SELECTED EVIDENTIARY ISSUES IN PROBATE AND GUARDIANSHIP CASES

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TABLE OF CONTENTS

I. "DEAD MAN'S RULE"-ADMISSIBILITY OF STATEMENTS OF A DECEDENT OR WARD 1

A. Purpose of the Rule 1

B. Current Rule 601 of the Texas Rules of Evidence 1

C. Checklist 2

D. In Depth Look at the Checklist 2

E. Miscellaneous Observations 9

II. HEARSAY EXCEPTION FOR THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION 9

III. ADMISSIBILITY OF LAWYER'S FILE AND TESTIMONY 11

A. Claimants through the same deceased client [Exception 2] 11

B. Documents Attested to by a Lawyer [Exception 4] 13

IV. ADMISSIBILITY ISSUES RELATING TO BUSINESS RECORDS AND DISCUSSION OF "HEARSAY WITHIN HEARSAY" 13

V. ADMISSIBILITY OF MENTAL HEALTH INFORMATION AND TESTIMONY . . . 15

VI. EVIDENCE REQUIRED OF A WILL PROPONENT AND GUARDIANSHIP APPLICANT FOR ESTABLISHING RIGHT TO ATTORNEY'S FEES 18

A. Will Proponent 18

B. Guardianship Applicant 20

CHECKLIST FOR APPLICABILITY OF THE DEAD MAN'S RULE 22

I. "DEAD MAN'S RULE"- ADMISSIBILITY OF STATEMENTS OF A DECEDENT OR WARD

In many probate cases, a witness will attempt to testify as to statements made by the deceased person. Obviously, such statements are often times self-serving (i.e. "Daddy wanted me to have the property. He told me so.")

A. Purpose of the Rule

The original purpose of the Dead Man's Rule was to prevent one party from testifying to conversations with the deceased, who was no longer available to refute the existence or truth of those conversations. *In re Estate of Watson*, 720 S.W.2d 806, 807 (Tex. 1986). The original rule was also applied to testimony about transactions with the deceased. An object of the statute is to prohibit the interested heirs and legal representatives from testifying to any facts, or opinions, based upon observations, arising out of any transaction with the decedent which the decedent could, if living, contradict or explain. *Andreades v. McMillan*, 256 S.W.2d 477, 479, (Tex. Civ. App. 1953, writ dism'd w.o.j.). Death having sealed the lips of one of the parties, the law, for reasons founded upon public policy, seals the lips of the other. *Id.*; 2 Wigmore, note 4 §578 at 820. The Dead Man's Rule is concerned only with the capacity or competency of a witness to testify as to a particular matter, rather than with admissibility of the evidence of the transaction itself. *Id.* The rule does not prohibit a party from testifying to facts from personal knowledge arising otherwise from a transaction with or statement by the decedent. *Adams v. Barry*, 560 S.W.2d 935, 937 (Tex. 1978).

Effective September 1, 1983, the Dead Man's Rule was limited to oral statements unless the statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party. Then, effective September 1, 1986, the Rule was repealed altogether in criminal cases. Therefore, the rule applies only in *civil* actions.

B. Current Rule 601 of the Texas Rules of Evidence

Rule 601 of the Texas Rules of Civil Evidence provides as follows:

> (a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:
>
> (1) Insane persons. Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.
>
> (2) Children. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.
>
> (b) "Dead Man's Rule" in Civil Actions. In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such,

> neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

Tex. R. Evid. 601 (West 2010).

C. Checklist

The following is a breakdown of the rule into the inquiries to be made regarding its applicability to a particular situation:

1. Is it a suit or an action brought by <u>or</u> against an:

a. executor, administrator, or guardian in which judgment may be rendered for or against them in that capacity? (or)

b. heir or legal representative of the deceased based in whole or in part upon the oral statement?

If not, the person can testify. If so, proceed to #2.

2. Is a *party* testifying against a party or parties? (see below for discussion of "party")

If not, the person can testify. If so, proceed to #3.

3. Is the party testifying as to an *oral statement*?

If not, the person can testify. If so, proceed to #4.

4. Is the statement corroborated?

If so, the person can testify. If not, proceed to #5.

5. Did the opponent call the witness to at the trial testify about the statement?

If so, the person can testify. If not, the testimony is barred.

D. In Depth Look at the Checklist

Inquiry (1): Is it a suit by or against an Executor, Administrator, Guardian, or Heir or Legal Representative?

The threshold inquiry as to whether the Dead Man's Rule applies to a particular action is to look at the parties and the nature of suit.

A. Executor, Administrator, Guardian

(a) Capacity Determined When Evidence Is Offered

The existence of the disqualifying interest must be determined as of the time the testimony sought to be excluded is offered, and not as of the time of the filing of the petition. *Pugh v. Turner*, 197 S.W.2d 822, 825 (Tex. 1946).

In *Pugh,* Mary Turner filed suit individually and as executrix of her husband's estate to recover on two notes executed by Pugh. At trial, Pugh was allowed to testify as to a meeting whereby the decedent agreed to settle the debt. *Id.* at 824. Pugh was victorious. *Id.* at 825. Turner contended on appeal that Pugh's testimony as to her husband's statements should have been excluded under the Dead Man's Rule. *Id.* Pugh contended that the rule was not applicable because at the time of the trial Turner, as executrix, was a mere nominal party. *Id.* at 826. At the time of the filing of the suit, the court pointed out that there were still unpaid debts and the legatees had not received their bequests. *Id.* at 825. However, by the time of the first trial, all of the debts had been paid and all of the bequests to others than herself had been satisfied in full. *Id.* By the time of the second trial, the only unfinished estate business was the collection of the notes sued upon. *Id.* Pugh argued, therefore, that Turner was recovering as a legatee under the will and not as executrix. *Id.* at 826. The Texas Supreme Court agreed and held that Dead Man's Rule was not applicable since no judgment could have been rendered in Turner's favor or against her as executrix of the estate. *Id.*

However, in *Ford v. Roberts*, 478 S.W.2d 129, 131-32 (Tex. Civ. App.-Dallas 1972, writ ref'd n.r.e.), a suit against an executrix individually and as executrix, the court found *Pugh* to be distinguishable since there was evidence of unpaid debts and claims, unlike in *Pugh*, and because a statute had since been enacted creating a means to close an independent administration [prior to the present Probate Code an independent administration, according to the law, considered the estate as closed after one year]. *Id.* at 131-32. Therefore, the Dead Man's Rule prevented testimony regarding statements decedent made to his attorney. *Id.*

In *Tramel v. Estate of Billings*, 699 S.W.2d 259 (Tex. App.-San Antonio 1985, no writ), an insurer brought an interpleader action to determine which of two claimants, the former wife or the estate, was entitled to proceeds of life insurance policies. The trial court awarded the proceeds to the estate. One issue on appeal related to the testimony of Pendergrass, the decedent's attorney and also the administrator of the estate, in which he stated that he conferred with the insurance company by telephone and then followed up with a letter confirming a change of beneficiary from the former wife to the estate. *Id.* at 261. The court of appeals held that the Dead Man's Rule did not prohibit the testimony because, although Pendergrass was the administrator of the estate, he was not named in the suit and is not one for or against whom the judgment may be rendered. *Id.* at 263. Further, Tramel, the party against whom the testimony was offered, was not in the posture of an heir or legal representative. *Id.* at 261. The court also noted that insurance proceeds are non-testamentary. *Id.* at 264.

Was the holding in *Tramel* incorrect? An estate can only sue and be sued through its

personal representative. A decedent's estate is not a legal entity and can neither sue nor be sued. *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex.1987); *Richardson v. Lake*, 966 S.W.2d 681, 683 (Tex. App.--San Antonio 1998, no pet.). Accordingly, a suit by or against an estate must be brought in the name of its legal representative. *See Estate of C.M. v. S.G.*, 937 S.W.2d 8, 10 (Tex. App.--Houston [14th Dist.] 1996, no writ); *Peek v. DeBerry*, 819 S.W.2d 217, 218 (Tex. App.-San Antonio 1991, writ denied). It would appear that Pendergrass should have been the named party rather than the estate. If he had been, would there have been a different result?

The Court in *Seymour v. American Engine & Grinding Company*, 956 S.W. 2d 49 (Tex. App.-Houston [14th Dist.] 1997, writ denied) had to deal with *Tramel*. In *Seymour*, a corporation filed a declaratory judgment action seeking construction of a stock purchase agreement funded by a "key man" policy on the life of the company's deceased president. The president's family members filed a counterclaim and cross-action alleging various causes of action contending they were tricked into transferring ownership of the policy to the corporation and naming the corporation as beneficiary. The company purchased a life insurance policy on the decedent in order to be able to fund the purchase of his shares pursuant to a stock purchase agreement. *Id.* at 53. After the decedent's death, decedent's wife refused to honor the purchase agreement. One of the bases of her argument was that the decedent allegedly had a conversation with his son wherein the decedent told his son that the company promised that the insurance proceeds would be paid to his wife. The trial court disallowed the testimony under the Dead Man's Rule. *Id.* at 54. The trial court granted a directed verdict for the corporation.

On appeal, the wife relied on *Tramel* in support of her position that the Dead Man's rule did not prevent the testimony. *Id.* at 55. The court disagreed, stating that *Tramel* did not control. *Id.* The court pointed out that, unlike in *Tramel*, the wife was a party to the case in her capacity as executrix. *Id.* Further, the suit involved an attempt by the company to enforce a contract with the decedent, whose shares passed through his estate to the wife. *Id.* The wife individually and as executrix was ordered in the judgment to sell the shares to the company. *Id.* Therefore, the court held that the rule was properly applied to exclude the uncorroborated statement. *Id.*

(b) Rule Applicable in Proceeding to Probate Will

In a proceeding to probate a will, the testimony of the executor named in the will as to transactions with or statements by the testator violates the Dead Man's Rule. *Thomason v. Burch*, 223 S.W.2d 320, 323 (Tex. Civ. App.- Fort Worth 1949, writ ref'd n.r.e.) .The court stated that the proponent actively sought probate of the will and could have appealed from a judgment denying probate of the will. Therefore, he was in a representative capacity. Although he had no personal interest, he was acting in behalf of those who were interested in the estate. *Id.*

(c) Rule Not Applicable in Heirship Proceeding

The dead man's rule does not apply to an action to determine heirship and to appoint personal representative. *Cain v. Whitlock*, 741 S.W. 2d 528 (Tex. App.-Houston [14th Dist.]

1987, no writ). In *Cain*, the appellee was named as common-law wife and appointed as administratrix of the estate. *Id.* at 529. Appellant alleged that the trial court erred in allowing appellee and the deceased's father to testify concerning oral statements made by the deceased under the Dead Man's Rule. *Id.* at 530. The court of appeals disagreed, stating that the statute does not apply to a suit seeking the appointment of an administrator because it is not an action by or against an executor or administrator. *Id.* Further, the court said that, with respect to the heirship, it would be difficult to prove common-law marriage without allowing the testimony as to the oral statements of the deceased. *Id.*

B. Heir or Legal representative of the deceased

(a) Rule does not extend to legatees or devisees

The Dead Man's Rule does not extend to *legatees* or *devisees*, since they are not included in the words "heirs or legal representatives" as used in the statute. *Pugh v. Turner*, 197 S.W.2d 822, 825 (Tex. 1946) (emphasis added).

(b) Rule does not extend to suits by co-owners with decedent

The Dead Man's Rule does not extend to co-owners with the deceased. *Quitta v. Fossati*, 808 S.W. 2d 636, 641 (Tex. App.-Corpus Christi 1991, writ denied). Quitta owned a house with Calhoun. *Id.* at 635. The property was leased to Fossati. *Id.* Calhoun died, and Quitta acquired Calhoun's interest in the property from Calhoun's estate. *Id.* Quitta sued for recovery of rent. *Id.* Fossati was allowed to testify that he had an oral agreement with Calhoun modifying the lease by allowing him to set off each month's rent by the cost of materials used in improving the leasehold. *Id.* Quitta contended the testimony violated the Dead Man's Rule. *Id.* at 641. The court disagreed, stating that construction of the rule has not been extended beyond its plain meaning and is strictly limited to suits by or against "executors, administrators, or guardians" and "heirs or legal representatives." *Id.* In this case, Quitta was neither an heir nor legal representative of Calhoun, having derived his interest as a co-owner with Calhoun. Therefore, the testimony was not barred. *Id.*

(c) Rule does not apply to wrongful death action

The Dead Man's Rule does not apply to a wrongful death claim. *Jordan v. Shields*, 674 S.W.2d 464 (Tex. App.-Beaumont 1984, no writ). *Jordan* arose out of a vehicular collision. Two separate suits were filed, and the actions were consolidated. *Id.* at 466. One ground on appeal was that the trial court erred in admitting into evidence the testimony of two witnesses concerning transactions they had with the decedent in violation of the Dead Man's Rule. [The prior rule was still in effect, therefore testimony as to "transactions" could also be excluded]. *Id.* at 468. The court of appeals disagreed, stating that the daughter and husband of the deceased proceeded to trial only on their wrongful death claims. *Id.* Therefore, their causes of action were their own, not an inherited right. *Id.*

(d) Rule applies to statements of deceased about division of property

Testimony regarding the intent of the decedent to divide the estate between his brothers and

sisters is inadmissible under Texas Dead Man's Rule. *Sawyer v. Lancaster*, 719 S.W.2d 346, 349-50 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e).

In *Miller v. Miller*, 285 S.W.2d 373 (Tex. Civ. App.-Eastland 1955, no writ), a proceeding for probate of parties' deceased parents' alleged lost wills, the proponent was precluded by Dead Man's Rule from testifying as to his conversations with parents concerning their disposition of their property. *See also Parham v. Wilbon*, 746 S.W.2d 347 (Tex. App.-Fort Worth 1988, no writ)(alleged statements made by testator to his daughter regarding his physical and emotional weakness and his desire that daughter inherit half his estate were not corroborated by any evidence other than daughter's testimony and were properly excluded.)

Inquiry (2): Is a party testifying?

The Dead Man's Rule applies only to parties: "neither *party* shall be allowed to testify against the others as to any oral statement…" Tex. R. Evid. 601(b)(West 2010)(emphasis added). Therefore, if the witness is not a party testifying against another party, he may testify. If he is a party testifying, we proceed to the next inquiry.

Note that the word "party" has been held to include not only parties of record, but all persons enumerated in the statute, that is, executors, administrators, guardians, heirs, and legal representatives, who may have or claim an actual and direct interest in the matters litigated which pertain to the deceased or his estate. *Ragsdale v. Ragsdale*, 179 S.W.2d 291, 294 (Tex. 1944); *See also*, *Ford v. Roberts*, 478 S. W. 2d 129, 133 (Tex. Civ. App. -Dallas 1972, writ ref'd n.r.e.); *Southworth v. Clark*, 411 S.W.2d 62 (Tex. Civ. App., Waco 1967, writ ref'd n.r.e.); *Graves v. Moon*, 92 S.W. 2d 290 (Tex. Civ. App.- Waco 1936, writ ref'd)

The word "party" means a person who has a direct and substantial interest in the issue to which the testimony relates and who is either an actual party to the suit or will be bound by any judgment entered therein. *Chandler v. Welborn*, 294 S.W.2d 801 (Tex. 1956). The statute applies to all who would be bound by the judgment even though they may not be actual parties thereto. *Lehman v. Howard*, 133 S.W.2d 800 (Tex. Civ. App.-Waco 1939, no writ); *Denbo v. Butler*, 523 S.W.2d 458 (Tex. Civ. App.-Houston [1st Dist.] 1975, no writ)(testimony of witness, who was a surviving sister of decedent, was properly excluded under Dead Man's Rule, even though witness was not a party to suit, where witness was an interested party in that she would inherit from her deceased sister by the laws of descent and distribution.)

Inquiry(3): Is the party testifying as to an oral statement?

The Dead Man's Rule also used to apply to "transactions" with the decedent. However, the rule was amended to apply only to oral statements of the decedent.

In *In re Estate of Watson*, 720 S.W.2d 806 (Tex. 1986), in an effort to refute a claim of undue influence, the proponent of the will being contested offered letters written by the decedent for the sole purpose of showing the mental attitude and affection between the parties. *Id.* at 807. The trial court excluded the letters under the Dead Man's Rule. *Id.* The Texas Supreme Court stated, however, that since no testimony was presented by the

proponent as to the circumstances, purposes or contents of the letters, there was no reason to invoke the Dead Man's Rule. *Id.* In addition, the letters were not offered for the truth of the matters asserted within, therefore there were no hearsay problems. *Id.* The Court went on to state that letters from a decedent describing warm feelings towards a beneficiary have been upheld as admissible by several Texas courts, despite objections on grounds of violation of the Dead Man's Rule, pointing out that these types of letters are particularly useful when, as here, there are contentions that animosity existed between the parties in the years preceding the execution of the will. *Id.*

However, in *Tuttle v. Simpson*, 735 S.W.2d 539 (Tex. App.-Texarkana 1987, no writ), a will construction case involving the identification of a parcel of land, the court stated that testimony which discussed the decedent *pointing out* the intended boundary to one of the parties would be barred under the Dead Man's Rule because, without the admission of the oral statements accompanying the *gestures*, the gestures would be meaningless. *Id.* at 542 (emphasis added).

Inquiry(4): Is the statement corroborated?

If the statement is corroborated, the party may testify as to the statement. If it is not corroborated, we proceed to the next inquiry.

The corroboration need not be sufficient on its own to support the verdict, but must tend to *confirm and strengthen* the testimony of the witness and show the *probability* of its truth. *Parham v. Wilbon*, 746 S.W.2d 347, 350 (Tex. App.-Fort Worth 1988, no writ)(emphasis added); *Bobbitt v. Bass*, 713 S.W.2d 217, 220 (Tex. App.-El Paso 1986, writ dism'd).

Corroboration may come from any other competent witness or other legal source, including documentary evidence. *Parham v. Wilbon*, 746 S.W.2d at 350; *Tramel v. Estate of Billings*, 699 S.W.2d 259, 262 (Tex.App.-San Antonio 1985, no writ). However, corroboration of an *interested party's testimony* may not emanate from him or depend on his credibility. *Tramel,* 699 S.W.2d at 262 (emphasis added).

In *Quitta v. Fossati*, 808 S.W. 2d 636, (Tex. App.-Corpus Christi 1991, writ denied), discussed earlier, the court held that even if the rule applied to testimony of the tenant as to his oral agreement with the decedent who co-owned property with the plaintiff, there was evidence that the decedent's brother heard the decedent state *before* the lease was signed that the tenants "were going to rent a house of hers and do some work in exchange for some rent." *Id.* at 641-42 (emphasis added). Although dicta, the court stated that even though the discussion occurred before the written lease was signed, the brother's testimony is some evidence to support the oral modification. *Id.* at 642.

In *Powers v. McDaniel*, 785 S.W. 2d 915 (Tex. App.-San Antonio 1990,writ denied), Powers, the decedent's mother, sued McDaniel, the son's widow, individually and as independent executrix of the son's estate for title to a one-half interest in a house and for title to 13 acres of land. With respect to the house, Powers was allowed to testify that she purchased the home with her own funds but agreed to put her son's name on the deed based upon his agreement to devise the property back to her should he predecease her. *Id.* at 916. The court held that the Dead Man's Rule applied to the testimony, but the testimony was, nonetheless, admissible

because it was corroborated by her checks used to purchase the property and by copies of the son's original will wherein he devised his one-half interest in the house to her. *Id.* at 920. Even though the will was executed a month *after* the oral statement, the subsequent action of the decedent in carrying out the oral statement was sufficient corroboration. *Id.*

Donaldson v. Taylor, 713 S.W. 2d 716 (Tex. App. Beaumont 1986, no writ) was an action brought on a guaranty of a deceased contractor regarding foundation work. Plaintiff contended that the decedent made a "guarantee for life of the structure." The heir of the decedent argued that the Plaintiff's testimony violated the Dead Man's Rule. *Id.* at 716. The Court disagreed, stating that the contractor's newspaper advertisement (which stated, in part, "[e]ach job guaranteed for the life of the structure") corroborated the testimony. *Id.*

Inquiry (5): Did the opponent call the witness at the trial to testify about the statement?

Regardless of whether the corroboration requirement is met, the witness can testify about a decedent's statement if the opposing party calls the witness *at the trial* to testify as to the statement. Tex. R. Evid. 601(b) (West 2006)(emphasis added). The original rule did not include the phrase "at the trial." This phrase was added in a 1984 amendment presumably to address the problem caused by earlier judicial decisions which held that when the testimony of a witness who would otherwise be incompetent to testify regarding the matters covered by the Dead Man's Rule is taken by *deposition* and the "opposite party" initiated an inquiry relative to a transaction with the decedent, the statute is waived and the witness may testify fully regarding such transaction, whether or not the deposition is offered in evidence. *See. .e.g, Allen v. Pollard*,212 S.W. 468 (Tex. 1919); *Chandler v. Welborn*, 294 S.W.2d 801 (Tex. 1956). This same waiver argument was even applied to other pre-trial procedures such as requests for admissions and written interrogatories. *See, e.g., Fleming v. Baylor University Medical Center,* 554 S.W.2d 263,, 266 (Tex. Civ. App.- Waco 1977,writ ref'd n.r.e.); *Denbo v. Butler*, 523 S.W.2d 458, 460 (Tex.Civ.App.- Houston [1st Dist.] 1975, no writ).;*Burris v. Levy*, 302 S.W.2d 171, 174 (Tex.Civ.App. San Antonio 1957, writ ref'd n. r. e.).

In *Fleming,* prior to trial the defendant propounded written interrogatories to Mrs. Fleming directly related to Mr. Fleming's mental and physical condition during his five-day stay in the hospital just preceding the fire, and Mr. Fleming's physical condition after the fire. By such inquiries, Defendant was held to have waived objections based upon the Dead Man's Rule to Mrs. Fleming's testimony about those facts. *Id* at 266. Presumably, this result would change in light of the additional phrase because, by sending interrogatories prior to trial, the Defendant was not asking the party to testify "at the trial."

Even under the earlier cases, a waiver did not occur when the opposite party merely cross-examined the witness at trial or in deposition brought out over his objection on direct examination. *Chandler v. Welborn*, 294 S.W.2d 801, 809 (Tex. 1956).

As stated earlier, the applicability of the statute is determined as of the time of trial, not when the testimony is elicited. *Chandler v. Welborn*, supra; *Pugh v. Turner*, 197 S.W.2d

822, 825 (Tex. 1946).

E. Miscellaneous Observations

(a) Strict construction

The statute is to be strictly construed. *Pugh v. Turner*, 197 S.W.2d 822, 825 (Tex. 1946). The court will usually allow the testimony unless the statement falls directly under the statute.

(b) Waiver by failure to object

Rule 33.1 of the Texas Rules of Appellate Procedure provides, in part:

> (a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1(a) (West 2010).

Any complaint about the admission of evidence admitted in violation of the Dead Man's rule is waived if the party fails to object to the testimony. *Evans v. May*, 923 S.W.2d 712, 714 (Tex. App.-Houston [1st Dist.] 1996, writ denied); *Tuttle v. Simpson*, 735 S.W.2d 539, 542 (Tex. App.-Texarkana 1987, no writ). However, waiver as to one witness is not waiver as to other witnesses. *Tuttle*, 735 S.W. 2d at 542.

(c) Limiting Instruction

The last sentence of the statute ("The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party") was added to prevent favored party from using the statute as a "sword" in closing argument by suggesting that if decedent had made any statements to opposing party, the jury would have heard them.

II. HEARSAY EXCEPTION FOR THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION

Lawyers seeking to have statements of the decedent admitted have also attempted to rely on Rule 803(3) of the Texas Rules of Evidence, claiming that the statement of the decedent was an expression of a then existing mental, emotional, or physical condition.

However, it appears that, with respect to wills, the exception is applied only to statements made by a testator, that relates to the execution, revocation, identification, or terms of his will. *In re Estate of Turner*, 265 S.W.3d 709, 712 (Tex. App.-Eastland 2008, no pet.)

Rule 803(3) of the Texas Rules of Evidence provides that the following is not excluded by the hearsay rule:

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Tex. R. Evid. 803(3) (West 2010)

In *Compton v. Dannenbauertex*, 35 S.W. 2d 682 (Tex. 1931), there was a contention that the will had been revoked. The question on appeal was whether the testator's statements made *after* the execution of a will *that he had made no other will* were admissible on the issue of revocation. The court found the statements to be admissible. *Id.* at 685.

In *Miller v. Miller*, 285 S. W. 2d 373 (Tex. Civ. App.-Eastland 1956, no writ), while the testimony about conversations the proponent had with the decedent concerning the disposition of his property were precluded under the Dead Man's Rule, the statements of decedent that he had seen an attorney and made a will were competent evidence to corroborate the fact that the carbon copies of the wills were executed by the decedent. *Id.* at 376.

In *Knesek v. Witte*, 715 S.W.2d 192,197 (Tex. App.-Houston [1st Dist.] 1986, writ ref. n.r.e.), statements by testatrix' former husband to witness that he and testatrix had made their wills and that all of the property was to go to former husband's nieces and nephews were statements of former husband's existing state of mind so as not to be hearsay, and were admissible to show oral contract for wills.

In *In re Estate of Turner*, 265 S.W.3d 709, (Tex. App.-Eastland 2008, no pet.), a will contest, the Court found that the state of mind exception to the hearsay rule did not apply to testimony of the testator's daughter that the testator told her "he had taken care of everything, and if he ever did pass away everything would be hers". Id. at 712. The court stated, however, that the testimony could have been considered relevant in establishing that the testator *had executed a new will* naming daughter as his sole beneficiary, when the contestants' position was that he died intestate. Id.

However, *Scott v. Townsend,* 166 S.W. 1138, 1143 (Tex. 1914) holds that declarations of the testator that the will was produced by undue influence were not competent to prove the fact of undue influence.

In summary, it would appear that a testator's statement such as "I tore up that will" or "I never made a will" would be admissible as existing mental condition. However, a statement concerning others such as, "my nephew pressured me to name him" would not be admissible. Mauet and Wolfson, *Trial Evidence* 3d Ed. (Aspen 2005) at p.193.

III. ADMISSIBILITY OF LAWYER'S FILE AND TESTIMONY

In many will contest cases, the parties seek discovery of the drafting lawyer's file in hope of either validating the will or finding evidence that can be used to invalidate the will. Often, the party will object to the admissibility of the file materials on the basis of the attorney-client privilege between the decedent and his lawyer.

The purpose of the attorney-client privilege is to promote the unrestrained communication and contact between the attorney and the client in all matters in which the attorney's professional advice or services are sought, without fear that the confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978)

The attorney-client privilege is set forth in Rule 503 of the Texas Rules of Evidence. A cursory review of the rule reveals that certain matters otherwise privileged are, nonetheless, unprotected by the privilege. There is no privilege for the following:

1. Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud

2. Claimants through the same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transactions

3. Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

4. Documents attested to by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and

5. Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Tex. R. Evid. 503(d) (West 2010)

Two of the exceptions most common in probate cases are (2) and (4).

A. Claimants through the same deceased client [Exception 2]

Generally, the attorney-client privilege survives the death of the client and may be claimed by the personal representative. *See* Tex. R. Evid. 503(c) (West 2010). There is an exception, however, where there is a dispute between different parties who claim the privilege through the decedent. For example, if one party is trying to throw out a will under the theory of undue influence, the issue as to who steps into the decedent's shoes is up in the air.

In *In Re Texas A&M-Corpus Christi Foundation, Inc.*, 84 S. W. 3d 358 (Tex. App.-Corpus Christi 2002, no writ), an administrator sued the foundation stating that the university president wrongfully induced

the decedent to make a gift to the foundation, contending that the decedent did not have the mental capacity required to effectuate the transfers at issue. *Id* at 359. The foundation sought discovery from two attorneys who worked with the decedent on the gift transaction. When the foundation sought to depose the two attorneys, the estate asserted the attorney-client privilege as a shield against the foundation's discovery of communications between decedent and the attorneys. *Id.* at 360.The Foundation brought a motion to compel the discovery, which the trial court denied. The Foundation sought mandamus relief. The court of appeals conditionally granted the mandamus relief, finding that discovery concerning decedent's mental capacity was relevant and not privileged because both the university and the estate were claiming through the same deceased client. *Id.* at 361.

In *Hayes v. Pennock*, 192 S.W.2d 169 (Tex. Civ. App.-Beaumont 1946, writ ref'd n.r.e.), an administrator brought suit to cancel a deed to certain real estate the decedent gave to her grandson. The testimony of decedent's attorney concerning communications with the decedent regarding the execution of a deed was excluded at trial. The court of appeals held that the testimony should have been allowed because the statements were not subject to the claim of privilege. *Id.* 173. The court provides a good summary of the law on the subject:

> Not all statements made by a person to his attorney are privileged communications. To be privileged, the communication must pass between the client and his attorney in professional confidence. (citation omitted) Unless it is clear that secrecy was desired the reason for the privilege ceases. (citation omitted). In any given case we must look to the circumstances to determine the intended character of the communication. Thus in regard to the execution and drafting of wills the knowledge gained by the attorney is privileged during the lifetime of the testator, but the confidence is temporary only and after the death of the testator the attorney may testify as to any facts affecting the execution or contents of the will (citations omitted)

Id. at 173-74

The court concluded that the decedent's statements to her attorney concerning the deed were similar to those made by a person who executes a will, and from the alleged statements to him she intended that such statements would be disclosed. Therefore, the statements were not privileged. *Id.* at 174.

In *Pierce v. Farrar*, 126 S. W. 932 (Tex. Civ. App. 1910, no writ), a will contest, the proponent attempted to call the drafting attorney to testify that, before the preparation of his will, the decedent had told him that he wanted to make the will in the way it was made; that his sons-in-law and folks had given him trouble; and that he wanted to fix the property so that practically all of it would go to the other children. The trial court sustained the contestants' objection to the testimony on the grounds that it violated the attorney-client privilege. *Id.* at 933. The court of appeals disagreed, stating that "the rule does not apply in the case of litigation between the heirs, legatees, or devisees of a testator concerning the disposition of his property, the genuineness or validity of the will, and the like." *Id.* In such case, the attorney of testator

is fully competent to testify as to communications between a testator and him as to the directions received as to the disposition of the testator's property, facts throwing light on questions of mental capacity, undue influence and circumstances attending the execution of the testamentary paper. *Id.*

As to the tenor and execution of the will, it hardly seems open to dispute that these are the very facts which the testator expected and intended to be disclosed after his death. Wigmore §2314 at 613.

This exception applies, however, only to disputes between parties who claim through the same client. The exception is not applicable when a party makes a claim adverse to both the client and those claiming under him. *Emerson v. Scott*, 87 S. W. 369 (Tex. Civ. App. 1905, no writ). In *Emerson,* plaintiff sued testator's heirs and devisees to cancel a deed. Plaintiff claimed the deed was really a mortgage. The testator released the debt in his will, therefore the plaintiff wanted the deed canceled. The court held that the communications between the attorney and the decedent regarding the nature of the deed were privileged. The exception was not applicable because plaintiff's claim was adverse to both the testator and his heirs. *Id.* at 369-70

B. Documents Attested to by a Lawyer [Exception 4]

When an attorney acts as a witness to a document, he is not rendering professional legal services. Therefore, communications relevant to an issue concerning the document are admissible. *In re Hardwick's Estate*, 278 S. W. 2d 258, 262 (Tex. Civ. App.-Amarillo 1954, writ ref'd n.r.e.) (attorney testimony concerning validity of a will in which the attorney drafted the will and was a witness to the will and codicil admissible). Therefore, the attorney should be cautioned about serving as a witness to a will.

IV. ADMISSIBILITY ISSUES RELATING TO BUSINESS RECORDS AND DISCUSSION OF "HEARSAY WITHIN HEARSAY"

In addition to oral statements of the decedent or others, many lawyers will seek to have business records, especially medical records, admitted.

Rule 803(6) of the Texas Rules of Evidence provides that the following are not excluded by the hearsay rule:

> Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

Tex R. Evid. 803(6) (West 2010)

The rule has four basic foundational requirements:

1. The record must have been made and kept in the course of a regularly conducted business activity;

2. Source of the information must be someone with personal knowledge of the events contained within the record, and the person must have a business duty to report it;

3. Record must have been made close in time to the event to be recorded.

4. Foundation must be laid by a custodian of records or "other qualified witness" or by self-proving affidavit under Rule 902(10) of the Texas Rules of Evidence.

What about the *contents* of the records?

Rule 805 of the Texas Rules of Evidence provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Tex. R. Evid. 805 (West 2010). A business record may be admissible under Rule 803(6) but also contain hearsay. This is called "hearsay within hearsay" or "double hearsay." Inadmissible hearsay testimony does not become admissible simply because it is contained within an admissible document or transcript. See, e.g. *Perry v. State*, 957 S. W. 2d 894, 899-900 (Tex. App.-Texarkana 1997, pet. ref'd); *Jones v. State*, 843 S.W. 2d 487, 492 (Tex. Ct. Crim. App. 1992); *Logan v. Grady*, 482 S.W.2d 313,317(Tex Civ. App.-Fort Worth 1972, no writ)(while police had duty to report driver's name, accident location, weather, "statements" by witnesses were not admissible as business record). The statements must fit into another exception to a hearsay rule.

As previously mentioned, one of the most common type of records sought to be admitted in probate cases are medical records of the decedent or ward. Rule 803(4) of the Texas Rules of Evidence provides that the following are not hearsay:

> Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment

Tex. R. Evid. 803(4) (West 2010).

The rationale for this exception is that patients seeking medical help generally do not lie or exaggerate their physical condition. However, unless the record shows the declarant was actually seeking a medical diagnosis or treatment, the statement made to medical personnel are not admissible. See, e.g., *Garcia v. State*, 126 S.W. 3d 921, 927 (Tex. Ct. Crim. App. 2004)(statement by victim that she had been "abused" by defendant not admissible under this exception)

The scope of this exception can be summarized as follows:

1. Exception includes statements by the patient concerning the causes of his condition as long as they are "reasonably pertinent to

diagnosis or treatment;"

[If the person is not being examined for purposes of medical diagnosis or treatment, then the exception is not applicable. *Walck v. State*, 943 S.W. 2d 544, 544-45 (Tex. App.-Eastland 1997, pet. ref'd) (psychologist who examined "state of mind" at the time of a murder not made for purpose of diagnosis or treatment.)]

2. Person to whom the statement is made need not be a physician. Her or she may be a hospital attendant, ambulance driver, member of family, etc; and

3. Statements need not be made by the patient himself.

[*Macias v. State*, 776 S.W. 2d, 255, 258-59 (Tex. App.-San Antonio 1989, pet .ref'd) (*mother* of victim's report that defendant had sexually abused the child was admissible.)]

Therefore, by combining the exceptions in 803(10) and 803(4), parties are often able to have the medical records of the decedent or ward admittted, assuming that they overcome exceptions to privilege and assuming they are relevant to the proceeding and are otherwise admissible.

V. ADMISSIBILITY OF MENTAL HEALTH INFORMATION AND TESTIMONY

In both will cases and guardianship cases, parties will see to admit mental health information about the ward or decedent. In fact, in guardianship cases, medical testimony and records are required evidence. *See* Tex. Prob. Code §687 (West 2010). We previously discussed some methods for having such evidence admitted. We noted that even if such evidence was otherwise admissible, the party still had to get around the issue of privilege. especially guardianship cases. The general rule with respect to mental health information is that a communication between a patient and a professional is confidential and shall not be disclosed in civil cases. Tex. R. Evid. 510(b)(1) (West 2010)

There are six exceptions listed in the rule. Two of the exceptions which tend to come up more often in probate and guardianship cases are the following:

> (4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient's mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure of all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;
>
> (5) as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense;

Tex. R. Evid. 510(d)(4) & (5) (West 2010).

Texas Rule of Evidence 510(d)(4) relates to the medical "Miranda" warning that the physician must give the patient if the physician intends to disclose the information to the court. This is usually the first question on cross-examination of a physician who testifies in favor of incapacity of a proposed ward. If the physician has not given the warning, the information is privileged and cannot be disclosed.

One of the primary, if not the most important, documents for the applicant in a guardianship proceeding is the statement or report of the doctor who performed the mental status evaluation. This document is ordinarily attached to the application for guardianship. Section 687(a) of the Texas Probate Code provides that, with a few delineated exceptions, the court may not grant an application to create a guardianship for an incapacitated person unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated *not earlier than the 120th day* before the date of the filing of the application and based on an examination the physician performed *not earlier than the 120th day* before the date of the filing of the application. Tex. Prob. Code Ann. § 687(a) (West 2010).

The Texas Legislature amended the requirements of the physician's letter effective September 1, 2009. Now, the letter or certificate must:

(1) describe the nature, degree, and severity of incapacity, including functional deficits, if any, regarding the proposed ward's ability to:

(A) handle business and managerial matters;

(B) manage financial matters;

(C) operate a motor vehicle;

(D) make personal decisions regarding residence, voting, and marriage; and

(E) consent to medical, dental, psychological, or psychiatric treatment ;

(2) provide an evaluation of the proposed ward's physical condition and mental function and summarize the proposed ward's medical history if reasonably available ;

(3) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the person's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) perform simple calculations;

(D) reason logically; and

(E) administer to daily life activities;

(4) state whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding;

(5) describe the precise physical and mental conditions underlying a diagnosis of a mental disability, and state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting ;

(6) in providing a description under Subdivision (1) of this subsection regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward:

(A) has the mental capacity to vote in a public election; and

(B) has the ability to safely operate a motor vehicle; and

(7) include any other information required by the court.

Tex. Prob. Code Ann. § 687(a) (West 2009).

Section 611.006 of the Texas Health & Safety Code also provides exceptions to the medial and mental health information privilege. That statute provides, in part that a professional may disclose confidential information in:

> (5) a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, except that those communications may be disclosed only with respect to issues involving the patient's mental or emotional health;
>
> (6) a judicial proceeding affecting the parent-child relationship;
>
> (9) a judicial proceeding relating to a will if the patient's physical or mental condition is relevant to the execution of the will;
>
> (10) an involuntary commitment proceeding for court-ordered treatment or for a probable cause hearing under:
>
> > (A) Chapter 462;
> >
> > (B) Chapter 574; or
> >
> > (C) Chapter 593; or
>
> (11) a judicial or administrative proceeding where the court or agency has issued an order or subpoena.

Tex. Health & Safety Code §611.006 (West 2010).

Most of the time, the medical testimony will have to come from an expert who is qualified to address the relevant medical issue. An expert may be used in a will contest to address the issue of the testator's "testamentary capacity" at or near the time of the execution of the will. In guardianship matters, the expert addresses the nature and degree of the proposed ward's "incapacity," as that term is defined in the Texas Probate Code. The same rules of evidence apply to probate and guardianship matters. Therefore, the same requirements for expert testimony must be met.

Assuming the doctor gave the appropriate warning, the doctor was be qualified as an expert witness. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and its progeny, ushered in a new standard for admissibility of expert testimony. *Daubert* held that the proffered expert testimony must be scientific knowledge which will assist the trier of fact to understand the evidence or determine a fact in issue. *Id.* at 589. To constitute "scientific knowledge," the testimony must be reliable. *Id.* In addition, the evidence must be relevant. Scientific evidence is relevant when there is "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592. The Court also enumerated four factors to be considered in determining relevance and reliability:

(1) whether a theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) the technique's known or potential rate of error; and

(4) the general acceptance of the theory or technique by the relevant scientific community. *Id.* at 591-94.

Texas has adopted *Daubert* in *E.I. du Pont de Nemours and Co. v. Robinson,* 923 S.W. 2d 549 (Tex. 1995). Further, the United States Supreme Court has made it clear in *Kumho Tire Corp., Ltd. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167 (1999) that the *Daubert* standard applies to all expert testimony.

The doctor testifying to a proposed ward's incapacity should have knowledge of issues of psychology and neurology. The Texas Supreme Court has made it clear that medical experts are not automatically qualified simply because they possess a medical degree. *See Broders v. Heise*, 924 S.W. 2d 148, 153 (Tex. 1996) (excluding the testimony of emergency room doctor to establish relationship between patient's head injury and death.) The offering party must show that the expert has "knowledge, skill, experience, training or education" regarding the specific issue before the Court which would qualify the expert to give an opinion in that particular subject. *Id.*

VI. EVIDENCE REQUIRED OF A WILL PROPONENT AND GUARDIANSHIP APPLICANT FOR ESTABLISHING RIGHT TO ATTORNEY'S FEES

A. Will Proponent

The party offering a will for probate or defending the will against a contest often seeks to recover her attorney's fees in doing so from the estate of the decedent. Section 243 of the Texas Probate Code provides as follows:

> When any person designated as executor in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings. When any person designated as a devisee, legatee, or beneficiary in a will or an alleged will, or as administrator with the will or alleged will annexed, defends it or prosecutes any proceeding in good faith, and with just cause, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he may be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings.

Tex. Prob. Code § 243 (West 2010).

Once the person designated as executor in a will or an alleged will defends the will or prosecutes any proceeding *in good faith, and with just cause*, for the purpose of having the will or alleged will admitted to probate, *whether successful or not*, he shall be allowed out expenses and attorneys fees out of the estate his necessary. *Id.* (emphasis added). Note that once good faith and just cause is found, the award of attorney's fees is *mandatory* in the case of the named executor. However, if the offering or defending party is a devisee, legatee, or beneficiary in a will or an alleged will, the language regarding the

recovery of attorney's fees and expenses is *permissive*. *Id.*

The evidence supporting a party's good faith and just cause will vary according to the case. The Courts of Appeals are reluctant to overturn the findings of the jury. In *Garton v. Rockett,* 190 S.W.3d 139, 148 -149 (Tex. App.-Houston [1st Dist.] 2005, no pet.), Sid and Kitty, the proponents of the will, testified that the decedent had told them that he did not want his uncles to inherit his property, that he intended to leave his property to Kitty, and that he wanted Sid to be in charge of his estate. *Id.* at 148. Sid and Kitty further testified that, the day before the decedent died, the decedent called them and stated that he wanted Sid to be "in charge" of his property. *Id.* After the decedent's death, Sid and Kitty searched for the original will, but were unsuccessful. *Id.* Two weeks after the death, Kitty found an envelope postmarked July 22, 2003, containing the copy of a will ultimately offered by Sid. *Id.* Sid and Kitty, who were familiar with the decedent's signature, testified that the decedent's signature appeared on the copy of the will. *Id.* Kitty also testified that during their phone conversation on July 22, 2003, the decedent had told her that he was mailing her a copy of the will for her to look over. *Id.* Kitty stated that the envelope she found in her post office box contained the decedent's letterhead and was addressed to Sid and Kitty in the decedent's handwriting. *Id.* The testimony was corroborated by two other witnesses. *Id.* The jury found the will to be the valid will of the decedent and found that Sid offered the will in good faith and with just cause. *Id.* at 144. The decedent's relatives filed a motion for judgment notwithstanding the verdict on the grounds that Sid failed to prove the due execution of the will, Sid failed to establish that any witness had knowledge of the contents of the will, Sid failed to overcome the presumption of revocation, and Sid did not offer the copy of the will in good faith and with just cause. *Id.* The trial court granted appellees' judgment notwithstanding the verdict on all grounds, and entered a judgment that Sid take nothing. *Id.*

The Court of Appeals affirmed the judgment with respect to the issue that the formalities of the were not adequately proven. On the issue of good faith and just cause, the relatives challenged Sid's good faith by citing to alleged inconsistencies in Sid's and Kitty's testimony. *Id.* at 149. They alleged that Sid's probate proceeding was based on nothing but "an alleged, unrecorded, telephone conversation" and Sid and Kitty's "bald assertion" that the copy of the will was mailed to them. *Id.* They posed rhetorical questions as to why a person would entrust an important legal document to a post office and why the envelope that allegedly contained a copy of the will was not presented at trial. *Id. The Court held that these issues are appropriately considered by a jury, not by an appellate court. Id.* (emphasis added). The jurors, who were the sole judges of the credibility of witnesses, were presented with some evidence that Sid filed his application to probate the will in good faith and with just cause, and the jurors were free to believe or disbelieve such evidence. *Id.* Determining whether Sid filed his application to probate the will in good faith and with just cause was a question that was appropriately resolved by the jury. *Id.* Therefore, the court reversed the judgment notwithstanding the verdict as to the good faith finding and remanded the issue to the trial court.

In *Collins v. Smith,* 53 S.W.3d 832 (Tex. App.-Houston [1st Dist.] 2001, no pet.), Smith filed an application for probate the decedent's

1998 will, which favored her over her sisters. *Id.* at 835. Her sisters contested admission of the 1998 will to probate on grounds of testamentary capacity, lack of testamentary intent, breach of fiduciary duty, and undue influence; they also filed an action to set aside or cancel the deed conveying the decedent's property to Smith and her husband. *Id.* at 835-836. They also filed their own application to probate the decedent's will which gave all of the decedent's property to his daughters equally. *Id.* at 836. The jury ruled in favor of Smith. The jury also found that the contesting sisters did not prosecute the proceeding to probate decedent's 1994 will in good faith and with just cause. *Id.*

On appeal, the sisters claimed that the jury's finding that they did not probate the decedent's 1994 will in good faith and with just cause was against the great weight and preponderance of the evidence and was manifestly unjust. *Id.* at 841. They contended they were entitled to an allowance out of estate assets because they brought the contest in good faith and with just cause in light of their knowledge of the decedent's deteriorating physical and mental health at the time of the execution of the 1998 will and the manner and means by which it was procured and executed. *Id.* at 841-842. They further contended the testimony of their expert, a clinical psychologist and an attorney, revealed that the type of depression the decedent was suffering from would affect the clarity of his thinking and make him susceptible to the influence of others. *Id.* at 842. They also claimed evidence of their good faith was shown by their probate expert, who stated that the 1998 will was not prepared according to usual standards. *Id.*

The Court found that although both sides presented conflicting evidence on the issues of undue influence, testamentary intent, and testamentary capacity, after considering the circumstances of the case and the conflicting nature of the testimony, the *Court could not say the jury's finding was so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. Id.* at 843 (emphasis added). The Court held the evidence was factually sufficient to support the jury's finding that the sisters did not proceed in good faith and with just cause in probating the 1994 will. *Id.*

B. Guardianship Applicant

The person applying for guardianship over a proposed ward must also file the action in good faith and with just cause. Section 665B of the Texas Probate Code provides that the court that creates a guardianship or creates a management trust under Section 867 of the Texas Probate Code, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of the management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, to an attorney who represents the person who filed the application at the application hearing, regardless of whether the person is appointed the ward's guardian or whether a management trust is created. Tex. Prob. Code §665B(a) (West 2010). However, that statute goes on to state that the court may not authorize attorney's fees under this section *unless the court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application.* Prob. Code §665B(b) (West 2010)(emphasis added).

Therefore, just as in the case of a will proponent, the applicant must secure a finding that she not only filed the application in good

faith and with just cause but also that she prosecuted the application in good faith and with just cause. Therefore, it is conceivable that a person could have been acting in good faith and with just cause at the inception of the guardianship action but later learned of information that he knew or should have known placed him in a position of bad faith for continuing to prosecute the action. The author found no cases specifically discussing the issue of good faith and just cause in the filing of an application for guardian. As with the issue of good faith and just cause for will proponents, the Courts of Appeals will unlikely set aside a jury or court finding one way or the other as in the two cases cited above. One can imagine, however, several scenarios that may be examples of bad faith or lack of just cause.

For example, if the proposed ward had done a designation of guardian before need arises [*see* Tex. Prob. Code §679] naming someone other than the applicant as her chosen guardian, and she made that designation at a time she had capacity to do so and when she was not unduly influenced to do so, then the continued prosecution of the application by the unnamed person may be evidence of bad faith. A person can also use a designation of guardian to disqualify a person she does not want to serve as guardian. *See* Tex. Prob. Code §679(b)] If the applicant is the disqualified person, and he continues to prosecute the guardianship action upon learning of the designation, he is undoubtedly acting in bad faith and without just cause, especially if the proposed ward made the designation at the time she had capacity.

Another example might be the case where an applicant is a person who is disqualified to serve under Section 681 of the Texas Probate Code yet continues to prosecute the action where there is no prospect of curing the disqualification, then that person may be acting in bad faith. For example, it is common that an applicant may be indebted to the proposed ward. Section 681(5) of the Texas Probate Code disqualifies that person from serving as guardian unless the person pays the debt before appointment. Tex. Prob. Code §681(5) (West 2010). While it may not be bad faith to file the application at a time when the applicant is indebted to the proposed ward, if there is little to no prospect that the applicant is capable of repaying the debt prior to her appointment, then it is likely bad faith to continue to prosecute the action. Obviously, if the applicant had financially exploited the proposed ward prior to filing the guardianship (perhaps to try to "cover his tracks"), then both the application and the prosecution of the action are likely to be found to be bad faith.

Therefore, the applicant in either a probate case or a guardianship case should be prepared to offer evidence not only on the reasonableness and necessity of the fees and expenses charged, but also on his client's good faith and just cause in filing the application.

CHECKLIST FOR APPLICABILITY OF THE DEAD MAN'S RULE RULE 601(b) OF THE TEXAS RULES OF EVIDENCE

1. Is it a suit or an action brought by <u>or</u> against an:

   a. executor, administrator, or guardian *in which judgment may be rendered for or against them in that capacity*? <u>OR</u>

   b. heir or legal representative of the deceased *based in whole or in part upon the oral statement*?

   If not, the person can testify. If so, proceed to #2.

2. Is a *party* testifying against a party or parties?

   If not, the person can testify. If so, proceed to #3.

3. Is the party testifying as to an *oral statemen*t?

   If not, the person can testify. If so, proceed to #4.

4. Is the statement corroborated?

   If so, the person can testify. If not, proceed to #5.

5. Did the opponent call the witness at the trial to testify about the statement?

   If so, the person can testify. If not, the testimony is barred.