



**JUDGE GUY HERMAN**  
TRAVIS COUNTY PROBATE COURT NO. 1  
Travis County Courthouse, Room 217  
1000 Guadalupe Street – P.O. Box 1748  
Austin, Texas 78767

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October 17, 2011

## **The Uncontested Docket: When the Decedent Dies With a Will**

Counselors,

Welcome to Travis County Probate Court 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 Travis 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 Probate 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 Probate Code.* Everything in this guide is consistent with the Probate Code, but this very basic guide makes no pretense of being comprehensive.

Guy Herman, Judge Presiding

### **I. ADMINISTRATIVE**

**A. Hearing Schedule.** The uncontested probate docket is heard on Tuesday and Thursday mornings (except for the day after a County holiday), with non-record settings at 8:30, 8:45, and 9:00. This docket includes the probating of wills, issuance of letters testamentary or letters of administration, determination of heirs, and appointment of successor executors or administrators. Most proceedings can be heard either Tuesday or Thursday; proceedings that must be heard on the record are scheduled on Tuesdays and Thursdays at 9:15 a.m.

Proceedings that must be heard on the record include heirships, probate of copies of wills, probate of wills more than four years after the testator's death, and the appointment of successor executors or administrators. Heirships are heard on Tuesdays at 9:15; all other uncontested-docket record cases are heard on Thursdays at 9:15.

**B. Submission of Documents.** The Court must receive all documents required for an uncontested-docket hearing **no later than 10:00 a.m. on Tuesday the week before the hearing**, as specified in the *Guidelines for Uncontested Docket Paperwork*. Compliance with this rule allows the Court staff 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, please see the *Guidelines for Uncontested Docket Paperwork* regarding how and where to submit documents. Unexecuted proposed documents (e.g., Proof, Order, Oath), should be submitted to the **Judge's chambers** before

the deadline, *preferably by emailing them to the Judge's Law Clerk in Word or WordPerfect 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 Court staff 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.

## **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 Probate Code and the Court require special pleadings, notice, and proof. See III.C. below, beginning on page 11. In addition, be sure you set the hearing on the Thursday 9:15 uncontested record docket (for the testimony from a disinterested witness regarding the testator's family history and the special testimony in the proof).
- **REVISED: 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 § 59(a) of the Texas Probate Code (TPC). The following are common flaws that make wills not self-proved *under § 59(a)*:
  - ✓ 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 the testator's or the witnesses' ages. (If the only problem is the failure to indicate ages, see "(1)" below and the box on page 11.)

Even if a will is not self-proved under § 59(a), 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 "NEW" 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."*

**NEW:** 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 § 59(a-1) – the new "one step" will execution procedure. Substantial compliance with the form set out in § 59(a-1) is required for the will to be self-proved.

**NEW:** 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 § 84(a)(2) if the will or an affidavit attached to the will provides everything set out in § 84(a)(2), which tracks the Uniform Probate Code requirements. A few of the *differences between § 59(a) and § 84(a)(2)*:
  - ✓ § 84(a)(2) does not require *witness* ages
  - ✓ § 84(a)(2) does not require a statement that the testator asked the witnesses to sign
  - ✓ § 84(a)(2) requires the witnesses to state that the testator was under no constraint or undue influence
  - ✓ § 84(a)(2) 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 § 84(a). *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 TPC § 145.

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 TPC § 145.

- **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 § 145(p) applies only to an independent administration created under subsections (c), (d), or (e). 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.
- **REVISED: 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 § 145(c) or (d),** 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 § 145 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 heard 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 top of page 7.
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. **REVISED:** **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 needed when named executor with priority will not serve:**
  - *Person is declining to serve:* need person's notarized declination in the file.
  - *Person is dead:* need proof of the death. The Court prefers a copy of the death certificate of the executor with priority. If the death certificate 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:* need sentencing order or other proof of conviction.
  - *Person is incompetent:* need 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:* need divorce decree.
  - *Person is a minor:* need birth certificate.

## B. Cover Sheets

Texas Rule of Civil Procedure 78a requires that all original petitions or applications filed in Texas civil courts include the state-mandated "Civil Case Information Sheet." Local rules require that all original petitions or applications filed in this Court include the Court's "Supplementary Probate Court Information Sheet." Both sheets must be included with all original petitions or applications filed in this Court; the only duplication between the forms is the case number and case style.

Current forms are available online at [http://www.co.travis.tx.us/probate/new\\_cover\\_sheet.asp](http://www.co.travis.tx.us/probate/new_cover_sheet.asp). Forms were modified slightly for cases beginning September 2010; if you've been using forms from before then, please use the current forms instead.

**COVER SHEET NOTES:**

1. On the Civil Case Information Sheet, **put the Applicant’s name – not the name of the estate – where the form requests the name of the “Plaintiff(s)/Petitioner(s).”**
2. **The Civil Case Information Sheet must be signed, even if e-filed.** If the case information sheet is submitted electronically, the Texas Judicial Council allows the signature to be either (1) a scanned image or (2) *“/s/” and the name of the person completing the case information sheet typed in the space where the signature would otherwise appear* (for example, *“/s/ John Doe”*).
3. **If you e-file the original application, neither information sheet can be the lead document.**

**C. The Application**

1. **Do not file a will, codicil, or death certificate 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, and you can file the death certificate at the same time. 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 § 81(a)	MT § 89A
• 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 <b>*** Residence means an <u>actual residential address</u>, not a P.O. box, and not just the county or city of residence.</b>	✓	✓
• 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 <i>If this is the situation, you will be requesting Letters of Administration with Will Annexed, not Letters Testamentary. See also TPC § 145(d).</i>	✓ if applicable	N/A
• The names <i>and residences</i> of the subscribing witnesses, if any <b>*** Residence means an <u>actual residential address</u>, not a P.O. box, and not just the county or city of residence.</b>	✓	✓
• 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; <i>if so, refer to TPC § 67</i>	✓	✓
• 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	✓

*Continued on next page*

By statute, applications must include the following information if indicated in the relevant column at the right	Proceeding	
<ul style="list-style-type: none"> <li>Whether a marriage of decedent was ever dissolved after the will was made, and if so, when and from whom. If so, refer to TPC § 69</li> </ul>	✓	✓
<ul style="list-style-type: none"> <li>Whether the state, a governmental agency of the state, or a charitable organization is named by the will as a devisee</li> </ul>	✓	✓

**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 § 81(a) or § 89A. **If an application fails to meet the statutory requirements, the Court will 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 certificate *as an exhibit or other formal attachment* to the application.

- Names and residences of subscribing witnesses and executor: The statute directs that an application for probate of a written will *shall state* “the names *and residences* of the subscribing witnesses, if any.” See §§ 81(a)(5) & 89A(5) (emphasis added). A common problem is the failure to say anything about the residences of the subscribing witnesses. If you cannot track down a subscribing witness, you can put “current residence unknown,” but you must say something about residence.
- **REVISED:** 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: To lessen the chance of identity theft, do not include the decedent’s or applicant’s social security number. The statute no longer requires them. The Court also prefers that you cross out or white out the social security number on the death certificate and the will.

**4. When the named executor is not the Applicant.** Under TPC § 76, 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 TPC § 3(r) for the definition of “interested person.”

5. **REVISED:** **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. TPC § 89C(b). 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.*

**D. The Proof of Death and Other Facts (POD)** (which you may call by another name). As required by Probate Code § 87, a witness needs to testify in open court, unless testimony is offered by deposition as discussed on the last two pages of this guide. Section 87 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 a deputy clerk.*

**1. Statutory Requirements.** Under § 88 or § 89B, 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,<sup>1</sup> 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 Travis County, TPC § 6(a). In that case, for example, add that decedent resided at 123 Sunny Lane, Austin, Travis 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 § 67.
- 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 TPC § 78 apply (incapacitated person, convicted felon, non-resident of state who has not appointed 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 § 145(d).

<sup>1</sup> A statutory probate court has exclusive jurisdiction over probate and administrations in counties where there is such a court. TPC § 4F. Having venue under TPC § 6 grants the court jurisdiction.

- **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.” TPC § 88(d).
- **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. TPC § 89B(4). (Under § 89C(a), 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](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. **REVISED: 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 certificate varies significantly from the name in the will
4. **Signature block.** For the POD and any other testimony that witnesses will sign after the hearing, you will streamline the process if your signature block for the deputy clerk includes *all* of the needed information. Here’s what the clerk’s signature block should include:

Dana DeBeauvoir  
 County Clerk, Travis County, Texas  
 By \_\_\_\_\_ Deputy

**E. 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.

- Judicial minutes. In 2009, the Texas Probate Code was amended to eliminate references to judicial “minutes.” Accordingly, do not submit an order requiring that the “clerk enter this order into the Court’s minutes.” Instead, orders should require that the clerk enter the order “into *the judge’s probate docket.*”
- 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.
- Terminology. The order should end “Signed . . .” or “Signed and Ordered Entered . . .” but in no case may it end “Signed and Entered . . .” (The Clerk, not the Court, “enters” an order.)
- Copy of Will or Codicil. See discussion in section III.C.5 on page 12 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 13 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.
- **NEW:** 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.
- **REVISED:** Section 128A notice to beneficiaries: The Court requires that all orders for administration of a will refer to the § 128A 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, appraisal, and list of claims as required by § 250 of the Texas Probate Code and the filing of an affidavit or certificate concerning notice to beneficiaries as required by § 128A of the Texas Probate 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, appraisal, and list of claims, or an affidavit in lieu of inventory, appraisal, and list of claims, as required by § 250 of the Texas Probate Code, and (2) the filing of an affidavit or certificate concerning notice to beneficiaries as required by § 128A of the Texas Probate Code.”
- **NEW:** Power of Sale. 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.
- **REVISED:** 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 § 89C(d) requirement otherwise. Now that the Legislature has affirmatively specified that applicants for probate of a will as a muniment of title do not need to comply with the requirements of TPC § 128A regarding notice to beneficiaries, the Court has rescinded its administrative order requiring compliance. Note, however, that the Court **will** send compliance letters if required affidavits of fulfillment are not filed.

### F. Appointment of Resident Agent.

- Under TPC § 78, 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 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.

## 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.** Section 88(b) of the Texas Probate 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 TPC § 84(b)(1) or TPC § 84(b)(2) for more details:

- the testimony of one subscribing witness to the will, TPC § 84(b)(1)
- or
- ***if a subscribing witness is unable to attend the hearing***, the testimony of two<sup>2</sup> disinterested<sup>3</sup> witnesses who are familiar with the signature of the decedent. TPC § 84(b)(2). ***If disinterested witnesses will testify, the Court requires the attorney to submit a motion for alternate proof and an order granting the motion for the Judge to sign.*** Sample motions and orders are posted on the Court's website, in both pdf and Word form versions ([www.co.travis.tx.us/probate/probate.asp](http://www.co.travis.tx.us/probate/probate.asp)).

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 a deputy clerk. Depending on the type of witness, here's what must be proved:

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<sup>2</sup> Section 84(b)(3) allows for only one disinterested handwriting witness, but only after a "diligent search" that is sworn to ***and satisfies the Court.***

<sup>3</sup> A disinterested witness is one who would not take under the terms of the will.

***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.

***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 Probate Code § 84(a)(2).

**C. REVISED: 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. Section 85 of the Texas Probate 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. **NEW: Attorney ad Litem.** For applications filed on or after September 1, 2011, the Court will appoint an attorney ad litem under TPC § 34A if a full or partial intestacy will result if the lost will is not admitted to probate. The ad litem will represent the interests of decedent's unknown heirs or heirs having a legal disability – who would collect if the presumption of revocation is not overcome. See the Court's administrative order at [http://www.co.travis.tx.us/probate/pdfs/lost\\_will.pdf](http://www.co.travis.tx.us/probate/pdfs/lost_will.pdf). 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. If you believe an attorney ad litem does not need to be appointed, contact Daniel Goldstein, Staff Attorney/Law Clerk to Judge Herman, at [daniel.goldstein@co.travis.tx.us](mailto:daniel.goldstein@co.travis.tx.us).
2. **Application.** TPC § 81(b) and § 89A(b) 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 #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 § 52A of the Texas Probate 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 § 52A: 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. **REVISED:** **Special form of Posting, plus either Personal Service or Waivers of Service.** TPC § 128(b) 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*. By administrative order revised in 2011, the Court requires (1) a special form of posting **and** (2) a special form of citation on or waivers *from the heirs and devisees*. The administrative order – along with the required notice form and a sample affidavit – is available on Court’s website ([www.co.travis.tx.us/probate/probate.asp](http://www.co.travis.tx.us/probate/probate.asp)).
  - The posting and personal service are special because the Clerk must attach to each citation a copy of the Court’s required notice form.
  - If some or all of the devisees and heirs sign affidavits waiving citation, the affidavits must explicitly include all of the points addressed in the special notice form that the Clerk attaches to all citations. *It is not sufficient for the affidavit waiving citation to refer to an attached notice.*<sup>4</sup>
7. **REVISED:** **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. Uncontested-docket cases to probate a copy of a will (or codicil) are heard on Thursdays at 9:15 a.m. ***Before calling the Court to set the hearing, find out when the attorney ad litem is available. Please tell the Court Coordinator that you are probating a copy of a will so that she will properly schedule your hearing.***

NOTE: A notary seal does not always show up on a copy of a will. In such situations, the will is not self-proved. See the discussion of non-self-proved wills in section III.B on pages 10-11 for the added procedures necessary.

- D. **REVISED:** **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. TPC § 73(a). The Court can admit the will only as a muniment of title and cannot grant letters testamentary. See TPC § 74. 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. **NEW:** **Attorney ad Litem.** For applications filed on or after September 1, 2011, the Court will appoint an attorney ad litem under TPC § 34A to represent the interests of decedent’s unknown heirs or heirs having a legal disability, unless the application indicates another will of the testator has previously been admitted to probate. (See [http://www.co.travis.tx.us/probate/pdfs/probate\\_more\\_than\\_four\\_years.pdf](http://www.co.travis.tx.us/probate/pdfs/probate_more_than_four_years.pdf).) *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.* If you believe an attorney ad litem does not need to be appointed, contact Daniel Goldstein, Staff Attorney/Law Clerk to Judge Herman, at [daniel.goldstein@co.travis.tx.us](mailto:daniel.goldstein@co.travis.tx.us).
  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.
  3. **Disinterested-witness Heirship Testimony.** ***In addition to the POD testimony discussed in #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 § 52A of the Texas Probate Code provide some useful ideas about the testimony necessary for establishing a testator’s heirs; see the following parts

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<sup>4</sup> The administrative order, [http://www.co.travis.tx.us/probate/pdfs/lost\\_will.pdf](http://www.co.travis.tx.us/probate/pdfs/lost_will.pdf), includes a sample affidavit waiving citation. The Court does not require the use of that specific form, but the Court does prefer that attorneys adapt the form affidavit to ensure all necessary information is included.

of the sample affidavit set out in § 52A: 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. **REVISED: Special form of Posting plus either Personal Service or Affidavit Waiving Citation and Waiving Objection.** Probate Code § 128B 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).

Section 128B(c) 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), and (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.

By administrative order, the Court requires (1) a special form of posting as well as (2) a special form of citation on or waivers from the heirs (or from the beneficiaries named in a previously probated will). The administrative order – along with the required notice form and a sample affidavit – is available on the Court's website ([www.co.travis.tx.us/probate/probate.asp](http://www.co.travis.tx.us/probate/probate.asp)).

- The posting and personal service are special because the Clerk must attach to each citation a copy of the Court's required notice form.
- If some or all of the heirs (or beneficiaries of a previous will) sign affidavits waiving citation and objection, the affidavits must explicitly include all of the points addressed in the special notice form that the Clerk attaches to all citations. *It is not sufficient for the affidavit waiving citation to refer to an attached notice.*<sup>5</sup>

6. **REVISED: 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. Uncontested-docket cases to probate a will more than four years after a testator's death are heard on Thursdays at 9:15 a.m. ***Before calling the Court to set the hearing, find out when the attorney ad litem is available. Please tell the Court Coordinator that you are probating a will more than four years after the decedent's death so that she will properly schedule your hearing.***

- E. **REVISED: When Witnesses are Unable to Appear in Court.** Section 87 of the Texas Probate 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 Probate Code. ***Affidavits and other statements that do not comport with the provisions outlined below constitute inadmissible evidence.*** Your options are outlined below. Please also read the caveats that follow:

**Caveats:** If you use depositions, be *sure* you ask the right questions so that you will have all the necessary proof once you get the responses. If an attorney ad litem has been appointed for any reason, get the ad litem's input about the necessary questions in advance, and add all questions the ad litem wants to ask the deponent.

**\*\*\* The Court strongly prefers that each question is set out immediately above the corresponding answer.**

Schedule a hearing for a date that will allow you to have the *responses* to the Court by the paperwork deadline – *no later than 10:00 a.m. on the Tuesday the week before the hearing*. The Court will need to review the responses, not just the questions, before the hearing.

<sup>5</sup> The administrative order, which can be found at [http://www.co.travis.tx.us/probate/pdfs/probate\\_more\\_than\\_four\\_years.pdf](http://www.co.travis.tx.us/probate/pdfs/probate_more_than_four_years.pdf), includes a sample affidavit waiving citation. The Court does not require the use of that specific form, but the Court does prefer that attorneys adapt the form affidavit to ensure all necessary information is included.

1. **REVISED:** **Deposition on Written Questions (Probate Code Option).** The Texas Rules of Civil Procedure that govern oral depositions and depositions on written question outline time-consuming and potentially 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 § 22 of the Texas Probate Code.<sup>6</sup> Once you have prepared the questions, the procedure is rather simple:
  - a. 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.
  - b. After the posting period has ended (10 days plus a Monday), the Clerk’s Office will mail to the attorney who requested the posting a commission to take the deposition on written questions attached with the notice and questions that were already filed with the Clerk’s Office.
  - c. Mail the commission, notice, and questions to the witnesses. Have them answer the questions as needed, execute the document before a notary public, *and have the notary follow the instructions on the commission – including the instructions about how to seal the envelope and return the envelope to the Travis County Clerk’s office.* **NEW:** Note that the commission has always mandated this procedure, but our instructions did not – and we did not verify how it was done. **We now will.**
  - d. **NEW:** Follow up to be sure the deposition answers have been filed with the Clerk’s Office **no later than the paperwork deadline.**
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.

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<sup>6</sup> Section 22 of the Probate Code provides the following:

[I]n other probate matters where there is no opposing party or attorney of record upon whom notice and copies of interrogatories may be served, service may be had by posting notice of intention to take depositions for a period of ten days as provided in this Code governing posting of notices. When such notice is filed with the clerk, a copy of the interrogatories shall also be filed, and at the expiration of ten days, commission may issue for taking the depositions, and the judge may file cross-interrogatories where no one appears, if he so desires.