JUDGE GUY HERMAN

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

September 2009

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 four less common (and 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.

Sincerely,

Guy Herman, Judge Presiding

I. ADMINISTRATIVE

A. Hearing Schedule. The uncontested probate docket is heard on Tuesday and Thursday mornings, with settings at 8:30, 8:45, and 9:00 (and on Thursdays at 9:15 when the other time slots are full). This docket includes the probating of wills, the issuance of letters testamentary or letters of administration, the declaration of heirs, and the appointment of successor executors or administrators. Most proceedings can be heard either Tuesday or Thursday, but proceedings that must be heard on the record are scheduled only on Tuesdays 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.

B. Submission of Documents. The Court must receive all documents required for an uncontested-docket hearing no later than 10:00 a.m. on the 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*** at that time. ***If you do so, you do <u>not</u> need to send anything directly to the Court.***

TIP: If you can't file some documents at the time you file the application, you'll need to submit those documents or copies of them ***to the Judge's chambers*** before the deadline. When submitting documents to the Judge's chambers put "Attention: Law Clerk" ***and include the date and time of your scheduled hearing***. Adding the date and time of the scheduled hearing will allow the law clerk to keep track of documents submitted directly to the Court.

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 definitely 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 <u>All</u> Documents

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

- <u>Do you have the original will?</u> If you don't have the original will, the Probate Code and the Court require special pleadings, notice, and proof. See III.B. below on pages 8-9. In addition, be sure you've set the hearing on the Tuesday heirship docket since there will need to be testimony from a disinterested witness regarding the testator's family history.
- <u>Is the will self-proved?</u> Before pleading that a will is self-proved, be sure that it is. Section 59(a) of the Texas Probate Code (TPC) provides a form for a self-proving affidavit that must be substantially followed. The following are common flaws that make wills not self-proved:
  - ✓ 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.

  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.A. below on page 8, "Proving up a Non-Self-Proved Will."
- <u>Does the will make the executor independent?</u> Before pleading that the will names someone to serve as independent executor, be sure it does. Naming the person who is seeking letters as "independent" executor obviously works, but so would using 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 pursuant to the appropriate subsection of TPC § 145.

  If the will does not make your executor independent and you're going to request independent administration, collect the appropriate 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 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 consents.
- Is there a partial intestacy? If there is a partial intestacy in the will, the best practice is to mention the intestacy in your pleadings, but what else you need to do is beyond the scope of this handout, with two exceptions. First, if you are requesting independent administration under § 145, partial intestacy will affect who needs to join in the § 145 request because all of the intestate heirs will need to consent. Second, if it is going to be a dependent administration, you will need to schedule an heirship proceeding within 60 days.

2. **The titles of all of your documents should be specific** because specific titles make 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,[1] ***followed by*** the additional or corrected name(s) that you need to include. 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.

   > 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.

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

5. **When the person who will serve as executor isn't the first-named executor in the will**, your documents – *and your proof* – need to 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 named executor is declining to serve, you will need to have that person's notarized declination in the file before the hearing. If any named executor died, we'll need proof of the death.

B. The Application

1. **NEW: 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 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.

[1] A/K/A = also known as; N/K/A = now known as; F/K/A = formerly known as.

2. **Statutory Requirements.** The application requirements for letters testamentary (LT) and muniments of title (MT) and their governing Code provisions are as follows. Note that 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 ****** Residence means an actual address, not just the county or city of residence.***	✓	✓
• If no executor is named in the will, then the name and residence of the person to whom it is desired that letters be issued *If this is the situation, you will be requesting Letters of Administration with Will Annexed, not Letters Testamentary. See also TPC § 145(d).*	✓ if applicable	N/A
• The names *and residences* of the subscribing witnesses, if any	✓	✓
• Whether a child or children born or adopted after the making of the will survived the decedent, and the name of each survivor, if any; *if so, refer to TPC § 67*	✓	✓
• 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	✓
• **NEW:** Whether a marriage of decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void, and if so, when and from whom. *If so, refer to TPC § 69*	✓	✓
• Whether the state, a governmental agency of the state, or a charitable organization is named by the will as a devisee	✓	✓

3. **Common Mistakes**. The following are some common mistakes found in applications. Most are simple and can be eliminated 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 B.1. on the previous page: *Don't* 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 can't say nothing about residence.

- **NEW:** Insufficient marital history: Effective September 1, 2009, an application to probate a will must state whether a marriage of decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void, and if so, when and from whom. *It will no longer be sufficient to state that decedent was never divorced; nor will it be sufficient to state that decedent was never divorced after the will was made.* What you should include is a statement similar to one of the following three examples, as appropriate for the facts:
    1. "No marriage of Decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void."
    2. "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."
    3. "Decedent was never married."
- 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.

4. **When the named executor is not the Applicant.** Under Probate Code § 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 Probate Code § 3(r) for the definition of "interested person."

5. **Muniments of Title and Declaratory Relief.** "If a person who is entitled to property under the provisions of the will cannot be ascertained solely by reference to the will or if a question of construction of the will exists," the Court will not admit the will into probate as a muniment of title ***unless*** a request for declaratory judgment has been made upon proper application and notice. TPC § 89C(b). 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 and Remedies Code. See TPC § 89C(b). One requirement is that the application for declaratory judgment must be posted for twenty days before the Court can act upon it.

C. The Proof of Death and Other Facts (POD) (which you may call by another name). As required by § 87 of the Probate Code, 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 shall be reduced to writing. Therefore, written testimony needs to be prepared in advance in the form of an affidavit. However, the witness will not sign the affidavit until immediately after the hearing, when the witness signs the affidavit 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 information, except where specifically noted:
    - That the 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,[2] including the underlying ***facts*** that support the allegation. Usually this requirement is fulfilled because the decedent was domiciled and had a

[2] A statutory probate court has exclusive jurisdiction over probate and administrations in counties where there is such a court. TPC § 5(d). Having venue under TPC § 6 grants the court jurisdiction.

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.
- Whether a necessity exists for administration. If the applicant is applying for letters testamentary or letters of administration with will annexed, then there obviously should be a need for administration. However, if you are applying to probate a will as a muniment of title, there should be no need for administration and this statement should be included in the proof.
- **NEW:** Whether a marriage of decedent was ever dissolved after the will was made, whether by divorce, annulment, or a declaration that the marriage was void, and if so, when and from whom. For more information, see discussion in Application section on the previous page.
- Whether any children were born or adopted ***after*** the date of the will. See TCP § 67.
- If you are 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).

> **NEW:** Claims for Medicaid recovery in Texas are debts of the estate because Texas has <u>not</u> 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 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.
>
> To satisfy the Court that a muniment proceeding is appropriate, **we require that attorneys add the following sentence to the POD when probating a will as a muniment of title:** "The Decedent did not apply for and receive Medicaid benefits on or after March 1, 2005."

- That the executor named in the will 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 "entitled" to serve because he or she is named executor in the will **or** because he or she is the person designated under a subsection of § 145.
>
> The person for whom letters are sought is "not disqualified" if none of the disqualifications listed in Probate Code § 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).

- Whether the state, a governmental agency of the state, or a charitable organization is named as a devisee.

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 decide whether citation is proper and whether a will is self-proved.

3. **ADDITIONAL INFORMATION:** There are times when additional information is needed in a POD. You should review the case and determine whether any extra information needs to be included. ***The following are <u>some</u> 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 party is now known by a different name
- a name was spelled incorrectly 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 stamp includes:

   Dana DeBeauvoir
   County Clerk, Travis County, Texas
   By _____ Deputy

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

1. All orders

- **NEW:** 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.
- Exact names and aliases. See discussion above in section II.A.3 on page 3. 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 it's given in the will.
- Terminology: The order should end "Signed . . . ." or "Signed and Ordered Entered . . . ." but in no case shall it end "Signed and Entered . . . ." (The Clerk, not the Court, "enters" an order.)
- Copy of Will or Codicil**.** See discussion in section III.B.2. on page 8 about presumption language that must be included in any order to probate a copy of a will or codicil.

2. Orders for Letters Testamentary

- 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 any other named executors who will not serve but who have priority over the executor(s) who will serve. (To be precise, don't use the term "successor" executor unless a court has previously *appointed* someone else as executor. If not, "alternate" is the appropriate term.)
- For decedents who die on or after September 1, 2007, the Court requires that all orders for administration of a will refer to the new § 128A notice to beneficiaries. A good place to refer to the notice is right after the reference to the inventory. For example: ". . . no other action shall be had in this Court other than the return of an inventory, appraisement, and list of claims as required by law, and the filing of an affidavit or certificate concerning notice to beneficiaries as required by § 128A of the Texas Probate Code."

3. Orders for a Muniment of Title

- 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.
- Sufficient legal authority: The order must indicate that the effect of the order is to transfer property to those named in the instrument.
- Waiver of Affidavit of Fulfillment: The order cannot waive the requirement of the affidavit of fulfillment of terms unless (1) the applicant is the sole distributee or (2) there are multiple

distributees, ***and all of them are applicants***. The Court will not waive the § 89C(d) requirement otherwise.

- For decedents who die on or after September 1, 2007, the Court by administrative order requires that applicants for probate of a will as a muniment of title comply with the requirements of Texas Probate Code § 128A regarding notice to beneficiaries. Except when the applicant is the sole beneficiary, all muniment orders must refer to the § 128A notice to beneficiaries by adding language like the following to the order: "As required by local administrative order, the applicant shall comply with all of the notice provisions required for personal representatives under Texas Probate Code § 128A."

E. Appointment of Resident Agent. Under Probate Code § 78, all non-Texas executors must have appointed a resident agent to accept service of process. The Court also requires that any non-Texas applicant for probating a will as a muniment title appoint a resident agent in case, for example, there is a creditor who files suit. Before the order can be signed, the executor (or the applicant for a muniment) must have signed the "Appointment of Resident Agent" before a notary. Note that the Appointment must be signed before a notary, not a Deputy Clerk.

III. FOUR LESS COMMON (AND TRICKIER) ISSUES

A. 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 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[3] disinterested[4] 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.***[5]

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

A subscribing witness must prove the following:

1. What happened when the will was signed that proves the will was duly executed.
2. At the time the will was executed, the testator was of sound mind.
3. At the time the will was executed, the testator was at least 18 years old (or had been lawfully married or a member of the armed forces).
4. At the time the will was executed, the witnesses were each at least 14 years old.

Disinterested 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 does not take under the will or by intestacy.

B. 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

[3] 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.*

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

[5] A sample motion and order is posted on the Court's website (www.co.travis.tx.us/probate/probate.asp).

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. **Pleading.** Both the application and the proof of death and other facts 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. The POD needs to *prove* each of these points; ***see In re Estate of Wilson*, 252 S.W.3d 708 (Tex. App. – Texarkana 2008, no pet. h.).**

2. **Order.** **NEW:** The order must include a finding that the applicant has overcome the presumption that the original will has been revoked.

3. **Testimony.** ***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*. Include testimony that the witness does not take under the will or by intestacy.

4. **Special form of Posting, plus either Personal Service or Waivers of Service.** By administrative order,[6] the Court requires (1) a special form of posting **and** (2) a special form of personal service upon all of the decedent's intestate heirs who are not applicants **or** 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,[7] along with the copy of the application. 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 waivers must clearly indicate that the heir signing the waiver knows about all of the points addressed in the notice.

5. **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. On-the-record hearings for the uncontested docket are held on Tuesday mornings when heirship proceedings are heard. ***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.A. on the previous page for the added procedures necessary.

C. 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). In such cases, 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, the following requirements are necessary:

1. **Pleading.** Both the application and the proof of death and other facts must state the reason the applicant was not in default for failing to probate the will sooner. The POD needs to *prove* that

[6] The order is available on Court's website (www.co.travis.tx.us/probate/probate.asp) or in the Court Coordinator's office.
[7] 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.

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.

2. **Testimony.** ***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. 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*. Include testimony that the witness does not take under the will or by intestacy.

3. **Personal Service or Affidavit (waiver of objection).** Probate Code § 128B requires personal service upon all of the decedent's intestate heirs who are not applicants **or** affidavits from such individuals. ***Section 128B(c) requires that the notice or the affidavit must contain the following:***

   - a statement that the testator's property will pass to the testator's heirs if the will is not admitted to probate; and
   - 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.

4. **Special form of Posting.** By administrative order, the Court requires that the special form of notice to decedent's intestate heirs required under TCP § 128B(c) also be attached to the Clerk's posted citation.

5. **Hearing on the Record.** The hearing for probating a will that is more than four years old must be on the record because of the heirship testimony. On-the-record hearings for the uncontested docket are held on Tuesday mornings when heirship proceedings are heard. ***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.***

D. 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.

> 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. In an heirship proceeding, get the attorney ad litem's input about the necessary questions, and add all questions the ad litem wants to ask the deponent.
>
> 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.

1. **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.[8] Once you have prepared the questions, the procedure is rather simple:

[8] 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

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 return all the documents to your office.

d. Read the responses when they are returned to your office so that you know before the hearing if there is a problem with any of the answers.

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

2. **Deposition on Written Questions (Rules of Civil Procedure Option, Rule 200).** 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 of the Texas Rules of Civil Procedure.

4. **NEW: 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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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.