STANDING AND ERROR CORRECTION IN PROBATE

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I. INTRODUCTION

Estate and guardianship proceedings are *in rem* and decisions are binding on the world, often without personal service or direct notice.[1] Error correction in probate is essential because incorrect decisions can adversely affect administrations for years in the future.[2] The Texas state legislature recognizes the importance of inheritance and guardianship and progressively expanded probate jurisdiction, including granting statutory probate courts exclusive jurisdiction over probate matters, and concurrent jurisdiction with district courts over trust and other matters.[3] Statutory probate courts even have the power to transfer cases in other courts around the state to their own court when the proceeding affects a pending administration—the power affectionately known by practitioners as the "reach-out-and-grab" power.[4] The legislature and courts recognize the difference between a "normal" lawsuit and an ongoing, continuing estate or guardianship administration and the need to accommodate the ability to correct errors well beyond the typical thirty days after an order is signed.[5] The first analysis in every probate proceeding is to determine the parties who have standing in an estate.[6] Persons with standing, i.e., "interested persons" may directly attack orders and judgments for up to two years after entry.[7] Courts have dispensed with the "one-final judgment" rule and instead choose how and when judgments or orders in probate become final and subject to direct appeal to appellate courts.[8] While normal finality and appellate rules apply, direct attack error correction procedures in probate are also allowed beyond the normal appellate timetables.[9] Because probate proceedings can have such a profound impact on peoples' lives and property, judges presiding over probate matters carry a high burden to follow the required procedure, get their decisions right, and afforded a "do-over," if the error standards are met.[10]

II. PURPOSE OF ERROR CORRECTION IN PROBATE

Error correction is necessary in probate because jurisdiction is *in rem* and the entire probate or guardianship proceeding, from start to finish, is

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1. TEX. EST. CODE § 32.002 (West 2014).
2. *Id.*
3. TEX. EST. CODE § 32.005 (West 2014).
4. TEX. EST. CODE § 32.003 (West 2014).
5. TEX. R. CIV. P. 329b(d).
6. Mary Galligan, *Who has standing in probate court? (or what business is it of yours?)*, https://probatecrt4.harriscountytx.gov/Documents/Who%20Has%20Standing%20in%20Probate%20Court.revisions.no%20table%20of%20contents%20title%20page.last.with%20TOC.Cora%20pg%20numbers.pdf perma.cc/GZC4-MYE5 (last visited Apr. 8, 2018).
7. TEX. EST. CODE § 452.007 (West 2014).
8. Lehmann v. Har-con Corp., 39 S.W.3d 191, 192 (Tex. 2001).
9. *In re* Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo 1929, writ ref'd n.r.e.).
10. TEX. EST. CODE § 55.251 (West 2014).

considered one proceeding.[11] "*In rem*" is a term applied to proceedings or actions instituted against the thing, that is, an action taken directly against property or brought to enforce a right in the thing itself.[12] A judgment *in rem* affects the interests of all persons in designated property.[13] Because *in rem* jurisdiction is jurisdiction over property, not a person, *in rem* judgments bind the whole world, whether the persons who have rights in the property were personally served or not.[14] The Texas Supreme Court established the significance of *in rem* proceedings, and held they bind all persons unless set aside in the manner provided by law.[15] As a result, *in rem* jurisdiction requires extended plenary power to change orders or set them aside.[16]

Error correction is so important in in rem proceedings because deciding title to property and making decisions affecting fundamental property rights have serious constitutional significance.[17] "A judgment admitting an instrument to probate as a will fixes and confirms the rights of those who are named as devisees and legatees and for those who take under them."[18] Because of *in rem* jurisdiction and entry of orders without personal due process, many times the error to be corrected is inadvertent or occurs without fault.[19] For example, facts are often discovered that were not known at the time of probate or at an heirship hearing.[20] Examples include: a self-proving affidavit was done incorrectly or was forged, but the will was still probated as a self-proven will; the will witnesses did not sign the self-proving affidavit; the will was fraudulently created, but admitted to probate because the court was not apprised of the fraud at the will prove-up hearing; an heir was forgotten or a common-law spouse was excluded; estate property was stolen by the personal representative, but not disclosed in an accounting.[21] It is imperative for probate courts to have every opportunity to get their decisions correct, so direct attack mechanisms are allowed.[22] Error correction is well established to compel compliance with "clear statutory requirements" and to promote the "need to ensure the validity of testamentary dispositions."[23] A

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11. TEX. EST. CODE §§ 32.001(d) and 1022.002(d) (West 2014); *see also* Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981) (probate proceedings are in rem); *In re* Estate of York, 951 S.W.2d 122, 126 (Tex. App.—Corpus Christi 1996, no writ) (guardianship proceedings are in rem).

12. Stephenson v. Walker, 593 S.W.2d 846, 849 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

13. Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

14. Ladehoff v. Ladehoff, 436 S.W.2d 334, 336 (Tex. 1968); Soto v. Ledezma, 529 S.W.2d 847, 850 (Tex. App.—Corpus Christi 1975, no writ).

15. Mooney, 622 S.W.2d at 85*;* Soto v. Ledezma, 529 S.W.2d at 850.

16. TEX. R. CIV. P. 324b(e).

17. Ladehoff, 436 S.W.2d at 336.

18. Stovall v. Mohler, 100 S.W.3d 424, 428 (Tex. App.—San Antonio 2002, writ denied).

19. TEX. EST. CODE § 55.251 (West 2014).

20. *Id.*

21. *Id.*

22. Matter of Estate of Jansa, 670 S.W.2e 767, 768 (Tex. App.—Amarillo 1984, no writ).

23. *Id.*

direct attack is an attempt to alter an order in a proceeding brought for that purpose.[24]

III. HISTORY OF ERROR CORRECTION

The bill of review procedure in probate originates nearly as far back as the Texas Constitution.[25] In 1884, in the case of *Heath v. Layne*, the Texas Supreme Court stated the following:

> It would seem that a proceeding in the nature of a bill of review might be instituted in the county court to revise and correct any proceeding therein had, provided it was done within the time prescribed for bringing suit by bill of review. And an appeal would be given to the district court from any final judgment by the county court in such proceeding rendered. The statute gives to any person interested in the estate the right to appeal to the district court from any decision, order, decree or judgment of the county court in matters of probate. . .[26] The party has the right also to institute his proceeding in the county court to revise and correct any proceeding therein had, within two years from the time the proceeding was had, and he also has the right of appeal from any judgment rendered therein.[27]

The Texas Supreme Court continued regarding the sale of real property out of an estate:

> . . .the doctrine has become firmly established in this state that the court has jurisdiction of the estate, and that orders of sale of real property without the notice prescribed are not void, but are irregular and voidable. And that such orders may be vacated and set aside by those interested in the estate, by direct proceeding for that purposes instituted in the tribunal and within the time prescribed by law.[28]

Recognizing the need to get the probate of wills right, the Texas Supreme Court further stated, "a proceeding to revoke the probate of a will may be instituted in the court in which the will was probated, within the time prescribed as recognized in *Franks v. Chapman*."[29] For a great outline of the history and policies behind probate error correction, see *Waters v. Stickney*, cited by the Texas Supreme Court in *Franks v. Chapman*.[30] The Supreme

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24. *In re* Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo, 1979, writ ref'd n.r.e.).
25. *See* TEX. R. CIV. P. 324.
26. Heath v. Layne, 62 Tex. 686, 691 (1884). The procedure to appeal probate decisions to the district was eliminated in 1955 with the adoption of the Texas Probate Code (now the Texas Estates Code) and Section allowing direct appellate court appeals of probate decisions.
27. Heath, 62 Tex. at 690.
28. *Id.* at 692.
29. *Id.* at 694; Franks v. Chapman, 61 Tex. 576, 576 (1884).
30. *See* Waters v. Stickley, 94 Mass. 1, 7 (1866); Franks, 61 Tex. at 576.

Judicial Court of Massachusetts in *Waters v. Stickney* cited its prior opinion in *Stetson v. Bass* where it stated:

> We think there can be no doubt of the right and authority of a judge of probate to open an account settled, for the purpose of correcting manifest mistake. In the proceedings of all courts errors and mistakes will occur, and frequently without the fault of either party, and justice requires that some method should be provided for the correction of such errors and mistakes, in whatever court they may occur. In courts of common law jurisdiction the remedy is by writ of error, motion for new trial or application for writ of review; but these remedies are not applicable to the proceedings of a court of probate. In that court, when a mistake is made in the settlement of an account, the course is to apply to the judge of probate for the correction of the mistake, by petition, or to state the amount claimed in a new account; unless when the mistake is discovered the party has a right of appeal by which it may be corrected in this Court. This practice seems to be well settled, and in several cases has received the sanction of this Court. It is indeed essentially necessary for the furtherance of justice, and ought not to be too strictly limited.[31]

Based on this, the Supreme Judicial Court of Massachusetts in *Waters v. Stickney* wrote:

> The authority of courts of probate to correct errors in their decrees on administration accounts, even when in terms final, upon clear proof of fraud or mistake in a point not once actually presented and passed upon, has been repeatedly sustained by this court and by the highest courts of Vermont and New York, and is now affirmed in this state by statute.[32]

Texas courts followed this lead and error correction is now a pillar in Texas probate jurisprudence.[33] For years, as in *Heath* above, it appears the right of a probate court to review its decisions was based mainly upon common law fraud or invalid orders of sale of land out of probate administrations.[34] For a long time, statutory error correction was mainly isolated to guardianship proceedings and certain specific probate scenarios.[35] "It seems to be the settled law of this state that although there is no statutory provision for the Bill of Review in probate matters not covered by Article 4328, R.C.S. (which apparently applies alone to guardianship matters), in the absence of

31. Stetson v. Bass, 26 Mass. 27, 30 (1829); Waters, 94 Mass. at 7.
32. Waters, 94 Mass. at 11.
33. Ladenhoff v. Ladenhoff, 436 S.W.2d 334, 336 (Tex. 1968).
34. *See* Heath v. Layne, 62 Tex. 686; Jones v. Sun Oil Co., 153 S.W.2d 571, 574 (Tex. 1941) (listing cases).
35. *Id.*

intervening rights of innocent third persons, erroneous judgments entered by the probate court may be reviewed and set aside under certain conditions."[36]

In 1955, the Texas Legislature enacted TEX. PROB. CODE § 93, allowing will contests up to two years after the will is probated, and TEX. PROB. CODE § 31, which initially provided interested persons with statutory authority to file a statutory bill of review for up to two years post-order, as follows:

> Any person interested may by a bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order or judgment shall be stayed except by writ of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order or judgment. Persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to apply for a bill of review.[37]

The latter statute applied as written to all probate actions until 1993 when it was amended to remove the tolling provision for minors and incapacitated persons.[38] Removal of the tolling provision evidences the intent of the legislature to somewhat narrow the opportunity to change probate orders.[39] The *Texas Probate Code* was later supplanted by the *Texas Estates Code* on January 1, 2014, but the bill of review statute remained unchanged.[40] Keeping the error correction process in the statutes with only slight changes evidences the effort of the Legislature to find a balance between the need to fix probate orders and allowing them to become final.[41]

IV. GENERAL STANDING AND CAPACITY

Standing is a constitutional pre-requisite to filing suit.[42] For any person to maintain suit, it is necessary that he have standing to litigate the matters at issue.[43] Generally speaking, standing consists of some interest peculiar to the person individually and not as a member of the general public.[44] A court does not have jurisdiction over a claim made by a plaintiff who does not have

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36. Union Bank & Trust Co. of Fort Worth v. Smith, 166 S.W.2d 928, 931 (Tex. Civ. App.—Fort Worth 1942, no writ) (*citing* 13 TEX. JUR., § 54, p. 639; Fortson v. Alford, 62 Tex. 576, 579 (1884); Jones v. Sun Oil Co., 153 S.W.2d 571, 574 (Tex. 1941).

37. TEX. EST. CODE § 55.251 (West 2015).

38. *See* Act of Sept. 1, 1993, 73d Leg., R.S., ch. 957, § 16, 1993 Tex. Sess. Law Serv. Ch. 957 (West) (codified at Tex. Est. Code §§ 55.251–.252).

39. *See id.*

40. *See* TEX. EST. CODE §§ 55.251–.252 (West 2015).

41. *See supra* Part III.

42. Heckman v. Williamson Cty., 369 S.W.3d 137, 150 (Tex. 2012).

43. Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984).

44. *Id.*; Mitchell v. Dixon, 168 S.W.2d 654, 656 (Tex. 1943).

standing to assert it.[45] The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit to have a "justiciable interest" in its outcome.[46] Without standing, a court lacks subject matter jurisdiction to hear the case.[47] Standing is a component of subject matter jurisdiction; therefore, it cannot be waived and can be challenged for the first time on appeal.[48]

A party must also have capacity to file or defend a suit if it has the legal authority to act, regardless of whether it has a justiciable interest.[49] Standing and capacity are often confused, but are completely separate and mutually exclusive concepts, meaning a party must have both to maintain suit.[50] The standing doctrine requires that the plaintiff have a justiciable interest in the matter in dispute.[51] Capacity, on the other hand, considers a party's personal qualifications to litigate.[52] The Texas Supreme Court distinguishes the two threshold inquiries clearly: A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.[53] A common example of a person who may have been personally aggrieved, but not have capacity to file suit, is an injured minor or incapacitated person.[54] Each lacks the legal capacity to bring the lawsuit, in which case, the lawsuit must be filed by a duly authorized person in their stead.[55]

The importance of recognizing and distinguishing between different capacities cannot be over-emphasized.[56] A person may possess many different capacities, each of which is separate and distinct by law.[57] Failing to sue a party in the correct capacity can have grave consequences and could

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45. Heckman, 369 S.W.3d at 150; State v. Naylor, 466 S.W.3d 783, 791–92 (Tex. 2015).

46. Austin Nursing Ctr., Inc., 171 S.W.3d 845, 848 (Tex. 2005).

47. Tex. Ass'n of Bus., 852 S.W.2d 440, 443(Tex. 1993).

48. West Orange-Cove Consol. ISD v. Alanis, 107 S.W.3d 558, 583 (Tex. 2003); Tex. Ass'n of Bus., 852 S.W.2d at 445.

49. *See* Coastal Liquids Transp. v. Harris Ct. Appr. Dist., 46 S.W.3d 880, 884 (Tex. 2001); Nootsie, Ltd. v. Williamson Ct. Appr. Dist., 925 S.W.2d 659, 661 (Tex. 1996); Christi Bay Temple v. GuideOne Specialty Mut. Ins., 330 S.W.3d 251, 253 (Tex. 2010). Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848–49 (Tex. 2005).

50. Coastal Liquids Transp. v. Harris Ct. Appr. Dist., 46 S.W.3d 880, 884 (Tex. 2001).

51. Cleaver v. George Staton Co., Inc., 908 S.W.2d 468, 469 (Tex. App.—Tyler 1995, writ denied) (citing Tex. Ind. Traffic League v. R.R. Comm'n, 633 S.W.2d 821, 823 (Tex.1982)).

52. *See* Austin Nursing Ctr., Inc., 171 S.W.3d. at 848.

53. Austin Nursing Ctr., Inc. 171 S.W.3d 845 at 848–49 (citing Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex.1996)); *see also* 6A Wright, Miller, & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1559, at 441 (Capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest).

54. See 6A C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1559 (3d ed. 2017).

55. *See* Byrd v. Woodruff, 891 S.W.2d 689, 704 (Tex. App.—Dallas 1994, writ dism'd).

56. See 6A C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1559 (3d ed. 2017).

57. *See id.*

even be malpractice.[58] An individual in one capacity has no connection with himself or herself in a different capacity:

> "A person who sues or is sued in his official capacity is, in contemplation of the law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual. It is equally true that a person in his individual capacity is a stranger to his rights and liabilities as a fiduciary or in a representative capacity."[59]

Other examples of an individual possessing multiple capacities include: an individual, executor/administrator, trustee, guardian, agent under power of attorney, partner or corporate officer, and the list goes on.[60] Even though one person possesses two or more of these capacities, each of these capacities is separate and distinct; as separate in the law as two different individuals are.[61] Distributions of inheritance to a trustee or guardian, for instance, must be made in those capacities, not to the individual holding those capacities.[62] Additionally, claims against an estate must be filed against the personal representative and cannot be pursued against the individual appointed as a personal representative.[63] A suit to collect filed against the individual serving as executor or administrator would be frivolous on its face.[64] If the same lawsuit filed and served on that same individual just prior to the expiration of the statute of limitations and later served on him or her as executor after the statute of limitations, the claim would be barred against the estate because the creditor sued and served the wrong party.[65] The same would be true if the individual attempted to sue on behalf of the estate — such suit would lack capacity, i.e., without authority.[66] These distinctions are crucial to all probate and guardianship matters.[67]

A. Standing in Probate Requires More

Existence of standing is a question of law.[68] For any person to maintain a suit, it is necessary that he or she have standing to litigate the matters at

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58. *See id.*
59. Elizondo v. Nat. Res.'s Conservation Comm'n, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.), *quoting* Alexander v. Todman, 361 F.2d 744, 746 (3d Cir. 1966).
60. See 6A C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1559 (3d ed. 2017).
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.*
67. *See supra* Part IV.
68. A&W Ind.'s, Inc. v. Day, 977 S.W.2d 738, 741 (Tex. App.—Fort Worth 1998, no pet.).

issue.[69] However, "the probate code generally places a heavier burden on the would-be litigant in probate matters requiring that the party qualify as an 'interested person.'"[70] "[B]efore one may prosecute a proceeding to probate a will or contest such a proceeding he must be, and if called upon to do so must prove that he is, a person interested in the estate."[71] "'Interested person' or 'person interested' means: (1) an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; and (2) anyone interested in the welfare of an incapacitated person, including a [minor]."[72] Interested persons may file, object to or be heard regarding "the thing", and are considered to have constructive notice of all filings and matters in probate proceedings.[73] As a result, any "interested person" is statutorily entitled to appear, and be heard, on any matter affecting the property (thing): "A person interested in an estate may, at any time before the court decides an issue, file written opposition. The person is entitled to process for witnesses and evidence, and to be heard on the opposition, as in other suits."[74]

This seemingly anoints standing on any interested person to be heard in any matter pending in the probate proceeding.[75] However, probate standing requires more than normal standing and not all probate standing qualifies the party to be heard on every matter.[76] In a contested matter, probate standing has two mandatory requirements: the party-litigant must (1) have general standing, i.e., been personally aggrieved (lost something/incurred damages) creating a justiciable interest and (2) be an "interested person" in the estate.[77] Obviously, the "interested person" with a justiciable interest must also have capacity to maintain suit.[78] To participate in the proceeding all three requirements must be met.[79] The latter seeks to prevent a "mere interloper" from intermeddling in the estate matter, but courts often blur these separate and distinct requirements based upon the definition of an "interested person."[80]

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69. *Id.*

70. *Id.*

71. Womble v. Atkins, 331 S.W.2d 294, 297–98 (Tex. 1960); *see also A&W*, 977 S.W.2d at 741 ("the burden of proof is on the person whose interest is challenged to present sufficient evidence . . . to prove that he is an interested person.").

72. TEX. EST. CODE §§ 22.108, 1002.018 (West 2014).

73. Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981) (citing Salas v. Mundy, 125 S.W. 633, 636 (Tex. Civ. App.—Amarillo 1910, writ ref'd) ("Persons interested in an estate admitted to probate are charged with notice of the contents of the probate records.")).

74. TEX. EST. CODE § 55.001 (West 2014).

75. *See id.*

76. TEX. EST. CODE § 22.018 (West 2014).

77. *Id.*

78. See Cunningham v. Fox, 879 S.W.2d 210, 212 (Tex. App.—Houston 1994, writ denied).

79. *See id.*

80. *In re* Estate of Redus, 321 S.W.3d 160, 162 (Tex. App.—Eastland 2010, no pet.) (Limiting will contestants to interested persons prevents those with no interest in a decedent's estate from "intermeddling with its administration.").

Two examples of courts that applied a fictional "bright line" rule that an "interested person" automatically has standing for all purposes in an estate proceeding, including to contest a will, are *In re McDonald*[81] and *Valdez v. Robertson*.[82] These cases are directly inconsistent with long-standing law requiring an interested person to have a pecuniary interest in the outcome of a will contest or probate proceeding to establish standing.[83] Notwithstanding definitional interested person status, creditors lack standing to contest a will because they do not have a pecuniary interest in the proceeding's outcome.[84] Stated another way, it is impossible for a creditor to prove the probate of any will would directly affect the estate's ability to pay the claim because, while all inheritance vests immediately in the estate's beneficiary, or heirs, it is subject to administration of the estate, which necessarily includes payment of valid creditor claims.[85] Creditors get paid before any inheritance is distributed, so the outcome of a will contest has no bearing whatsoever on whether the creditor will get paid.[86]

It is well established in Texas law that an executor of an estate is not an interested person with property rights in, or claims against, an estate.[87] Therefore, executors have no right or duty to contest a purported will.[88] Persons designated as an independent executor in a Will, but not yet appointed, have no obligation to defend the Will naming them.[89] This is supported by statute where a "named executor" is designated as a person who may file a will for probate,[90] but is not included in the statute establishing who may file a will contest, i.e., interested persons.[91] This difference is

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81. In re McDonald, 424 S.W.3d 774 (Tex. App.—Beaumont 2014, pet. denied) (Claimant, who paid funeral expenses, was an "interested person").

82. Valdez v. Robertson, 2016 WL 1644550 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (Attorney, who represented daughter of proposed ward in guardianship, held an "interested person" as a claimant for attorneys' fees against that now deceased ward's estate and was allowed to contest probate of deceased ward's will).

83. *See, e.g.*, Logan v. Thomason, 202 S.W.2d 212, 216 (Tex. 1947); Moore v. Stark, 17 S.W.2d 1037, 1041 (Tex. 1929).

84. *Id.*

85. TEX. EST. CODE § 101.001(a–b) and 101.051(a–b) (West 2014).

86. TEX. EST. CODE § 101.051 (West 2014).

87. In re Estate of Bendtsen, 230 S.W.3d 832, 834 (Tex. App. 2007) (citing Cunningham v. Fox, 879 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1994, writ den.) (citing Muse, Currie and Kohen v. Drake, 535 S.W.2d 343 (Tex. 1976)); TEX. EST. CODE 22.108 (Executors and administrators not included in definition of "interested person").

88. *In re* Estate of Bendtsen, 230 S.W.3d 832, 934 (Tex. App.—Dallas 2007, no pet.) (ruling that a named executor in unprobated will was not an interested person and did not have standing to oppose proceedings in the estate because she did not meet the statutory requirements, "nor does she have any pecuniary interest in the estate, which well-settled Texas law requires.") (citing Cunningham v. Fox, 879 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1994, writ denied)); *see also* Muse, Currie & Cohen v. Drake, 535 S.W.2d 343, 344 (Tex. 1976) ("It is apparent, therefore, that an administrator has no right or duty to contest a purported will of the decedent.").

89. In re Estate of Robinson, 140 S.W.3d 801, 808–09 (Tex. App.—Corpus Christi 2004, pet. dism'd).

90. TEX. EST. CODE § 256.051 (West 2015).

91. TEX. EST. CODE § 256.204 (West 2014).

deliberate; the legislature did not intend a named executor to have standing to contest a will.[92] Executors, administrators, and personal representatives are not included in the definition of "interested person" and do not have a justiciable interest that gives them standing to file a will contest or a probate bill of review.[93]

B. Standing to Correct Error

To file (and certainly to prosecute) any direct attack on a probate order or judgment, a prerequisite is establishing interested person status.[94] The *Cunningham* court strictly construed the probate bill of review section to mean only those individuals defined as "interested persons" in TEX. PROB. CODE § 3(r) and excluded personal representatives from that group. [95] Because executors, administrators, and personal representatives are not interested persons, they do not have interest or standing to commence or prosecute statutory probate bills of review.[96] However, courts in at least three cases prior to *Cunningham* have taken a broader view of who may file to correct error pursuant to the probate bill of review section.[97]

The court in *Tindal v. Texas Dept. of Mental Health and Mental Retardation*, cited the Supreme Court in *Logan v. Thomason*, which "ruled on the constituent elements of an interested person as follows" in statutory bill of review proceedings:

> the interest [of an interested person] 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 basis other than gain or loss of money . . . is insufficient. Thus the burden is on every person . . . offering [a will] for probate, to . . . prove . . . some legally ascertained pecuniary interest, real or

92. *See generally* Beverly Bird, *"Interested Person" Probate Definition*, LEGALZOOM, http://info.legalzoom.com/interested-person-probate-definition-21724.html perma.cc/DPN6-YH8M (last visited Apr. 6, 2018) (providing definitions of interested persons and fiduciaries, including executors).

93. *See* Cunningham, 879 S.W.2d at 212 (an executor could not file a bill of review because he was not an "interested person" within the meaning of the statute); Muse, Currie and Kohen v. Drake, 535 S.W.2d 343, 344 (Tex. 1976); Travis v. Robertson, 597 S.W.2d 496, 497 (Tex. Civ. App.—Dallas 1980, no writ).

94. Cunningham v. Fox, 879 S.W.2d 210, 211–12 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (*citing* Womble v. Atkins, 331 S.W.2d 294, 297–98 (Tex. 1960); Jones v. LaFargue, 758 S.W.2d 320, 323 (Tex. App.—Houston [14th Dist.] 1988, writ denied); and *In re* Estate of Hill, 761 S.W.2d 527, 528 (Tex. App.—Amarillo 1988, no writ)); *see also* A&W Indus., Inc. v. Day, 977 S.W.2d 738, 741 (Tex. App.—Fort Worth 1998, no pet.).

95. Now, TEX. EST. CODE § 22.018 (West 2014).

96. Cunningham, 879 S.W.2d at 212; Nadolney v. Taub, 116 S.W.3d 273, 276 (Tex. App.—Houston [14th Dist.] 2003, writ denied) (citing Cunningham with approval).

97. *See infra* Part I.

> prospective, absolute or contingent, which will be impaired or benefited or in some manner materially affected.[98]

The Court then held that the State of Texas is a person interested in a guardianship estate for purposes of recovering actual costs for reimbursement of support, maintenance, or treatment of a ward.[99]

The court in *Westchester Fire Insurance Co. v. Nuckols*,[100] following the lead of the *Tindal* Court, also found a more broad interpretation of interested person as follows: "'[a]ny person interested' should be given its natural meaning. This phrase has been construed as anyone who is injured in a legal sense. An interest exists in an action which creates or determines a liability or pecuniary loss or gain depending upon the result of a trial."[101] The Court went on to hold the surety (company) was authorized to perfect a direct appeal by bill of review.[102]

Another court allowed an independent executor to file a statutory probate bill of review regarding the alleged invalidity of a decree confirming sale in absence of the prerequisite report of sale and corresponding due process[103] After the trial court denied the bill of review, the appellate court reversed the decision and rendered in favor of the independent executor.[104] In *dicta*, the appellate court stated that even though the independent executor was entitled to raise the complaint by bill of review, neither court specifically decided the issue of the independent executor's standing to file the bill of review, presumably because it was never raised by any party to the action.[105] The issue in *Walker* was very similar to the one addressed in *Nadolney v. Taub*, in that they both involved administration issues.[106] The court noted in *Nadolney* that the executor could not bring the action, but allowed the same individual in her capacity as devisee to proceed with the action; there is no indication that standing was ever raised or considered by the trial or appellate court.[107]

The various scenarios confuse the issue because they support both a narrow and broad interpretation of "any interested person."[108] Some support an interpretation of interested person which includes an independent

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98. Tindal v. State, 656 S.W.2d 176, 178 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); Logan v. Thomason, 202 S.W.2d 212, 215 (Tex. 1947).

99. *See* Tindal, 656 S.W.2d at 178.

100. Westchester, 666 S.W.2d 372, 374 (Tex. App.—Eastland 1984, writ ref'd n.r.e.).

101. Persky v. Greever, 202 S.W.2d 303, 306 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.).

102. Westchester, 666 S.W.2d at 374.

103. Walker v. Sharpe, 807 S.W.2d 448, 449 (Tex. App.—Corpus Christi 1991, writ denied).

104. *Id.* at 451.

105. *Id.*

106. Nadolney v. Taub, 116 S.W.3d 273, 275 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

107. *Id.* at 276.

108. *See generally Interested Person (Probate) Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/i/interested-person-probate/ perma.cc/SK36-938E (last visited Apr. 8, 2018) (explaining that the definition of an interested person can change depending on the time and circumstance).

executor, the State of Texas, and a surety, because each of them would be interested in "an action which creates or determines a liability or pecuniary loss or gain depending upon the result of the trial."[109] However, each of them in their particular case was affected by the decision and each affected the administration of the estate.[110] The Fort Worth Court of Appeals confirmed this analysis in *A&W Indus., Inc. v. Day* when it affirmed the trial court's holding that a contract claimant was not an interested person for purposes of attempting to remove the independent co-executors and, therefore, lacked standing.[111] While this was not an error correction case, the logic follows that a person interested for a specific purpose, i.e., to establish a pecuniary interest (a claim), and not otherwise, was not an interested person for general purposes in the estate.[112] The relief requested—to remove the independent executor—was not directly related to the contract claimant's claim.[113]

Determination of standing for all purposes in an estate is not automatic and is not a question of whether to strictly or liberally construe the definition of interested person, but rather is based upon the pecuniary interest of the interested person asserting a position.[114] If the issue raised involves inheritance or title to property, then only persons interested in those issues may be heard.[115] Rhetorically, does the issue before the court affect a pecuniary interest of the interested person?[116] If the issues involve an interest affected by the administration, then interested person status may extend to others.[117] For instance, if a personal representative refuses to pursue valuable assets belonging to an estate that makes the estate insolvent for purposes of paying claims, a creditor would have the requisite pecuniary interest to file a motion to show cause or to remove that personal representative.[118]

On the other hand, in an estate that is grossly solvent, i.e., a $20 million estate with a creditor who claims to be owed $60,000.00, that same creditor may lack standing to file a motion to show cause or to seek removal of the personal representative because there is very little jeopardy of the estate

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109. *See generally Glossary of Terms Important in Inheritance Issues in Texas*, TEXAS INHERITANCE, http://www.texasinheritance.com/faq/glossary-of-probate-terms-mainmenu-30/297-find-out-who-is-an-interested-party-for-probate-purposes perma.cc/B39E-QMDD (last visited Apr. 8, 2018) (discussing the pecuniary interests of interested persons).

110. A & W Indus., Inc. v. Day, 977 S.W.2d 738, 740 (Tex. App.—Fort Worth 1998, no pet.).

111. *Id.*

112. *Id.* at 742.

113. *Id.*

114. *Id.*

115. *Id.* at 741.

116. *Id*. at 741–42.

117. *See generally* Mary Galligan, Tammy C. Manning, & Michael J. Galligan, WHO HAS STANDING IN PROBATE COURT? (OR WHAT BUSINESS IS IT OF YOURS?) 3 (Galligan & Manning) (discussing the burden placed on those trying to establish standing and how it affects their court process).

118. *A & W Indus*, at 741–42.

being unable to pay the claim, if any.[119] To further eliminate risk of non-payment, an amount sufficient to pay the claimant's disputed claim or an established creditor's claim may be deposited into the court registry and earmarked for payment of the claim, subject to litigation over establishing the claim, thereby eliminating that creditor's standing other than to establishing the right to be paid by the estate or from the deposited fund.[120] Similarly, a specific bequest beneficiary not otherwise interested in the estate would lose "interested person" status as soon as the specific bequest is paid, since nothing that happens in the proceeding will affect the completed bequest.[121] These parties qualify as interested persons, but their pecuniary interest is eliminated and they should not be allowed to intermeddle in an estate, once they cannot be affected by the proceeding.[122]

Under the current law, as written, a creditor of an estate is an "interested person" but there is absolutely no distinction between a creditor and any other interested person or a creditor and a claimant.[123] Anyone can come forward with their hand-out and claim the decedent owed them money.[124] But, until such claim is proven via well-established claims procedure, that claimant is, by definition, not a creditor.[125] Failure to differentiate between a claimant and a creditor creates aberrational scenarios of imposters concocting bogus claims against an estate and, per the current statute, being instantly afforded "interested person" status equal to that of a beneficiary or an heir.[126] Under current law, the way most courts interpret TEX. EST. CODE § 22.018, is that a claimant—not an actual creditor or beneficiary—has the following rights: the ability to file a will contest, a bill of review, demand or file for an accounting, the ability to file for construction of the will or other documents, to remove a personal representative, request a court to declare a forfeiture of inheritance or any other assertion an "interested person" could make.[127] Bad actors or someone with a grudge against the decedent or a beneficiary or heir could cause huge loss to the estate in the form of attorneys' fees and expenses by claiming to be owed money by the estate and filing various claims that,

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119. *See generally* Anna Assad, *Probate Creditors' Rights Under Texas Law*, LEGALZOOM, http://info.legalzoom.com/probate-creditors-rights-under-texas-law-21870.html perma.cc/3NS2-D6LV (last visited Apr. 8, 2018) (discussing debt priority and claims).

120. *Id.*

121. *See generally Specific Bequests*, LEGALZOOM, https://www.legalzoom.com/knowledge/last-will/topic/specific-bequests perma.cc/ZK66-HZVF (last visited Apr. 8, 2018) (discussing specific bequests in estates).

122. *See generally* Keith Davidson, *Do you have standing? Who has the right to file a Trust or Will contest?* Albertson & Davidson (Jan. 31, 2018) http://www.aldavlaw.com/2018/01/standing-right-file-trust-will-contest/ perma.cc/Y8SU-THTK (explaining that a "party must have a property right that will be affected by the lawsuit).

123. *See supra* note 92.

124. A & W Indus., Inc. v. Day, 977 S.W.2d 738, 741 (Tex. App.—Fort Worth 1998, no pet.).

125. *Id.*

126. TEX. EST. CODE ANN. § 22.018 (West 2014).

127. *See supra* note 92.

frivolous or not, the estate must exert the time and resources to defend.[128] It also allows a creditor defendant to file dilatory pleas and cost the estate large sums to attempt to extort a resolution—dilatory pleas not otherwise available without interested persons status.[129] The rights allowed an unproven claimant under TEX. EST. CODE § 22.018 are a travesty and directly violates the holding in *A&W Industries* and many other cases establishing the policy against such interference with estates by outsiders.[130] Only after satisfying the three requirements of (1) "interested person" status, (2) a pecuniary interests and (3) capacity, should a party be allowed to file error correction proceedings in an estate, and, even then, only to the extent the issue may affect their pecuniary interest.[131]

C. Raising Standing in Probate

In the probate context, "interested person" status should be tried *in limine* before trial, with the burden of proof on the person seeking to establish interest, once raised and called upon to do so. Some cases which have supported this concept are *Cunningham*,[132] *Womble*,[133] *Jones v. LaFargue*,[134] and *Hill*.[135] "When called upon to do so, and in a separate hearing in advance of a trial of the issues affecting the validity of the will, a potential contestant must prove [his] interest in the estate."[136] As a general rule, where the issue of standing is unchallenged, the trial court looks only to the plaintiff's allegations set forth in the pleadings to determine whether he has alleged jurisdictional facts.[137] It is important to remember that the interested person or purported interested person will be required to prove standing only after a party to the action has raised and challenged the issue.[138] Also, to be entitled to relief under a statutory bill of review, it is necessary to "specifically allege and prove substantial error by the trial court" and it is "not necessary that the error appear on the face of the record."[139] Instead, the error "may be proven

128. Author Hypothetical.

129. *See generally Dilatory Plea*, THE LEGAL DICTIONARY, https://legal-dictionary.thefreedictionary.com/Dilatory+Plea perma.cc/FEW6-CFHS (last visited Apr. 9, 2018) (explaining a dilatory plea).

130. A & W Indus., Inc. v. Day, 977 S.W.2d 738, 742 (Tex. App.—Fort Worth 1998, no pet.).

131. Author recommendation.

132. Cunningham v. Fox, 879 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

133. Womble v. Atkins, 331 S.W.2d 294, 298 (1960).

134. Jones v. LaFargue, 758 S.W.2d 320, 323 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

135. *In re* Estate of Hill, 761 S.W.2d 527, 528 (Tex. App.—Amarillo 1988, no writ).

136. *In re* Estate of Redus, 321 S.W.3d 160, 162 (Tex. App.—Eastland 2010, no pet.).

137. A&W Indus., Inc., 977 S.W.2d at 741 (*citing* Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)).

138. *Id.*

139. *McDonald v. Carroll*, 783 S.W.2d 286, 288 (Tex. App.—Dallas 1989, writ denied).

at trial."[140] Once the court makes a determination of a lack of interest (i.e., lack of standing), it is not interlocutory, but is a final appealable judgment.[141]

In *Womble v. Atkins*, the Texas Supreme Court recognized "interested person" status in a will contest as a threshold issue.[142] The court held:

> It is too well settled to admit of argument that before one may prosecute a proceeding to probate a will or contest such a proceeding he must be, and if called upon to do so must prove that he is, a person interested in the estate.[143] 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.[144] 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.[145]

There is a long history of cases holding "the proper procedure is to try the issue of interest separately in an in limine proceeding and in advance of trial on the merits of a will contest."[146]

In *Estate of Matthews*, the opposing party did not challenge the contestant's status as an interested person by a pre-trial proceeding; rather, they raised the issue for the first time in a motion for judgment notwithstanding the verdict.[147] The court held that the failure to challenge the contestant's status as an interested person by pre-trial proceeding waived the complaint, citing the following support for its holding:

> *Contra Womble*, 331 S.W.2d at 297–98 (*The proper procedure is to try the issue of interest separately and in advance of a trial of the issues . . .*); *Chalmers*, 154 S.W.2d at 642 *([T]his exception [to interested person status]*

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140. *Id.*; *see also Ablon v. Campbell*, 457 S.W.3d 604, 609 (Tex. App.—Dallas 2015, pet. denied) and *In re Estate of Cunningham*, 390 S.W.3d 685, 687 (Tex. App.—Dallas 2012, no pet.) (*The error need not appear on the face of the record; but if it does not, the party filing the bill of review must prove the error at trial by a preponderance of the evidence."*). This raises the issue addressed below of whether a party is entitled to a jury trial on these fact questions in a probate bill of review proceeding.

141. *Crowson v. Wakeham*, 897 S.W.2d 779, 781 (Tex. 1995); *Cunningham*, 879 S.W.2d at 212; *Womble*, 331 S.W.2d at 298.

142. The same was held in *In re Estate of Hill*, 761 S.W.2d 527, 528 (Tex. App.—Amarillo 1988, no writ).

143. Abrams v. Ross' Estate, Tex. Com. App., 250 S.W. 1019; Moore v. Stark, 17 S.W.2d 1037.

144. Davenport v. Hervey, 30 Tex. 308, 327; Newton v. Newton, 61 Tex. 511; Chalmers v. Gumm, 154 S.W.2d 640.

145. Womble v. Atkins, at 297–98.

146. Estate of Matthews III, 510 S.W.3d 106, 114–15 (Tex. App.—San Antonio 2016, pet. denied); *In re* Estate of Perez-Muzza, 446 S.W.3d 415, 419 (Tex. App. 2014); *In re* Estate of Redus, 321 S.W.3d 160, 162 (Tex. App.—Eastland 2010, no pet.); Cunningham v. Fox, 879 S.W.2d 210, 211–12 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Matter of Estate of Hill, 761 S.W.2d 527, 528 (Tex. App.—Amarillo 1988, no writ); Jones v. LaFargue, 758 S.W.2d 320, 323 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Turcotte v. Trevino, 499 S.W.2d 705, 720 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.); Chalmers v. Gumm, 137 Tex. 467, 154 S.W.2d 640 (1941); Newton v. Newton, 61 Tex. 511 (1884).

147. Estate of Matthews, at 114.

> *must be taken in limine, and could form no part of the inquiry after an issue had been made upon the merits.*) (quoting *Newton v. Newton*, 61 Tex. 511, 512 (1884)); *Estate of Hill*, 761 S.W.2d at 528.[148]

The burden is upon every person who opposes the probate of a will to allege, and if required, prove that he has some interest in the estate of the testator; however, the proponents of the will must, by timely demand, put contestants upon proof of the facts relating to their interest.[149] Similarly, in *Villegas v. Griffin Indus.*,[150] a purported common law spouse brought wrongful death and survivorship claims for the death of her purported common law husband.[151] The court stated that all the claims she asserted were dependent on her status as the decedent's common law spouse.[152] The defendants in that case filed an answer and, after plaintiff rested her case in chief, filed a motion for directed verdict that plaintiff did not prove the marriage and lacked standing.[153] The trial court granted the motion for directed verdict and dismissed all the plaintiff's claims. On appeal, the court affirmed the trial court.[154] If the parties tried the marriage first and separately, then the case would have never gotten that far.[155]

D. Case Study for Statutory Change

A creditor should never be allowed to seek construction of a Will, invoke an *in terrorem* clause to seek a declaration of forfeiture of inheritance, seek removal of a personal representative or be heard on any matter having nothing to do with the claim.[156] More importantly, a mere claimant is, by definition, an officious intermeddler who should never be granted interested person status and should lack standing in an estate other than standing necessary to prove the purported claim under statutory claims procedure.[157] Due to courts blurring the requirements and broadly construing the "interested person" definition to allow any interested person to participate

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148. *Estate of Matthews*, at 114 (citing *Womble*, 331 S.W.2d 297–98 ("the proper procedure is to try the issue of interest separately and in advance of a trial of the issues. . .")) (citing *Chalmers*, 154 S.W.2d at 642 ("This exception [to interested person status] must be taken in limine, and could form no part of the inquiry after an issue had been made upon the merits")).

149. *Turcotte v. Trevino*, 499 S.W.2d 705, 720 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.).

150. Villegas v. Griffin Indus, 975 S.W.2d 745 (Tex. App.—Corpus Christi 1998, pet. denied).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 751.

155. *Id.*

156. Logan v. Thomason, 202 S.W.2d 212, 217 (Tex. 1947) (indicating that a creditor is not an "interested person" because "it is immaterial by whom the claim is paid, or whether the assets are administered under the will, or as in the case of intestacy").

157. TEX. EST. CODE ANN. § 355, *et. seq.* (for dependent administrations) and TEX. EST. CODE § 403.051, *et. seq.* (for independent administrations).

in all aspects of the probate proceeding, the legislature must clarify the statute.[158] These real cases that have occurred, contrary to the intent of the legislature.[159]

1. The Current Statute

Est. § 22.018. INTERESTED PERSON; PERSON INTERESTED
"Interested person" or "person interested" means:
(1) an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; (Emphasis added) and
(2) anyone interested in the welfare of an incapacitated person, including a minor.

Statement of Needed Change. A "creditor" must be an actual, established and proven creditor of an Estate before being allowed to interfere with the Estate in any way.[160] Claimants who assert they are owed money or property are just that—a claimant.[161] Until claimants successfully prove their claims and show the estate actually owes the money or property, claimants should not have standing or the right to be heard on anything other than to establish the claim; in other words, claimants have to prove they are actually owed money before they have any rights in an estate.[162] Claimants should not have "interested person" status in an estate based upon the mere thin, unsupported, fictitious or even deliberately concocted allegation that the estate owes the claimant money.[163] Anyone can say an estate owes money, but it is the claimant's burden to prove the money is actually owed.[164] Until a right to be paid is proven, a claimant should not be allowed the rights of an interested person.

2. Scenario Justifying Change in Statute — A Claimant, not Creditor, Interfered With Estate

Consider the following real-life scenario: a daughter of a decedent became successor executor of the decedent's estate.[165] The former executor was removed and he and his lawyer and his lawyer's law firm were sued by

158. A & W Indus., at 741–42.

159. *Id.*

160. TEX. EST. CODE ANN. § 22.018 (West 2018).

161. *Compare* TEX. EST. CODE ANN. § 22.018 (West 2018); *see also supra* Part IV.D (arguing reasons for statutory change).

162. *Compare* TEX. EST. CODE ANN. § 22.018 (West 2018); *see also supra* Part IV.D (arguing reasons for statutory change).

163. *Id.*

164. *Id.*

165. Author Hypothetical (these scenarios are drawn from the Author's own practice that the author has since amalgamated to demonstrate the divergence between legislative intent and effect).

the successor executor for civil conspiracy and overpayment of federal estate tax, mismanagement and breach of fiduciary duty and legal malpractice costing the estate millions of dollars.[166] The attorney and his law firm alleged in a counter-claim the estate owed them attorneys' fees and expenses, based upon the representation of the former executor with whom they had contracted.[167] The successor executor denied the allegations because the former executor agreed to the contract in his individual capacity, not in his executor capacity, and he incurred some of the fees for representing him in his divorce.[168] The attorney or law firm never presented a claim to the former executor but submitted one to the successor executor for $118,297.37.[169] It was later reduced to just over $92,000.00 because they knew they could not prove the estate owed the difference; so, at least, some of the estate's denials of liability were correct.[170] There were disputed fact issues about whether the estate owed any fees and, if so, how much.[171]

Notwithstanding that the attorney and his firm had yet to prove their claim and were mere claimants, not creditors, they had the same "interested person" status as a "creditor" equal to a surviving spouse, heir or beneficiary, and as a result, filed the following dilatory pleas:

a. to have the successor independent executor removed;
b. to require the successor independent executor to post a bond;
c. to require the successor independent executor to prepare and file an accounting;
d. requested a declaratory judgment action seeking a forfeiture of the inheritance rights of the successor independent executor in her individual capacity; and
e. requested the successor independent executor be sanctioned because she refused to pay the yet unproven claim/debt.[172]

The aforementioned defense tactics were designed to cause the estate to incur so much expense that it would be forced to quit and dismiss its lawsuit against them.[173] To eliminate their standing and ability to continue to file dilatory pleas in hopes of saving the estate money, the successor executor deposited $118,297.37 from estate funds (the full alleged amount of the original claim) into the registry of the court, subject to the dispute over the validity of the claim.[174] The amount on deposit more than covered the

166. *See supra* note 167.
167. *See supra* note 167.
168. *See supra* note 167.
169. *See supra* note 167.
170. *See supra* note 167.
171. *See supra* note 167.
172. *See supra* note 167.
173. TEX. EST. CODE ANN. § 22.018 (West 2018).
174. *Compare* TEX. EST. CODE ANN. § 22.018 (West 2018); *supra* Part IV.D (arguing reasons for statutory change).

adjusted claim with interest.[175] With the funds in the court registry, there was zero risk that the claim would not be paid, yet the claimant had full "interested person" status under the statute and was able to disrupt the estate administration for almost two years with dilatory pleas, completely avoiding the litigation against them.[176] The unproven claim was for just over $92,000.00 in an estate they over-valued at $33,000,000.00[177] on the Estate tax return.[178] The attorney and his law firm should have never been able to file the dilatory pleas, but the court could not find they lacked standing under the current definition of "interested persons," which anointed them "creditors."[179] These dilatory pleas cost the estate hundreds of thousands of dollars and almost two years of time.[180] Creditors got paid in due course of administration, and the administration was on going.[181] The legislature should remove full "interested person" status for claimants because anyone could allege the estate owes them money and, without having to prove it, could interfere with the administration.[182]

Key to the analysis of creditor standing is that creditors should not hold the same position in an estate as a spouse, beneficiary or heir, because their interest is limited to collection of their claim and the personal representative does not owe creditors the same fiduciary duties and obligations as they owe a spouse, beneficiary, or heir.[183] "[A]n independent executor does not hold the estate property in trust for the benefit of the estate creditors and therefore does not owe them a fiduciary duty."[184] Creditors should never have full interested person status—meaning, a creditor should not be allowed to file a will contest. Absent a specific provision in a Will affecting payment of claims, it is fundamental that the determination of which Will to probate, if any, has no effect on a creditor, since the outcome of the will contest does not affect payment of claims, i.e., disposition of the estate is irrelevant to payment of claims, since the latter occurs only after due administration.[185] Further, a creditor should not be allowed to seek a construction of a will or seek the removal of a personal representative or complain about any other

175. *Id.*

176. *Id.*

177. *Id.* The Internal Revenue Service agreed with the Successor Executor and reduced the originally reported value ($33,000,000) to $26,000,000.00 and the Estate received a refund check in excess of $3,100,000.00 ($2,400,000.00, plus seven years of interest). So, the Successor Executor's allegation that the former executor and his attorneys overvalued the gross Estate and therefore, over-paid estate taxes turned out to be correct.

178. *Id.*

179. *Id.*

180. These facts represent a hypothetical situation created by the author.

181. *Id.*

182. Logan v. Thomason, 202 S.W.2d 212, 217 (Tex. 1947) (indicating that a creditor is not an "interested person" because "it is immaterial by whom the claim is paid, or whether the assets are administered under the will, or as in the case of intestacy").

183. Mohseni v. Hartman, 363 S.W.3d 652, 658 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

184. *Id.*

185. TEX. EST. CODE § 101.051.

administrative matter unless it affects payment of the claim or prevents the creditor from enforcing an established claim or judgment against the estate.[186] In *Mohseni v. Hartman*, the Court held "Mohseni, as an unsecured estate creditor, qualifies as an 'interested party.'"[187] "However, the limited nature of the remedy—removal—and the higher bar for obtaining it—proof of gross misconduct—make it clear that § 149C[188] does not create an ordinary duty of care owed to an unsecured creditor that may be breached by mere negligence."[189] Creditors standing should be limited to whatever is necessary to present and prove their claim; anything greater destroys the efficient administration policies in probate.[190]

3. Suggested Change to the Texas Estates Code

TEX. EST. CODE § 22.005. CLAIMS; CLAIMANT; CREDITOR. In this section:

(a) "Claims" includes:

(1) liabilities of a decedent that survive the decedent's death, including taxes, regardless of whether the liabilities arise in contract or tor or otherwise;
(2) funeral expenses;
(3) the expense of a tombstone;
(4) expenses of administration;
(5) estate and inheritance taxes; and
(6) debts due such estates.

(b) "Claimant" means a person or entity who asserts that an estate owes the person or entity money or property, but has yet to prove or establish the claim. A claimant is not an "interested person" or "person interested" in an estate, except for the purpose of establishing the claim against the estate to take an action necessary to prove a claim or to obtain approval and classification of the creditor's claim or to enforce payment or to seek an administration of an estate solely to establish a claim against the estate.

(c) "Creditor" means a person or entity who has established a claim against an estate by judgment, court order, or any other method of establishing a claim in this Code against an estate that has been allowed or approved. Once the claim is established and approved, a creditor may be considered an "interested person" or "person interested" in an estate only for the limited purpose of enforcing the creditor's claim. A creditor may not:

(1) file a will contest under 256.204;
(2) demand or require an accounting or distribution under Section 404.001 or 405.001, unless the estate is or is allegedly insolvent;

186. *Id.*

187. *Id.* at 659; TEX. PROB. CODE § 3(r) (West Supp. 2009) ('Interested persons'. . . means heirs, devisees, spouses, [or] creditors.), TEX. EST. CODE ANN. § 22.018.

188. Now, TEX. EST. CODE ANN. § 404.003 (West 2015).

189. Mohseni, 363 S.W.3d at 659.

190. *Id.*

> (3) seek removal of a personal representative under Section 404.003 or Subchapter B, Chapter 361; or
> (4) notwithstanding any other provision of this code, file or object to any other matter relating to the administration of an estate, other than an action necessary to collect the claim.
>
> TEX. EST. CODE § 22.018. INTERESTED PERSON; PERSON INTERESTED; CREDITOR; CLAIMANT. In this section:
>
> "Interested person" or "person interested" means:
>
> (1) an heir, devisee, spouse, creditor, as limited in §22.005(c), or any other having a property right in an estate being administered.
> and
> (2) anyone interested in the welfare of an incapacitated person, including a minor.

Corresponding changes should be made to the Guardianship Chapter of the Estates Code at § 1002.005 and § 1002.018.[191]

V. METHODS OF DIRECT ATTACK

A probate judgment is binding on everyone until it is set aside by direct attack.[192] There are numerous methods directly attacking decisions in probate and guardianships within certain time frames.[193] The main methods of direct attack are as follows: (1) motion for new trial (TEX. R. CIV. P., Rule 329b), (2) statutory bill of review (TEX. EST. CODE § 55.251 and TEX. EST. CODE §1056.101), (3) a post-probate will contest TEX. EST. CODE § 256.204) and (4) a restricted appeal to the appellate court, if all conditions are met (TEX. R. APP. P., Rule 30).[194] Until recently, an equitable bill of review was a fifth method, but, as discussed below, the Texas Supreme Court found that equitable bills of review no longer apply to probate proceedings.[195]

A. Motion for New Trial

The first and most obvious error correction method, if a party discovers the error early, is the normal motion for new trial filed under the Texas Rules of Civil Procedure, Rule 505.3.[196] Motions for new trial must be filed within thirty days from the date the judgment to be revised, corrected, reformed, or

191. TEX. EST. CODE ANN. §§ 1002.005, 1002.018 (2014).
192. Estate of Hutchins, 829 S.W.2d 295, 297 (Tex. App.—Corpus Christi 1992, writ denied *sub. nom.*).
193. *Id.*
194. TEX. R. APP. P., 30.
195. *See infra* Part V.B.
196. TEX. R. CIV. P. 505.3.

set aside is signed.[197] A motion for new trial can be filed in relation to both substantive and procedural errors.[198] A court can grant new trial within its period of plenary power for any reason or for no reason at all.[199] Orders may be set aside (and/or modified) at any time prior to the expiration of thirty days following their entry, i.e. during the trial court's plenary power.[200] Granting a new trial in the interest of "justice and fairness" is not an abuse of discretion.[201] Where the latter appears to grant unfettered discretion to change orders, and it certainly does as to order of the court, it does not grant such discretion to alter or change jury verdicts.[202]

The Texas Supreme Court now requires the court to state a valid and legally supportable reason to alter jury verdicts, where it stated:

> We do not retreat from the position that trial courts have significant discretion in granting new trials.[203] However, such discretion should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis. A trial court's actions in refusing to disclose the reasons it set aside or disregarded a jury verdict is no less arbitrary to the parties and public than if an appellate court did so.[204] The trial court's action in failing to give its reasons for disregarding the jury verdict as to Columbia was arbitrary and an abuse of discretion. In *Johnson*, we held that a trial court may, in its discretion, grant a new trial "in the interest of justice."[205] We have reaffirmed that decision.[206] However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury.[207]

The requirement to explain the reasons for granting a new trial established in *Columbia*, applies to jury verdicts.[208] The *Johnson* holding of unfettered

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197. *Id.*

198. *Id.*

199. Atascosa County Appraisal Dist. v. Tymrak, 815 S.W.2d 364, 366 (Tex. App.—San Antonio, 1991), *aff'd*, 858 S.W. 2d 335 (Tex. 1993).

200. *See* Womack-Humphreys Architects, Inc. v. Barrasso, 886 S.W.2d 809, 813 (Tex. App.—Dallas 1994, writ denied); Fruehauf Corp. v. Carillo, 848 S.W.2d 83, 84 (Tex. 1993).

201. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

202. *Id.*

203. Johnson, 700 S.W.2d at 917.

204. *See* Scott, 195 S.W.3d at 96; Gonzalez v. McAllen Med. Ctr., Inc., 195 S.W.3d 680, 682 (Tex. 2006) (noting that plaintiffs were entitled to a written opinion from the court of appeals stating why the jury's verdict can or cannot be set aside).

205. 700 S.W.2d at 918.

206. *See, e.g.*, Champion Int'l Corp. v. Twelfth Court of Appeals, 762 S.W.2d 898, 899 (Tex. 1988).

207. *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 212–13 (Tex. 2009).

208. *Id.*

discretion to change orders "in the interest of justice" remains for most probate orders for purposes of error correction.[209]

Filing a motion for new trial and using it to correct error in probate, invokes the other rules and requirements that flow from it, i.e., the appellate timetables.[210] A motion for new trial must be filed within the thirty days following the judgment, and a hearing or decision must be obtained within seventy-five days of the judgment or order, else it be deemed denied by operation of law.[211] A motion for new trial is a mechanism for perfecting an appeal and extending deadlines to perfecting an appeal.[212] It seeks to modify, correct, reform or set aside an order or judgment, but there is no error standard. Error can be corrected, including setting aside orders, for good reason, bad reason or no reason; the Court can simply change its mind.[213] If error is detected within thirty days of the order, there is no need to invoke the statutory bill of review procedure because its error standard is higher than the no standard for a motion for new trial.[214] Granting a motion for new trial does not subject the ruling to an appeal, but merely reinstates the case into its pre-judgment or pre-order status.[215] The case continues until a final judgment is entered.[216] Denial of a motion for new trial requires action to perfect a direct appeal and obtain error correction.[217]

1. Direct Appeal

A "final" order of a probate court is appealable to the court of appeals.[218] Guardianships are also subject to direct appellate court appeals.[219] However, when does a probate ruling become final, making it appealable? It is always dicey trying to determine when an order is final and subject to an appeal in probate, which makes the practice in the area very difficult.[220] "A probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based."[221] "The need to review controlling intermediate decisions before an error can harm later phases of the proceedings has been held to justify modifying the 'one final judgment rule'"

209. *See* Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).
210. TEX. R. CIV. P., Rule 329b and TEX. R. APP. P., Rule 26.1(a).
211. TEX. R. CIV. P., Rule 329b(c).
212. TEX. R. APP. P., Rule 26.1(a).
213. *See* Johnson, 700 S.W.2d at 916.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. TEX. EST. CODE ANN. § 32.001(c).
219. *See* TEX. EST. CODE ANN. § 1157.058.
220. Logan v. McDaniel, 21 S.W.3d 683, 688 (Tex. App.—Austin 2000, pet. denied).
221. *Id.*

in probate proceedings.[222] The Texas Supreme Court established the standard for determining whether and when probate orders are appealable.[223] An appellate court has jurisdiction over a probate appeal once a decision adjudicates substantial rights and ends that particular phase or a discrete phase of the probate proceeding.[224] A probate matter is appealable if the order finally disposes of the issue or controverted question for which the particular part of proceeding was brought.[225] The decision need not dispose of the entire probate proceeding to be appealable.[226]

The *Crowson* case involved an heirship and, once determined, ended the heirship phase of the proceeding, making it final and appealable; but not all rulings and orders are so clear-cut.[227] Does the approval of an annual accounting or a decision on a bill of review or the approval of a creditor's claim end those particular phases of the proceeding or not? What about a common law spouse determination?[228] Certainly, the trial or issue over whether the marriage existed and when it started ends the phase of the proceeding about the marriage, but that determination can be a direct part of the heirship phase of the proceeding if the Decedent died intestate.[229] Finality can also depend upon how the issue was presented and tried.[230] For example, if the common law marriage determination was filed as a separate declaratory judgment lawsuit and, after trial, a judgment is entered, it is becomes more obvious that case has ended and normal finality rules attach.[231] However, if the common law marriage is tried in the original estate cause and the court finds and signs an order that the marriage existed, but sets the heirship hearing for a later date (presumably more than thirty days from the marriage ruling), then is that order final or not?[232] A much murkier situation, which may require a direct attack, after the initial thirty days for finality expire.[233] The easiest way to eliminate all question about finality, is to request a severance, if all the requirements are met.[234]

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222. Logan, 21 S.W.3d at 688 (citing *Christensen v. Harkins*, 740 S.W.2d 69, 72 (Tex. App.—Fort Worth, 1987, no writ)).

223. *See* Logan, 21 S.W.3d at 683.

224. Crowson v. Wakeham, 897 S.W.2d 779, 782 (Tex. 1995).

225. Spies v. Milner, 928 S.W.2d 317, 318 (Tex. App.—Fort Worth 1996, no writ).

226. Crowson, 897 S.W.2d at 781–82; Christensen, 740 S.W.2d at 72.

227. Crowson, 897 S.W.2d at 781–82. The holding that a Judgment Declaring Heirship is final is codified at TEX. EST. CODE § 202.202.

228. See for example *In re* Estate of Armstrong, 155 S.W.3d 448 (Tex. Civ. App.—San Antonio 2004, writ denied).

229. *Id.*

230. *Id.*

231. *Id.*

232. *See, e.g.*, Georgiades v. Di Ferrante, 871 S.W.2d 878 (Tex. Civ. App.—Houston [14th Dist.] 1994, writ denied).

233. *Id.*

234. Crowson, 897 S.W.2d at 783.

B. Statutory Bills of Review

A bill of review may be filed as a direct attack on a judgment that is no longer appealable or subject to a motion for new trial.[235] A probate bill of review is a unique, statutory error correction method in probate.[236] The probate bill of review statute, TEX. EST. CODE § 55.251, provides:

> (a) An interested person may, by a bill of review filed in the court in which the probate proceedings were held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment, as applicable.
> (b) A bill of review to revise and correct an order or judgment may not be filed more than two years after the date of the order or judgment, as applicable.[237]

The guardianship bill of review statute, TEX. EST. CODE § 1056.101, provides:

> (a) An interested person, including a ward, may, by a bill of review filed in the court in which the guardianship proceeding was held, have an order or judgment rendered by the court revised and corrected on a showing of error in the order or judgment.
> (b) Except as provided by Subsection (c), a bill of review to revise or correct an order or judgment may not be filed more than two years after the date of the order or judgment.
> (c) A bill of review to revise and correct an order or judgment filed by a person whose disability has been removed must be filed not later than the second anniversary of the date of the person's disability was removed.[238]

The purpose of a bill of review is to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by the probate court.[239] Setting aside orders is allowed, but revising or modifying them is favored.[240] The court has the power to correct errors by modifying orders in the best interest of the estate, its administration, and its beneficiaries.[241]

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235. Frost Nat. Bank v. Fernandez, 315 S.W.3d 494, 504 (Tex. 2010), citing King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 751 (Tex. 2003).

236. TEX. EST. CODE ANN. § 55.251 (West 2015).

237. *Id.*

238. TEX. EST. CODE ANN. § 1056.101 (West 2017).

239. Jackson v. Thompson, 610 S.W.2d 519, 522 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

240. Valdez v. Hollenbeck, 465 S.W.3d 217 (Tex. 2015).

241. *Id.*

1. Time Period

Probate (statutory) bills of review must be filed within two years from the date the judgment to be revised, corrected, reformed, or set aside is signed. Interestingly, earlier versions of the former TEX. PROB. CODE § 31 contained the following caveat: "Persons *non compos mentis* and minors shall have two years after the removal of their respective disabilities within which to apply for a bill of review."[242] The 1993 Legislature removed this provision and the withdrawal of this provision became effective on September 1, 1993 and continued unchanged in the Texas Estates Code.[243] This must be reconciled with TEX. PROB. CODE § 93 which still contains a tolling provision for incapacitateds, fraud, and forgery.[244]

One case prior to the change, *Ladehoff v. Ladehoff*, illustrates the difficulty in allowing tolling for minors and incapacitateds.[245] A child of the decedent filed a bill of review some ten years after the 1957 probate judgment, despite having been represented as a minor by a guardian ad litem in the proceeding to obtain the judgment.[246] Because of the tolling provision of the previous TEX. PROB. CODE § 31, his claim was allowed, the order was changed and a ten-year-old administration was altered.[247] The court found that the tolling provision of the statute kept the judgment voidable until he was able to avail himself of the rights under the probate code.[248] This is the antithesis of finality, but the finality has to be weighed against a minor or incapacitated individual being affected by an order at a time when they cannot protect themselves.[249] Even though it took a while to change the statute, based upon *Ladehoff*, it appears the policy behind removing the tolling provision from the probate bill of review statute was to avoid changing administrations years after they have been finished or closed.[250]

"Statutes of limitations for bills of review reflect legislative concern for the orderly administration of estates and finality of judgments and are consistent with the strong 'public interest in according finality to probate proceedings,' which has been afforded great weight in our precedent."[251] The 1993 change to the statute eliminated all argument for extending the finality and *res judicata* effect of an order or judgment, even when it contains error.

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242. TEX. PROB. CODE § 31

243. *See id.*

244. TEX. PROB. CODE § 93.

245. See the lower court opinion at Ladehoff v. Ladehoff, 423 S.W.2d 115 (Tex. Civ. App.—Amarillo 1967, rev'd, at 436 S.W.2d 334).

246. *Id.*

247. *Id.*

248. *See* Ladehoff, 423 S.W.2d at 337.

249. Valdez v. Hollenbeck, 465 S.W.3d 217, 229 (Tex. 2015).

250. *Id.*

251. Valdez v. Hollenbeck, 465 S.W.3d 217, 229 (Tex. 2015), citing Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997) (discovery rule does not apply belated inheritance claims) and Frost Nat'l Bank v. Fernandez, at 497 (discovery rule does not apply to bill of review claims).

Basic statutory construction[252] requires the more specific probate bill of review section removing tolling provisions in 1993 to control over the more general equitable bill of review statutes or the tolling provisions for minors and incapacitated persons.[253] "When the Legislature has declared an express limitations period, however, the more specific time limit controls."[254] Direct attack proceedings in probate filed after the two years have expired are barred by *res judicata*.[255] The Texas Supreme Court held in *Valdez v. Hollenbeck* that statutory bills of review in probate, under TEX. PROB. CODE § 31, now TEX. EST. CODE § 55.251, must be filed within two years of the order or judgment, not four years.[256] This holding directly conforms to the Texas Supreme Court holding eliminating equitable bills of review in probate proceedings (see below).[257]

2. Pleadings and Requisites

Because it is a direct attack, a bill of review must be brought in the court that rendered the original judgment, and only that court has jurisdiction over the bill.[258] To secure relief under the statutory bill of review as provided by TEX. EST. CODE § 55.251, it is necessary to specifically allege and prove substantial errors by the trial court.[259] The court in *Jackson v. Thompson* stated that "[t]he statutory bill of review in a probate proceeding must be filed in the court rendering the decision under attack. This is the same rule applicable to equitable bills of review."[260] However, the statutory bill of review need not conform to the rules and is not limited by the restrictions of

252. Howell Aviation Services v. Aerial Ads, Inc., 29 S.W.3d 321, 323 (Tex. App.—Dallas 2000, no pet.) (It is a fundamental rule of statutory construction that when two statutes conflict the more specific statute controls over the more general statute. *See* City of Dallas v. Mitchell, 870 S.W.2d 21, 23 (Tex.1994); *see also* TEX. GOV'T CODE ANN. § 311.026(b)).

253. TEX. CIV. PRAC. & REM. CODE § 16.001; *see also*, Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998), citing, TEX. CIV. PRAC. & REM. CODE § 16.051 (Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.).

254. Valdez v. Hollenbeck, at 227.

255. Hooper v. Bruner, 2002 WL 1303434 (*not designated for publication*; *see Wittner v. Scanlan*, 959 S.W.2d 640, 641 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

256. Valdez v. Hollenbeck, 465 S.W. 3d at 231–32.

257. Frost Nat'l Bank, 315 S.W.3d at 504, citing *In re* The John G. & Marie Stella Kenedy Mem'l Found*., et al.*, 159 S.W.3d 133, 141, 146 (Tex. App.—Corpus Christi 2004, orig. proceeding).

258. Frost Nat'l Bank, 315 S.W.3d at 504, citing *In re* The John G. & Marie Stella Kenedy Mem'l Found*., et al.*, 159 S.W.3d 133, 141, 146 (Tex. App.—Corpus Christi 2004, orig. proceeding).

259. Hoover v. Sims, 792 S.W.2d 171, 173 (Tex. App.—Houston [14th Dist.] 1990, writ denied); Westchester Fire, 666 S.W.2d at 374; Hamilton v. Jones, 521 S.W.2d 350, 351 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

260. Jackson v. Thompson, 610 S.W.2d at 522.

an equitable bill of review.[261] For instance, a meritorious defense is unnecessary and not required in a statutory bill of review.[262]

The ordinary rules as to diligently making motions for new trials and appealing from the judgment complained of do not apply in a bill of review under TEX. EST. CODE § 55.251.[263] These holdings are well-grounded in the history of probate statutory bills of review.[264] Even back then (prior to the statute), the statutory bill of review to set aside all orders in probate court guardianship proceedings were not governed by rules applicable to an equitable bill of review.[265]

3. Standard(s) and Proceedings

Interestingly, TEX. EST. CODE § 55.251 requires only that error be shown in order to seek a ruling on a bill of review ("*on showing error therein*").[266] But courts have consistently applied a "substantial error" standard.[267] It appears the substantial error standard is in line with the very strong policy behind orders and judgments becoming final.[268] The Texas Supreme Court in *Valdez v. Hollenbeck* stated that "[e]xtending the time period for avoiding or altering a judgment is inherently antagonistic to the systemic need for finality of judgments, which we have observed with particularity in the probate context."[269] The Court went further, saying "[e]ndless litigation in which nothing was ever finally determined, would be worse than occasional miscarriages of justice."[270] Requiring substantial error to modify or set aside orders ensures finality and avoids changes based upon minor error or novel arguments.[271] The orders and judgments of courts are entitled to dignity and authority and should not be overturned lightly.[272]

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261. Walker v. Sharpe, 807 S.W.2d at 450; Westchester Fire, 666 S.W.2d at 375; Hamilton v. Jones, 521 S.W.2d at 353; Jackson v. Thompson, 610 S.W.2d at 522; Schoenhals v. Schoenhals, 366 S.W.2d 594, 597 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e; Norton v. Cheney, 161 S.W.2d 73 (1942); Pure Oil Co. v. Reece, 78 S.W.2d 932 (1935).

262. Westchester Fire, 666 S.W.2d at 375.

263. Hamilton v. Jones, 521 S.W.2d at 353; Stillwell v. Standard Savings & Loan Ass'n, 30 S.W.2d 690, 695 (Tex. Civ. App.—Fort Worth 1930, error dism'd); Jones v. Sun Oil Co., 153 S.W.2d 571 1947); Parmley v. Parmley, 149 S.W.2d 647 (Tex. Civ. App.—Amarillo 1941, writ ref'd).

264. *Id.*

265. Moncus v. Grace Oil Co., *et. al.*, 284 S.W.2d 375, 379 (Tex. Civ. App.—Galveston, 1955, writ ref'd n.r.e.); Persky v. Greever, 202 S.W.2d 303, 305 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.); Norton v. Cheney, 161 S.W.2d 73, 74 (Comm. App. Tex.—Section A 1942, no writ); Pure Oil Co. v. Reece, 78 S.W.2d 932, 934 (Comm. App. Tex.—Section A 1935, no writ); Jones v. Parker, 3 S.W. 222, 224 (Tex. 1886).

266. *Id.*

267. *Id.*

268. *Id.*

269. Valdez, 465 S.W.3d at 230, citing Little, 943 S.W.2d at 417.

270. Valdez, 465 S.W.3d at 230, citing Alexander, 226 S.W.2d at 998.

271. *Id.*

272. *Id.*

Usually a probate bill of review is based upon something forgotten or formality defects in the probate proceedings.[273] The error need not appear from the face of the record, but may be proved at trial.[274] Further, the burden of proof for allegations of error is by a preponderance of the evidence.[275] The latter means a court must find substantial error justifying modification or set aside the order by a preponderance of evidence.[276] A separate statute allows error correction based upon substantive complaints of lack of testamentary capacity, undue influence, forgery, or fraud nullifying the validity of a will.[277] The latter method applies only to will contests; statutory bills of review apply to all orders and judgments.[278] Probate requirements are mandatory, as follows:

> **(a) Wills**. In determining whether the will is valid and should be admitted to probate, the court must decide "whether it had been revoked, whether it was executed in the manner and under the conditions required by law, and whether the maker had testamentary capacity and was not under undue influence (if raised) when it was executed."[279] Contestant may obtain the annulment of a will which has already been admitted to probate by demonstrating that one or more of the statutory requirements for making and probating a valid will have not been fulfilled.[280] "It is the duty of the court in probate proceedings to probate wills, whether contested or not, to determine that the instrument being offered for probate meets the statutory requisites of a will before admitting the will to probate."[281] These requirements cannot be waived by the court, and cannot be waived by a party, either by, a failure to plead or a judicial admission.[282] "To probate a will, a trial court first must find that it is a valid one under the *Texas Probate Code*."[283] If a will is not executed in accordance with all of the prescribed formalities and solemnities, it is of no force and effect.[284] It is fundamental that a will must be found to be valid and admitted to probate to be

273. *Id.*

274. Hoover v. Sims, 792 S.W.2d 171, 173 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citing Hamilton v. Jones, 521 S.W.2d at 353).

275. Hoover v. Sims, 792 S.W.2d at 173 (citing Lee v. Lee, 424 S.W.2d 609, 610 (Tex. 1968).

276. *Id.*

277. TEX. EST. CODE ANN. § 256.204 (West 2014).

278. *See id.*

279. Zaruba v. Schumaker, 178 S.W.2d 542, 544 (Tex. Civ. App.—Galveston, 1944 no writ).

280. Lee v. Lee, 424 S.W.2d 609, 610 (Tex. 1968).

281. *In re* Rosborough's Estate, 542 S.W.2d 685 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

282. Green v. Hewett, 118 S.W. 170, 170 (Tex. Civ. App.—1909, no writ) (Since an application to probate a will is a proceeding in rem, the provisions of [formerly, TEX. PROB. CODE § 88], requiring certain facts to be established before probate, cannot be waived).

283. Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no writ); Taylor v. Martin's Estate, 3 S.W.2d 408 (Tex. 1928).

284. TEX. EST. CODE ANN. § 251.051; Estate of Hutchins, 829 S.W.2d at 299.

binding.[285] The Court in *Hutchins* held that it was reversible error to admit a will to probate when all the statutory requirements had not been met.[286]

(b) Codicils. These same rules apply to codicils as well. "Except as otherwise provided by Chapter XIII of this Code [the Guardianship Code], when used in this Code, unless otherwise apparent from the context: a "Will" includes codicil. . ."[287] TEX. EST. CODE § 251.051 requires certain formalities and solemnities to make a will, and those same formalities and solemnities apply to a codicil.[288] It also applies to codicils where TEX. EST. CODE § 256.153, TEX. EST. CODE § 256.151, and TEX. EST. CODE § 256.157 have mandatory and substantive condition precedent requirements to probate a will; those same requirements are imposed upon the probate of a codicil.[289]

(c) Heirship. Heirship and common law spouse issues can also be reviewed by a bill of review.[290]

(d) Notice. "Without proper service of citation, no application for probate of a will may be acted upon."[291] For example, in *Marrs v. Marquis*, the will could not be probated where a will proponent did not testify or otherwise present evidence at the hearing that the requirements for probate and issuance of letters testamentary had been satisfied, and record was "devoid of proof that citation was issued to all parties interested in estate."[292] Notice is particularly important because probate proceedings are *in rem*.[293] These requirements and rules of law are mandatory and are examples of the types of issues to be addressed and the necessity for probate bills of review.[294]

When these mandatory rules are not followed, the flaw or flaws must be corrected by a motion for new trial or a statutory bill of review.[295] Courts have no option but to grant such motions or bills when parties diverge from the probate process; the modification or correction is mandatory.[296]

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285. TEX. EST. CODE ANN. § 256.001; Guthrie v. Suitor, 934 S.W.2d 820 (Tex. App.—Houston [1st Dist.] 1996, no writ).

286. Estate of Hutchins, 829 S.W.2d at 300.

287. TEX. EST. CODE ANN. § 22.034 (West 2014).

288. *See, e.g.*, Magee v. Magee, 272 S.W 252 (Tex. Civ. App.—Waco 1925, writ dism'd w.o.j.).

289. TEX. EST. CODE ANN. § 256.153 (West 2014); TEX. EST. CODE ANN. § 256.151 (West 2014); TEX. EST. CODE ANN. § 256.157 (West 2014); *see also* Estate of Jansa, 670 S.W.2d at 767–68.

290. McDonald v. Carroll, 783 S.W.2d at 287; Dussetscheleger v. Smith, 577 S.W.2d 771 (Tex. Civ. App.—Tyler 1979, no writ); Golden v. York, 407 S.W.2d 293 (Tex. Civ. App.—San Antonio 1966, writ denied); Acevedo v. Acevedo, 2004 WL 635321 (Tex. App.—Austin 2004, no pet.).

291. Watson v. Dingler, 831 S.W.2d 834, 839 (Tex. App.—Houston[14th Dist.] 1992, writ denied).

292. Marrs v. Marquis, 927 S.W.2d 304, 305-06 (Tex. App.—El Paso 1996, no writ).

293. TEX. EST. CODE ANN. § 32.001 (West 2014); *see also In re Estate of York*, 951 S.W.2d at 126.

294. *See supra* text accompanying notes 280–94.

295. *See e.g.*, In re Estate of York, 951 S.W.2d at 127.

296. *See id.*

4. Contested Proceedings/Right to Jury

Anyone who may be heard in a probate matter, if contested, is entitled to a jury trial, which is a right guaranteed by statute.[297] Courts must broadly interpret the latter statute to allow for jury trials, even multiple jury trials.[298] The standard is simple: Is the probate proceeding contested? If so, then a jury trial should be available if timely requested, which, by definition, contemplates the possibility of multiple jury trials in the same proceeding.[299] Just as the one-final judgment rule is eliminated in probate, so is the myth that only one jury trial is allowed.[300] Of course, the Court may exercise its discretion in relation to the issues that must be tried and the procedure for doing so, but that discretion is tempered by whether one ruling is dependent upon the other.[301] If more than one judgment may be entered, more than one jury trial may be ordered.[302] When a party directly attacks a probate order and its determination depends on resolution of a fact question, the parties are entitled to separate jury trial if the issues are separate or severable.[303] Obviously, severance is within the Court's discretion, but because the *Texas Estates Code* contains separate and distinct direct attack procedures, those procedures require separate and distinct decisions; anything less would eliminate each separate statute because one would be subsumed by the other.[304]

Texas Rules of Civil Procedure 174(b) authorizes the trial court, in the furtherance of convenience and to avoid prejudice, to order a separate trial of any claim or issue.[305] Rule 174(b) allows trial courts wide latitude in consolidating causes of action or in granting separate trials; the court's action in such matters will not be disturbed on appeal except for abuse of discretion.[306] By analogy, there are multiple cases that held two trials: one on the existence of a common law marriage, and the other on the merits of the other claims.[307] In *Winfield v. Renfro*, Renfro filed suit for divorce

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297. TEX. EST. CODE ANN. § 55.002 (West 2014) (stating that "in a contested probate or mental illness proceeding in a probate court, a party is entitled to a jury trial as in other civil actions").

298. *Id.*

299. *Id.*

300. Hubert Green, *Finality of Judgment for Appeal: Watch Out in Probate and Receivership Cases*, 8 APP. ADVOC. 3 (1994).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. Garrison v. Tex. Commerce Bank, 560 S.W.2d 451, 453 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.); TEX. R. CIV. P., 174(b) (holding that the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues).

306. Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 384 (Tex. 1985); Damron v. Fireman's Fund Ins. Co., 430 S.W.2d 956, 958 (Tex. Civ. App.—Amarillo 1968, no writ).

307. *Id.*

alleging a common-law marriage and Winfield denied any marriage existed.[308] As a result, the threshold issue of whether a common law marriage existed had to be determined because there was no need for a divorce and division of property if no marriage existed.[309] The trial court separated the trials of the marriage and divorce and the Houston Court of Appeals held that "because the determination of the marriage issue had the potential to dispose of the divorce and property questions, the trial court did not abuse its discretion in ordering separate trials."[310] The *Winfield* Court went on to say:

> Moreover, the separate trials did not deprive Winfield of his right to a jury trial. The Texas Constitution provides that the right to a jury trial is not an absolute right, but is subject to certain procedural rules. One such procedural rule is 174(b) of the Texas Rules of Civil Procedure, which allows for a separate trial of issues before different juries if the issues are distinct and separable.[311]

In *Shelton v. Belknap*, the Texas Supreme Court considered the exact situation as in *Winfield* in the wrongful death context.[312] The plaintiff alleged to be the surviving spouse of the decedent sued the defendants for damages for the decedent's wrongful death.[313] The defendants, in their sworn pleading, challenged the plaintiff's right to maintain the suit because there admittedly was no ceremonial marriage between the parties and the existence of the common law marriage was challenged.[314] The issue of the common-law marriage "was severed and tried in limine" prior to the trial on the merits of the wrongful death claim.[315] *Winfield* and *Shelton* provide direct support for trying a disputed common law marriage claim separately and in advance of other claims, especially in which the trial on the common law marriage issue may be dispositive on the other claims in the lawsuit.[316] The parties' common law marriage and wrongful death claim are distinct and separable.[317] Rule 174(b) of the *Texas Rules of Civil Procedure* provides the District Court the discretion to try the common law marriage issue as a separate jury trial.[318]

Likewise, parties in an estate with a pending probate bill of review are entitled to a trial on the merits of the motion.[319] Many courts have held or

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308. Winfield v. Renfro, 821 S.W.2d 640, 652 (Tex. Civ. App.—Houston [1st Dist.] 1990, writ ref'd).
309. *Id.*
310. *Id.*
311. *Id.* at 652; *see, e.g.*, Shelton v. Belknap, 282 S.W.2d 682, 683 (1955) (issue of common-law marriage tried first where common law wife brought suit for damages for wrongful death of her common-law husband).
312. Shelton, 382 S.W.2d at 683.
313. *Id.*
314. *Id.*
315. *Id.*
316. *See supra* text accompanying notes 310–17.
317. *See supra* text accompanying notes 310–17.
318. *See supra* text accompanying notes 310–17.
319. *See e.g.*, *Walker*, 807 S.W.2d at 450.

affirmed the following law: It is not necessary that the error appear from the face of the record, because the fact of error may be proven on the trial.[320] No court has stated specifically that the right to a jury trial on a statutory bill of review exists.[321] Only one court hearing a statutory bill of review case had the issue of denial of a jury request before it, but did not rule on it because its disposition of the underlying issue mooted the right to a jury question.[322] Many courts impliedly address the issue by noting that the bill of review issues were tried without a jury or that the proceeding was a non-jury trial.[323]

The answer to this question lies in a statute and two cases.[324] It is clear that TEX. EST. CODE § 55.002 guarantees a jury trial as to any contested matter in probate, "[i]n a contested probate or mental illness proceeding . . . the parties shall be entitled to trial by jury as in other civil actions."[325] The court in *Jackson v. Thompson*, for purposes of determining whether to transfer a matter from county court to district court, held that a statutory probate bill of review is a "contested proceeding."[326] We consider that the legislature in using the words "contested probate matters" intended to include all matters in a probate proceeding where the pleadings on file demonstrate that the parties to the suit have adopted adversary positions.[327] Both of these cases hold that a probate bill of review is a contested proceeding for purposes of transfer under TEX. EST. CODE § 32.003.[328] If a matter is a contested proceeding for purposes of transfer to a district court, it is certainly a contested proceeding for purposes of determining the right to a jury trial.[329]

A statutory bill of review, under TEX. EST. CODE § 55.251, is a "contested proceeding," and because the parties are entitled to a trial, the right to a jury trial in a statutory probate bill of review is guaranteed.[330] This right also invokes the forty-five day notice requirement for a trial.[331] Parties are entitled to a trial on a statutory bill of review, so all pretrial procedures and pretrial relief such as motions for summary judgment, are

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320. *Id.*

321. *Id.*

322. *Nadolney*, 116 S.W.3d at 282.

323. Acevedo v. Acevedo, 03-03-00309-CV, 2004 WL 635321, at *4 (Tex. App.—Austin, 2004, no pet.); *Nadolney*, 116 S.W.3d at 277 (ruling that *jury fee paid, and jury denied, appellate court never reached the issue*); Braddock v. Taylor, 592 S.W.2d 40, 41 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); Rhetorically, this begs the question: Why would a court note the non-jury trial, if the option for a jury was not available?

324. *See infra* notes 325–29.

325. TEX. EST. CODE ANN. § 55.002 (West 2014).

326. Jackson v. Thompson, 610 S.W.2d at 522; *see also*, In re John G. Kenedy Mem'l Found., 159 S.W.3d 133, 145 (Tex. App.—Corpus Christi 2004, no pet.).

327. *Id.*

328. *Id.*; *see also*, TEX. EST. CODE ANN. § 32.003 (West 2014) (stating that when there is no statutory probate court and a probate matter is contested, the county court may request a probate court judge to sit in on the matter or transfer the case to a district court).

329. *See id.*

330. TEX. EST. CODE ANN. § 55.251

331. TEX. R. CIV. P. 245.

available.[332] The Court in *Gallegos v. Millers* noted that "[o]ur Courts have held that a summary judgment is a "trial" within the meaning of the Rules of Civil Procedure."[333] A summary judgment is a trial within the meaning of TEX. R. CIV. P. 63.[334] Indeed, several of the cases cited herein involved summary judgments and appellate decisions affirming or reversing bills of review based upon summary judgment.[335]

The cases above illustrate the mandatory nature of the technical requirements of probate.[336] A probate bill of review assures that a probate court can correct a decision if it did not meet any of these technical requirements.[337] In order to effectuate a change in an incorrect order or judgment, the legislature gave the probate courts extended plenary power and the ability to review its decisions for up to two years.[338] The legislature still wants the courts to promote the dignity of their orders and judgments, but expects the court to act quickly if shown that substantial error has occurred.[339] The policies behind getting probate decisions right outweigh the policies of finality and the "one-judgment" rule.[340]

C. Will Contests

A will contest may be brought pursuant to TEX. EST. CODE § 256.204, which provides as follows:

> (a) After a will has been admitted to probate, an interested person may commence a suit to contest the validity thereof not later than the second anniversary of the date the will was admitted to probate, except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered.

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332. TEX. EST. CODE ANN. § 55.251.

333. Gallegos v. Millers Mut. Fire Ins. Co. of Tex., 550 S.W.2d 350, 353 (Tex. Civ. App.—El Paso 1977, no writ), citing, Jones v. Houston Materials Co., 477 S.W.2d 694, 695 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ); Leche v. Stautz, 386 S.W.2d 872, 873 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.).

334. Goswami v. Metro. Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988).

335. Power v. Chapman, 994 S.W.2d 331, 336 (Tex. App.—Texarkana 1999, no writ); Jones v. Jones, 888 S.W.2d 849, 854 (Tex. App.—Houston [1st Dist.] 1994, no writ); Cunningham v. Fox, 879 S.W.2d 210, 212–13 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Coppock v. Teltschik v. Mayor, Day & Caldwell, 857 S.W.2d 631, 639 (Tex. App.—Houston [1st Dist.] 1993, writ denied); McDonald v. Carroll, 783 S.W.2d 286, 288; Estate of Devitt, 758 S.W.2d 601, 607 (Tex. App.—Amarillo 1988, writ denied); Westchester Fire Ins. Co. v. Nuckols, 666 S.W.2d 372, 375–76 (Tex. App.—Eastland 1984, writ ref'd n.r.e.).

336. *See supra* note 339.

337. TEX. EST. CODE ANN. § 55.251.

338. *Id.*

339. *Id.*

340. *See supra* note 224.

> (b) Notwithstanding Subsection (a), an incapacitated person may commence the contest under that subsection on or before the second anniversary of the date the person's disabilities are removed.[341]

A will contest under TEX. EST. CODE § 256.204 is a direct attack upon the order admitting the will to probate.[342] The decree is voidable and subject to attack.[343] A will contest attacks the validity of documents based upon substantive facts surrounding their execution, particularly that the testator lacked testamentary capacity or was unduly influenced at the time the will was signed.[344] It may also involve evidence of forgery, fraud, or other grounds, but these are less common.[345] It does not address the technical requirements of the prove-up.[346] Proving a testator's lack of testamentary capacity at the time of will execution is the seminal question in a will contest.[347] Evidence of the testator's state of mind at other times can be used to prove his state of mind on the day of will execution, provided the evidence demonstrates a condition affecting his testamentary capacity was persistent and likely present at the time of will execution. [348] Lay opinion testimony regarding the soundness of the testator's mind at the time of will execution is admissible.[349] Additionally, medical expert testimony is desirable and admissible.[350] It is reversible error to deny admission of expert testimony in a will contest.[351]

The statute of limitations for filing a will contest is two years from the date it is admitted to probate.[352] If a will contest is not filed within two years of the date it is admitted to probate, the contest is barred forever.[353] The court's plenary power to reexamine, modify, correct, or set aside extends to that two-year period, when *res judicata* still applies, except for forgery, fraud, or incapacity.[354] Because probate proceedings are *in rem*, the timely filing of a will contest (within two years) tolls the statute of limitations as to all other

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341. TEX. EST. CODE § 256.204.

342. Estate of Devitt, 758 S.W.2d 601, 607 (Tex. App.—Amarillo 1988, writ denied); Estate of Morris, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); A&M Coll. of Tex. v. Guinn, 280 S.W.2d 373, 377 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

343. Ladehoff v. Ladehoff, 436 S.W.2d 334, 340 (Tex. 1968).

344. *See In re* Estate of Blakes, 104 S.W.3d 333, 337 (Tex. App.—Dallas 2003, no writ).

345. *Id.*

346. TEX. EST. CODE ANN.§ 256.152.

347. *In re* Estate of Blakes, 104 S.W.3d 333 (Tex. App.—Dallas, 2003, no writ) (citing Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th dist.] 2000, no writ).

348. Estate of Blakes, 104 S.W.3d at 336 (citing Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983)); *In re* Estate of Robinson, 140 S.W.3d 782, 792 (Tex. App.—Corpus Christi 2004, pet. denied).

349. Carr v. Radkey, 393 S.W.2d 806, 813–14 (Tex. 1965).

350. Estate of Blakes, 104 S.W.3d at 336; *In re* Estate of Robinson, 140 S.W.3d at 792 (Tex. App.—Corpus Christi 2004, pet. denied).

351. *See* Carr, 393 S.W.2d at 813–14.

352. TEX. EST. CODE ANN. § 256.204.

353. *Id.*

354. *Id.*

interested persons, who might otherwise be barred by the two-year time limitation stated in TEX. EST. CODE § 256.204.[355] In other words, if an interested party timely files a will contest, as long as the will contest is still pending after the two years have run, any other interested person may file a will contest and enter their appearance in the action after the two years expire.[356] Will contests under TEX. EST. CODE § 256.204 are the most common form of error correction and it is the statute most pursued in probate litigation.[357] In the context of will contest litigation, there is a severe equitable hole in the treatment of parties in relation to whether the estate pays their attorneys' fees and expenses that allows a bad actor to benefit by their bad act(s) and punishes those who try to fix what they have done.[358]

1. Case Study for Statutory Change

The current law requires an estate to pay for the "necessary expenses and disbursements," including attorneys' fees, of a will contestant when the contestant offers a will for probate, but it does not require it when the contestant does not have a will to offer for probate.[359]

2. The Current Statute

> TEX. EST. CODE § 352.052. ALLOWANCE FOR DEFENSE OF WILL.
>
> (a) A person designated as an executor in a will or an alleged will, or as administrator with the will or alleged will annexed, who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate the executor's or administrator's necessary expenses and disbursements in those proceedings, including reasonable attorney's fees.
>
> (b) A person designated as a devisee in or beneficiary of a will or an alleged will, or as administrator with the will or alleged will annexed, who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, may be allowed out of the estate the person's necessary expenses and disbursements in those proceedings, including reasonable attorney's fees.

Fees are paid to a contestant offering a will only when the trier-of-fact determines that the will contest was brought in good faith and with just

355. *In re* Estate of Robinson, 140 S.W.3d 782, 800 (Tex. App.—Corpus Christi 2004, pet. denied).
356. *Id.* at 801.
357. *Id.*
358. TEX. EST. CODE ANN. § 352.052.
359. *Id.*

cause.[360] A good faith and just cause finding by the trier-of-fact necessarily finds the will contest proceeding was a benefit to the estate, i.e., the estate benefits by determining the correct will to probate.[361] Notwithstanding the same result, a contestant without a will to offer never gets a chance to ask for such finding.[362]

3. Statement of Needed Change

When a trier-of-fact determines that a will contest action was brought in good faith and with just cause, the estate should be required to pay for such expense even when the contestant does not have a will to offer for probate under the same theory and public policy of the Texas Probate System that an estate pays expenses, including attorneys' fees, when an action benefits the estate.[363] If a contestant obtains that finding by the trier-of-fact, regardless of whether the contestant has a will to offer for probate, the contest still benefits the estate.[364] Once the "good faith and just cause" finding is obtained, offering a will for probate or not having one to offer has no bearing on whether there is a benefit to the estate; the finding establishes the benefit.[365]

4. Examples Justifying Change in Statute — A Bad Actor Gets Fees Paid by Estate, but Contestants Do Not

Example 1 – Successful Will Contest Benefits Estate:

A father disinherited his daughter, so she contested his will for probate.[366] The will left decedent's entire estate to his second wife, who orchestrated the will signing in a hospital two to three hours before the decedent was transferred into the Intensive Care Unit and less than twenty four hours before he went on a ventilator and into a coma. He never regained consciousness and died ten days later. The decedent had a well-known history of wanting to leave property he owned prior to his second marriage property, including his lucrative business, to his daughter by his first marriage. Everyone knew the decedent had an earlier will leaving his daughter a substantial portion of the Estate. The second wife had access to all of the decedent's files and, even though the second wife denied it and it could not be proven, the daughter was certain she destroyed the decedent's

360. *See* Yost v. Fails, 534 S.W.3d 517, 520 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).
361. *Id.*
362. *See supra* note 356.
363. *See infra* note 370.
364. *See supra* note 358.
365. *See supra* note 358.
366. *See, e.g.*, Zapalac v. Cuin, 39 S.W.3d 4144 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (describing a situation similar to the hypothetical posed).

earlier Will or Wills and she had motive and opportunity to do so. No earlier Will of the decedent was ever found.

Prior to submitting the case to the jury, the statutory probate court ruled the daughter could not present a "good faith and just cause" question to the jury because TEX. PROB. CODE 243 required her to have a will to offer for probate before seeking her attorneys' fees from the estate. The jury determined the will to be invalid: the court set aside the order probating it and denied it probate. The estate passed by intestacy with fifty-percent of community property and two-thirds separate property to daughter and one-third separate property to the second wife. The second wife was allowed a "good faith and just cause" question and the court found in her favor, so the second wife ("bad actor") was allowed her attorneys' fees and expenses from the estate for defending the invalid (and always bogus) will. The inherent unfairness of this scenario is obvious. The daughter, who was wrongfully disinherited by the bad acts of her step-mother, had to pay all of the attorneys' fees of both sides because she had to pay hers out of her share and the bad actor, second wife, who orchestrated the bogus Will and had motive and opportunity to destroy earlier wills of the decedent was allowed her attorneys' fees and expenses out of the estate (the community estate). In this scenario, the bad actor can commit fraud in wrongfully redirecting a person's estate and get her attorneys' fees and expenses paid out of the estate for defending the bogus Will (causing harm to the estate), yet the successful will contestant, who prevented a bogus will from being probated (benefitting the estate) cannot.

Example 2 – Unsuccessful Contest, a Benefit to Estate:

A disinherited adopted son and heir of a decedent contested, post-probate, a Will and three Codicils.[367] The decedent had a stroke before the Will and continued to deteriorate. She made numerous mistakes in the Will and three Codicils that a competent testator would not have made. The contestant was an intestate heir and was not allowed to submit a good faith and just cause question to the jury because he did not have a will to offer for probate. Following a week-long trial, the jury found in favor of the contestant on five of eight questions. The jury determined the Will invalid for lack of capacity and the second and third codicils invalid both for lack of capacity and undue influence. However, because the first codicil was not found invalid by the jury, it republished the invalid Will under the *Hinson* rule,[368] which did not save the second and third Codicils because they post-dated the first codicil; they were set aside completely. The contestant was, ultimately, unsuccessful, even though five of eight jury questions were in his favor. The estate benefitted by the contest because it cleared up which

367. *See, e.g.*, Schindler v. Schindler, 119 S.W.3d 923, 927 (Tex. App.—Dallas, Nov 21, 2013, pet. denied) (describing a situation similar to the hypothetical provided).

368. Hinson v. Hinson, 154 Tex. 561, 280 S.W.2d 731, 735 (1955).

of the documents should have been probated and withdrew the second and third codicils from probate. Despite the benefit of the contest to the estate, the jury would have, presumably, found the contest to have been brought in "good faith and with just cause" and the contestant's attorneys' fees and expenses were not paid by the estate. He could not submit the question to the jury solely because he did not have a Will to offer for probate. If the trier-of-fact determines the contest was brought in good faith and with just cause, then it necessarily determines that subjecting the proposed Will to will contest scrutiny to make sure the correct and valid will is admitted to probate was beneficial to the estate. The same opportunity for a jury to determine the fact question of whether an action benefits the estate should be available to all parties, even a contestant that has no will to offer to probate.

5. Mandatory Fees v. Permissive Fees

An additional inequity in the award or denial of attorneys' fees in will contests is when an executor gets a good faith and just cause finding the payment of the executor's attorneys' fees and expenses out of an estate becomes mandatory.[369] When a beneficiary gets a good faith and just cause finding, payment of beneficiary's attorneys' fees and expenses out of the estate is permissive.[370] A "good faith and just cause" finding is, by definition, a finding of benefit to the estate and, therefore, should make fees and expenses associated with that benefit a mandatory obligation of the estate, regardless of who brings the action.[371] The current law allows a bad actor to obtain the execution of an invalid will, destroy all prior valid wills, and to have attorneys' fees and expenses paid out of the estate (win or lose) for defending the bogus will, while a contestant does not get such fees and expenses paid out of the estate for successfully proving the bogus will invalid.[372] In other words, the bad actor is actually benefitted by committing fraud and the lawful or innocent heir is punished.[373] Worse, if the bad actor gets a vulnerable decedent to sign a bogus or invalid will, he or she gets a free run at attempting to find the bogus will valid. There is no deterrent whatsoever to taking advantage of a vulnerable testator.[374] However, if an innocent heir finds out about it and files suit to have the bogus will declared invalid, the innocent heir must pay attorneys' fees and expenses to have the fraudulent or invalid will set aside out of his or her own pocket, even if there

369. TEX. EST. CODE ANN. § 352.052(A) (West 2015).

370. TEX. EST. CODE ANN. § 342.052(b) (West 2015)

371. TEX. PROBATE CODE ANN. § 241 (West 2014) (repealed by Acts 2009, ch. 680, § 10); *see* Salmon v. Salmon, 395 S.W.2d 29, 31 (Tex. 1965).

372. *See generally* Miller v. Anderson, 651 S.W.2d 726, 728 (Tex. 1983) (stating that when the will is admitted to probate, there is no need for a good faith or just cause analysis).

373. *Id.*

374. *Id.*

was a prior will benefitting the contestant that was destroyed by the bad actor or cannot be found.[375]

6. Suggested Change to the Statute

> TEX. EST. CODE § 352.052. ALLOWANCE FOR DEFENSE OF WILL OR FOR WILL CONTEST.
>
> (a) A person designated as an executor in a will or an alleged will, or as administrator with the will or alleged will annexed, who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate the executor's or administrator's necessary expenses and disbursements in those proceedings, including reasonable attorney's fees.
>
> (b) A person designated as a devisee in or beneficiary of a will or an alleged will, or as administrator with the will or alleged will annexed, who, for the purpose of having the will or alleged will admitted to probate, defends the will or alleged will or prosecutes any proceeding in good faith and with just cause, whether or not successful, shall be allowed out of the estate the person's reasonable and necessary expenses and disbursements in those proceedings, including reasonable attorney's fees.
>
> (c) An interested person, other than a claimant against or creditor of the estate, who prosecutes any proceeding to have a will or alleged will set aside or denied probate in good faith and with just cause, whether successful or not, shall be allowed out of the estate the person's reasonable and necessary expenses and disbursements in those proceedings, including reasonable attorney's fees.

The key question is whether the action was a benefit to the estate, not whether a party has a will to offer for probate.[376] The good faith and just cause finding should be determinative, not whether a party has a will, because it determines whether the estate received a benefit by the action.[377] A benefit is a benefit is a benefit; offering a will for probate should not matter.[378] The suggested change puts the parties on an equal playing field in relation to the estate paying fees and costs of the proceeding.[379]

375. *Id.*
376. *See supra* Section C.3.
377. *See supra* Section C.3.
378. *See supra* Section C.3.
379. *See supra* Section C.3.

7. Probate Bill of Review and Will Contest Should be Considered Different Phases of Probate Proceeding

In *Estate of Davison*, the only case addressing whether a statutory bill of review and a will contest are separate phases of the probate proceeding held that, post-probate, each are part of the same proceeding.[380] In *Davidson*, the contestant alleged the probate process was defective and the trial court had to set aside the probate order and start over, which would have made it the pre-probate contest.[381] The trial court denied a probate bill of review and the ruling was appealed.[382] The Beaumont Court of Appeals held that because both the bill of review and the will contest sought to set aside the probate order, each sought the same relief and, therefore, were part of the same proceeding.[383] It held that because of the latter, the bill of review decision did not meet the *Crowson* test for finality and that it lacked jurisdiction because the bill of review ruling was not final.[384] The court suggested the bill of review ruling could have been severed.[385] Because the court in *Davidson* held it lacked jurisdiction and dismissed the appeal, it failed to consider the substance of the appeal, i.e., whether the grant or denial of the bill of review was error or the effect of combining the two proceedings.[386]

A probate bill of review and a post-probate will contest[387] fall under separate statutes and are independent proceedings focused on two entirely different issues. Rolling the Bill of Review into the Will Contest renders TEX. EST. CODE § 55.251 meaningless and eliminates the statute contrary to legislative intent.[388] The court in *Burnett v. Lunceford* presumed "that the entire statute is intended to be effective and that the legislature enacted it with complete knowledge of the existing law and with reference to it."[389] The legislature established separate procedures by separate statutes requiring separate evidence and standards.[390] It did not intend each procedure be

380. *In re* Davidson, 153 S.W.3d 301, 304 (Tex. App.—Beaumont 2004, pet. denied).
381. *Id.* at 303.
382. *Id.*
383. *Id.* at 304.
384. *Id.*
385. *Id.*
386. *Id.*
387. *See* TEX. EST. CODE ANN. §§ 55.251, 256.204.
388. *See* TEX. GOV'T CODE ANN. § 311.021 (West 2013). In enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.
389. Burnett v. Lunceford, 2016 WL 7155062, at *3 (Tex. App.—El Paso Dec. 7, 2016, pet. denied) (*citing* TEX. GOV'T CODE § 311.021(2) (West 2013); Acker v. Texas Water Commission, 790 S.W.2d 299, 301 (Tex. 1990)).
390. TEX. GOV'T. CODE ANN. § 311.021 (West 2013).

treated as the same regardless of the effect on the order being the same, i.e., setting aside the order.[391]

> a.) **Bill of Review**. The court is duty bound to ascertain the statutory requirements to probate a will are met and those requirements are mandatory and cannot be waived. If a will was proven up as a self-proven will, but its self-proving affidavit was invalid rendering the submitted proof statutorily and fatally deficient, then the probate must be set aside.[392] At the hearing on the bill of review, the trier-of-fact and the court will consider the evidence and determine whether the process of probating the will was fatally defective, not the validity of the will. The standard is substantial error (in probating the will). The bill of review is not usually determinative and does not end the case, but could shift the burden of proof at trial. The bill of review is necessarily a pre-trial matter because it is determinative of what party will carry the initial burden of proof in the will contest trial. If the bill of review is granted, the case would be converted to a pre-probate will contest and the initial burden of proof would shift to the proponent of the will to prove its substantive validity.[393] If the bill of review is not determined pre-trial, then the wrong party could be assigned the burden of proof in the will contest creating automatic error. The trier-of-fact, i.e., the jury, of the will contest cannot determine the bill of review, because by then reversible error will have occurred.
>
> b.) **Will Contest**. The key questions in the will contest are whether the decedent lacked testamentary capacity or was unduly influenced when the decedent signed the will. The latter is definitionally different, separate and distinct from the bill of review described above—since it places the actual validity of will without reference to what happened at the will prove-up hearing at issue and is determinative of what Will should be probated.[394]

A court cannot ignore the substance of each proceeding and blindly look only to the requested relief—to set aside the probate order—because the method of getting to the relief is different.[395] The bill of review ruling could

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391. *Id.*

392. McDonald v. Carroll, 783 S.W.2d 286, 288 (Tex. App.—Dallas 1989, writ denied) (stating that to be entitled to relief under a statutory bill of review, it is necessary to "specifically allege and prove substantial error by the trial court" and it is "not necessary that the error appear on the face of the record."); *see also* Ablon v. Campbell, 457 S.W.3d 604, 609 (Tex. App.—Dallas 2015, pet. denied); *see In re* Estate of Cunningham, 390 S.W.3d 685, 687 (Tex. App.—Dallas 2012, no pet.) ("The error need not appear on the face of the record; but if it does not, the party filing the bill of review must prove the error at trial by a preponderance of the evidence."). *See also* TEX. EST. CODE ANN. §§ 256.152─.153.

393. *See* TEX. EST. CODE ANN. §§ 256.152–.153.

394. TEX. EST. CODE ANN. § 256.204 (West 2014).

395. *Id.*

order the probate order set aside, but it will not end the proceeding.[396] The will contest, on the other hand, could have the permanent effect of nullifying the purported wills and documents as invalid, *ab initio*, and for all time, thereby preventing any of them from ever being probated or recognized again—meaning, such determination will end the proceeding.[397] These are profound and fundamental differences that separate the two proceedings, rather than combine them.[398]

D. Restricted Appeal

A restricted appeal, formerly a writ of error, is available for the limited purpose of providing a party that did not participate at trial with the opportunity to correct an erroneous judgment.[399] The Texas Rules of Appellate Procedure, Rule 30, provides as follows:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a post judgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c). Restricted appeals replace writ of error appeals to the court of appeals. Statutes pertaining to writ of error appeals to the court of appeals apply equally to restricted appeals.[400]

Obviously, a restricted appeal is not specific to probate matters, but because probate orders are often obtained without the participation of all interested persons, it can be used as another avenue to modify erroneous or incorrect probate judgments.[401] Restricted appeals are not as common as other appeals because the requirements must be perfectly met, which is not common.[402] Restricted appeals are direct appeals to the appellate court, pursuant to TEX. R. APP. P., Rule 30, TEX. CIV. PRAC. & REM. CODE § 51.012 and TEX. CIV. PRAC. & REM. CODE § 51.013. Restricted appeals are a direct attack.[403] For a restricted appeal to be successful:

> (1) a notice of restricted appeal must be filed within six months after judgment is signed; (2) by a party to the lawsuit; (3) who did not participate in the hearing that resulted in the judgment complained of; (4) who did not

396. *Id.*
397. *See id.*
398. *See id.*
399. *In re* Estate of Head, 165 S.W.3d 897, 900 (Tex. App.—Texarkana 2005, no pet.) (citing TAC Americas, Inc. v. Boothe, 94 S.W.3d 315, 218 (Tex. App.—Austin 2002, no pet)).
400. TEX. R. APP. P. 30.
401. *See* Spencer, *supra* note 415, at 17–18.
402. *See* Spencer *supra* note 415, at 17.
403. Fazio v. Newman, 113 S.W.3d 747, 748 (Tex. App.—Eastland 2003, pet. denied).

> file a timely post-judgment motion or request for findings of fact and conclusions of law; and (5) error must be apparent on the face of the record.[404]

The "face of the record" requirement means the error must be apparent on the face of all papers on file in the appeal, including the reporter's record.[405] The error need not be affirmatively established, but need only be apparent.[406] These requirements are jurisdictional and will cut off a party's right to seek relief by way of a restricted appeal if they are not met.[407]

An appellate court may not consider evidence in a restricted appeal unless it was before the trial court when judgment was rendered; such prohibition is appropriate because an appeal by writ of error directly attacks the judgment rendered and prevents this court from indulging in presumptions supporting the judgment.[408] It is important to understand a party pursuing reversal of a probate decision may pursue a restricted appeal (a direct attack) without first availing itself of the direct attack remedies in TEX. EST. CODE § 55.251[409] and TEX. PROB. CODE § 256.204.[410] This allows a direct attack on the probate judgment in the appellate court.[411] The court in *Lee A. Hughes Custom Homes, Inc. v. Shows* held that the "pendency of a restricted appeal does not preclude pursuit of a bill of review in the trial court simultaneously when the matters raised in the bill of review proceeding are not apparent on the face of the record and thus could not be addressed in the restricted appeal."[412] All these cases involve an equitable bill of review

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404. *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.) (citing TEX. R. APP. P., 30 and 26.1(c)); Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985); Roventini v. Ocular Sciences, Inc., 111 S.W.3d 719, 721 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

405. *In re* Estate of Wilson, 252 S.W.3d 708, 711 (Tex. App.—Texarkana 2008, no pet.); Westcliffe, Inc. v. Bear Creek Constr., Ltd., 105 S.W.3d 286, 289 (Tex. App.—Dallas 2003, no writ).

406. TEX. R. APP. P. 30; Brown v. Brookshires Grocery Store, 10 S.W.3d 351, 353 (Tex. App.—Dallas 1999, pet. denied) (*citing* Norman Communications v. Texas Eastman, Co., 955 S.W.2d 269, 270 (Tex. 1997)).

407. Franklin v. Wilcox, 53 S.W.3d 739, 741 (Tex. App.—Fort Worth 2001, no pet.) (holding that court lacked jurisdiction over restricted appeal because appellant had participated through his attorney in the hearing that led to the adverse order); Lab. Corp. v. Mid-Town Surgical Ctr., Inc., 16 S.W.3d 527, 528–29 (Tex. App.—Dallas 2000, no pet.) (holding that court lacked jurisdiction over restricted appeal when laboratory corporation was precluded from perfecting restricted appeal because it had filed a timely post-judgment motion and where its notice of appeal was filed more than six months after judgment was signed). *See* Clopton v. Pak, 66 S.W.3d 513, 515 (Tex. App.—Fort Worth 2001, pet. denied).

408. Campsey v. Campsey, 111 S.W.3d 767, 770 (Tex. App.—Fort Worth 2003, no pet.); TEX. R. APP. P. 26.1(c).

409. Formerly, TEX. PROB. CODE § 31 (repealed by TEX. EST. CODE ANN. § 55.251 (West 2014).

410. Formerly, TEX. PROB. CODE § 93 (repealed by TEX. EST. CODE ANN. § 256.204 (West 2014); Estate of Hutchins, 829 S.W.2d at 297.

411. *See* TEX. R. APP. P. 30.

412. Lee A. Hughes Custom Homes, Inc. v. Shows, 2003 WL 21235512 at *3 (Tex. App.—Fort Worth 2003, no pet.). *See, e.g.*, Tri-Steel Structures, Inc. v. Hackman, 883 S.W.2d 391, 395, n. 2 (Tex. App.—Fort Worth 1994, writ denied) (holding, under former rules of appellate procedure, that party may seek bill of review while simultaneously pursuing appeal by writ of error); Am. Motorists Ins. Co. v. Box, 531 S.W.2d 407, 408 (Tex. Civ. App.—Tyler 1975, no writ) (stating both methods of attack may be

proceeding while the restricted appeal proceeds, but are directly applicable to a statutory bill of review because the appellate requirements and standards are the same.[413]

Because a bill of review necessarily relies upon evidence and usually requires an evidentiary hearing, it is directly contrary to a direct attack by the restricted appeal because only the face of the record may be examined.[414] The evidence of error in a bill of review would be outside the face of the record.[415] As a result, a probate bill of review may proceed seeking modification or set aside the same order or judgment subject to a restricted appeal.[416] A will contest may also be, simultaneously, pending seeking to set aside the same order or judgment subject to the restricted appeal and bill of review.[417] These three error correction procedures are direct attacks on the order or judgment but with different procedures and standards.[418] While the restricted appeal focuses on error that is in the record without presentation of evidence, a probate bill of review requires presentation of evidence of substantial error technical defect in entry of the order or judgment that does not determine validity or invalidity of the will, and a will contest determines the validity of a will or multiple wills based upon presentation of evidence of lack of capacity or undue influence, fraud, or forgery.[419] Separate and distinct rules and statutes establish separate and distinct standards and procedures for direct attack error correction.[420] The latter is the very reason the *Crowson v. Wakeham* finality standard should apply to any direct attack on an order or judgment—each adjudicates a substantial right and ends a discrete phase in a probate proceeding.[421]

E. The Demise of the Equitable Bill of Review in Probate

A "bill of review" is an equitable "proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal."[422] As an independent suit, a bill of review

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simultaneously pursued where matters raised in each method differ) (citing 4 MCDONALD, TEXAS CIVIL PRACTICE § 18.25 (1971)); First Nat'l Bank of Fort Worth v. Kelley, 278 S.W.2d 350, 351 (Tex. Civ. App.—Eastland 1955,no writ); Smith v. Rogers, 129 S.W.2d 776, 777 (Tex. Civ. App.—Galveston 1939, no writ) (refusing writ of prohibition seeking to prevent trial judge from proceeding with bill of review while appeal by writ of error pending).

413. TEX. R. CIV. P. 329b, TEX. R. APP. P. 26.1(a).

414. *See* Spencer *supra* note 415, at 18; TEX. R. APP. P. 26.1.

415. Walker v. Sharpe, 807 S.W.2d 448, 450 (Tex. App.—Corpus Christi 1991, writ denied).

416. *See* Spencer *supra* note 415, at 18.

417. *See id.*

418. *See id.*

419. *See generally id*. (comparing and contrasting three error correction procedures.).

420. *Id.*

421. Crowson v. Wakeham, 897 S.W.2d 779, 783 (Tex. 1995).

422. Power v. Chapman, 994 S.W.2d 331, 334 (Tex. App.—Texarkana 1999, no pet.); Caldwell v. Barnes, 975 S.W.2d 535, 537 (Tex. 1998).

is available only after expiration of a trial court's plenary power.[423] When all other avenues and time limits had expired, the equitable bill of review is the only option to set aside of an order or judgment.[424] Rightly so, an equitable bill of review carries a high burden and stringent requirements must be met.[425] While an equitable bill of review is still generally available, in civil cases and was, until recently, a fifth method of error correction in probate, it was eliminated by the Texas Supreme Court in *Valdez v. Hollenbeck*.[426] The Texas Supreme Court states its reasoning behind the elimination of the equitable bill of review in probate matters as follows:

> Whether section 31[427] prescribes the applicable statute of limitations presents a matter of statutory construction, which we review *de novo*.[428] In doing so, we construe the words of the statute according to their plain meaning and within their contextual environs.[429] Enacting statutes of limitations is a legislative prerogative.[430] The purpose of a limitations period is to "establish a point of repose and to terminate stale claims."[431] Bills of review are subject to statutes of limitations, but the limitations period depends on the legal context. The Legislature has provided a default limitations period of four years if no express limitations period has been specified for a particular cause of action: "Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues."[432] The four-year residual statute of limitations typically applies to bills of review.[433]
>
> When the Legislature has declared an express limitations period, however, the more specific time limit controls.[434] The Legislature has done so here. As part of a comprehensive statutory scheme governing the probate process, the Legislature authorized an interested party to seek a bill of review, but affirmatively declared "no bill of review shall be filed after two years have elapsed from the date" of a probate court decision, order, or

423. Elliott v. Elliott, 21 S.W.3d 913, 916 (Tex. App.—Fort Worth 2000, pet. denied); *In re* Moreno, 4 S.W.3d 278, 281 (Tex. App.—Houston [14th Dist.] 1999, no pet.); Villalba v. Fashing, 951 S.W.2d 485, 489 (Tex. App.—El Paso 1997, writ denied).

424. *See* Elliott, 21 S.W.3d at 916.

425. Power, 994 S.W.2d at 334–35 (citing, Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987); Baker v. Goldsmith, 582 S.W.2d 404, 406–07 (Tex. 1979); Alexander v. Hagedorn, 226 S.W.2d 996, 998 (Tex. 1950)).

426. Valdez v. Hollenbeck, 465 S.W.3d 217, 226–27 (Tex. 2015).

427. Now, TEX. EST. CODE ANN. § 55.251 (West 2014).

428. City of Rockwall v. Hughes, 246 S.W.3d 621, 625 (Tex. 2008).

429. Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 (Tex. 2004).

430. S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996).

431. *Id.* (citing Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990)).

432. TEX. CIV. PRAC. & REM. CODE § 16.051.

433. Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998).

434. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 16.002–.072 (West 2017) (prescribing limitations periods of one to five years for various common-law causes of action); Williams v. Khalaf, 802 S.W.2d 651, 654 n. 3 (Tex.1990) (listing a multitude of statutory alterations to the residual four-year limitations period).

> judgment.[435] Without regard to whether the Legislature intended to abrogate equitable bills of review in the probate context—which we need not decide—section 31 unequivocally prescribes a two-year limitations period for all bills of review in probate proceedings. The statute neither provides nor suggests different limitations periods for bills of review in the probate context. Absent an absurd or unreasonable result, we must give effect to the statute's plain language.[436]
>
> Our plain-language reading of section 31 is reinforced when the statute is viewed within the context of the Probate Code.[437] The Legislature has rarely prescribed express limitations periods for bills of review but did so several times in the Probate Code and carried those limitations forward when the Probate Code was recently recodified as the Texas Estates Code.[438] These express references to statutes of limitations for bills of review reflect legislative concern for the orderly administration of estates and finality of judgments and are consistent with the "strong public interest in according finality to probate proceedings," which has been afforded great weight in our precedent.[439] Construing section 31 as prescribing a two-year limitations period for bills of review is neither patently absurd nor unreasonable in the statutory context.
>
> Accordingly, we conclude the two-year statute of limitations prescribed in section 31 applies and the heirs' bill of review was untimely unless (1) the limitations period was tolled *and* (2) the heirs filed their petition for bill of review within two years from the date the injury was discoverable or the estoppel effect of tolling ceased.[440]

Based on the holding in *Valdez*, the equitable bill of review error correction procedure is eliminated in probate matters, so the two-year period following the order or judgment to be directly attacked applies and only tolling of such time period will offer any extension.[441]

Prior to *Valdez v. Hollenbeck*, a great misconception was that equitable bill of review rules and requirements apply to a statutory probate bill of

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435. Former TEX. PROB. CODE § 31 (repealed by TEX. EST. CODE § 55.251).

436. *See* TGS–NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011).

437. *See, e.g.*, CHCA Woman's Hosp. v. Lidji, 403 S.W.3d 228, 231–32 (Tex. 2013) (citing the well-established statutory-construction canon requiring consideration of statutory language in the context of the entire statutory scheme).

438. *See* former TEX. PROBATE CODE § 31 (repealed by TEX. EST. CODE § 55.251) (prescribing two-year limitations period for bills of review), § 55 (heir not properly served in an heirship proceeding to file a bill of review within four years or "after the passage of any length of time" with "proof of actual fraud"), § 657 (bill of review in guardianship proceeding cannot be filed more than two years from the date of the decision, order, or judgment, or more than two years after the date a disability is removed); *see also* TEX. ESTATES CODE §§ 55.251, 202.203, 1056.101 (West 2014); *cf.* § 256.204 (limiting will contest to two years or two years after discovering fraud or forgery).

439. Little v. Smith, 943 S.W.2d 414, 418–21 (Tex. 1997) (concluding that the discovery rule does not apply to adoptees' belated inheritance claims despite the inherent difficulty of promptly asserting such claims); *see* Frost Nat. Bank v. Fernandez, 315 S.W.3d 494, 497 (Tex. 2010) (holding that "the discovery rule does not apply to . . . bill of review claims to set aside probate judgments").

440. *See* Valdez v. Hollenbeck, 465 S.W.3d 217 (Tex. 2015).

441. *See id.*

review, which is absolutely incorrect, as stated by virtually every court ruling on a statutory probate bill of review.[442] In contrast to equitable bills of review, section 31 has been interpreted to require a showing of "substantial error" in a prior decision, order, or judgment.[443] With the elimination of the equitable bill of review in probate, the Texas Supreme Court eliminated all the requirements of an equitable bill of review in probate matters, once and for all.[444] A probate bill of review has its own requirement of proving, usually with evidence, substantial error in entry of the order or judgment and these requirements were never part of equitable bill of review.[445] Just as the statutory bill of review has its own limitations period, it also has its own proof requirements and standards.[446] Any discussion of an equitable bill of review or its standards and requirements in probate is now moot.[447] Since the requirements and limitations period of an equitable bill of review do not apply to a statutory probate bill of review and because *Valdez v. Hollenbeck* holds that only TEX. EST. CODE § 55.251 applies in probate, the equitable bill of review no longer exists as an error correction method in estate matters.[448]

VI. CONCLUSION

This entire article underscores the uniqueness of the probate process in Texas and why it is procedurally different than a normal civil matter.[449] *In rem* jurisdiction allows relief without personal service requiring only constructive notice creates unique scenarios.[450] Probate proceedings have capacity and standing requirements over and above normal civil capacity and standing.[451] Any person who wants to be heard on a matter must not only be an "interested person," but must also have a pecuniary interest in the outcome of the proceeding or the particular procedure before the court.[452] "Interested person" status merely creates a place at the table; whether that person or

442. *See* Walker v. Sharpe, 807 S.W.2d 448, 450 (Tex. App.—Corpus Christi 1991, writ denied).; Westchester Fire Ins. Co. v. Nuckols, 666 S.W.2d 372, 375 (Tex. App.—Eastland 1984, writ ref'd n.r.e.); Hamilton v. Jones, 521 S.W.2d 350, 353 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.); Schoenhals v. Schoenhals, 366 S.W.2d 594, 597 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.); Pure Oil Co. v. Reece, 78 S.W.2d 932 (1935); Norton v. Cheney, 161 S.W.2d 73, 74 (1942) (holding that standard for obtaining equitable bill of review did not apply to statutory bill of review in guardianship proceeding, (citing Jones v. Parker, 67 Tex. 76, 3 S.W. 222, 224 (1886))).

443. *See, e.g.*, Nadolney v. Taub, 116 S.W.3d 273, 278 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (The purpose of a section 31 bill of review is to revise and correct errors, not merely to set aside decisions, orders, or judgments rendered by the probate court.); McDonald v. Carroll, 783 S.W.2d 286, 288 (Tex. App.—Dallas 1989, writ denied); Valdez, at 226–27.

444. *See* Valdez v. Hollenbeck, 465 S.W.3d at 217.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *See supra* Parts I–V.

450. *See supra* Part II.

451. *See supra* Part IV.A.

452. *See supra* Part IV.A.

entity will have a right to say anything or participate in the process depends upon whether the result of the proceeding will have an effect monetarily.[453] Without both, that person or entity should not be allowed to intermeddle in an estate.[454] More directly, they are a stranger to the estate and cannot interfere with its efficient administration.[455] In that regard, claimants should not be allowed any standing in an estate other than the minimum necessary to establish the claim.[456] Once the claim against the estate is established, a creditor, by definition, will have a pecuniary interest in the estate, but not necessarily in the entire proceeding.[457] The "interested person" status conferred on a creditor should be limited to the standing necessary to collect the claim; anything beyond that would amount to unreasonable and unlawful interference with the estate administration.[458]

Creditors with merely a possible right to be paid, should not be allowed to participate in the substantive part of the administration unless the proceeding will have a substantial impact on that claim.[459] A will contest, i.e., determining which will, if any, of the decedent should be probated, is never going to have any impact on payment of the claim because all inheritance is taken subject to the administration and payment of claims.[460] It is, arguably, possible that the named independent executor could have an impact on payment of the claim, if there was an inherent bias or conflict with the creditor, but such instance would be rare.[461] Even then, a disqualification lawsuit does not entitle the creditor to participate in the will contest.[462]

Because substantive probate rulings, orders, and judgments establishing inheritance rights necessarily invoke fundamental constitutional (property) rights, probate matters are treated differently than normal lawsuits.[463] A probate proceeding consists of a continuing series of events, allowing the courts to review controlling intermediate decisions before an error can harm later phases of the proceeding.[464] This is required in the interest of justice and to promote judicial economy.[465] Our inheritance and guardianship procedures rely upon the law being applied correctly, but information is often not available or heirs are not found until later or interested persons come forward after orders are entered.[466] In other words, orders or judgments can

453. *See supra* Part IV.A.
454. *See supra* Part IV.A.
455. *See supra* Part IV.A.
456. *See supra* Part IV.A.
457. *See supra* Part IV.A.
458. *See supra* Part IV.A.
459. *See supra* Part IV.D.
460. *See supra* Part IV.A.
461. *See supra* Part IV.A.
462. *See supra* Part IV.A.
463. *See supra* Part II.
464. *See supra* Part II.
465. *See supra* Part II.
466. *See supra* Part II.

be entered in error through no fault of anyone.[467] A court ought to be able to change such orders in fairness to everyone with an interest in the estate.[468] As a result, the "one final judgment rule" in probate proceedings is modified.[469] Imagine if inheritance decisions were absolutely final thirty days after entry; many people would lose their inheritance, solely because the court was not timely made aware of their existence.[470] Error correction is a necessity in such *in rem* proceedings and is well-established to ensure these important decisions are right.[471]

Every citizen of Texas has the fundamental right to, at death, pass property earned over a lifetime to the person, persons, or entities of her or his choosing, and probate courts are the legal mechanism of accomplishing those goals.[472] Error correction is one of the benchmarks of the Texas inheritance system.[473] Interested persons should never hesitate to use one of the, now, four error correction procedures in probate if they are available to change a judgment issued incorrectly or in error.[474] Having these multiple options emphasizes the importance of getting the order or judgment right, which is their overriding purpose; it does not matter which one is utilized to accomplish that goal.[475] Obviously, the law favors finality of disputes and judgments, so while it is important to be able to change incorrect or erroneous orders, it is equally important to establish a point where no further changes can be made.[476] The ability to alter an order cannot go on forever, otherwise an heir or beneficiary of an estate would never know for sure the property inherited is theirs unequivocally.[477] Erring on the side of inclusion, rather than exclusion, the law allows courts a lot of time and opportunity to get probate orders right before they become final.[478] Clarity of title to inherited property is vital, therefore, finality of probate orders and judgments is a central part of property rights jurisprudence in Texas.[479] The procedure and finality established by the *Valdez* holding, the bill of review and will contest statutes together provide that clarity and provide certainty that such orders and judgments, once final, are as correct as possible or, at least, will not be changed.[480] The Texas Probate System works very well and, while not

467. *See supra* Part II.
468. *See supra* Part II.
469. *See supra* Part II.
470. *See supra* Part II.
471. *See supra* Part II.
472. *See supra* Part I.
473. *See supra* Part V.
474. *See supra* Part V.
475. *See supra* Part I.
476. *See supra* Part V.D.
477. *See supra* Part V.D.
478. *See supra* Part V.D.
479. *See supra* Part V.D.
480. *See supra* Part V.E.

perfect, is an extremely equitable system to attempt to secure the inheritance rights of all persons.[481]

481. *See supra* Part V.E.