STANDING ISSUES IN PROBATE LITIGATION OR NO “MEDDLESOME INTRUDERS” ALLOWED

MARY C. BURDETT
Calloway, Norris, Burdette & Weber
Dallas, Texas

State Bar of Texas
29th ANNUAL ADVANCED
ESTATE PLANNING AND PROBATE COURSE
June 8-10, 2005
Fort Worth

CHAPTER 17
MARY C. BURDETT
Calloway, Norris, Burdette & Weber
3811 Turtle Creek Blvd., Suite 400
Dallas, Texas 75219
Phone: 214-521-1520
Fax: 214-521-2201
Email: mburdette@cnbwlaw.com

BIOGRAPHICAL INFORMATION

AREAS OF PRACTICE

Probate Litigation, Trust Litigation, Fiduciary Litigation, Estate Administration, Guardianships, including Contested Guardianships; Wills and Trusts

EDUCATION

Juris Doctor Degree, cum laude, from Southern Methodist University School of Law 1982; Phi Delta Phi scholastic honorary fraternity; Order of the Coif; Notes and Comments Editor, Southwestern Law Review

Bachelor of Science Degree in Accounting, summa cum laude, from the University of Texas at Dallas 1978.

PROFESSIONAL HISTORY

Admitted to the State Bar of Texas by the Supreme Court of Texas, November 1982.

Thompson & Knight, Tax and Estate Section, 1982-1994 (Shareholder from 1987).


Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization.

Board Certified Tax Law – Texas Board of Legal Specialization.

Certified Public Accountant.

Chair of Probate, Estates & Trust Section, Dallas Bar Association 2003-2004.

Council Member, Real Estate Probate & Trust Law Section, State Bar of Texas 2004-2008.

Member, Texas Board of Legal Specialization Estate Planning and Probate Law Legal Assistant Exam Commission (1999-2004).
TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 1

II. STANDING IN DECEDENT'S ESTATES ................................................................. 1
   A. Texas Probate Code .................................................................................................. 1
      1. Probate Code §10 ................................................................................................. 1
      2. Other Probate Code Sections ............................................................................... 1
   B. Seminal Cases Establishing “Standing” Rules ........................................................ 1
      1. Logan v. Thomason ............................................................................................. 1
      2. Womble v. Atkins ............................................................................................... 2
   C. Who Is An “Interested Person” ................................................................................ 2
      1. Probate Code §3(r) ............................................................................................. 2
      2. Case Law ........................................................................................................... 3
         a. Heirs ................................................................................................................ 3
         b. Release ............................................................................................................. 3
         c. Acceptance of Benefits ..................................................................................... 3
         d. Creditor of Decedent ....................................................................................... 3
         e. Creditor of Beneficiary or Heir ........................................................................ 3
         f. Alternate Life Insurance Beneficiary ............................................................... 3
         g. Representative of Deceased “Interested Person” ................................................. 3
         h. Grantees, Assignees, Beneficiaries or Devises of a Deceased Heir or Beneficiary . 4
         i. Remainder Beneficiary of a Testamentary Trust .............................................. 4
         j. Executor/Administrator ...................................................................................... 4
         k. Former Beneficiary of Life Insurance Policy .................................................... 4
         l. Appointee Under Power of Appointment ........................................................... 4
         m. Alleged Common Law Spouse ......................................................................... 4
         n. Alleged Beneficiary Under “Lost” Will ............................................................... 4
   D. Application to Other Probate Proceedings ........................................................... 4
      1. Motion to Remove Independent Executor ......................................................... 4
      2. Objection to Final Account of Temporary Administrator .................................. 5
      3. Opposition to Grant of Letters of Administration (§179) or Application for Appointment of Temporary Administrator (§131A(b)) ........................................................................................................................................... 5

III. PROCEDURE TO CHALLENGE STANDING ......................................................... 5
   A. Motion In Limine ..................................................................................................... 5
   B. Distinguish From Evidentiary Motion In Limine .................................................... 6
   C. Hearing “In Advance of” Trial on Merits ................................................................ 6
   D. No Right to Jury ..................................................................................................... 6
   E. Burden of Proof ...................................................................................................... 6
   F. Notice of Hearing .................................................................................................... 7
   G. Appeal of Order on Standing .................................................................................. 7
   H. Conclusive Effect of Standing Decision .................................................................. 7
   I. Issues Presented in Motion in Limine Should Not Be Confused with Issues to Be Tried on the Merits .................................................................................................................. 9

IV. STANDING IN GUARDIANSHIP PROCEEDINGS ............................................... 9
   A. Probate Code §642 “Standing” Rule ....................................................................... 10
   B. Definition of Adverse Interest ................................................................................ 10
   C. Distinguish Standing from Disqualification To Serve As Guardian ....................... 11

V. CONCLUSION ............................................................................................................. 11
STANDING ISSUES IN PROBATE LITIGATION OR NO “MEDDLESOME INTRUDERS” ALLOWED

I. INTRODUCTION
Special requirements and procedures to challenge a person’s “standing” to participate in probate proceedings have developed to exclude anyone not having a financial interest in the estate, or otherwise known as a “mere meddlesome intruder.” Womble v. Atkins, 160 Tex. 363, 331 S.W.2d 294, 296 (1960). This concept of standing in probate proceedings differs from that found in other civil court actions. It does not involve the court’s subject matter jurisdiction and may be waived if not challenged at the appropriate time. This article will explore the concept of standing as it has evolved through court decisions relating to decedent’s estates and guardianships.

II. STANDING IN DECEDENT’S ESTATES
A. Texas Probate Code
Under the Probate Code and related case law, only an “interested person” has standing to participate in a probate proceeding. An “interested person” is generally one who has a pecuniary interest that will be affected by the probate proceeding. Anyone else is a “mere meddlesome intruder.”

1. Probate Code §10
Probate Code §10 provides as follows:

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. Other Probate Code Sections
Although most of the “standing” cases have involved will contests, the concept has broader application to estate administration proceedings. Some of the Probate Code sections expressly applicable only to an “interested person” include:

a. 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);

b. Section 31 – Bill of Review (allowing any person interested to file a bill for review to have a decision, order, or judgment rendered by the court revised and corrected upon the showing of an error).

c. 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).

d. 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).

e. 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).

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

g. 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).

h. 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).

i. 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).

B. Seminal Cases Establishing “Standing” Rules
1. Logan v. Thomason
In Logan v. Thomason, 146 Tex. 37, 202 S.W.2d 212, 215 (1947), the Texas Supreme Court held that the son of a named beneficiary who predeceased the testator had no right to contest the will because his father’s bequest lapsed when he died before the testator, citing a predecessor statute to Probate Code §10, 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:

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.

... 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.


2. Womble v. Atkins

Womble v. Atkins, 331 S.W.2d 294 (Tex. 1960), involved a person who had signed a release regarding all claims against the estate, was determined not to be an “interested person,” lacked standing to contest the will and could not later file suit to invalidate the release. 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 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 v. Atkins, 331 S.W.2d at 298.

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. For further discussion of the conclusive affect of an order determining standing, see paragraph III.H., infra.

C. Who Is An “Interested Person”

1. Probate Code §3(r)

Probate Code §3(r) (enacted in 1956) defines an “interested person” as follows:

[H]eirs, 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.
2. **Case Law**

The courts have given standing to some persons not listed in §3(r) and denied standing to persons technically falling within a classification listed in §3(r). The courts have not applied §3(r) “as 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 Probate Code §§ 48, 49 and 50 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).

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. See Edward v. Haynes, 690 S.W.2d 50 (Tex. App. – Houston [14th Dist.], reversed on other grounds, 698 S.W.2d 104 (Tex. 1985).

b. **Release**

A person who has signed a release of all claims against the decedent’s estate is not an “interested person” and lacks standing to contest decedent’s will. Womble v. Atkins, 331 S.W.2d 294 (Tex. 1960).

c. **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. Turcotte, 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 v. Scott, 620 S.W.2d 691, 693 (Tex. App. – Houston [14th Dist.] 1981, writ ref’d n.r.e.); 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, no writ (Tex. App. – Eastland 1994, no writ).

d. **Creditor of Decedent**

The court in Logan v. Thomason 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 v. Thomason 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, Probate Code §3(r), enacted subsequent to the decision in Logan v. Thomason, included “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).

e. **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 §§149, 149B and 149C, 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 v. Thomason 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 §3(r) 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 v. FDIC, 861 S.W.2d at 10.

f. **Alternate Life Insurance Beneficiary**

Decedent’s sister, who was the alternative 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 that will be 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.

g. 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 mother’s estate was an interested person with standing to contest the heirship proceeding. Also, since 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).

h. 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 §3(r)); 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).

i. 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 writ).

j. 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).

k. Former Beneficiary of Life Insurance Policy


l. 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).

m. Alleged Common Law Spouse


n. Alleged Beneficiary Under “Lost” Will

A person contesting a will claiming to be a beneficiary under a “lost” will must, if their standing is challenged, offer evidence to show that he 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”)

D. Application to Other Probate Proceedings

Although most of the above discussed cases involved will contest, the rules should apply to determine a person’s standing in other probate proceedings involving decedent’s estates.

1. Motion to Remove Independent Executor

In A & W Industries, Inc. v. Day, 977 S.W.2d 738 (Tex. App. – Fort Worth 1988, no writ), the court held that an estate creditor (based on a contract with the executors) did not have standing to file a motion to remove the independent executor because the creditor
failed to offer any proof at the *in limine* hearing to support its standing. However, the court reviewed the fundamental rules prohibiting a “mere meddlesome intruder” from interfering in a decedent’s estate and concluded that the same principles should apply in an estate administration proceeding:

The same fundamental principle that bars an uninterested party from interfering in the probate of a will is equally important in the area of estate administration. A mere interloper has no more right to intervene in the administration of a decedent’s estate than he does in the admission of a decedent’s will to probate. For this reason, we hold that where the standing of a party suing to remove the personal representative of an estate is challenged before a trial on the merits, that party must support his allegations of interest with proof. If he fails [to do so], his suit must be dismissed. The alternative to this requirement - allowing uninterested strangers to interfere in the administration of decedent’s estate by merely alleging a factual scenario that, if true, would qualify them as “interested persons” under §3(r) - is repugnant to the public policy of this state.

*A & W Industries, Inc. v. Day*, 977 S.W.2d at 742.

2. **Objection to Final Account of Temporary Administrator**

   In *Roach v. Rowley*, 135 S.W.3d 845 (Tex. App. – Houston [1st Dist.] 2004, no writ), the court considered whether a devisee under the testator’s will had standing to object to the temporary administrator’s final accounting. The temporary administrator argued that the devisee had no standing based on the principle that only the personal representative (the permanent administrator that had been appointed) could sue for recovery of estate property. The Court of Appeals disagreed and held that under Probate Code §10, “any interested person may file an objection to a final accounting of a decedent’s estate.” *Id.* at 847.

3. **Opposition to Grant of Letters of Administration (§179) or Application for Appointment of Temporary Administrator (§131A(b))**

   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).

   In *Balfour v. Collins*, 119 Tex. 122, 25 S.W.2d 804 (Tex. Comm’n App. 1930, judgm’t adopted), the Texas Supreme Court held that the phrase “any person” should be taken literally, such that a person would not be required to have an interest in the decedent’s estate to have standing to contest an application for letters of administration. The 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 found 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. 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 v. Collins*, 25 S.W.2d at 807.

   This decision predates the seminal cases of *Logan v. Thomason* and *Womble v. Atkins*. The standing rule established by those and subsequent cases requiring a person to have a pecuniary interest that would be affected by a probate proceeding logically should apply to these sections as well. As stated in *A & W Industries, Inc.*, there is no basis for applying a different rule to estate administration proceedings. Further, the general standing rule applicable in all civil cases requires that for any person to maintain a suit, it is necessary that he have standing to litigate the matters in issue. See, *e.g.*, *Hunt v. Bass*, 664 S.W.2d 223, 224 (Tex. 1984).

   Under the general standing rule, standing consists of some interest peculiar to the person individually and not as a member of the general public. This rule would seem to preclude a total stranger from contesting an application for letters of administration or the appointment of a temporary administrator in an estate in which the person has absolutely no interest.

   The same analysis should apply to §131 A(b) of the Texas Probate Code, which 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).

**III. PROCEDURE TO CHALLENGE STANDING**

A. **Motion In Limine**

   Although essentially unique to probate proceedings, it is well settled that the proper procedure for challenging a litigant’s standing in a probate proceeding involving a

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 v. Scott*, 620 S.W.2d 691, 693.

The author’s position is that the preferred pleading to contest standing is a Motion In Limine. A sample form is attached to back of this outline.

Other procedural vehicles that may be used to contest standing include a verified plea under Texas Rules of Civil Procedure 93(2) contesting the plaintiff’s capacity, 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. Distinguish From Evidentiary Motion In Limine**

A motion in limine contesting standing should be distinguished from an evidentiary motion in limine typically filed in jury cases seeking to prevent inadmissible evidence from being suggested to the jury. See *Dove v. Director*, 857 S.W.2d 577, 579-80 (Tex. App. – Houston [1st Dist.], writ denied).

**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 v. Scott*, 620 S.W.2d 691,693; *Chalmers v. Gumm*, 137 Tex. 467, 154 S.W.2d 640 (1941).

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. *In re Estate of Hill*, 761 S.W.2d at 530.

**D. No Right to Jury**

In *Sheffield v. Scott*, 620 S.W.2d 691 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref’d n.r.e.), the will contestants argued that Probate Code §21, 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 §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 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, 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

F. Notice of Hearing

In *Womble v. Atkins*, 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 *in limine*. This practice presumably is based on the view that a motion in *in limine* is a procedural matter rather than a “trial” even if contested. Although it has been argued, no case has held that Texas Rules of Civil Procedure 245 applies to a contested motion in *in limine*. *See Betts v. Brown*, 2001 WL 40337 (Tex. App. – Houston [14th Dist.]). Rule 245 requires at least forty-five (45) days notice of the setting of a trial on a contested case. 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 *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.). (TRCP 245 applies to contest to appointment of executor.)

G. Appeal of Order on Standing

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 disposables 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. v. Day*, 977 S.W.2d at 740 (relying in part on the court’s decisions 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 a motion in *in limine* is considered interlocutory and, therefore, not appealable. *Edward v. Haynes*, 698 S.W.2d 97 (Tex. 1985); *Fischer v. Williams*, 331 S.W.2d 210, 213-14 (Tex. 1960).

H. Conclusive 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, an alleged common law spouse files a contest to the probate of a will. The proponent objects to her standing. At the hearing on the motion in *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 *in limine*, does that order preclude her from making any further claim to be the common law spouse? The answer is not clear.

In *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294 (1960), the Texas Supreme Court held that the standing judgment was binding to prevent further litigation on any issue on which the standing question was determined. The validity of the standing judgment was the subject in *Atkins v. Womble*, 300 S.W.2d 688 (Tex. App. – Dallas 1957, writ ref’d n.r.e.) 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 in *Womble v. Atkins*, 160 Tex. 363, 331 S.W.2d 294 (1960). 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 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:

Decision of the validity of the release was essential to the judgment rendered.

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 v. Atkins, 331 S.W.2d 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.

The recent case of In re: Estate of Armstrong, 155 S.W.3d 448 (Tex. App.– San Antonio 2004, no writ), 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 v. Atkins 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.

The Court distinguished the other standing cases on the basis that they did not “mention a simultaneously pending heirship proceeding.” Since the heirship proceeding was contested in this case, Probate Code §21 entitled the contestant to a jury trial. The Court framed the issue as “whether Schumann’s actions taken in the estate administration proceeding, which required the Probate Court to determine her standing by making a finding with regard to the common law marriage, preclude Schumann from presenting the issue to a jury in the heirship proceeding.” Id. at 453.

The Court examined the case of In re: Evans’ Estate, 198 S.W.2d 743 (Tex. Civ. App.– Beaumont 1946, no writ). In that case, the appellant had filed an Application for Letters of Administration, which was denied by the Court upon a finding that the appellant was not related to the deceased and had no interest in the estate. The appellant then filed a petition to intervene in the appellee’s Application to Determine Heirship, claiming to be the surviving spouse. The issue was whether the trial court’s ruling in relation to the Letters of Administration was conclusive that appellant was not the decedent’s surviving spouse so as to preclude her from presenting her claim for distribution of the assets of the estate upon a later trial on the heirship petition. The Beaumont Court reviewed cases in other states addressing this question, and found the decisions to be conflicting. Cases were cited holding that an adjudication on an issue of heirship in connection with the appointment of an administrator is not conclusive on that question in a subsequent proceeding for distribution of the estate, even though the issue was directly presented and decided in the former proceeding. These decisions seemed to focus on the difference in the purpose and ultimate end of each proceeding. Other decisions were noted which held that the former adjudication is conclusive in the subsequent proceeding involving the same parties where the issue was litigated and directly decided in the prior proceeding.
Finally, the Court noted that the holdings were practically unanimous that when the issue was not litigated or it was not necessary to decide the issue in order to render judgment in the prior proceeding, then such a finding as to relationship is “merely collateral” and is not conclusive in a later suit to determine heirship. The Beaumont Court held that the finding by the Probate Court that appellant was not related to the decedent was “merely collateral” and “incidental” to the judgment denying appellant’s Application for Letters of Administration. However, the Court cautioned:

We do not go so far as to hold in this case that a judgment of a Probate Court granting or refusing Letters of Administration can not be conclusive on a question of relationship of an applicant to the deceased regardless of whether the issue was presented, was necessary for a decision on the appointment, and was litigated by the parties.

In Armstrong, 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.” 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.”

If the Womble v. Atkins 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 “lost” will. 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.

I. Issues Presented in Motion in Limine Should Not Be Confused with Issues to Be Tried on the Merits

In order to prove standing it is not proper to require a person to prove any of the ultimate issues that go to the merits 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 attached, 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.”).

IV. STANDING IN GUARDIANSHIP PROCEEDINGS

The standing rule for guardianship proceedings is entirely different from the rule applicable to decedent’s estates. The primary focus in decedent’s estate is whether the person has a pecuniary interest that would be affected by the particular acting being pursued. 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.” Probate Code §602.

A. Probate Code §642 “Standing” Rule

Probate Code §601(14), 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 limited to “interested persons.” Probate Code §642, which was enacted in 1993, expressly addresses standing in certain guardianship proceedings:

(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.

See also Probate Code §682 (“any person may commence a proceeding for the appointment of a guardian. . . .”); §694A (“any person interested in the ward’s welfare” may file an application for restoration of the ward’s capacity); and Hagan v. Snider, 98 S.W. 213, 214, 44 Tex. Civ. App. 139 (1906, writ ref’d) (any person has the right to commence any proceeding which he considers beneficial to the ward).

Former Probate Code §113 the predecessor to §642, 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.”

B. Definition of Adverse Interest

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, mand. overr.) was decided prior to the enactment of Probate Code §642. 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 Probate Code §108, the rules applicable to decedent’s estates apply to guardianships, that they were “interested persons” within the meaning of Probate Code §3(r) and Logan v. Thomason because they had a claim against the proposed ward and the guardianship could affect their claim, and they had a right to contest the guardianship under Probate Code §10. 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.” 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.

The recent unreported case of Betts v. Brown, 2001 WL 40337 (Tex. App. – Houston [14th Dist.]), is the only case specifically addressing the issue of what constitutes an interest adverse to the ward under Probate Code §642, which the court noted was an issue of first impression in Texas.” In this 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 v. Walvoord in Probate Code §602, under which “a court may appoint a guardian . . . only as
necessary to promote the well-being of the person.”
Relying on this language and the rational used in Allison, the Court adopted the following definition of an “adverse interest”:

Given the rationale used in Allison, and the language found in Section 602, an interest is adverse to an interest of a proposed ward under Section 642 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.

Applying this definition, the Court concluded that neither party had an interest adverse to the proposed ward. The Court held that, although these facts might support the disqualification of either daughter under Probate Code §681, they were not sufficient to constitute an “adverse interest” under §642 because they did not demonstrate an interest by either daughter contrary to promoting the well-being of their mother. Distinguishing the daughters from the contestants in Allison, whose sole interest in contesting the guardianship was against the well-being of the proposed ward, the court found no evidence “that Brown was not concerned with [the proposed ward’s] well-being.” The court found significant that Brown had cared for Jackson prior to initiation of the guardianship proceedings, assisting her with her medical and residential needs. The court also found that there was no evidence to demonstrate any interest on behalf of Betts that would be contrary to promoting the well-being of the proposed ward.

C. Distinguish Standing from Disqualification To Serve As Guardian

An “adverse interest” that precludes standing in certain guardianship proceedings is distinct from the provisions that may disqualify a person from serving as guardian of the person and/or estate. Probate Code §681 provides as follows:

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 § 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.

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, 61 S.W. 3d 20, n. 5 (Tex. App.–Amarillo 2001, writ 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 §642, there is no right to a jury trial.

V. CONCLUSION

The concept of standing in probate proceedings, particularly in decedent’s estates, is deeply entrenched in the law. The courts have rigidly protected estates from intruders to promote finality and the orderly disposition of estates. In order to see just how far the courts will go to enforce this protection, see Littleton v. Prange, 9 S.W.3d (Tex. App. – San Antonio 1999, no writ) (“spouse” lacked standing to file suit under wrongful death and survival statute).
IN RE: ESTATE OF § IN THE PROBATE COURT
§
JOHN SMITH, §       OF
§
DECEASED § DALLAS COUNTY, TEXAS

MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

MARY JONES (“Movant”) files this Motion in Limine and respectfully shows the Court as follows:


2. On January 22, 2004, Susan Brown filed an Opposition to Application for Independent Administrator and Issuance of Letters of Independent Administration and Application for Probate of Written Will Not Produced and For Letters Testamentary, objecting to Movant’s appointment as Independent Administrator and seeking the probate of a Will, the original or a copy of which she cannot locate.

3. Movant requests the Court to determine in limine whether Susan Brown has the requisite interest in this Estate that would allow her to file her pleadings and to oppose the appointment of Movant as Independent Administrator.

WHEREFORE, PREMISES CONSIDERED, Movant requests that this Court determine in limine whether Susan Brown has the requisite interest to appear and file pleadings in this matter, to strike the pleadings filed by Susan Brown and for such other and further relief to which Movant may be entitled.

Respectfully submitted,

LAW FIRM

______________________________
ATTORNEY
State Bar No. ______________
Dallas, Texas ______________
Phone ______________
Fax ______________