JUDGE GUY HERMAN
TRAVIS COUNTY PROBATE COURT NO. 1
TRAVIS COUNTY, TEXAS

Travis County Courthouse
Room 217- P.O. Box 1748
Austin, Texas 78767
512-473-9258

January 8, 2001

Re: Helpful Reminders about the Uncontested Docket and the Filing of Inventories and Accountings

Dear Counselor:

The Court takes this opportunity to introduce you to two new staff members. Many of you have had the opportunity to meet Associate Judge Susan Whitman, who started in August. Judge Whitman assists the Court with the uncontested docket, guardianship hearings, pre-trial and discovery motions, and select non-jury cases, as well as presiding over the monthly show-cause docket and the weekly mental health commitment docket at the Austin State Hospital. In addition, Judge Whitman reviews all inventories and applications, including applications for payment of fees, applications to expend estate funds, and applications to sell real and personal property, to determine whether they comply with applicable law and should be signed by the Court. Judge Whitman will be using courtroom 216, located across the hall from the main probate courtroom, for many of her hearings.

Carla Anderson, who started at the beginning of this month, is our new Court Investigator. She reviews all guardianship applications, investigates allegations that a guardianship is needed as well as complaints about a pending guardianship, supervises the Court visitor program, and reviews annual reports of the guardian of the person.

The changes in the Court's staff have acted as a catalyst for the Court's review of its uncontested docket procedures and its guidelines for approval of inventories and accountings. As a result of that internal review, the Court has compiled the following helpful reminders and tips to assist counsel when appearing before the Court for the uncontested docket and when preparing inventories and accountings for the Court's approval.

I. UNCONTESTED DOCKET

The uncontested docket is heard on Tuesday and Wednesday mornings from 8:30 a.m. to 10:00 a.m. Proceedings such as the probate of a will, the issuance of letters, the declarations of heirs, and the appointment of successor executors or administrators are proper matters for the uncontested docket. The Court may hear any of these proceedings, other than a declaration of heirship, on Tuesday and Wednesday; the Court hears heirship proceedings only on Tuesday.

By the Wednesday the week before any scheduled uncontested docket hearing, the Court requires the submission of the proposed order and accompanying documents as described below. Compliance with this rule allows the Court staff to review the file and contact the attorney should any deficiencies be present. Additionally, possession of these documents by the Court staff ensures that the attorney is not embarrassed in front of his or her client should he or she forget to bring the required documents, thus precluding the Court from granting immediate relief. Should an attorney not submit the order and other documents by the Wednesday before the hearing, the Court, in its discretion, may either place the attorney's case at the end of the docket or strike the case from the docket altogether. The Court will not grant any exceptions to this rule.

The Court strongly encourages an attorney to file the order and accompanying documents as described below at the same time the attorney files an application. If an attorney waits to submit the order and accompanying documents as described below by the Wednesday the week before the hearing, the attorney should submit those documents directly to the Court, rather than to the Clerk. Doing so increases the likelihood that the Court will receive these documents by the Wednesday the week before the hearing.

A. LETTERS TESTAMENTARY

1. **Submission of Documents –** The Court requires an attorney to submit, by the Wednesday the week before the hearing on the uncontested docket, the following documents: 1) the order admitting will to probate and authorizing letters testamentary, 2) the proof of death and other facts, 3) the oath, and 4) the death certificate of decedent.

2. **Helpful Reminders**

   a. **Application -** The Court would like to remind you that the application for probate of a will and for issuance of letters testamentary must conform to the statutory requirements set forth by the Probate Code. It has come to the Court's attention that numerous applications have failed in this respect. A common problem is the failure to state the names and residences of the subscribing witnesses, if any, as required by Section 81(a)(5). Please take the time to look at your application and compare it to Section 81. If an application fails to meet the statutory requirements, the Court will require the attorney to amend the application.

b. **Proof of Death** – It has come to the Court's attention that some attorneys ask their clients to testify to the fact that citation has been returned and that the will is self-proved. The Court feels that these questions are not proper subjects for a lay witness to answer because they are unlikely to have knowledge about these matters. Thus, the Court requests that attorneys no longer ask these questions of their clients. The Court is more than willing to take judicial notice of citation and self-proved wills.

Please remember that the Court prefers a witness to testify in person in open court. As required by the Probate Code, testimony taken in open court during the hearing on an application to probate a will shall be reduced to writing. Therefore, written testimony should be prepared in advance in the form of an affidavit. The affidavit will remain unexecuted until the person providing testimony signs it and swears to the truth of its contents, at the time the testimony is given.

Should a witness not be able to provide live testimony, the testimony of the witness may be by deposition, either written or oral, taken in the same manner and under the same rules as depositions taken in other civil actions, except as modified by the Probate Code (Code). Under the Texas Rules of Civil Procedure (Rules), a notice of intent to take a deposition on oral examination must be served on the witness and all other parties a reasonable time before the deposition is taken. 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.

In response to the expense of oral depositions and to the amount of time for depositions on written questions, the legislature has made available in §22 of the Code a less costly, less time-consuming method, different from that provided by the Rules, for serving witness from whom testimony will be elicited by deposition. **Only when a will is to be probated, and in any other probate matters where there is no opposing party or attorney of record upon whom**

notice and copies of interrogatories may be served, may service be had by posting a notice of intention to take a deposition for a period of ten days as provided in the Code governing posting of notices.

Thus, the Rules and the Code provide for three methods to serve witnesses from whom testimony will be elicited by deposition in an action to probate a will or in any other probate matter on the uncontested docket. For a deposition on oral examination, the Rules require an attorney to serve the witness with the notice of intent and wait a reasonable period of time before deposition is taken. For a deposition upon written questions, the Rules require an attorney to serve the witness with the notice of intent and wait 20 days before the deposition is taken. However, the Code provides an alternate method, different from the one set forth by the Rules, for a deposition by written questions that shortens from 20 days to 10 days the period before the deposition may be taken. Under the Code, service may be had by filing the notice of intent to take a deposition by written questions, along with a copy of the questions, with the Clerk, who will then post the notice. If an attorney chooses to proceed under the Code, the deposition may be taken only by the issuance by the Clerk of a commission for taking depositions. Without the issuance of a commission by the Clerk the witness may not be deposed. Moreover, the Clerk is prohibited from issuing the commission until the Monday following the expiration of ten days, excluding the date of posting.

c. **Order –** An order for issuance of letters testamentary should include all names used by decedent and applicant, such as aliases, former names, etc. Moreover, please be aware that the Court prefers that “executor” or “administrator”, rather than “executrix” or “administratix”, be used. In addition, the order should end “Signed ....” or “Signed and Ordered Entered ....” but in no case shall it end “Signed and Entered ....”

d. **Non Self-Proved Will –** For a will that is non self-proved, the Court will accept the testimony of one subscribing witness to the will, or, alternatively, the testimony of two disinterested witnesses who are familiar with the signature of the decedent, if a subscribing witness is unable to attend the hearing. A witness, whether subscribing or disinterested, must prove to the satisfaction of the court that, at the time the will was executed, the testator was of sound mind and at least 18 years of age. If two disinterested witnesses will testify, the

Court requires the attorney to submit a motion for alternate proof and an order granting the motion.

The discussion above concerning the deposition of witnesses applies to the testimony given by witnesses to prove up a will.

e. **Copy of Will** - The Court will admit into probate a copy of a decedent's attested written will as it would any attested will produced in court, except that additional proof is required. Not only must the applicant provide all of the proof necessary to prove up an attested written will, but her or she must also provide: (1) testimony that the testator did not revoke his or her will to overcome the presumption that it has been physically destroyed; 2) testimony by one disinterested witness that identifies the decedent's heirs-at-law; and (3) service upon all non-applicant individuals who would be entitled to receive a share of the estate if the will were not admitted into probate (generally, the decedent's intestate heirs) or waivers from such individuals acknowledging that they are aware that if the copy of the will were not offered for probate they may be entitled to a different share of the estate under the laws of descent and distribution.

Similar to an attested written will produced in court, a will not produced in court can be proved to be self-proved. However, it is likely that a copy may not have reproduced the seal of the notary. In such situations the will is non self-proved. Hence, the proponent of the will should present the testimony of one subscribing witness to the will, or, alternatively, the testimony of two disinterested witnesses who are familiar with the signature of the decedent, if a subscribing witness is unable to attend the hearing. A witness, whether subscribing or disinterested, must prove to the satisfaction of the court that, at the time the will was executed, the testator was of sound mind and at least 18 years of age. If two disinterested witnesses will testify, the Court requires the attorney to submit a motion for alternate proof and an order granting the motion.

Again, the discussion above concerning the deposition of witnesses is applicable to the testimony given by these witnesses.

B. MUNIMENT OF TITLE

1. **Submission of Documents –** The Court requires an attorney to submit, by the Wednesday the week before the hearing on the uncontested docket, the following documents: 1) the order admitting will to probate as a muniment of title, 2) the proof of death and other facts, and 3) the oath of no debts (the oath may be a separate document or be incorporated into the Proof of Death and Other Facts), and 4) the death certificate of decedent.

2. **Helpful Reminders**

   a. **Application -** The Court would like to remind you that the application for probate of a will as a muniment of title must conform to the statutory requirements set forth by the Probate Code. It has come to the Court's attention that numerous applications have failed in this respect. A common problem is the failure to state the names and residences of the subscribing witnesses, if any, as required by Section 89A(a)(5). Another commonly encountered problem is the failure of the application to state the name and residence of the executor named in the will, if any, as required by Section 89A(a)(5). Please take the time to look at your application and compare it to Section 89A. If an application fails to meet the statutory requirements, the Court will require the attorney to amend the application.

      Please note that an application to probate a will as a muniment of titled filed on or after September 1, 2001, no longer needs to state the social security number of the applicant and of the decedent.

   b. **Proof of Death –** See discussion above.

   c. **Order –** An order for probate of a will as a muniment of title should include all names used by decedent and applicant, such as aliases, former names, etc. In addition, the order should contain language that the effect of the order is to transfer property to those named in the instrument. Moreover, if there are multiple distributees, the order should not include a waiver of the requirement of the affidavit of fulfillment of terms. The Court will waive this requirement only in the case of a sole distributee. Lastly, the order should end "Signed ...." or "Signed and Ordered Entered ...." but in no case shall it end "Signed and Entered ...."

d. **Declaratory Relief** - The Court will admit into probate as a muniment of title only those wills under which a distributee is identified by the terms of the will itself. If a will devisees property to a "trustee" or to "my children", but the will is silent in identifying "trustee" or "my children", the Court will not enter the will into probate unless a request for declaratory judgment has been made upon proper application. This means that the Clerk must post the request for declaratory judgment for twenty days before the Court can act upon it.

e. **Non Self-Proved Will –** See discussion above.

f. **Copy of Will –** See discussion above.

C. DECLARATION OF HEIRSHIP

1. **Submission of Documents –** The Court requires an attorney to submit, by the Wednesday the week before the hearing on the uncontested docket, the following documents: 1) the judgment declaring heirs, 2) the proof of death and other facts, 3) service on or waiver from non-applicant heir(s), 4) affidavit of publication, 5) statement of facts for the two disinterested witnesses, and 6) the death certificate. The Court also requires the submission of any court-appointed attorney ad litem's original answer by the same Wednesday the week before the hearing.

2. **Helpful Reminders**

a. **Setting hearing –** In every determination of heirship, the Court will automatically appoint, by its own order, an attorney ad litem to represent the decedent's unknown heirs. All heirship hearings shall be heard within 60 days of filing the application or within 60 days of filing an application for administration, whichever is earlier. A hearing on a determination of heirship should not be set until the applicant's attorney has contacted the attorney ad litem to verify the ad litem's availability for the proposed hearing date. The attorney ad litem's presence is required at the hearing.

If an administration is sought in conjunction with the declaration of heirs, please remember that the Court requires that action to be heard by a certain date. For example, a hearing for an independent administration must be held simultaneously with an heirship hearing, whereas a dependent administration may be heard no less than 60 days prior to the heirship hearing.

b. **Order** - A judgment to declare heirs should include all names used by a decedent and applicants, such as aliases, former names, etc. In addition, the Court prefers interests in community and separate property to be described by fractions, rather than percentages, unless it is 100 percent. Moreover, the Court will not sign an order if it includes descriptions of specific items of property. Additionally, the judgment should include a provision discharging the attorney ad litem and taxing his or her fees as costs. Lastly, the order should end "Signed ...." or "Signed and Ordered Entered ...." but in no case shall it end "Signed and Entered ...."

If an administration is sought in conjunction with the declaration of heirs, an attorney should submit one order that incorporates the issuance of letters of administration and the judgment declaring heirs. **Please note that if minor heirs are involved, the Court will grant only a dependent, not an independent, administration**.

c. **Citation and Service – Section 50 of the Probate Code requires citation by publication in all heirship proceedings**. Although the Travis County Clerk prepares the citation, it is the attorney's responsibility to secure publication in one of the local papers. Publication is evidenced by an affidavit of publication executed by the publisher and filed with the Court. In addition, the Court reminds you that all heirs, including minor heirs, must be served with process.

Adult heirs may waive service, and a natural parent, managing conservator, guardian, attorney ad litem, or guardian ad litem, of a minor younger than 12 years may waive service on behalf of the minor in that person's capacity as parent, managing conservator, guardian, attorney ad litem, or guardian ad litem. Minors who are at least 12 years of age but younger than 19 years of age must be served. Service may not be waived. For further clarification, read Section 50 of the Probate Code.

d. **Attorney ad Litem – Section 53 of the Probate Code requires the court to appoint an attorney ad litem to represent the interests of unknown heirs**.

II. INVENTORIES – Because the law does not allow a fiduciary to act *pro se* (only a "person" may appear without an attorney under Rule 7 of the Rules), the inventory must indicate that an attorney prepared or reviewed the inventory. The simplest way to indicate representation is for the attorney to include his signature block on the inventory. This representation requirement is also satisfied if the representative is an attorney and indicates this fact on the inventory. Moreover, the Court requires that the inventory provide the information specified by §§ 250 and 251 of the Code (for decedent's estates) and §§ 727 and 730 (for guardianships.) The Court notes that many representatives fail to differentiate in the inventory between separate and community property, and, if the property is jointly owned with a non-spouse, to indicate the estate's interest in that property along with the names and relationships of the co-owners. Finally, the Court requests that the representative describe any claims in the inventory with the specificity required by §§ 251 and 730. For example, if a written obligation or account evidences such claim, the inventory must identify the nature of the obligation, date of the indebtedness, date of maturity, term, interest rate, and the identity and interest of any co-owners.

III. ACCOUNTINGS

A. ANNUAL ACCOUNTS: The Court's Auditor would like to remind attorneys of certain requirements of §741 of the Code concerning accountings for probate and guardianship estates. The accounting should state what claims against the estate have been paid by, or presented to, the representative, and the dates of payment. When reporting income of the estate, please remember to describe all notes due the estate with the specificity required by §741(a)(6) and the rental terms and price of any rented real property. To help the Court better analyze changes in the estate's financial position during the accounting period, please use schedules with a break-down of receipts of principal and income, disbursements by category, and the date of any court-approved disbursement (including a fee award or special allowance) that is not part of a previously approved allowance. The accounting should also include a recapitulation of the cash accounts for the accounting period that includes the beginning cash balance, a statement of principal and income received, a statement of disbursements, and the ending balance. You may pick up a sample of an annual account in proper form from the Court. Accountings also require proper documentation.

The Court requires the representative to support the accounting with proper documentation. Please attach copies of bank statements, check registers, receipts for all cash transactions, as well as brokerage account statements. The Court reminds attorneys that representatives must retain receipts of all disbursements; the Court reserves the right to require production of all receipts. The Code also requires that you attach to the accounting a verification of funds on deposit attested by a bank officer and a verification of any safe-keeping accounts. Under oath, the representative must also verify that he or she has paid the bond premium for the next accounting period, that he or she has filed all tax returns, and that he or she has paid all taxes owed during the accounting period, with a statement of the date the taxes were paid and the governmental entity to whom they were made.

B. FINAL ACCOUNTS FOR GUARDIANSHIPS: When a ward dies, the Court cannot approve the distribution of the assets of the guardianship estate without a determination of heirship or the probate of the deceased ward's will. The final account must be served on all of the intestate heirs, or, if there is an administration, on the personal representative (if he is not also the guardian filing the final account). Remember also that §751(b) of the Code requires personal service on any ward 14 years of age or older, unless a waiver of such service is filed with the Clerk.

C. FINAL ACCOUNTS IN DEPENDENT ADMINISTRATIONS: The Probate Code requires service of the account on all heirs at law or under the will of the deceased. Final Account forms are available for attorneys at the Probate Court.

The entire Court staff is dedicated to ensuring that probate, guardianship, and mental health cases are handled as expeditiously and as professionally as possible. Mike Kilgore, the Court's Administrator, is familiar with all aspects of the Court's operations. Jana Cotton, the Auditor, reviews all accountings in both probate and guardianship estates. Tanya Scanlon, the Court Coordinator, schedules all hearings and directs attorney and public questions to the appropriate Court staff member. Aries Solis is the Court's law clerk. If you have any questions about the uncontested docket, please call either Aries or Mike. Melissa Voigt is our court reporter. Please contact her if you need a reporter's record from any proceeding. Should your question concern an inventory or application, please speak to Judge Susan Whitman. For matters related to guardianships, contact Carla Anderson.

Thank you for your consideration of these guidelines. The Court appreciates your assistance in helping the Court continue to operate in an efficient and timely manner.

Sincerely,

Guy Herman, Judge Presiding
Travis County Probate Court No. 1