# Ellis County Court at Law No. 1

JUDGE JIM CHAPMAN
Ellis County Courts Building
109 S. Jackson
Waxahachie, TX 75165

Updated April 2019

## When the Decedent Dies With a Will

Counselors,

Welcome to Ellis County Court at Law No. 1. As you know, representing a client who is handling the estate of a loved one is an important responsibility. The families who come through this Court are going through a difficult time. That is why the staff of this Court is committed to ensuring that the probate process is as smooth as possible. This guide is designed to help you understand how the uncontested docket works in Ellis County when your client dies with a will. The first part is a brief overview of some administrative procedures that you might want to share with your staff. The second part highlights some basic requirements of the Estates Code that pertain to the two most common probate proceedings – letters testamentary and muniments of title – and shows how you can avoid the most common mistakes made by lawyers. The final part is a guide to some less common (and sometimes trickier) issues that you may need to deal with occasionally when probating a will.

I hope you will find this guide useful, but it comes with two important caveats. First, the guide is not intended as a substitute for legal expertise. For example, although the guide includes selected pleading tips for different probate proceedings, it doesn't address which proceeding is appropriate given your client's situation. Second, this guide is not a substitute for the Estates Code. Everything in this guide is consistent with the Estates Code, but this very basic guide makes no pretense of being comprehensive.

Jim Chapman, Judge Presiding

### I. ADMINISTRATIVE

**A. Submission of Documents. The Court must receive all documents required (Proof, Order, Oath, Citations, Death Verification** which is obtainable from the County Clerk of the county in which Decedent died or the State Vital Statistics Office**, Waivers, Consents as needed) for an uncontested-docket hearing no later than 10:00 a.m. three business days before the hearing.** Compliance with this rule allows the Court to review the file and contact the attorney should any deficiencies be present. Compliance with the rule also ensures that the attorneys are not embarrassed in front of their clients should they forget to bring the required documents.

TIP: If you have all the required documents for a hearing prepared at the time you file the application, submit them all to the Clerk's Office with the application. If you do so, you do not need to send anything directly to the Court.

TIP: If you don't file all necessary documents at the time you file the application, the unexecuted proposed documents (e.g., Proof, Order, Oath etc.), should be submitted to the Judge's chambers before the deadline, **preferably by emailing them to the Court Coordinator, Tianta Schwartz, (ccl1coordinator@co.ellis.tx.us) in Word format**. When submitting documents to the Judge's chambers, always include the date and time of your scheduled hearing to ensure the documents make it to the file.

If you miss the deadline, you should still get the missing documents to the Judge's chambers as soon as possible. Documents you're submitting after the deadline should be submitted directly to the Court, not to the Clerk's Office. However, there is no guarantee that the Court will be able to review the tardy documents before the hearing. At its discretion, the Court may postpone or cancel a hearing if an attorney fails to comply with the posted guidelines for uncontested-docket paperwork.

**B. Attorney Ad Litem.** In every probate involving a Lost Will, Copy of a Will or a Will offered for probate More than Four Years after the Death of the Testator, the Court will appoint an attorney ad litem to represent the decedent's unknown heirs (and, if any, known heirs whose whereabouts are unknown and known heirs suffering legal disability). The attorney ad litem's presence is required at the hearing. The applicant in these cases shall pay a $400.00 deposit into the registry of the Court towards the ad litem expense, this amount while a deposit only, should cover the expense in the majority of cases. No case for which an ad litem deposit is required will be heard by the Court until such deposit has been paid. The ad litem will need to obtain prior Court approval before undertaking work on the case that will necessitate a fee greater than $400.00

## II. GENERAL PLEADING ISSUES

### A. Pleading Issues for All Documents

**1. Facts about a will that change how you should draft the pleadings:**

- **Do you have the original will?** If you don't have the original will, the Estates Code and the Court require special pleadings, notice, and proof. See III.C. below, beginning on Page 11.
- **Is the will self-proved?** Before pleading that a will is self-proved, be sure it is. Knowing whether a will is self-proved got more complicated after the 2011 Legislative session; the answer now can depend on the date of decedent's death or the date of the will. Whatever those dates, a will is self-proved if it includes a self-proving affidavit in substantial compliance with § 251.104 of the Texas Estates Code (TEC). The following are common flaws that make wills not self-proved under § 251.104:
  - ✓ Blank lines for the names of the testator and/or witnesses have not been filled in by the notary in the notary's statement at the end of the affidavit.
  - ✓ The witnesses have not sworn to the statement, thus preventing it from being an affidavit.
  - ✓ The affidavit does not carry a notary seal.
  - ✓ The affidavit fails to include reference to the requisite testator's or the witnesses' minimum ages. (If the only problem is the failure to indicate ages, see "(1)" below and the box on page 10.)

Even if a will is not self-proved under § 251.104, it still might be self-proved depending on the date of decedent's death and the date of the will, as explained in the two sections below.

If the will is not self-proved, modify your application and order to remove the boilerplate about the will being self-proved. In addition, you will need to meet additional requirements to prove the will. See section III.B. below on Pages 10-11, "Proving up a Non-Self-Proved Will."

If the will was executed on or after September 1, 2011, a will is also self-proved if it was simultaneously executed, attested, and made self-proved as provided by § 251.1045 – the new "one step" will execution procedure. Substantial compliance with the form set out in § 251.1045 is required for the will to be self-proved.

If the decedent died on or after September 1, 2011, there are two other ways a will can be considered self-proved:

(1) A will is considered self-proved under new § 256.152 if the will or an affidavit attached to the will provides everything set out in § 256.152, which tracks the Uniform Probate Code requirements. A few of the differences between § 251.104 and § 256.152:
  - ✓ § 256.152 does not require witness ages
  - ✓ § 256.152 does not require a statement that the testator asked the witnesses to sign
  - ✓ § 256.152 requires the witnesses to state that the testator was under no constraint or undue influence
  - ✓ § 256.152 requires the testator to state that he was 18 or over, of sound mind, and under no constraint or undue influence

(2) If the will was executed outside of Texas, the Court will consider the will self-proved if the will is self-proved according to the laws of the state or foreign country of the testator's domicile at the time of execution. See § 256.152. To show that a will is self-proved under this provision, you must do all of the following:

- In your Application or in a separate Motion,
  - ✓ state the jurisdiction where the testator was domiciled at the time the will was executed,
  - ✓ ask the Court to take judicial notice of the laws regarding self-proof of that jurisdiction (with a statutory citation),
  - ✓ allege that the will is self-proved according to that law, and
  - ✓ attach as an exhibit a copy of the statute regarding self-proof for that jurisdiction. The statute must indicate on its face that it is from the jurisdiction; in other words, it is not sufficient to simply type the text of the statute into a document. It would be sufficient to print the statute from Westlaw, Lexis, or another legal database or to photocopy a printed statute that includes reference to the jurisdiction.

- *In your Proof of Death and Other Facts,* prove that the testator was domiciled in the alleged jurisdiction at the time the will was executed. (As with all Proofs, do not have the witness state that the will was self-proved; the Court will make that determination. Also do not request in the Proof that the Court take judicial notice of the laws regarding self-proof of foreign jurisdiction.)

- *In your proposed Order,* make sure there isn't any inaccurate boilerplate language.

- **Does the will make the executor independent?** Before pleading that the will names someone to serve as independent executor, be sure it does. Naming the person who is seeking letters "independent" executor obviously works, but so would the "no other action shall be had" statutory language or naming someone to serve with "the least possible court involvement." If the will does not make the person for whom you are seeking letters independent, modify your forms accordingly.

  > Some wills make the first-named executor independent, but do not make alternate executors independent. Whether the difference is intentional or caused by sloppy drafting, the end result in such a case is that an alternate executor will be independent only through consents filed according to the appropriate subsection of TEC Ch. 401.

  If the will does not make your executor independent and you're requesting independent administration, collect the appropriate sworn consents and indicate the statutory basis of your request in your application, proof, and order. See TEC Ch. 401. In the event the will names beneficiaries by a class such as "children" without naming the children anywhere in the will and an independent administration under TEC Ch. 401 is sought, it will be necessary to have two disinterested witnesses testify at the hearing about who the children are for purposes of ensuring that all requisite consents have been obtained.

- **Does the will name the executor to serve without bond?** Before pleading that the will names an executor to serve without bond, be sure that it does. If the will does not waive bond for the person for whom you are seeking letters, consents alone will not fix the problem because § 401.005 applies only to an independent administration created under subsections 401.002 or 401.003. Therefore, if the will doesn't waive bond, the only way to have bond waived is for all of the executors named in the will to decline to serve and then to seek Letters of Independent Administration with Will Annexed without Bond. In that case, you will need to modify the application, proof, and order, in addition to getting the necessary declinations and sworn consents.

- **Is there a partial intestacy?** If there is a partial intestacy in the will, mention the intestacy in your pleadings. What else you need to do depends on the situation.

  (1) **When the will creates an independent administration for the executor who will serve,** you can decide whether to seek an heirship to determine the heirs for the property that does not pass under the will. Of course, if there is no heirship proceeding, the independent executor assumes the risk

that the intestate property will be distributed incorrectly, and you assume the risk of a malpractice action for not having done the heirship.

(2) **When you are requesting independent administration under § 401.002 or 401.003,** the Court requires that you combine the will probate with an heirship proceeding to determine who receives the property that does not pass under the will and to determine the heirs who will need to join the beneficiaries in the request(s).

(3) **When there will be a dependent administration,** the Court requires an heirship proceeding for the intestate property. The Court prefers to hear the heirship proceeding and the will probate at the same time, with a combined order. The will can be probated first if there's a need for administration before the heirship can be completed, but in that case the Court requires that the heirship proceeding be filed before the administration is granted and completed within 60 days of the date letters are granted.

(4) **When you are probating the will as a muniment of title**, the Court requires a declaratory judgment. See Page 6.

2. **The titles of all of your documents should be specific** because specific titles make the clerk's docket sheet and the indexed documents in the clerk's databases more usable. For example, "Order Admitting Will and First Codicil to Probate and Authorizing Letters Testamentary" . . . "Oath of Independent Executor" . . . "Testimony of Subscribing Witness."

3. **In all pleadings, always begin with the exact names as they appear in the will** for the testator, executor, and any beneficiaries mentioned in the pleadings. Then, if needed, put "a/k/a," "n/k/a," or "f/k/a" depending on the circumstances, followed by the additional or corrected name(s) that you need to include (a/k/a = also known as; n/k/a = now known as; f/k/a = formerly known as). Be sure to watch for spelling errors made in either the will or the documents your office prepares. If the testator misspelled a name, then all other documents must carry that mistake with an "a/k/a" to correct the typo that the testator missed. Alias problems and spelling errors that you miss in the application can require reposting (depending on the circumstances), which could increase your cost and delay your hearing.

   > If you need to use a/k/a or similar acronyms in the application and order, you might also need to put on appropriate testimony about the different names unless the differences are self-explanatory.

4. **Executor, not executrix.** By administrative order, the Court requires the use of "executor" or "administrator" rather than "executrix" or "administratrix."

5. **When the person who will serve as executor isn't the first-named executor in the will**, your documents – and your proof for the Court – must explain what happened to the first-named executor and all others who will not serve but who have priority over the executor(s) who will. Examples of proof when named executor with priority will not serve:
   - *Person is declining to serve:* person's notarized declination in the file.
   - *Person is dead:* proof of the death. The Court prefers a copy of the Death Verification for the executor with priority. If the Death Verification is not available, you must provide either (1) the cause number and jurisdiction where the executor with priority died or (2) a published obituary.
   - *Person is convicted felon:* sentencing order or other proof of conviction.
   - *Person is incompetent:* guardianship cause number, if any, or letters from one or two doctors. (Only one letter is required if the letter is sufficiently specific.)
   - *Person was divorced from decedent after the date of the will:* divorce decree.
   - *Person is a minor:* birth certificate.
   - *For all of the above, except in the declining to serve scenario:* if the preferred documentary proofs listed above are not available, a disinterested witness with knowledge may appear at the hearing to testify to provide the necessary proof.

6. **When the applicant to probate the will as a muniment of title isn't named as the first and sole named executor of the will,** you must obtain written declinations to serve by all executors named in the will who

are named as co-executors with the applicant or have priority over the applicant, or have them personally served or show proof that they are deceased.

## B. The Application

1. **Do not file a will, codicil, or Death Verification as an exhibit or other formal attachment to the application.** You definitely should file the will and any codicil(s) at the same time you file the application, the Death Verification (obtainable from the County Clerk of the county in which Decedent died or the State Vital Statistics Office) should not be filed but brought to court for the hearing. But it causes problems if those documents are filed as formal attachments to the application. For example, if your application says the will is attached as Exhibit A and a codicil is attached as Exhibit B, neither the will nor the codicil will be noted on the docket sheet. And that's a problem because no one looking at the docket sheet will be able to tell that a will and codicil have been filed, and no one looking for a scanned copy of either will know where to look.

2. **Statutory Requirements.** The application requirements for letters testamentary (LT) and muniments of title (MT) and the governing Code provisions are as follows. Note some requirements have multiple parts.

| **By statute, applications must include the following information if indicated in the relevant column at the right** | **Proceeding** | |
|---|---|---|
| | **LT** §256.052 | **MT** §257.051 |
| • The name and domicile of each applicant | ✓ | ✓ |
| • The name, age if known, and domicile of the decedent | ✓ | ✓ |
| • The fact, time, and place of death | ✓ | ✓ |
| • Facts showing that the Court has venue | ✓ | ✓ |
| • That the decedent owned real or personal property, or both, describing the same generally, and stating its probable value | ✓ | ✓ |
| • The date of the will | ✓ | ✓ |
| • The name & residence of the executor named in the will, if any<br>*** Residence means an actual residential address, not a P.O. box, and not just the county or city of residence. | ✓ | ✓ |
| • If no executor is named in the will, then the name and residence of the person to whom it is desired that letters be issued<br>If this is the situation, you will be requesting Letters of Administration with Will Annexed, not Letters Testamentary. See also TEC § 401.002 and 401.003. | ✓ if applicable | N/A |
| • The names and residences of the subscribing witnesses, if any<br>*** Residence means an actual residential address, not a P.O. box, and not just the county or city of residence. | ✓ | ✓ |
| • Whether a child or children born or adopted after the making of the will survived the decedent, and the name of each survivor, if any; if so, refer to TEC Ch. 255 | ✓ | ✓ |
| • That such executor or applicant, or other person to whom it is desired that letter be issued, is not disqualified by law from accepting letters | ✓ | N/A |
| • That there are no unpaid debts owing by the estate of the testator, excluding debts secured by liens on real estate | N/A | ✓ |

| By statute, applications must include the following information if indicated in the relevant column at the right | Proceeding | |
|---|---|---|
| | LT §256.052 | MT §257.051 |
| • Whether a marriage of decedent was ever dissolved after the will was made, and if so, when and from whom. If so, refer to TEC § Ch. 255 | ✓ | ✓ |
| • Whether the state, a governmental agency of the state, or a charitable organization is named by the will as a devisee | ✓ | ✓ |

3. **Common Mistakes**. The following are some common mistakes found in applications. Most can be eliminated easily by a careful reading of the document before filing it. Please take the time to look at your application and compare it to § 256.052 or § 257.051. If an application fails to meet the statutory requirements, the Court may require the attorney to amend the application.

   - Instruments the application seeks to have probated: In the title of the application, be sure to specify accurately which instruments are being filed for probate. For example, if you are seeking to probate a copy of a will and a codicil, specify all of that information in the title as well as in the body of the application. Otherwise, there is a risk that the clerk will not see the documents being filed and will post them incorrectly, which will require reposting – with resulting costs and delay.

     > Please remember C.1. on the previous page: Do not file a will, codicil, or Death Verification as an exhibit or other formal attachment to the application.

   - Insufficient marital history: Effective September 1, 2011, an application to probate a will must state whether a marriage of decedent was ever dissolved after the will was made, and if so, when and from whom. Although the 2011 Legislature got rid of the requirement that the application itself include the additional explanation "whether by divorce, annulment, or a declaration that the marriage was void," you still need to ask about any kind of marriage dissolution. It is still not sufficient to say that the decedent was not divorced after the will was made. What you should include is a statement similar to one of the following examples, as appropriate for the facts:
     - ✓ "No marriage of decedent was ever dissolved after the will was made."
     - ✓ "No marriage of decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void." (No longer required, but not prohibited.)
     - ✓ "Decedent was never married."
     - ✓ "Two marriages of decedent were dissolved after the will was made. Decedent's marriage to Jane Stephens Doe was annulled on August 13, 2003, and decedent was divorced from Janice Howard Roe on January 9, 2009."

   - Social Security numbers and Driver's License numbers: The last three digits of the Decendant's Social Security number and Driver's License number must be included in the application. The Court also requires that you cross out or white all but the last three digits of the social security number on the will.

   - Executor's address: The state of residence, and physical address where service can be had of the executor listed in the will or other person whom the applicant desires that letters be issued to must be included.

4. **When the named executor is not the Applicant.** Under TEC § 256.051 and 301.051, the applicant must be an executor named in the will or an "interested person." If your Applicant is not the executor named in the will, it's helpful if your application explicitly indicates why the applicant is "an interested person." See TEC § 22.018 for the definition of "interested person."

5. **Muniments of Title and Declaratory Relief.** "If a person who is entitled to property under the provisions of the will cannot be ascertained solely by reference to the will or if a question of construction of the will

exists," the Court will not admit the will into probate as a muniment of title unless a request for declaratory judgment has been made upon proper application and notice. TEC § 257.101. One requirement is that the application with the declaratory judgment must be posted for twenty days before the Court can act upon it. Therefore, if you're probating a will as a muniment of title, check to see if the will itself sufficiently identifies both the distributees and the property:

- For example, if the will devises property to a "trustee" or to "my children," but then is silent in identifying the "trustee" or "my children," you will need to seek declaratory relief as provided by Chapter 37, Civil Practice & Remedies Code to identify the "trustee" or "my children."
- If there is a partial intestacy, you will need to seek a declaratory relief as provided by Chapter 37, Civil Practice & Remedies Code, seeking both (1) a declaration that there is a partial intestacy and (2) a declaration of the heirs that will take the property that passes by intestacy. In this case, an attorney ad litem will need to be appointed to represent unknown heirs. You will need to provide a copy of the application for the attorney ad litem, and you will need to pay an ad litem deposit.

**C. The Proof of Death and Other Facts (POD).** As required by Estates Code §257.157, a witness needs to testify in open court, unless testimony is offered by deposition as discussed on the last two pages of this guide. §257.157 also requires that testimony taken in open court during the hearing be reduced to writing. Therefore, written testimony needs to be prepared in advance, either in question-and-answer form or in the form of an affidavit. Although the testimony must be prepared and submitted in advance, the witness will not sign the written testimony until immediately after the hearing, when the witness signs the testimony before the judge.

1. **Statutory Requirements.** Under Ch. 256, Ch. 301 or Ch. 257, the POD for letters testamentary, letters of administration, or muniments of title must include the following, except where specifically noted:
   - That decedent died on a particular date and that the application was filed within four years of that date.
   - That the Court has jurisdiction and venue, including the underlying facts that support the allegation. Usually this requirement is fulfilled because the decedent was domiciled and had a fixed place of residence in Ellis County, TEC § 33.001. In that case, for example, add that decedent resided at (street address), Ellis County, Texas.
   - The date of the will and the fact that it was never revoked. (Same information for any codicils.)
   - Whether a marriage of decedent was ever dissolved after the will was made, and if so, when and from whom. For more information, see discussion in Application section on Page 6.
   - Whether any children were born or adopted after the date of the will. See TCP Ch. 255.
   - That the person for whom letters testamentary or of administration are sought is entitled to letters by law and is not disqualified. Note that "entitled" and "qualified" are not synonyms, so it's not sufficient to say that the executor is "qualified and not disqualified." Most attorneys simply track the statutory language (entitled and not disqualified) and flesh out the proof of qualification in court as needed. Other attorneys spell out the proof in the written testimony.

     > The person for whom letters are sought is "not disqualified" if none of the disqualifications listed in TEC § 304.003 apply (incapacitated person, convicted felon, non-resident of state who has not appointed a resident agent, corporation not authorized to act as fiduciary in this state, person whom court finds unsuitable).
     >
     > When there is a will, the person for whom letters are sought is "entitled" to serve either because he or she is named executor in the will **or** because he or she is the person designated under § 401.001 or §401.002.

   - **If the applicant is applying for letters of administration with will annexed**, the applicant must "prove to the satisfaction of the court that there exists a necessity for an administration upon such estate." TEC § 301.153.
   - **If the applicant is applying to probate a will as a muniment of title**, the affiant must prove that there are no unpaid debts owing by the estate of the testator, excluding debts secured by liens on real estate. TEC § 257.054. (Under § 257.001, the applicant may try to prove to the Court that – for other reasons – there is no necessity for administration.)

- **If the applicant is applying to probate a will as a muniment of title**, the POD must include the following sentence: "The decedent did not apply for and receive Medicaid benefits on or after March 1, 2005." Alternatively, the POD can indicate that decedent did receive Medicaid benefits on or after March 1, 2005, and then explain why there is no Medicaid claim against the estate.

> Claims for Medicaid recovery in Texas are debts of the estate because Texas has not adopted a Medicaid-lien approach to Medicaid recovery. Therefore, it is imperative that attorneys consult with their clients about whether the deceased received Medicaid benefits. If the deceased applied for Medicaid benefits on or after March 1, 2005, and received any Medicaid benefits, attorneys need to thoroughly investigate whether the Medicaid Estate Recovery Program has any claim against the estate. If so, the decedent's will cannot be probated as a muniment of title until that debt is paid.
>
> For further information, see http://www.dads.state.tx.us/services/estate_recovery/faqs.html.

2. **DO NOT** include in the POD any language regarding citation or whether the will is self-proved. Seldom does a witness have knowledge about the requirements of a self-proving affidavit or about whether citation has been properly served. The Court will check to see whether a will is self-proved and citation is proper.

3. **ADDITIONAL INFORMATION:** There are times when additional information is needed in a POD. You should review the case and determine whether any extra information needs to be included. The following are some of the situations when additional information is needed***:***
   - a first-named executor is unable to serve
   - a resident agent needs to be appointed
   - a will is being probated more than four years after the decedent's death
   - a copy of a will is being probated
   - a name was spelled incorrectly in the will
   - a party is now known by a different name
   - the decedent's name on the Death Verification varies significantly from the name in the will

4. **Signature block.** For the POD and any other testimony that witnesses will sign at the hearing, you will streamline the process if your signature block for the Court includes the following information:

> Ellis County Court at Law #1
>
> _____
>
> Judge Presiding

## D. The Order. Here are some special issues when drafting an order:

### 1. All Orders

- Do not include a finding in the order that "the allegations contained in the application are true." The Court will make all of its findings explicitly, rather than by reference to another document, especially since applications sometimes include allegations that will not be proved up during the hearing.
- Extra information. Unless you have also requested a declaratory judgment upon proper application and notice, do not include extra information such as property descriptions, the names of distributees, or the family history of distributees. This type of information can be determined only in a declaratory judgment action.
- Exact names and aliases. See discussion above in Section II.A.3 on Page 4. You must begin with the exact names used in the will for the decedent and the executor, even if the executor is now known by another name. The Court requires that the "now known as" name – or any other a/k/a or f/k/a/ name – follow the executor's name as the name is given in the will.
- Copy of Will or Codicil**.** See discussion in Section III.C.5 on Page 11 about presumption language that must be included in any order to probate a copy of a will or codicil.

- Probating a Will More than Four Years after Decedent's Death. See discussion in Section III.D.4 on Page 11 about additional language that must be included in the order.

**2. Orders for Letters Testamentary** (also for Letters of Administration with Will Annexed, except for the first bullet)

- Alternate executor: If the order appoints an executor other than the first-named executor in the will, be sure to refer to the first-named executor and indicate, in the findings section, why he or she cannot serve. Do the same for all other named executors who will not serve but who have priority over the executor(s) who will serve. To be precise, use the term "alternate" executor – not "successor" executor – unless a court has previously appointed someone else as executor.

- Affidavit in lieu of an inventory: Do not refer to an affidavit in lieu of an inventory unless the decedent died on or after September 1, 2011.

- Ch. 308 notice to beneficiaries: The Court requires that all orders for administration of a will refer to the Ch. 308 notice to beneficiaries.
  (1) For example, if decedent died before September 1, 2011: ". . . no other action shall be had in this Court other than the return of an inventory, appraisement, and list of claims as required by Ch. 309 of the Texas Estates Code and the filing of an affidavit or certificate concerning notice to beneficiaries as required by Ch. 308 of the Texas Estates Code."
  (2) For example, if decedent died on or after September 1, 2011: ". . . no other action shall be had in this Court other than (1) the return of an inventory, appraisement, and list of claims, or an affidavit in lieu of inventory, appraisement, and list of claims, as required by §309.051 and 309.056 of the Texas Estates Code, and (2) the filing of an affidavit or certificate concerning notice to beneficiaries as required by Ch. 308 of the Texas Estates Code."

- Power of Sale: Estates Code § 401.006. Do not include language in the order regarding the personal representative's power to sell real property unless:
  (1) The decedent died on or after September 1, 2011.
  (2) The personal representative will be appointed as independent executor or independent administrator with will annexed.
  (3) The will does not contain language authorizing the personal representative to sell real property or contains language that is not sufficient to grant the representative that authority.
  (4) All of the beneficiaries who are to receive any interest in the real property have consented to the general or specific authority regarding the power of the independent executor to sell real property to be included in the order. Consents must be included in a verified application, in verified written consents, or in testimony in open court that is reduced to writing.

**3. Orders for a Muniment of Title**

- Sufficient legal authority: The order must indicate that the effect of the order is to transfer property to those named in the instrument.

- Waiver of Affidavit of Fulfillment: The order cannot waive the requirement of the affidavit of fulfillment of terms unless (1) the applicant is the sole distributee or (2) there are multiple distributees, and all of them are applicants who have signed a verified application or who appear in court. The Court will not waive the § 257.103 requirement otherwise.

## E. Appointment of Resident Agent.

- Under TEC § 304.003, a non-Texas executor or administrator is disqualified to serve until the executor or administrator has appointed a resident agent to accept service of process and the appointment has been filed with the Court. The sworn appointment must be filed before the hearing because no one can testify that the executor or administrator is qualified until the appointment is on file.
- The Court also requires that non-Texas applicants appoint resident agents in two other situations: (1) when probating a will as a muniment of title or (2) when seeking to determine heirship with no order of

administration. The Court requires appointment of a resident agent in these situations in case there is a creditor who files suit, for example.

- Note that an Appointment of Resident Agent must be signed before a notary, not a Deputy Clerk.

### F. Safekeeping Agreement in Lieu of Some Portion of the Required Bond.

Please note that if it is contemplated that your client may prefer a Safekeeping Agreement in lieu of some portion of the required bond you will need to bring an Order Authorizing Safekeeping Agreement to the prove-up hearing. The Order and Safekeeping Agreement are promulgated by the Court and fillable pdf versions of these documents are available on the Court's website. The Court will establish a full bond amount at the prove-up hearing and if the signed Safekeeping Agreement is ultimately approved the bond will be reduced at that time to reflect the assets kept in safekeeping. Please note that Safekeeping Agreements may only be put in place with "financial institutions" as defined by Texas Finance Code §201.101.

## III. OTHER LESS COMMON ISSUES

**A. Use of Interpreters.** If you have a client or a witness who cannot communicate in English during a hearing, whether due to a hearing impairment or inability to speak and/or comprehend the English language, then you must procure the services of a state-certified interpreter as defined by Government Code § 57.001. The Court does not provide interpreters but can provide you with names of certified interpreters.

**B. Proving up a Non-Self-Proved Will**. § 256.152 of the Texas Estates Code enumerates the elements that must be proved to the Court for a will that is not self-proved. You have the following options for proving-up a non-self-proved will; consult TEC § 256.153 for more details:

- the testimony of one subscribing witness to the will, TEC § 256.153

  or

- if a subscribing witness is unable to attend the hearing, the testimony of two[1] disinterested[2] witnesses who are familiar with the signature of the decedent. TEC § 256.153.

Written testimony for each witness needs to be prepared in advance, but the witness will not sign the testimony until immediately after the hearing, when the witness signs the testimony before the judge. Depending on the type of witness, here's what must be proved:

A subscribing witness must prove the following:

1. What happened when the will was signed that proves the will was duly executed.
2. At the time the will was executed, the testator was of sound mind.
3. At the time the will was executed, the testator was at least 18 years old (or had been lawfully married or a member of the armed forces).

Disinterested handwriting witnesses must prove the following:

1. At the time the will was executed, the testator was of sound mind.
2. At the time the will was executed, the testator was at least 18 years old (or had been lawfully married or a member of the armed forces).
3. The signature on the will was decedent's.
4. The witness has sufficient knowledge to testify to all of the above.
5. The witness does not take under the will.

> **NOTE:** If the failure to indicate the testator's or witnesses' ages is the only reason a will is not self-proved, you can fill in the gap without using separate witnesses as described below:
>
> The testator's age may be proved up by additional testimony in the Proof of Death.

[1] Section 256.153 allows for only one disinterested handwriting witness, but only after a "diligent search" that is sworn to *and satisfies the Court*.

[2] A disinterested witness is one who would not take under the terms of the will.

Witness ages may be proved up by filing copies of the witnesses' driver licenses (or similar documents) or by a sworn affidavit from the attorney who supervised the signing of the will. You may redact driver license numbers. If Decedent died on or after September 1, 2011, a will can be self-proved even if it doesn't give the witnesses' ages. See Estates Code § 256.152.

**C. Probating a Copy of a Will (or Codicil) or a Lost Will (or Codicil).** When an original will cannot be found, there is a presumption that it has been revoked. §256.156 of the Texas Estates Code governs how to probate a copy of a will. That section lists three elements that must be met to probate a copy of a will: "[1] the cause of its non-production must be proved, and [2] such cause must be sufficient to satisfy the Court that it cannot by any reasonable diligence be produced, and [3] the contents of such will must be substantially proved by the testimony of a credible witness who has read the will, has heard the will read, or can identify a copy of the will." The following special requirements must be followed when probating a copy of a will:

1. **Attorney ad Litem.** The Court will appoint an attorney ad litem under TEC § 53.104. The ad litem will represent the interests of decedent's unknown heirs, known heirs whose whereabouts are unknown and known heirs having a legal disability – who would collect if the presumption of revocation is not overcome. A deposit for the fee of the attorney ad litem is required, along with copies of the application and the will for the ad litem.
2. **Application.** TEC § 256.054 and § 257.053 require that the application state (1) the reason the original will cannot be produced, (2) the contents of the will, as far as known, (3) the date of the will and the executor appointed in the will, if any, as far as known, and (4) the name, age, marital status, and address, if known, of each devisee named in the will and of each of decedent's heirs.
3. **Proof.** The proof of death and other facts (POD) must include sufficient information to prove to the Court (1) the cause of the will's non-production, (2) that reasonable diligence has been used to locate the original will, and (3) that the testator did not revoke the will. *See In re Estate of Wilson*, 252 S.W.3d 708, 712-714 (Tex. App. – Texarkana 2008, no pet. h.). If applicant seeks to probate a lost will without a copy, testimony obviously will also need to prove the contents of the will. See test immediately after "C" above.
4. **Disinterested-witness Heirship Testimony**. In addition to the POD testimony discussed in No. 3 above, the Court requires the testimony of one disinterested witness who can identify the decedent's heirs-at-law**.** This witness will testify in open court, and the applicant's attorney needs to prepare a written statement of the witness's testimony, phrased as court testimony. Parts of § 203.002 of the Texas Estates Code provide some useful ideas about the testimony necessary for establishing a testator's heirs; see the following parts of the sample affidavit set out in § 203.002: Numbers 1-5, and then 6-8 as needed. Include testimony that the witness does not take under the will or by intestacy.
5. **Order.** The order must include a finding that the applicant has overcome the presumption that the original will has been revoked.
6. **Special form of Posting, plus either Personal Service or Waivers of Service.** TEC § 258.002 requires citation to all parties interested in the estate, which for lost wills includes both heirs who would take if the lost will is not probated and devisees named in the will.
7. **Hearing on the Record.** The hearing for probating a copy of a will must be on the record because of the testimony of the disinterested witness regarding the testator's family history and the extra proof required in the POD.

**D. Probating a Will More than Four Years after the Death of the Testator.** A will may not be probated more than four years after the date of death of the testator unless the applicant proves that he or she was not in default for failing to probate the will sooner. TEC § 256.003. The Court can admit the will only as a muniment of title and cannot grant letters testamentary. See TEC § 301.002. Along with the requirements for probating a will as a muniment of title outlined above (see Pages 7-10), the following are also necessary:

1. **Attorney ad Litem.** The Court will appoint an attorney ad litem under TEC § 53.104 to represent the interests of decedent's unknown heirs, known heirs whose whereabouts are unknown and known heirs having a legal disability, unless the application indicates another will of the testator has previously been

admitted to probate. A deposit for the fee of the attorney ad litem is required, along with copies of the application and the will for the ad litem.

2. **Application and Proof.** Both the application and the proof of death and other facts (POD) must state the reason the applicant was not in default for failing to probate the will sooner. The POD needs to prove that applicant was not in default. It's not enough, for example, that the applicant didn't have money to probate the will earlier or that the heirs had previously agreed not to probate the will. The application and proof of death also each need to list the decedent's heirs, their names, addresses, age and relationship to the decedent.

3. **Disinterested-witness Heirship Testimony.** In addition to the POD testimony discussed in No. 2 above, the Court requires the testimony of one disinterested witness who can identify the decedent's heirs-at-law. This witness will testify in open court, and the applicant's attorney needs to prepare a written statement of the witness's testimony, phrased as court testimony. Parts of § 203.002 of the Texas Estates Code provide some useful ideas about the testimony necessary for establishing a testator's heirs; see the following parts of the sample affidavit set out in § 203.002: numbers 1-5, and then 6-8 as needed. Include testimony that the witness does not take under the will or by intestacy.

4. **Order.** The order must include a finding that the applicant was not in default for failing to probate the will within four years of decedent's death.

5. **Special form of Posting plus either Personal Service or Affidavit Waiving Citation and Waiving Objection.** Estates Code § 258.051 requires personal service upon all of the decedent's heirs who are not applicants or affidavits from such individuals (or, if another will of decedent has previously been admitted to probate, service on or affidavits from all beneficiaries of that will).

   § 258.051 requires that the notice or the affidavit must contain (1) a statement that the testator's property will pass to the testator's heirs if the will is not admitted to probate (or, if another will of decedent has previously been admitted to probate, to those beneficiaries), (2) a statement that the person offering the testator's will for probate may not be in default for failing to present the will for probate during the four-year period immediately following the testator's death and (3) if the affidavit option is chosen, that the heir does not object to the offer of the testator's will for probate.

6. **Hearing on the Record.** The hearing for probating a will more than four years after a testator's death must be on the record because of the heirship testimony and the extra proof required in the POD.

**E. When Witnesses are Unable to Appear in Court**. Section 256.157 of the Texas Estates Code presupposes live testimony for all proceedings. Should a witness not be able to provide live testimony, the testimony of the witness may be by written or oral deposition, taken in accordance with the Texas Rules of Civil Procedure, except as modified by the Estates Code**.**

1. **Deposition On Written Questions (Estates Code Option**) – The Texas Rules of Civil Procedure that govern oral depositions and depositions on written question outline time-consuming and expensive procedures for replacing live testimony with written testimony or oral depositions. In response to this inefficiency, the legislature has made available a less costly and less time-consuming method for reducing live testimony to writing in § 51.203 of the Texas Estates Code. Once you have prepared the questions, the procedure is rather simple:

   1. File in the County Clerk's Office the notice of intention to take deposition on written questions for the individual you want to depose, with the questions attached. As a courtesy, deliver a copy to the ad litem.

   2. After the 10-day posting period has ended, mail the notice, and questions to the witnesses. Have them answer the questions as needed, execute the document before a notary public, and return all the documents to your office.

   3. Read the responses when they are returned to your office so that you know before the hearing if there is a problem with any of the answers. Send a copy to the attorney ad litem.

4. File the documents with the Clerk's Office. If you have a scheduled hearing within three weeks of the date you file the documents, please send a copy to the Court, with the hearing time noted. (It can take a while for documents to get from the Clerk's Office to the Court.)

2. **Deposition on Written Questions (Rules of Civil Procedure Option, Rule 200.1 et seq.).** For a deposition by written questions, the Rules require the notice of intent to take a deposition by written questions to be served on the witness and all other parties at least 20 days before the deposition is taken. Such notice – along with proof of its service 20 days before the taking of the deposition – must be filed with the Clerk and a copy provided to the Court in advance of the hearing.

3. **Oral Deposition.** This is the most costly and rarely used option. It is governed by Rule 199.1 et seq. of the Texas Rules of Civil Procedure.

4. **Oral Deposition by Telephone or Other Remote Electronic Means (Rules of Civil Procedure, Rule 199.1(b)).** This procedure may be more expedient than using a Deposition on Written Questions since no posting period is involved. As with regular depositions, this is a costly procedure, but it may prove useful if the only witnesses with personal knowledge cannot travel to the hearing because of health problems or undue expense. Attorneys are advised to ask very thorough and detailed questions of the witness as any deficiency in the proof offered may result in the Will being denied probate.