

## Check 10 key points in the Will to get all the paperwork right for letters testamentary

Key Points to Check	How it Affects Paperwork, Related Testimony, etc.
<p>1. Was the will <b><u>validly executed</u></b>?</p>	<p>Don't forget to check the obvious question of whether the will was validly executed. If not, none of the rest of this list is relevant. See requirements in § 59(a): "Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator."</p> <p>Remember that according to § 59(b), "[a] signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or the witnesses, or both, but in that case, the will may not be considered a self-proved will." See #4 below about self-proved wills.</p> <p>In addition, a will could be valid with only one "witness" <i>plus a notary who witnessed the signing of the will</i>. In that case, the Court strongly prefers that the notary be the subscribing witness in court. If the notary cannot appear in court, the court requires both (1) that the notary sign an affidavit with typical subscribing-witness information and <i>with an attached copy of the relevant log book</i> <b>and</b> (2) that two disinterested handwriting witnesses testify in court, with a motion &amp; order for alternative proof. See #4 below about self-proved wills.</p>
<p>2. Is the will (and any codicil) an <b><u>original</u></b> and not a copy?</p>	<p>You will need to do a variety of things differently when the will or a codicil is a copy:</p> <ol style="list-style-type: none"> <li>a. <b>Additional information required in Application, Proof, and Order.</b> See TPC §§ 81(b) &amp; 85. <ul style="list-style-type: none"> <li>• <i>The Application</i> must state (a) the cause of the will's non-production, (b) that reasonable diligence has been used to locate the original will, and (c) that the testator did not revoke the will.</li> <li>• <i>The Proof of Death and Other Facts</i> must include testimony that proves each of the above three points. See <i>In re Estate of Wilson</i>, 252 S.W.3d 708 (Tex. App. – Texarkana 2008, no pet. h.), where evidence was insufficient to rebut the presumption of revocation.</li> <li>• <i>The Order</i> must include a finding that the applicant has overcome the presumption that the original will has been revoked.</li> </ul> </li> <li>b. <b>"Copy" mentioned in all paperwork. The text <u>and</u> the title</b> of the Application, the Order, and the Oath must indicate that a copy of a will (or codicil) is being probated. For example, "Order Admitting Copy of Will and Original First Codicil to Probate and Authorizing Letters Testamentary." The <b>text</b> of the Proof also needs to mention the copy.</li> <li>c. <b>Special form of Posting, <u>plus</u> either Personal Service <u>or</u> Waivers of Service.</b> By administrative order, the Court requires (1) a special form of posting <b>and</b> (2) a special form of personal service on all of the decedent's intestate heirs who are not applicants <b>or</b> waivers from such individuals. The posting and personal service are special because the Clerk must attach to each citation a copy of the Court's special notice form, along with the copy of the Application. (The notice is attached to the administrative order you can pick up in the Court Coordinator's office or find on the Court's website.) If you are having some or all of the decedent's intestate heirs sign waivers, we recommend that you use the Court's notice form as a guide when drafting waivers since all</li> </ol>

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<div style="border: 1px dashed black; padding: 5px; margin-bottom: 10px;"> <p>#2 Continued: Is the will (and any codicil) an <b><u>original</u></b> and not a copy?</p> </div>	<p>waivers must clearly show that the heir signing the waiver knows about all of the points addressed in the notice. Note that minors cannot consent; if there's a minor heir, an ad litem may need to be appointed.</p> <p>d. <b>Heirship testimony.</b> In addition to the testimony contained in the Proof of Death and Other Facts discussed 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 § 52A of the Texas Probate Code provide a useful format for the testimony necessary for establishing a testator's heirs; see the following parts of the sample affidavit set out in § 52A: numbers 1-5, and then 6-8 as needed.</p> <p>e. <b>Hearing time.</b> When you call to schedule a hearing, tell Tanya you are probating a copy of a will or codicil. Because of the heirship testimony, uncontested hearings for probate of a copy of a will or codicil must be heard with other record cases on the heirship docket (usually on Tuesdays at 9:15 a.m.).</p>
<p>3. Are there any <b><u>codicils</u></b>?</p>	<p>If there are any codicils:</p> <p>a. Is anything in this checklist affected by what's in the codicil(s)? If so, follow the suggestions given.</p> <p>b. You must mention "Codicil" in <b>both the text <u>and</u> the title</b> of the Application, the Order, and the Oath. For example, "Order Admitting Will and Codicil to Probate and Authorizing Letters Testamentary." You also need to mention the codicil(s) in the <b>text</b> of the Proof.</p>
<p>4. Is the will <b><u>self-proved</u></b>?</p> <p>Section 59(a) of the Texas Probate Code provides a form for a self-proving affidavit that must be <i>substantially</i> followed. The following are common flaws that make wills not self-proved (although other flaws are possible):</p> <ul style="list-style-type: none"> <li>• Blank lines for the names of the testator and/or witnesses have not been filled in by the notary <i>in the notary's statement at the end of the affidavit.</i></li> <li>• The witnesses have not actually <i>signed</i> or otherwise subscribed the affidavit. (The notary can't print their names on the signature line.)</li> <li>• The witnesses have not <i>sworn</i> to the statement, thus preventing it from being an affidavit.</li> <li>• The affidavit does not carry a notary seal. (Often a problem if you're probating an older copy of a will.)</li> <li>• Affidavit doesn't indicate the witnesses were at least 14 years old. (Often a problem with non-Texas wills.)</li> </ul>	<p>If the will is not self-proved, you need to do several things differently:</p> <p>a. Modify your standard forms to indicate that the will (or codicil) is not self-proved, but is validly executed (assuming, of course, that it is).</p> <p>b. In the Application, also set out how you're going to prove up the will – either the testimony of one subscribing witness to the will, or, if a subscribing witness is unable to attend the hearing, the testimony of two disinterested witnesses who are familiar with the signature of the decedent <i>plus a motion and order for alternative proof.</i></p> <p>c. By the paperwork deadline, give the Court your proposed paperwork for proving up the will.</p> <p style="padding-left: 20px;"><i>A subscribing witness must prove the following:</i></p> <ol style="list-style-type: none"> <li>1. What happened when the will was signed that proves the will was duly executed.</li> <li>2. At the time the will was executed, the testator was of sound mind.</li> <li>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).</li> <li>4. At the time the will was executed, the witnesses were each at least 14 years old.</li> </ol> <p style="padding-left: 20px;"><i>Disinterested witnesses must prove the following:</i></p> <ol style="list-style-type: none"> <li>1. At the time the will was executed, the testator was of sound mind.</li> <li>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).</li> <li>3. The signature on the will was decedent's.</li> <li>4. The witness does not take under the will or by intestacy.</li> </ol> <p>d. Have the necessary witnesses testify at the hearing.</p>

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<p>5. Is any devisee a <b>state</b>, a <b>governmental agency</b> of the state, or a <b>charitable organization</b>?</p>	<p>Again, modify your forms: never use the standard boilerplate when it's not accurate. It is helpful to also indicate whether the charity, etc., is named as contingent or direct devisee and – if a contingent devisee on the face of the will – whether the charity, etc., takes given the circumstances.</p>
<p>6. Is the person who will serve as <b>executor</b> the <b>first-named</b> executor in the will? If not, what happened to the executor(s) with priority?</p>	<p>When the person who will serve as executor is not the first-named executor in the will, your Application – and your Proof – 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. If any executor is declining to serve, you need to have that person's notarized declination in the file before the hearing. For example, if you're seeking letters for the fourth-named executor, you might state that "X," the first-named executor, died on ____ date, with his will probated in Travis County Cause No. ____; "Y," the second-named executor, lacks capacity (which you'll need to prove at the hearing); and "Z," the third-named executor, will file a notarized declination to serve.</p>
<p>7. As set out in the will, what, <b>exactly</b>, are the <b>names</b> of</p> <ul style="list-style-type: none"> <li>• <b>the decedent</b></li> <li>• <b>the executor who will serve?</b></li> </ul>	<p>In all pleadings, <b>always begin</b> with the <b>exact names as they appear in the will</b> for the <b>testator, executor</b>, 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, <b>followed by</b> the additional or corrected name(s) that you need to include. <b>Even in the Order, the executor's name as it's given in the will must come first, with even "now known as" names following.</b></p> <p>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.</p> <p>Note that 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.</p>
<p>8. Does the will indicate that the executor seeking letters should be <b>independent</b>?</p> <p>Check to see if the will indicates that the executor <i>for whom you are seeking letters</i> should be independent:</p> <ul style="list-style-type: none"> <li>• "no court action"</li> <li>• "independent"</li> <li>• "least possible court involvement"</li> <li>• etc.</li> </ul> <p>Definitely look at what the will says about the executor who will serve. It is not uncommon that a will makes the first-named executor independent, but does not make alternate executors independent (whether intentionally or not).</p>	<p>If the will <b>doesn't</b> indicate that the executor who is seeking letters should be independent, start by modifying your forms so you're not using inaccurate boilerplate.</p> <p>If you're seeking independent administration when the will doesn't state that the executor who will serve should be independent, indicate the statutory basis of your request. See § 145. Then be sure to get sufficient requests from <b>all</b> of the distributees.</p> <p>If there is a minor distributee, the Court will not approve an independent administration under § 145.</p>

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<p>9. Does the will indicate that the executor seeking letters should serve <b><u>without bond</u></b>?</p> <p><b>“Sec. 195. When no Bond Required.</b>            (a) By Will. Whenever any will probated in a Texas court directs that no bond or security be required of the person or persons named as executors, the court finding that such person or persons are qualified, letters testamentary shall be issued to the persons so named, without requirement of bond.            (b) Corporate Fiduciary Exempted From Bond. If a personal representative is a corporate fiduciary, as said term is defined in this Code, no bond shall be required.”</p> <p>Here, too, definitely look at what the will says about bond <i>for the executor who will serve</i>. It is not uncommon that a will waives bond for the first-named executor independent, but does not waive bond for alternate executors (again, whether intentionally or not).</p>	<p>The only provision that allows <b>the Court</b> to waive bond when the will does not is § 145(p), which allows the Court to waive the bond when an independent administration is created pursuant to § 145(c), (d), or (e).</p> <p><b>Therefore, if the will doesn’t waive bond for the executor who will serve, the only way to avoid bond is to proceed under § 145(p), coupled with either § 145(c) or (d).</b> (Subsection (e) applies only if the decedent dies intestate.)</p> <p>a. <b>§ 145(c) &amp; (p).</b> Subsection (c) applies when the executor who will serve is named in the will, but the will does not provide for that executor to be independent. If this is your case, all of the distributees may agree on the advisability of having an independent administration and may request that the executor named in the will serve as independent executor without bond under Probate Code § 145(c) &amp; (p).</p> <p>b. <b>§ 145(d) &amp; (p).</b> Subsection (d) applies “where no executor is named in the decedent’s will, or in situations where each executor named in the will is deceased or is disqualified to serve as executor or indicates by affidavit filed with the application for administration of the decedent’s estate his inability or unwillingness to serve as executor.” In these situations, all of the distributees of decedent may collectively designate “a qualified person, firm, or corporation” to serve as independent administrator without bond under Probate Code § 145(d) &amp; (p). <b>If you proceed under § 145(d), you will be requesting independent administration with will annexed.</b> All of the paperwork should reflect that request.</p> <p><b>What if the will makes your executor independent, but doesn’t waive bond for that executor?</b> As noted above, § 145(p) allows the Court to waive the bond <b>only</b> when an independent administration is created pursuant to § 145(c), (d), or (e). The Court has no authority to waive bond when an independent administration is created by the testator under the will (§ 145(b)). Therefore, if the will makes your executor independent but doesn’t waive bond for that executor, you can avoid bond only if you get sworn declinations from all of the live and qualified named executors so that you can proceed under § 145(d). See “b” above. The distributees can choose anyone they want, including the person who was named in the will. If they do choose someone who was named in the will, that person would simply decline to serve as executor <i>as named in the will</i>, but would accept the appointment as independent administrator with will annexed.</p> <p>If you proceed under any of the above scenarios, be sure that the requests you prepare for the distributees include everything necessary. If any of the distributees are dead, or are minors, you may want to confer with the Court about how to proceed.</p>
<p>10. Does the will dispose of all property? Is there a partial <b><u>intestacy</u></b> because there isn’t any residuary clause?</p> <p>This problem is more common with holographic wills, but we’ve seen it even with lawyer-prepared wills.</p>	<p>If there is a partial <b><u>intestacy</u></b>, the best practice is to mention the intestacy. What you do next is beyond the scope of this handout, except in the following two cases:</p> <p>a. If you are requesting independent administration under § 145, a partial intestacy will affect who needs to join in the § 145 request.</p> <p>b. If it’s going to be a dependent administration, you will need to request a determination of heirship at some point if there’s a partial intestacy.</p>