2001, writ denied)(not yet released for publication) (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 §642, there is no right to a jury trial or any of the procedural safeguards that go along with a trial on the merits.

Earlier in this article, there was a reference made to the warning by the court in *Baptist Foundation of Texas v. Buchanan*, 291 S.W. 2d 464, 469 (Tex. Civ. App. – Dallas 1956, writ ref'd n.r.e.) not to commingle the issues to be tried in limine with those that are triable in the case on its merits. *Baptist Foundation*, 291 S.W. 2d at 469. The overlap of what disqualifies a person for standing purposes under §642 and what disqualifies a person from being a guardian under §681 seems to invite the kind of commingling of issues that concerned the *Baptist Foundation* Court.

Another indication that the lack of adverse interest standing requirement under §642 has been confused with the notion of disqualification relates to the burden of proof. In proceedings involving decedent's estates, it is the person asserting standing who has the burden of proving that such person has an interest in the decedent's estate. *A & W Industries, Inc. v. Day*, 977 S.W.2d 294 (Tex. 1960). In a guardianship motion in limine, it is difficult to imagine how a person asserting standing carries the burden of proving a negative, i.e., that the person does not have an interest adverse to the proposed ward. Logic dictates that the person alleging another person's adverse interest have the burden of proof. This is the procedure followed when there is a challenge under Section 681, the disqualification statute. *See Guardianship of Henson*, 551 S.W. 2d 136, 138 (Tex. Civ. App. – Corpus Christi 1977, writ ref. n.r.e.).

2. Is There a Denial of Due Process as a Result of No Right to a Jury Trial?

Section 643 of the Texas Probate Code provides that "[a] party in a contested guardianship proceeding is entitled, on request, to a jury trial." There could be a conflict between §643 and §642 of the Code, if there is a fact issue relating to whether a person had an interest that is adverse to a ward or a proposed ward. This would be especially true if the same issue could be tried to a jury under §681. It is possible that a claim of denial of due process could be made under Tex. Const. art. I, §19 which prohibits disfranchisement and deprivation of property and privileges.

3. Is There a Loss of Judicial Economy By Allowing the Same Issues to Be Litigated Twice?

It is conceivable under the current §642 in a contest involving a person's qualifications to be guardian, that person could prove no adverse interest in a motion in limine and then have to litigate and prove the same

issues in a trial on the merits. This is contrary to the public policy goal of judicial economy. An analogous situation was discussed by the court in *In Re Guardianship of Norman,* ____ S.W.3d _____, 2001 WL 128010 (Tex. App. – Amarillo 2001, writ denied). The heart of the Norman case involved the proposed ward's capacity. The ad litem in the case argued that §692 of the Texas Probate Code allowed a judge to dismiss the guardianship proceeding if the judge found that the ward had capacity, even if the applicant for guardianship had requested a jury trial. The Norman court stated that, if the ad litem were correct in his reading of the law, the applicant would be obligated to prove to the trial court that the proposed ward was an incapacitated person in order to win the right to prove the same thing to a jury. As the court observed, "In short, two trials would be required; one to a trial court in order to secure one to a jury . . .such an inefficient and wasteful result would be absurd and hardly that intended by the legislature." *In re Guardianship of Norman*, at pg. 3.

This same result could be a possibility in a guardianship proceeding if the same issues were contested under §642 and §681 of the Code.

4. What is an "interest that is adverse to the proposed ward or incapacitated person"?

The rules of statutory construction require that all the sections of the Probate Code be read so that they do not conflict with one another. *See State v. Dyer*, 145 Tex. 586, 200 S.W.2d 813, 817 (Tex. 1947)(statutes relating to the same subject should be taken together and so construed, in reference to each other, so that effect may be given to the entire provisions of each.)

One way to resolve the possible contradictions in §§642, 643, and 681 of the Texas Probate Code is to arrive at a definition of an "interest that is adverse to the proposed ward or incapacitated person" that would satisfy the requirements of all the statutes. This was the approach used by the court in the unpublished opinion, *Betts v. Brown*, 2001 WL 40337 (Tex. App. – Houston [14th Dist.])(not published).

In *Betts*, two daughters contested each other's application to be guardian of their mother. They each filed motions in limine claiming the other did not have standing because of interests each held that were adverse to the proposed ward. The trial court denied each daughter standing, one because she was unable to account for checks written on her mother's account which she was managing and the other because the mother had guaranteed a loan to her.

The appellate court noted that §602 of the Probate Code provides that " a court may appoint a guardian ... only as necessary to promote the well-being of the person." The court also reviewed the rationale expressed in *Allison v. Walvoord*, 819 S.W. 2d 624 (Tex. App. – El Paso 1991, orig. proceeding [leave denied]) which dealt with a creditor's contest of the appointment of a guardian. The *Walvoord* court had denied the creditor standing because "those with an adverse interest can hardly qualify as being persons interested in protecting [the ward's] well-being." *Walvoord*, 819 S.W. 2d at 627.

The *Betts* court announced a standard when it stated that "... an interest is adverse to an interest of a proposed ward under §642 when that interest does not promote the well-being of the ward ... the interest must adversely affect the welfare or well-being of the proposed ward. *Betts*, 2001 WL 40337 at page 3.

The *Betts* Court then found that, while the daughters might be involved in situations which would result in their disqualification from being guardians, the daughters did not have interests that rose to the level of being "against the well-being" of the proposed ward. *Betts*, 2001 WL 40337 at page 3.

The *Betts* court also reviewed the interplay of §§642 and 681 and stated that, while it may be true that both daughters are indebted to the proposed ward, and may be disqualified from being guardians, holding that their indebtedness qualified as an adverse interest under §642 would contravene the purpose of the legislature. The court continued, "Reading §642 and §681 together, the legislature contemplated that a person indebted to the proposed ward would be allowed to participate in the guardianship proceeding, but may be disqualified to serve as guardian." The *Betts* court even ventured to say that it may be possible that a person who owed a debt to a proposed ward may be capable of serving as guardian of the person, while being disqualified from serving as guardian of the estate. *Betts,* 2001 WL 40337 at page 5.

Though the Betts decision is unpublished and cannot be used as authority, it seems to point the way to reasoning through the maze of conflicts created by §642.

IV. PROCEDURAL RECOMMENDATIONS

A. Avoiding the Filing of Special Exceptions or a Motion in Limine.

You are required to set forth in your application or petition the facts that support your client's standing. *Logan v. Thomason,* 202 S.W.2d 212, 215 (Tex. 1947)(applicant or contestant must allege some legally ascertained pecuniary interest). It can simply be a statement that "Applicant is a person interested in the Estate of XYZ because she is the surviving daughter of XYZ and a beneficiary of XYZ's last will and testament." You may save your client some money by providing this type of information up front rather than in response to a motion in limine based on incorrect assumptions of the opposing party. There is no worse feeling in probate litigation than to file your application or contest and then receive by return fax a motion in limine. Before filing any pleading, identify and understand your facts supporting standing and confirm your proof is readily available. You could be called upon to meet your burden of proof with live testimony or documentary evidence on very short notice (Local Rules of Harris County allow three days). You must not only allege the facts but prove them also, all possibly without benefit of much notice and definitely in the absence of a jury.

B. Timing for the Filing of a Motion in Limine.

File the motion in limine as soon as you feel comfortable you have all necessary information. If you do not need discovery to know that the applicant or contestant has a standing problem, file the motion concurrently with your answer or opposition. Set the hearing as soon as possible and oppose any continuance on the ground that the applicant or contestant either has standing or he does not. Additional discovery and delays are not going to change these facts. If you do not file a motion in limine prior to swearing in the jury, you waive the right to object to standing on appeal. *Chalmers,* 154 S.W.2d at 642.

C. Monitor the Opposing Party's Standing.

Keep in mind that a party's standing can change at any time under certain circumstances. For example, if a party who initially had standing because he was a beneficiary later accepts benefits under the will during the administration of the estate, argue in limine that estoppel bars any contest of the will and the party is no longer "interested" in the estate. *Sheffield v. Scott*, 620 S.W.2d 691, 693-694 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.). The facts of your case should be periodically reviewed to determine whether a motion in limine is appropriate. Remember though, that a motion in limine must be heard before a jury is sworn or it is waived.

D. Contents of the Motion in Limine.

Much like a "no evidence" motion for summary judgment filed under *Tex. R. Civ. P. 166a(i)*, you can file a very short motion simply alleging brief facts and stating the opposing party is not "interested" or, in a guardianship estate, has an "adverse interest". The opposing party then has the burden of coming forward with proof of his or her standing.

E. Responding to the Motion in Limine.

1. Immediately identify all necessary witnesses and their availability;

2. Identify all necessary documentary evidence and what needs to be done to make sure it is admissible;

3. If steps 1 and 2 cannot be completed prior to the hearing date, immediately file a motion for continuance with a supporting affidavit alleging unavailability of witnesses or evidence, absence of due process, prejudice, lack of notice, unfair surprise pursuant to *Tex. R. Civ. P. 251, 252.*

4. If the motion in limine is of the improper type that asks the Court to decide an ultimate issue of fact (e.g. capacity, undue influence, validity of a claim) rather than just the isolated issue of standing, immediately file a demand for jury with the appropriate fee. *See Tex. Prob. Code §§ 21, 643; Tex. Constit. Art. I, §15.* You should also assert you are entitled to 45 days notice pursuant to *Tex. R. Civ. P. 245. See In Re Guardianship of Norman,* ____ S.W.3d _____, 2001 WL 128010 (Tex. App. – Amarillo 2001, writ denied)(not yet released for publication)(applicant's entitlement to jury trial in guardianship case). You will at least preserve this point for appeal. Also argue, in the alternative, that the motion is actually a motion for summary judgment and you are entitled to 21 days notice. *Tex. R. Civ. P. 166a.*

5. Include in your response the reasons why you have standing and attach relevant documents. Be prepared to introduce these same documents into evidence at the hearing by live testimony if necessary. You will not have time for a business records affidavit to prove up bank records, for example; therefore, be prepared to introduce the documents through a subpoenaed bank custodian or through a deposition (oral or by written question) that must be taken prior to the hearing. Bring certified copies of birth certificates, wills or marriage licenses if the motion in limine involves those type of standing issues. Case law is unclear what evidentiary standards the court must follow regarding the introduction of evidence; therefore, to be on the safe side, prepare as if you were going to trial. This is essentially a bench trial related only to the standing.

6. Confirm your pleadings do allege the facts that support your claim of standing. If the pleadings do not, amend prior to the hearing on the motion in limine.

7. Evaluate the movant's own standing and determine whether you should also file a competing motion in limine.

F. Hearing on the Motion in Limine.

The hearing should be an evidentiary hearing conducted as if you were in a trial on the sole issue of standing. Request a record; otherwise, the appellate review is limited to errors appearing in the clerk's record. *Tex. R. App. P. 37.3(c); In Re Marriage of Spiegel,* 6 S.W.3d 643, 646 (Tex. App. – Amarillo 1999, no writ). Appellants have the burden to present the record showing the error about which the appellant is complaining. *Chapman v. Hootman*, 999 S.W.2d 118, 122 (Tex. App. – Houston [14th Dist.] 1999, no writ). If there is no reporters' record, the reviewing court must indulge all presumptions in favor of the court's findings and judgment. *Fiesta Mart, Inc. v. Hall,* 886 S.W.2d 440, 443 (Tex. App. – Texarkana 1999, no writ)(reporter's record necessary to challenge ruling on motions after evidentiary hearing). The evidence is presumed to support the judgment. *Vickery v. Commission for Lawyer Discipline,* 5 S.W.3d 241, 251 (Tex. App. – Houston [14th Dist.] 1999, no writ). You will begin the appellate process with the deck strongly stacked against you when all you had to do was request the presence of the court reporter for the in limine hearing.

G. Appeal of Order Granting Motion in Limine.

File your motion for new trial and/or notice of appeal just as if you were filing an appeal of a final judgment. The order granting the motion is a final order and completely appealable. *A & W Industries, Inc. v. Day*, 977 S.W.2d 294 (Tex. 1960). Civil appellate timetables will apply. *See Tex. R. Civ. P. 329b, Tex. R. App. P. 25.1, 26.1.* File proposed findings of fact and conclusions of law for the court to sign. Follow the very specific procedure for requesting such findings in *Tex. R. Civ. P. 296-299.* Failure to do so will result in the appellate court presuming the trial court found all necessary facts in support of the judgment if there is any probative evidence to support such findings. *Roberson v. Robinson,* 768 S.W.2d 280, 281 (Tex. 1989).

H. Beware of §681 Disqualification Motions Acting as Wolves in Sheep's Clothing of §642 Motions in Limine.

As more fully discussed elsewhere in this paper, there is a very fine line between §642 involving standing and §681 related to disqualification of potential guardians. The latter section should be resolved by the fact finder while §642 issues are resolved by the court as a matter of law. The similarity between the two sections dealing with adverse interest will inevitably lead to confusion by the attorneys and the courts. The absence of case law interpreting §642 is not helpful. If you receive a motion in limine that purports to be a §642 motion that goes to the very heart of the guardianship proceeding, read the unpublished case of *Betts vs. Brown*, 2001 WL 40337 (Tex. App. – Houston [14th Dist.] 2001, no writ) for the rationale to include in your motion. Be sure to assert the same objections listed above involving lack of notice, lack of due process, and violation of the right to a jury trial and the open courts provision. Participation in the guardianship proceeding should be allowed in most circumstances while the

same person may be ultimately disqualified from serving as the guardian. *Id.* at fn. 2.

I. Distinguish between Guardian of the Person and Estate.

If necessary due to the evidence against your client of adverse interest that affects the proposed ward's well-being, allege your client has standing in the capacity of guardian of the person **or** estate if the adverse interest only affects the proposed ward's health or the financial well-being. *See, Betts* at fn. 2. This move may allow your client to participate in the proceeding.

J. Beware of Reliance on Decedent's Estate Cases for Guardianship Proceedings in Which Standing is an Issue.

Standing in estate cases involves "interest" in the estate. Standing in guardianship cases is wide open to any and all, except those with an adverse interest. Therefore, the cases interpreting standing in a decedent's estate may be in direct opposition to the guardianship rationale necessary to analyze whether an applicant or contestant is disinterested. Do not allow opposing counsel to mix apples and oranges when making legal arguments to the court. *cf.* Tex. Prob. Code Ann. §603 (if not inconsistent with guardianship provisions, laws and rules of estates apply).

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