MAY IT PLEASE THE COURT: MEETING COURT EXPECTATIONS IN PROBATE ADMINISTRATIONS

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State Bar of Texas
INTERMEDIATE ESTATE PLANNING & PROBATE
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CHAPTER 8

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AREAS OF PRACTICE

Estate, guardianship, and trust administration; probate, guardianship, and other fiduciary litigation; estate planning

EDUCATION

University of Texas at Austin (J.D., 2016)
University of Texas at Austin (B.A., Plan II Program and History, with high honors, 2013)

PROFESSIONAL HISTORY

Hopper Mikeska, PLLC, 2018-Present
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Judicial Career

1985-2014 & 2015- Present	**Judge**, Travis County Probate Court No. 1 -- Appointed on May 17, 1985 -- Reelected in 1986, 1990, 1994, 1998, 2002, 2006, 2010, and 2014
1980-85	**Justice of the Peace,** Travis County Precinct 5

Legal Career

1978	**Licensed**, May 1978
1978-80	**Associate,** Practiced with the Law Offices of David R. Richards and Associates with David Richards and David Van Os

Education

University of Texas at Austin, B.A., 1972
University of Delhi, India, 1973
University of Texas at Austin, J.D., 1977

Professional Activities

1998-2001 & 2006 –	**Presiding Judge,** Statutory Probate Judges of Texas; elected by his peers for four 4-year terms as statewide presiding statutory probate judge
1993 –	**President,** Texas College of Probate Judges
Ongoing	Lectures throughout the state on probate, guardianship, and mental health law
2011-2012	Served on the Texas State Bar Committee on Pattern Jury Charges – Family and Probate
2006 –	Appointed to the Mental Health Crisis Services System Task Force of the Texas Department of State Health Services
2001-02	Appointed to the Mental Health Service System Task Force upon the recommendation of the Texas Department of Mental Health and Mental Retardation
1991-92	Chairperson**,** the Guardianship Work Group created by the Texas Senate Interim Committee on Health & Human Services
1991-92	Member of the Citizens' Commission on the Texas Judicial System
1989	Organized the Travis County Mental Health Coordinating Council, providing agencies and advocacy groups with a forum to address concerns with the involuntary mental health service system
1986	Instrumental in the conception and formation of the Family Eldercare Guardianship Program, a volunteer guardianship program
1983	Organized, with three others, the Travis County Dispute Resolution Center, an organization committed to using mediation when possible to resolve guardianship contests involving family members

Professional Memberships

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MAY IT PLEASE THE COURT: MEETING COURT EXPECTATIONS IN PROBATE ADMINISTRATIONS

I. INTRODUCTION

As a former law clerk to Judge Herman, I have had the opportunity to review hundreds of probate applications and prove-up documents and, consequently, to learn from the common issues that attorneys encounter during probate administrations. This paper is not meant to be a roadmap for probate administrations—that would require a much longer paper! Rather, it is a collection of tips for successfully administering probate estates from a probate court's perspective. All references to "EC" are references to the Texas Estates Code, and all references to "TRCP" are references to the Texas Rules of Civil Procedure.

II. READ THE WILL YOU ARE PROBATING

You would be surprised by how many attorneys seemingly neglect to read the will before filing an application for probate. You can avoid many common mistakes on your uncontested docket cases by reading the will carefully and considering the following questions.

A. Is the will validly executed?

While this may seem like an obvious question, it is not uncommon for attorneys to file a will for probate without first checking to ensure that it is a valid testamentary instrument. There are two types of valid wills under Texas law: (1) attested wills and (2) holographic wills. EC § 251.051 lays out the requirements for attested wills, and EC § 251.052 lays out the requirements for holographic wills. Keep in mind that a handwritten will that is written by someone other than the testator does not qualify as a holographic instrument under EC § 251.052 and, therefore, must be properly attested.

B. What are your options when a purported will was not validly executed?

If your client presents you with a purported will that was not validly executed, the purported will cannot be probated. If probate is necessary but the will is invalid, there are several available options, depending on the circumstances. If there is not an earlier will that was validly executed, you may file a small estate affidavit or apply for a determination of heirship. If there is an earlier will that was validly executed, the final option is to apply to probate that earlier will. If there is a dispute as to whether a purported will was validly executed, all the beneficiaries of that purported will should be notified so they have an opportunity to argue that the will is valid. The Travis County Probate Court requires such notice. For example, if the purported will is handwritten and unattested and your client believes that the instrument was written in the handwriting of someone other than the testator, the beneficiaries of the handwritten will should be notified so that they have the opportunity to argue that the will was written wholly in the handwriting of the testator. If the will is typewritten and unattested, there is no possible argument that the will was validly executed, and the court will not likely require the beneficiaries of the typewritten will to be notified.

C. Is the will an original or a photocopy?

Because we live in the age of high-quality photocopiers, including color copiers, and notary stamps rather than raised seals, it can be very difficult to determine whether a will is an original or a photocopy. Pages nine through eleven of Appendix A, the Travis County Probate Court's *Check 10 Key Points in the Will*, include tips for determining whether a document is an original or a photocopy. If you determine that the will provided by your client is actually a photocopy rather than the original, ask your client to look again for the original document. In the majority of cases, the client will find the original document. If the original is simply lost and you must proceed with an application to probate a copy of a lost will, ensure that you are meeting the many procedural requirements involved in lost will cases. *See* pages ten and eleven of Appendix A for more details about the requirements in lost will cases.

D. Is the will self-proved?

The answer to this question may depend on the state or country the will was executed in and/or the date of the will's execution. No matter the date of execution, a will that includes a self-proving affidavit in substantial compliance with EC § 251.104 is a self-proved will.[1] If the will was executed on or after September 1, 2011, the will may be simultaneously executed, attested, and made self-proved by using the form provided by EC § 251.1045. Again, the form used in the will must be in substantial compliance with the statutory form. The will is also considered self-proved if (1) the will was executed outside of Texas or the testator was domiciled or had a place of residence outside of Texas at the time of the will's execution or the testator's death and (2) the will met the state or foreign country's requirements for

[1] "Substantial compliance" is a squishy term. Some judges interpret it more narrowly than others. If in doubt as to whether the self-proving affidavit is in substantial compliance with the statute, consider either: (1) proceeding as if the will is not self-proved and bringing the requisite witness(es) to the prove-up hearing or (2) if the case is uncontested, contacting the court's staff attorney to ask about the judge's interpretation of substantial compliance.

self-proved wills at the time of execution. EC § 256.152(b), (c)(1).

If you are offering a will for probate that is not self-proved, you need to "prove up" the will at the hearing with live testimony from one of the subscribing witnesses to the will. The subscribing witness must prove that the will was properly executed, that the testator was of sound mind and at least 18 years old at the time the will was signed, and that the witnesses were each at least 14 years old at the time the will was signed. The subscribing witness's testimony will essentially track the language of the self-proving affidavits reflected in EC § 251.104 or EC § 251.1045.

If neither subscribing witness is available to provide live testimony, there are three options for proving up the will: (1) a deposition on written questions of one of the subscribing witnesses; (2) live testimony of two witnesses who are familiar with the handwriting and signature of the decedent; or (3) a deposition on written questions of two witnesses who are familiar with the handwriting and signature of the decedent. Handwriting and signature witnesses should only be used if the subscribing witness is unable to testify by deposition on written questions. In uncontested cases, the deposition on written questions must be made in accordance with EC § 51.203. For detailed instructions on how to successfully take a deposition on written questions in uncontested matters, see pages 27 and 28 of Appendix B.

If you plan to prove up the will with any of these three alternative options *and* the will is attested rather than holographic, you also need to e-file a motion for alternative proof. A sample Motion for Alternate Method of Proof of Will by Deposition of Subscribing Witness and the accompanying proposed order are attached as Appendix C. A sample Motion for Alternate Method of Proof of Will When No Subscribing Witness Available to Testimony in Person or by Deposition and an accompanying proposed order are attached as Appendix D. If you need to file a motion for alternative proof, be sure to do so in advance of the hearing so that the court has the opportunity to rule on the motion before the hearing. If you are doing a deposition on written questions, keep in mind that the court needs time to review the responses to the deposition before the hearing, so plan to e-file the responses to the deposition at least one week before the date of the hearing.

E. Who is the named executor?

If your client is seeking appointment as executor and there are named executors with priority ahead of her in the will, your application needs to explain why the other named executors are not seeking appointment. The best practices for what evidence is required to show that a named executor with priority will not or cannot serve are enumerated on page 13 of Appendix A. If the will does not name an executor or if the none of the named executors can or will serve as such, the distributees may agree on the appointment of an independent administrator with will annexed. See EC §§ 401.002(b) & 401.005 and page 15 of Appendix A for instructions on how to proceed in these situations. If the distributees cannot come to an agreement as to who will serve as independent administrator with will annexed, the court may appoint a third-party dependent administrator with will annexed.

F. If the will names an executor, does it provide for an independent administration or waive bond?

When answering these questions, make sure you are considering whether the language in the instrument (1) waives bond for the specific named executor you are seeking to have appointed and (2) indicates that the specific named executor may serve without the requirement of bond. For example, consider a will that states: "I name Melissa to serve as my independent executor without bond. If Melissa declines to serve or if she is deceased or incapacitated, I name Amanda as my alternate executor." Your client is Amanda, and she is seeking letters because Melissa predeceased the Decedent. Pursuant to the terms of the will, Amanda is not independent and does not have a waiver of bond. In this situation, you would need to proceed under EC §§ 401.002(b) & 401.005.

G. Does the will name a governmental agency or a charitable organization as a beneficiary?

If the answer is yes, your application for probate and prove-up documents need to be modified accordingly. When a will names a governmental agency or a charitable organization, it is a best practice to specify whether the agency or organization is a direct or contingent beneficiary in the application and proof of death testimony. If you are offering a will for probate that names a charitable organization as a beneficiary and your application incorrectly states that the will does not name a charitable organization as a beneficiary, the probate court will likely require your application to be amended.

H. Is there a partial or total intestacy in the will?

Too many attorneys fail to consider this question before filing their probate applications. If your client is seeking to admit a holographic will to probate, be sure to read the will especially carefully, as partial intestacies are common with holographic wills. How to proceed when there is an intestacy depends on a variety of factors, ranging from the language of the will to your client's risk tolerance. See page 16 of Appendix A for details about when a determination of heirship may be required in addition to probate of the will with an intestacy.

III. READ INTESTACY STATUTES CLOSELY

When an individual dies intestate and probate is necessary, there are two options: (1) a small estate affidavit (SEA) or (2) a determination of heirship. SEAs are only proper under very limited circumstances. Because SEAs may not be approved when there is a need for administration, SEAs will not be discussed in this paper. To learn more about SEAs, please see the Travis County Small Estate Affidavit Checklist attached as Appendix E. Keep in mind that SEAs are more complex than they appear and have very specific limitations related to real property. The rest of this section will address some common issues in determinations of heirship.

A. Does the application meet all of the statutory requirements?

If it does not, you will be embarrassed when the court asks you to amend the application, and possibly repost it, before the case can be set for a hearing. Appendix F is the Travis County Probate Court's checklist for applications for determination of heirship. If an administration is necessary, try to combine the application for administration with the application for determination of heirship. Under EC § 401.003(b), the court may not hold a hearing for an independent administration before an heirship hearing. If it is essential to open an administration before the heirship hearing, the only option is to open a dependent administration or, in rare circumstances, a temporary administration.

B. Are there incapacitated heirs?

Pursuant to EC § 401.004(c), the guardian of the person of an incapacitated heir may consent to the creation of an independent administration on behalf of the incapacitated heir. If an incapacitated heir does not have a guardian of the person, the court may appoint a guardian ad litem to act on behalf of the incapacitated individual if the court considers such appointment necessary to protect her interests. EC § 401.004(c). If the incapacitated heir is a minor and has no guardian of the person, the natural guardian(s) of the minor may consent to an independent administration on the minor's behalf if there is no conflict of interest between the minor and the natural guardian(s). EC § 401.004(c). Despite these provisions of the Estates Code, some courts will not allow consent to be given on behalf of an incapacitated heir, so it is important to check local rules. For example, the Travis County Probate Court will not grant an independent administration if there is a minor heir.

If you are requesting an administration and there are minor heirs that were born to or adopted by the decedent, the minor's birth date needs to be included in the application pursuant to EC § 301.052(7), but be sure to designate the application as containing sensitive data. If there are minor heirs who are not children born to or adopted by the decedent (a grandchild of the decedent, for example), do not include their birth dates. Because the Estates Code does not require that information, TRCP Rule 21c prohibits its inclusion in the application.

For minor heirs younger than 12 years of age, citation may be served on the parent, managing conservator, or guardian. EC § 202.051. For minor heirs 12 years of age or older, the Estates Code provides that they shall be served by registered or certified mail; however, some courts have more stringent requirements for service on minor heirs aged 12 or older. In Travis County, the court requires that minor heirs aged 12 through 17 either be personally served with citation or attend the heirship hearing.

C. Are the shares in the application correct under the Texas rules governing descent and distribution?

Almost all probate attorneys I've spoken with about intestate succession agree that Appendix G is the best resource available for confirming that the shares in your application are correct. Problem areas include: community property when there are children or other descendants from outside of the existing marriage on the date of the decedent's death (see EC § 201.003(c)); collateral kindred of whole- and half-blood (see EC § 201.057); and the rare situations where a decedent's estate must be divided into two moieties (see EC § 201.001(f)-(h)).

D. Was the decedent married when he died?

If so, the heirship application must include each heir's interest in all possible types of property: separate personal property, separate real property, and community property. Even if you know that the decedent did not own separate property, the heirship application needs to list each heir's share of theoretical separate property. See pages 68 and 69 of Appendix H for sample heirship charts involving surviving spouses, children, and other descendants.

For any heirship application, the relationship of each heir to the decedent must be listed. EC § 202.005(2). If there is a surviving spouse and children or descendants, the relationship information must also indicate who the child or descendant's other parent or ascendant is. This additional requirement exists because for decedents who died on or after September 1, 1993, the distribution of community property depends on whether the surviving children and/or descendants of the deceased spouse are also children and/or descendants of the surviving spouse. EC § 201.003.

IV. TIMELY FILE YOUR INVENTORY

Within 90 days of your client's qualification as a personal representative, either as an executor or an administrator, you must file an inventory, appraisement,

and list of claims of the estate or, if permissible, an affidavit in lieu of inventory, appraisement, and list of claims. EC §§ 309.051 – 309.052 & 309.056. Pursuant to EC § 309.056, an affidavit in lieu of inventory may be filed only if there are no unpaid debts, except for secured debts, taxes, and administration expenses, at the time the inventory is due. Keep in mind that the inventory must be signed by you and your clients. EC §§ 309.053 & 309.056(b). If a signature is missing, the court will not approve the inventory. If you need an extension of time to file the inventory or affidavit in lieu, you may file a motion requesting such extension. Most courts will automatically grant at least one extension.

V. CONSIDER WHETHER CLOSING THE ADMINISTRATION IS APPROPRIATE

Pursuant to EC § 362.001, estate administrations should be settled and closed when all debts against the estate have been paid, to the extent permitted by the assets in the personal representative's possession, and there is no further need for administration. The vast majority of independent administrations are concluded informally. Although the Estates Code includes mechanisms for judicial discharge of an independent executor (EC § 405.003) and the filing of a notice of closing of estate (EC § 405.006), these methods are not routinely used by practitioners. Rather, the last pleading filed in an independent administration is usually the inventory, appraisement, and list of claims. Once the court approves the inventory, the court loses jurisdiction over the estate and most attorneys proceed to informally conclude the estate.

In dependent administrations, the personal representative must file a final account when the estate is ready to be closed. EC § 362.003. If a personal representative in a dependent administration fails to file a final account within three years of the issuance of letters testamentary or letters of administration, the representative may be removed on the complaint of an interested person or on the court's own motion, unless the representative has received an extension from the court after showing good cause for such extension. EC § 361.052(a)(6).

VI. BE PROMPT AND EFFICIENT WHEN SERVING AS AN ATTORNEY AD LITEM

Initiate and complete your investigation promptly. Remember that you are dealing with individuals who are grieving, and do all that you can to be a helpful part of the probate process. If you struggle to complete a straightforward investigation in an uncontested probate within a few weeks of the Court's appointment, consider whether you should ask the Court for permission to be placed on inactive status on the Court's ad litem list. It is very frustrating for applicant's attorneys, their clients, and the court when the attorney ad litem is the reason a case cannot move forward in a timely manner.

Remember that you are not being paid by a private client when you are appointed by the Court in a case. You are likely going to be paid, whether in full or in part, with estate funds. In straightforward cases, attorneys ad litem should expect to spend approximately three hours on their investigation and report. If you have spent three hours working on a matter and are nowhere near finishing your investigation, email the Court and request guidance or set a status conference. For more information on how to serve as an effective and efficient attorney ad litem in determinations of heirship, see the Ad Litem Manual for Heirship Proceedings, which is attached as Appendix I.

VII. AVOID *EX PARTE* COMMUNICATION WITH THE COURT

Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct prohibits lawyers from engaging in *ex parte* communications with court staff. Accordingly, if you email a member of court staff for any reason, be sure to copy all attorneys of record. This includes emails to court staff for scheduling purposes. If you are working on an uncontested matter, it may be appropriate to call a member of court staff with a question; however, if you are working on a contested matter, do not call a member of court staff unless it is a conference call with all parties in attendance.

VIII. CALENDAR YOUR DEADLINES BEFORE YOU MISS THEM

There are many important deadlines over the course of a probate administration. There are statutory requirements by which the fiduciary must complete notice to unsecured creditors, notice to secured creditors, the inventory, and written disclaimers. These are just a few of the many deadlines. Consider drafting a memorandum to your clients that provides them with their various deadlines as well as a description of their powers and duties as fiduciaries. Do not wait until you receive a compliance docket notice to update your calendar. Stay ahead of the deadlines and keep your client organized.

IX. SUBMIT PROPOSED DOCUMENTS ON TIME

Most probate courts require prove-up documents—the written testimony of all witnesses, the oath(s), and the proposed order—to be submitted before the hearing. Make sure you are aware of the document submission deadline before you set your hearing. When you submit your documents, be sure to do so in an editable format, such as Microsoft Word or Rich Text Format. If you receive revisions to your documents, change your template to match the court-approved format. Remember that busy courts are handling over fifty uncontested probate matters every week. Court staff do not want to spend time making the same

revisions over and over again. Once you understand the court's preferences, adapt!

X. LEARN COURT RULES REGARDING FEES BEFORE YOU START BILLING

In dependent administrations, you will be filing fee applications periodically. Every court has its own standards and policies regarding attorney fee applications, and it is imperative that you learn these before you begin billing. The Travis County Standards for Court Approval of Attorney Fee Applications are attached as Appendix J.

XI. IF YOU MUST MISS A HEARING DUE TO AN EMERGENCY, CALL THE COURT ASAP

You should always avoid missing a hearing, but in the event of an emergency, make sure you, or someone from your office, contacts the court as soon as possible to let a staff member know about your situation. The last thing you want to do is simply miss a court hearing without providing an explanation for your absence.

XII. COURT STAFF CANNOT PROVIDE LEGAL ADVICE

Many attorneys call court staff with questions about probate administrations and are frustrated when the response is: "The court cannot provide you with legal advice." Before you contact the court with a question, consider whether your question is strictly procedural or whether it borders on substantive. If it is a substantive question, even in an uncontested matter, the court will not be able to provide an answer and, instead, will likely point you toward a resource on the court's website.

XIII. CHECK THE COURT'S WEBSITE

The best way to stay updated on a court's local rules and preferences is to check the court's website with relative frequency. Often there will be relevant announcements and documents posted. If you are about to pick up the phone to call the court or clerk's office with a question, see if you can find the answer yourself on the website. If you will be appearing for the first time in a court for a probate hearing and the court website is either nonexistent or sparse, consider observing a hearing prior to your setting or, if the case is uncontested, calling the court coordinator and asking about the court's preferences, such as how the judge likes proposed orders to be submitted.

APPENDIX A

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
1. Was the will **validly executed**?	Don't forget to check the obvious question of whether the will was validly executed. **Attested Will.** See requirements in Texas Estates Code ("EC") §251.051): Except as otherwise provided by law, a last will and testament must be: (1) in writing; (2) signed by: (A) the testator in person; or (B) another person on behalf of the testator: (i) in the testator's presence; and (ii) under the testator's direction; and (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence. Remember that according to EC §251.105, "[a] signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witnesses or both, *except that, in that case, the will may not be considered a self-proved will*." Emphasis added. See #4 below about self-proved wills. In addition, a will could be valid with only one "witness" *plus a notary who witnessed the signing of the will*. In that case, the Court strongly prefers that the notary be the subscribing witness in court. If the notary cannot appear in court, the court requires both (1) that the notary sign an affidavit with typical subscribing-witness information (modified to accurately state the notary's role) and *with an attached copy of the relevant log book* **and** (2) that the one subscribing witness testify in court (or two disinterested handwriting witnesses testify in court, with a motion & order for alternative proof). See #4 below about self-proved wills. **Holographic will.** "Notwithstanding Section 251.051, a will written wholly in the testator's handwriting is not required to be attested by subscribing witnesses." EC §251.052. **What if the "will" is not validly executed?** If a purported will was not validly executed – either as a valid attested will or as a valid holographic will – none of the rest of this list is relevant because an invalidly executed will cannot be probated. In that case, if probate is necessary, there will need to be a determination of heirship, or a small estate affidavit, or a probate of an earlier will, depending on the circumstances. Note that if there's *any* possible argument that a purported will was validly executed, the Travis County Probate Court requires that the beneficiaries have notice so they have an opportunity to argue the will is valid.
2. Is the will (and any codicil) an **original** and not a copy?	**How do you know?** In these days of good copiers – including color copiers – and notary stamps instead of raised seals, it's not always easy to tell whether a will is the original will. Do take time to look at *all pages* of the will and see whether all pages of the will are originals. As you see more originals and copies, you can develop a pretty good eye. Don't simply take the client's word; in Travis County, it's not unusual for clients to swear a will is an original – but then find the actual original elsewhere after being told that what they thought was an original is a copy. Some hints follow below, but no checklist will always lead you to a definitive answer: • A raised notary seal is proof for that page of the will, at least! • Most stamped notary seals will smear with a careful spit test, but be sure to check whether everything else smears, too: ✓ If *only* the seal smears, it's probably an original (or at least that page is). ✓ If *everything* smears or if *nothing* smears, there's a pretty good chance it's a copy – so carefully check the other hints. • Original signatures often can be felt on the front or back side of the paper (slightly raised or slightly indented – or both). • If all signatures are in black, take a second look. • Blue ink is more likely an original, but not definitely given color copiers.

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
2. Continued: Is the will (and any codicil) an **original** and not a copy?	• Copied signatures can look somewhat spotty– but that can also happen with different pens. • If different pages are on different types of paper, take a second look. **What if the will or a codicil is a copy?** When the will or a codicil is a copy, you will need to do a variety of things differently (unless an original codicil specifically republishes the will of which there is only a copy). a. **Additional information required in application, proof, and order.** See EC §256.054 (applications) and EC §256.156 (proof). • *The application* 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 proof of death and other facts* must include testimony that proves each of the above three points. See *In re Estate of Wilson*, 252 S.W.3d 708 (Tex. App. – Texarkana 2008, no pet. h.), where evidence was insufficient to rebut the presumption of revocation. In addition, "the contents of the will must be substantially proved by the testimony of a credible witness who has read either the original or a copy of the will, has heard the will read, or can identify a copy of the will." EC § 256.156(b)(2). • *The order* must include a finding that the applicant has overcome the presumption that the original will has been revoked. b. **"Copy" mentioned in all paperwork**. **The text and the title** of the application and the order must indicate that a copy of a will (or codicil) is being probated. For example, "Order Admitting Original Will and Copy of First Codicil to Probate and Authorizing Letters Testamentary." The **text** of the proof and the oath also needs to mention the copy. c. By administrative order, the Court requires that, within three business days of filing the application, you ***physically file the will copy your client brought in to you*.** Having the actual document being offered for probate helps the Court properly evaluate the will copy. *The Court will not set a hearing until you file the will copy.* d. **Special form of Posting, plus either Personal Service or Waivers of Service.** EC §258.002 requires citation to all parties interested in the estate when there's a copy of a will, *which includes both heirs who would take if the lost will is not probated and devisees named in the will*. e. By administrative order, the Court requires (1) a special form of posting **and** (2) a special form of personal service on all of the decedent's intestate heirs and all devisees under the will 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, along with the copy of the application. (The notice is attached to the administrative order you can find on the Court's website.) If you are having some or all of the decedent's intestate heirs sign waivers, we recommend that you use the Court's notice form as a guide when drafting waivers since all waivers must clearly show that the heir signing the waiver knows about all of the points addressed in the notice. f. **Attorney ad Litem**. The Court will appoint an attorney ad litem to represent the interests of decedent's unknown heirs or heirs having a legal disability if any intestacy will result if the lost will is not admitted to probate. g. **Heirship 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 EC §203.002 – phrased as testimony

Check 10 key points *in the Will* to get all the paperwork right for letters testamentary	
Key Points to Check	**How to Check & How it Affects Paperwork, Related Testimony, etc.**
	rather than as an affidavit – provide ideas for the type of testimony necessary to establish a testator's heirs; see numbers 1-5, and then 6-8 as needed given the facts. Also include a statement that the witness does not have an interest in the estate. h. **Hearing time**. When you schedule a hearing, tell the Court you are probating a copy of a will or codicil. Uncontested hearings for probate of a copy of a will or codicil are heard with other record cases on Thursdays at 9:15 a.m.
3. Are there any **codicils**?	If there are any codicils: a. Is anything in this checklist affected by what is in the codicil(s)? If so, follow the suggestions given. b. You must mention "Codicil" in **both the text and the title** of the application and the order. For example, "Order Admitting Will and Two Codicils to Probate and Authorizing Letters Testamentary." You also need to mention the codicil(s) in the **text** of the proof and the oath. c. The posted citation must mention all codicils. In the title of the application, be sure to specify accurately which instruments are being filed for probate. 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.
4. Is the will **self-proved**?	**How do you know if the will is self-proved?** Before pleading a will is self-proved, be sure it is. The answer can depend on the date of decedent's death or the date of the will. Whatever the dates, a will is self-proved if it includes a self-proving affidavit in substantial compliance with EC §251.104. The following are common flaws that make wills not self-proved ***under §251.104***: ✓ Blank lines for the names of the testator and/or witnesses have not been filled in by the notary *in the notary's statement at the end of the affidavit*. ✓ The witnesses have not actually *signed* or otherwise subscribed the affidavit. (The notary cannot print their names on the signature line.) ✓ The witnesses have not ***sworn*** to the statement, thus preventing it from being an affidavit. ✓ The affidavit does not carry a notary seal. (Often a problem if you are probating a copy of an older will.) Even if a will is not self-proved under §251.104, it still might be self-proved depending on the date of the will (in all cases) and on the date of decedent's death (if the will was executed outside of Texas). **If the will was executed on or after September 1, 2011**, a will is also self-proved if it was simultaneously executed, attested, and made self-proved as provided by §251.1045 – the "one step" will execution procedure. Substantial compliance with the form set out in §251.1045 is required for the will to be self-proved under this section. **If the decedent died on or after September 1, 2011 AND the will was executed outside of Texas**, there are two other ways a will can be considered self-proved: (1) Under the above facts, a will is considered self-proved under §256.152(c) if the will or an affidavit attached to the will provides everything set out in §256.152(c) – which tracks the Uniform Probate Code requirements. A few of the *differences between §251.104 and §256.152(c):* ✓ §256.152(c) does not require *witness* ages ✓ §256.152(c) does not require a statement that the testator asked the witnesses to sign ✓ §256.152(c) requires the witnesses to state that the testator was under no

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
4. Continued: Is the will **self-proved**?	constraint or undue influence ✓ §256.152(c) requires the *testator* to state that he was 18 or over, of sound mind, and under no constraint or undue influence (2) Under the above facts, a will is considered self-proved if the will is self-proved according to the laws of the state or foreign country of the testator's domicile *at the time of execution*. See §256.152(b). *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 *on the relevant date* (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 *on the date the will was executed*. 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 download the statute from Westlaw, Lexis, or another legal database or to photocopy a printed statute that includes reference to both the jurisdiction *and* the relevant date. • *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. **What if the will is not self-proved?** If the will is not self-proved, you need to do several things differently: a. Modify your standard forms to indicate that the will (or codicil) is not self-proved, but is validly executed (assuming, of course, that it is). b. In the application, also set out how you're going to prove up the will – either the live testimony of one subscribing witness to the will, or, if a subscribing witness is unable to attend the hearing, either the deposition of a subscribing witness or the testimony of two disinterested witnesses who are familiar with the signature of the decedent. ***If you won't have live testimony of a subscribing witness, you also need to e-file a motion for alternative proof and proposed order (unless it's a holographic will). See motion and order templates on the Court's website.*** c. As soon as you set the hearing, email the Court your proposed testimony for proving up the will: *A subscribing witness must prove the following:* 1. What happened when the will was signed that proves the will was duly executed. (See EC §251.104 or EC §251.1045.) 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.

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
	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 the decedent's. 4. The witness does not have an interest in the estate. d. Have the necessary witnesses testify at the hearing.
5. Is any devisee a **state**, a **governmental agency** of the state, or a **charitable organization**?	Again, modify your forms: don't use standard boilerplate when it's not accurate. If you list any such devisees, make sure to state there are no *other* such devisees other than the one(s) listed. It is helpful to also indicate whether the charity, etc., is named as contingent or direct devisee and, if a contingent devisee on the face of the will, whether the charity, etc., takes given the circumstances. (Absent a declaratory judgment, information about whether a contingent devisee takes cannot be included *in the order*.)
6. Is the person who will serve as **executor** the **first-named** executor in the will? If not, what happened to the executor(s) with priority?	When the person who will serve as executor is not the first-named executor in the will, your application and your proof must explain what happened to the first-named executor and all others who will not serve but who have priority over the executor(s) who will (and the order should include the information). If any executor is declining to serve, you need to have that person's notarized declination in the file before the hearing. For example, if you are seeking letters for the fourth-named executor, you might state that "X," the first-named executor, died on ___ date, with his will probated in Travis County Cause No. _____; "Y," the second-named executor, lacks capacity (which you'll need to prove at the hearing); and "Z," the third-named executor, will file a notarized declination to serve. The following are examples of the types of proof Travis County requires when any named executor with priority will not serve: • **Person is declining to serve**: need person's *filed* notarized declination. • **Person is dead**: The court prefers a copy of the death certificate of the named executor with priority. If the death certificate is not available, the applicant 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 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.
7. As set out in the will, what, **exactly**, are the **names** of • **the decedent**? and • **the executor who will serve**?	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. **Even in the order, the executor's name as it is given in the will must come first, with even "now known as" names following.** 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 mistaken name *first* 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.

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
8. Does the will indicate that the executor seeking letters should be **independent**?	**Does the will make the executor seeking letters independent?** Check to see if the will indicates that the executor *for whom you are seeking letters* should be independent for *all* purposes (not just for some specific listed actions): • "no court action" • "independent" • "least possible court involvement" • etc. Definitely look at what the will says *about the executor who will serve*. It is not uncommon that a will makes the first-named executor independent, but does not make alternate executors independent (whether intentionally or not). **What if it doesn't?** If the will **does not** indicate that the executor who is seeking letters should be independent, start by modifying your forms so you are not using inaccurate boilerplate. If you are seeking independent administration when the will does not state that the executor who will serve should be independent, indicate the statutory basis of your request in your application, proof, and order. See EC Chapter 401. Then be sure to get sufficient sworn requests from **all** of the distributees. *If there's an intestacy, you'll also need an heirship determination to identify all the distributees.* If there is a minor distributee, the Court will not approve an independent administration under EC §401.002.
9. Does the will indicate that the executor seeking letters should serve **without bond**? "§ 305.101. Bond Generally Required; Exceptions. (a) Except as otherwise provided by this title, a person to whom letters testamentary or of administration will be issued must enter into a bond before issuance of the letters. (b) Letters testamentary shall be issued without the requirement of a bond to a person named as executor in a will probated in a court of this state if: (1) the will directs that no bond or security be required of the person; and (2) the court finds that the person is qualified. (c) A bond is not required if a personal representative is a corporate fiduciary."	**Does the will waive bond for the executor seeking letters?** Here, too, definitely look at what the will says about bond *for the executor who will serve*. It is not uncommon that a will waives bond for the first-named executor independent, but does not waive bond for alternate executors (again, whether intentionally or not). **What if it doesn't?** When the will does not waive bond, the statute that allows **the Court** to waive bond when the testator did not is EC §401.005. And 401.005 allows the Court to waive the bond **only** when an independent administration is created under 401.002 or 401.003 – and **not** when the independent administration is created *by the testator under 401.001*. Here's what that means if you have a will that does not waive bond for the personal representative who will serve: **A. When the will names an executor, but does not create an independent administration and does not waive bond,** proceed under EC § 401.002(a) & 401.005. Under 401.002(a), the court can appoint someone as an independent executor when all the distributees of the estate agree on the advisability of having an independent administration and consent to the nomination of the person named in the will. Under 401.005, the court can waive bond when an independent administration is created pursuant to 401.002(a). ***The procedure:*** All of the distributees of the will must consent to the named executor serving as the Independent Executor under 401.002(a). In the same consents, also have the distributees request a waiver of bond under 401.005. The consent must be in the form of a notarized affidavit. Don't forget to include waiver of citation language in this affidavit, see 401.004.

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
#9 Continued: Does the will indicate that the executor seeking letters should serve **without bond**?	**B. When the will does not name an executor and does not waive bond,** proceed under EC § 401.002(b) & 401.005. Section 401.002(b) applies "where no executor is named in the decedent's will, or in situations where each executor named in the will is deceased or is disqualified to serve as executor or indicates by affidavit filed with the application for administration of the decedent's estate his inability or unwillingness to serve as executor." ***The procedure:*** All of the distributees of decedent may collectively designate "a qualified person, firm, or corporation" to serve as independent administrator without bond under EC §§401.002(b) & 401.005. ***If you proceed under 401.002(b), you will be requesting "independent administration with will annexed."*** All of the paperwork should reflect the "will annexed" language. **C. When the will names an independent executor, but does not waive bond,** it gets more complicated. EC §401.005 does not allow the Court to waive bond when an independent administration is created *by the testator* under the will (401.001). Under 401.005, *the Court* may waive the bond only when an independent administration is created pursuant to one of the following sections: 401.002(a) – will names executor, but does not create independent administration 401.002(b) – will names no executor who can serve, and does not create independent administration 401.003 – intestacy To get bond waived here, therefore, you'll need to take steps so you fall within 401.002(b), since that is the only one of the three sections that could apply in this situation. ***The procedure, step 1:*** Have *all* named executors decline to serve. The declinations to serve must be in the form of a notarized affidavit. These declinations will take you to a blank slate so you are able to proceed under 401.002(b). ***The procedure, step 2:*** As with "B" above, all of the distributees of the will can then consent to someone serving as ***the Independent Administrator with Will Annexed*** under 401.002(b) and also request the person to serve without bond under 401.005. The distributees can choose anyone they want, including the person who was named in the will to serve as the independent executor. If they do choose the person who was named in the will, that person would simply decline to serve as executor *as named in the will* but would accept the appointment as independent administrator with will annexed. The consent must be in the form of a notarized affidavit. Do not forget to include waiver of citation language in this affidavit, see 401.004. If you proceed under any of the above scenarios, be sure that the requests you prepare for the distributees include everything necessary. If any of the distributees are dead, or are minors, you may want to confer with the Court about how to proceed.

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

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
10. Will the probated will dispose of all property? Is there a partial **intestacy** because there is no residuary clause? *The partial-intestacy problem is more common with holographic wills, but we have seen it even with lawyer-prepared wills.*	If there is a partial **intestacy**, the best practice is to mention the intestacy. What you do next depends on the situation. • **When the will creates an independent administration for the executor who will serve**, the Travis County Probate Court allows the applicant to decide whether to seek an heirship to determine the heirs for the property that does not pass under the will, unless there is a total intestacy. Of course, if there is no heirship proceeding, the independent executor assumes the risk that the intestate property will be distributed incorrectly, and the lawyer assumes the risk of a malpractice action for not having done the heirship. If there is a total intestacy, the Travis County Probate Court requires that the applicant combine a determination of heirship with the will probate. • **When the applicant is requesting independent administration under EC §401.002**, the Travis County Probate Court requires that the applicant 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 §401.002 request(s). • **When there will be a dependent administration**, the Travis County Probate 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 court will allow the will to 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. In insolvent estates, an heirship may not need to be done, but the Travis County Probate Court will not waive the heirship until the insolvency is proved during the dependent administration. • **When you are probating the will as a muniment of title**, the Travis County Probate Court requires a declaratory judgment as provided by Chapter 37, Civil Practice & Remedies Code because the "person who is entitled to property under the provisions of the will cannot be ascertained solely by reference to the will." EC §257.101. The applicant needs to seek both (1) a declaration that there is a partial intestacy and (2) an heirship proceeding to determine the heirs that will take the property that passes by intestacy. An attorney ad litem needs to be appointed to represent unknown heirs. The return date for a declaratory judgment application is twenty days, not ten days.

APPENDIX B

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

Revised for January 4, 2019

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. This Court is committed to ensuring the probate process is as smooth as possible. This guide and the other handouts referred to in it are designed to help you understand how the docket works in Travis County when your client dies with a will. The first part of this guide is a brief overview of some administrative procedures. The second part highlights some basic requirements of the Estates Code that pertain to the two most common probate proceedings – letters testamentary and muniments of title – and shows how you can avoid the most common mistakes we see. The final part addresses less common issues you may need to deal with occasionally.

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

Guy Herman, Probate Judge

I. ADMINISTRATIVE

A. Hearing Schedule. To set a hearing for a will prove-up, email probate.hearings@traviscountytx.gov. ***The Court will not schedule a hearing for a will probate until the original will has been filed (or, if you are seeking to probate a copy of a will, until you physically file the will copy your client brought in to you).*** 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.

> Uncontested probate-docket 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. For information about heirship proceedings, please see *The Uncontested docket: When the Decedent Dies Without a Will.*

B. Submission of Documents. The Court reviews, before the hearing, documents for probate prove-up hearings – not only for uncontested-docket hearings, but also for most regular-docket probate prove-ups. By reviewing documents in advance, the Court can ensure that hearings go more smoothly for participants who are already dealing with the stress of someone's death. Attorneys also benefit from smoother hearings and can avoid having errors pointed out to them in front of their clients. Because the Court hears 40-60 probate prove-ups *every* week, we ask that you help by submitting documents timely, which will enable us to review the file and get back to you timely. **For detailed information about when and how to submit documents, please see the Court's handout *Submitting Paperwork for Will Prove-ups and Heirships: When & How?*,** which is available at the Court or on the Court's website (https://www.traviscountytx.gov/images/probate/Docs/Submitting_paperwork_will_prove-ups_heirships.pdf). This document includes information about what needs to be done and how:

- When you e-file the application to probate a Will.
- Within 3 business days after e-filing the application.
- As soon as you set the probate prove-up hearing.
- ***At least*** one week before the hearing date. *(Earlier is helpful!)*

II. GENERAL PLEADING ISSUES

A. Issues for All Documents

1. Basic facts about a will can change how you need to draft the documents.

Look carefully at the Will before you begin your paperwork. Details about the Will can change the options available to the applicant and can change what you as the attorney need to do with procedures and paperwork. For information about (1) how to check the following 10 key points regarding the Will **and** (2) how the answers can affect what's needed next, see the Court's ***"Check 10 Key Points in the Will"*** handout, available at the Court and on the Court's website (https://www.traviscountytx.gov/images/probate/Docs/Check_10_key_points_inwill.pdf)**.** *Information included in the "10 Key Points" handout is **not** included in this handout. For information about the Court's policies, see both handouts.*

1. Was the will **validly executed**?
2. Is the will (and any codicil) an **original** and not a copy?
3. Are there any **codicils**?
4. Is the will **self-proved**?
5. Is any devisee a **state**, a **governmental agency of the state**, or a **charitable organization**?
6. Is the person who will serve as executor the **first-named executor** in the will? If not, what happened to the executor(s) with priority?
7. As set out in the will, **what – exactly – are the names** of (1) the decedent and (2) the executor who will serve?
8. Does the will indicate that the **executor seeking letters** should be **independent**?
9. Does the will indicate that the **executor seeking letters** should serve **without bond**?
10. Does the will dispose of all property? Is there are **partial intestacy** because there is no residuary clause?

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

4. Don't leave unnecessary blanks that will need to be filled in the day of the hearing. A few things in a proposed document might need to be left as a blank until the hearing is held, but you can make the uncontested probate docket go more smoothly and more quickly if you draft your proposed documents so there aren't any unnecessary blanks. Two *examples*:

Put "On this day" instead of "On _____," since the signature date will provide the needed information.

In a proposed order, don't refer to an "application filed on _____." By the time you're sending in a proposed order, you should be able to add that filing date.

B. The Application

1. With electronic filing, **original wills and any copies of wills** that are offered for probate (or filed and not offered for probate) **must be physically filed in the Clerk's office within three business days** after the application is e-filed. (Original wills required by TRCP Rule 21; copies of wills required by Administrative Order.)

Filing a pdf of the will at the time you file the application – SHOULD YOU?

For several reasons, the Court recommends you file a pdf of a will at the time you file the application to probate the will. By doing so, you will comply as much as possible with EC §256.053, which directs that an "applicant for the probate of a will shall file the will with the application if the will is in the applicant's control." In addition, you will provide the best notice to anyone interested in an estate. As a bonus, you also get a chance for the clerks to spot problems with the requested notice – which they definitely sometimes do.

Filing a pdf of the will at the time you file the application – HOW DO YOU DO IT?

File a pdf of the will along with your application as a separate document so the clerks can note it as an "e-filed copy of will."

2. **Never file multiple pleadings as exhibits or as part of the same e-filed document.** (Note, however, that it is okay to file multiple pleadings in the same e-filed **envelope**.) It causes problems if anything other than a will or codicil is filed as an exhibit to the application. For example, if your application says the death certificate is attached as Exhibit A and a waiver is attached as Exhibit B, neither the death certificate nor the waiver will be file marked and neither will be noted on the docket sheet. That's a problem because no one looking at the docket sheet will be able to tell either has been filed, and no one looking for a scanned copy of either will know where to look. The same problem results if multiple documents are filed as one **document**; only the first one will be file-marked, and only the first one will be noted on the docket sheet. If multiple documents are filed in the same e-filing envelope but not the same document, each document will be file-marked and noted.

3. **Statutory Requirements.** An application for the probate of a will for letters testamentary (LT) and muniments of title (MT) "must state and aver the following to the extent each is known to the applicant or can, with reasonable diligence, be ascertained by the applicant." Note some requirements have multiple parts. *Also note that if the applicant does **not** "state or aver any matter required by [the statute] in the application, **the application must state the reason the matter is not stated and averred**.*" EC §§256.052(b) & 257.051(b) (emphasis added).

By statute, applications must include the following information if indicated in the relevant column at the right	**Proceeding**	
	LT §256.052	**MT** §257.051
• The name and domicile of each applicant	✓	✓
• The last three numbers of each applicant's driver's license number and social security number, if applicable.	✓	✓
• The name, age if known, and domicile of the decedent	✓	✓
• The last three numbers of the testator's driver's license number and social security number.	✓	✓
• The fact, date, and place of death	✓	✓
• Facts showing that the Court has venue	✓	✓
• That the decedent owned property, including a statement generally describing the property and the property's probable value	✓	✓
• The date of the will	✓	✓
• The ***name***, ***state of residence***, and ***physical address where service can be had*** of the executor named in the will or, for letters, other person to whom the applicant desires that letters be issued	✓	✓
• The names of the subscribing witnesses, if any *(Witness addresses are no longer required. Three cheers!)*	✓	✓
• 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, see EC §§251.051-251.056*	✓	✓
• Whether a marriage of decedent was ever dissolved after the will was made ***and, if so, when and from whom*** – *if so, see EC §§123.001-123.002*	✓	✓

By statute, applications must include the following information if indicated in the relevant column at the right	Proceeding	
	LT §256.052	MT §257.051
• Whether the state, a governmental agency of the state, or a charitable organization is named in the will as a devisee	✓	✓
• **For letters**, that the executor named in the will, the applicant, or another person to whom the applicant desires that letters be issued is not disqualified by law from accepting the letters	✓	N/A
• **For muniments**, that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate or that for another reason there is no necessity for administration of the estate	N/A	✓

4. **Common Mistakes**. The following are some common mistakes found in applications. Most can be eliminated easily by carefully reading the document before filing it – and comparing the application to the statutory requirements of EC §§256.052(a) & 257.051(a), listed above. **If an application doesn't meet the statutory requirements, the Court will require the attorney to amend the application.**

   - Last three digits of social security numbers and driver's license numbers. The Estates Code now requires that all applications to probate a will include the last three numbers of **each applicant's** driver's license number and social security number **and** the last three numbers of **the testator's** driver's license number and social security number. If any of this information cannot be ascertained by reasonable diligence or is not applicable, then the application ***must state the reason the missing information is not stated and averred.***

   - 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 application will be posted incorrectly, which will require reposting – with resulting costs and delay.

   - Executor addresses. The application must include the ***name***, ***state of residence***, and ***physical address where service can be had*** of the executor named in the will or other person to whom the applicant desires that letters be issued. EC §256.052(a)(7).

   - Insufficient marital history. The application must state whether a marriage of decedent was ever dissolved after the will was made and, if so, when and from whom. Although you no longer need to include the "whether by divorce, annulment, or a declaration that the marriage was void" language in the application, you still need to ask your client about all types of marriage dissolution. Because dissolution includes more than divorce, it is not sufficient for the application to say that the decedent was never divorced. 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."
     - ✓ "Two marriages of decedent were dissolved after the will was made. Decedent's marriage to Jane Doe was annulled on May 1, 2003, and decedent was divorced from Janice Roe on May 9, 2012."
     - ✓ "Decedent was never married."
     - ✓ "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 okay.)

5. **When the named executor is not the Applicant.** Under EC §§256.051 & 301.051, the applicant must be an executor named in the will or an "interested person." If your applicant is ***not*** an executor named in the will:
   - In the application, it is helpful if you explicitly indicate ***why*** the applicant is "an interested person." See EC §22.018 for the definition of "interested person."
   - If you are filing an application to probate the will as a muniment of title, indicate in the application why a named executor is not the applicant and, preferably, have each living named executor consent to the probate of the will as a muniment of title.

6. **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 as provided by Chapter 37, Civil Practice and Remedies Code. EC §257.101. One requirement is that an application with a declaratory judgment has a 20-day return date under the civil rules, rather than the Estates Code 10-day return date. 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." Depending on the specific situation, the Court may appoint an attorney ad litem.
   - If there is a partial intestacy, you will need (1) to seek declaratory relief as provided by Chapter 37, Civil Practice & Remedies Code, seeking a declaration that there is a partial intestacy and (2) to request a determination of heirship under the Estates Code to determine the heirs that will take the property that passes by intestacy. *In this case, an attorney ad litem will definitely be appointed to represent unknown heirs (statutorily required for all heirships), and you will need to pay an ad litem deposit.*

C. The Proof of Death and Other Facts (POD) (which you may call by another name). As required by Estates Code §257.157, a witness needs to testify in open court, unless testimony is offered by deposition as discussed on the last two pages of this guide. Section 257.157 also requires that testimony taken in open court during the hearing be reduced to writing. Therefore, written testimony needs to be prepared in advance, either in question-and-answer form or in the form of a statement. *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 EC §§256.151-256.152, EC §257.054, or EC §§301.151-256.153, 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,[1] 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, EC §33.001(1). In that case, for example, add that decedent resided at 1234 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 5. If a marriage was dissolved after the date of the will, also see EC §§123.001-123.002.
   - Whether any children were born or adopted ***after*** the date of the will. See EC §§251.051-251.056.
   - 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 EC §304.003 apply (incapacitated person, convicted felon, non-resident of state who has not filed an appointment of 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 EC §401.002.

[1] A statutory probate court has exclusive jurisdiction over probate and administrations in counties where there is such a court. EC §32.005. Having venue under EC §33.001 grants the court jurisdiction.

- **If the applicant is applying for letters of administration with will annexed**, the applicant must "prove to the court's satisfaction that a necessity for an administration of the estate exists." EC §301.153(a).
- **If the applicant is applying to probate a will as a muniment of title**, the affiant must prove that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate, or that – for other reasons – there is no necessity for administration. EC §257.054(5).
- **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.

> For detailed information about what to do if decedent did receive Medicaid benefits on or after March 1, 2005, see the Court's handout – ***"How to Address Medicaid for Muniments and Determinations of Heirship with No Administration."*** (https://www.traviscountytx.gov/images/probate/Docs/medicaid.pdf)

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

3. **ADDITIONAL INFORMATION:** There are times when additional information is needed in a POD. Always 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 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
   - the death certificate says that the decedent was not a resident of Travis County

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* needed information. Here's what the clerk's signature block should include:

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

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

1. **All orders**
   - <u>Do *not* include a finding in the order that "the allegations contained in the application are true."</u> 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.
   - <u>Extra information.</u> 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.
   - <u>Exact names and aliases.</u> Whenever you mention the decedent's or executor's name, you must ***<u>begin</u> with the exact name used in the will***, even if the person 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 name as given in the will. For further information, see the Court's new ***"Check 10 Key Points in the Will"*** handout.
   - <u>Terminology.</u> 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.)

2. **Orders for Letters Testamentary** (or for Letters of Administration with Will Annexed)

   - 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.***
   - EC Chapter 308 notice to beneficiaries: The Court requires that all orders for administration of a will refer to the Chapter 308 notice to beneficiaries. For example, ". . . no other action shall be had in this Court other than (1) the return of an inventory, appraisement, and list of claims, or an affidavit in lieu of inventory, appraisement, and list of claims, as required by Texas Estates Code Chapter 309 and (2) the filing of an affidavit or certificate concerning notice to beneficiaries as required by Texas Estates Code Chapter 308."
   - Power of Sale. EC §401.006. Do not include language in the order regarding the personal representative's power to sell property ***unless***:
     (1) The decedent died on or after September 1, 2011.
     (2) The will does ***not*** contain language authorizing the personal representative to sell property or contains language that is not sufficient to grant the representative that authority.
     (3) All of the beneficiaries who are to receive any interest in the property have consented ***to the general or specific authority regarding the power of the independent executor or independent administrator with will annexed to sell 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. (Testimony in open court is possible only if the case will be heard on the record.)

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

   - Sufficient legal authority: The order must indicate that the effect of the order is to transfer property to those named in the instrument.
   - Waiver of Affidavit of Fulfillment: The order cannot waive the requirement of the affidavit of fulfillment of terms unless (1) the applicant is the sole distributee or (2) there are multiple distributees, ***and all of them are applicants*** who have signed a verified application or who appear in court. The Court will not waive the EC §257.103 requirement otherwise.

E. Appointment of Resident Agent.

- Under EC §304.003, a non-Texas executor or administrator is disqualified to serve until the person seeking to be appointed 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 e-filed before the hearing because no one can testify that the executor or administrator is qualified until the appointment has been filed.***
- ***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.

For detailed information about what's needed if the will is not self-proved, see the Court's ***"Check 10 Key Points in the Will"*** handout. (https://www.traviscountytx.gov/images/probate/Docs/Check_10_key_points_inwill.pdf)

C. Probating a Copy of a Will (or Codicil) or a Lost Will (or Codicil).

For detailed information about what's needed if the will (or codicil) is not an original – as well as some hints about how to determine if a document is an original – see the Court's ***"Check 10 Key Points in the Will"*** handout. (https://www.traviscountytx.gov/images/probate/Docs/Check_10_key_points_inwill.pdf)

D. Probating a Will More than Four Years after the Death of the Testator. A will may not be probated more than four years after the date of death of the testator ***unless*** the applicant proves that he or she was not in default for failing to probate the will sooner. EC §256.003. The Court can admit the will only as a muniment of title and cannot grant letters testamentary. See EC §301.002. Along with the requirements for probating a will as a muniment of title outlined above (see pages 3-8), the following are also necessary:

1. **Attorney ad Litem.** The Court will appoint an attorney ad litem under EC §53.104 to represent the interests of decedent's unknown heirs or heirs having a legal disability unless the application indicates another will of testator has previously been admitted to probate. A deposit for the ad litem fee is required. See https://www.traviscountytx.gov/images/probate/Docs/probate_more_than_four_years.pdf.

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. Parts of EC §203.002 – phrased as testimony rather than as an affidavit – provide ideas for the type of testimony necessary to establish a testator's heirs; see numbers 1-5, and then 6-8 as needed given the facts. ***Also include a statement that the witness does not have an interest in the estate.***

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

5. **Special form of Posting plus either Personal Service or Affidavit Waiving Citation and Waiving Objection.** EC §§258.051-28.053 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).

   Estates Code §258.051 requires that the notice or the affidavit must contain (1) a statement that the testator's property will pass to the testator's heirs if the will is not admitted to probate (or, if another will of decedent has previously been admitted to probate, to those beneficiaries), 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 of the previously admitted will). The administrative order – along with the required notice form and a sample affidavit – is available on the Court's website (https://www.traviscountytx.gov/images/probate/Docs/probate_more_than_four_years.pdf).

- 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 the previously admitted 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.* The administrative order includes a sample affidavit waiving citation. The Court does not require the use of that specific form, but if you adapt the form make sure ***all*** necessary information is included.

6. **Hearing on the Record.** The hearing for probating a will more than four years after a testator's death must be on the record because of the heirship testimony and the extra proof required in the POD. 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 or emailing 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. When Witnesses are Unable to Appear in Court and a Will is to be Probated

As noted above, Estates Code §256.157 presupposes live testimony in open court for all probate proceedings. In an uncontested case when a will is to be probated, the testimony of a witness who is unable to appear in court may be by deposition *in accordance with Estates Code §51.203*:

> **§51.203. Service of Notice of Intention to Take Depositions in Certain Matters.**
>
> (a) ***If a will is to be probated, or in another probate matter in which there is no opposing party or attorney of record on whom to serve notice and copies of interrogatories***, service may be made by posting notice of the intention to take depositions for a period of 10 days as provided by Section 51.053 governing a posting of notice.
> (b) When notice by posting under Subsection (a) is filed with the county clerk, a copy of the interrogatories must also be filed.
> (c) At the expiration of the 10-day period prescribed by Subsection (a):
> (1) the depositions for which the notice was posted may be taken; and
> (2) the judge may file cross-interrogatories if no person appears.

Note the following important points:

- **Notice required.** When a will is to be probated in an uncontested case, you can't skip the §51.203 posted notice. This is not a new requirement, but the greater clarity of the Estates Code made it more obvious.
- **No commissions – but still a posting period of 10 days plus a Monday.** Although commissions are no longer required, notice of the intention to take depositions must be still be posted for the statutory period. Pay attention to the return date; an untimely deposition will need to be redone.
- **File the interrogatories with the notice.** A copy of the interrogatories must be filed with the notice.
- **Cross-interrogatories from the judge?** Under §51.203, the judge may file cross-interrogatories. The Court currently does not look at depositions during the posting period, but don't take a deposition without checking the docket to be sure no cross-interrogatories have been filed.
- **Depositions for a Proof of Death and Other Facts?** If you are taking testimony for a Proof of Death and Other Facts by deposition, note that a deposition can be used for POD testimony ***only if*** it is "proved under oath to the satisfaction of the court that the witness is unavailable." EC §301.155. Therefore, include questions in your POD deposition that, when answered, will show the underlying facts to make that required proof. Simply stating that the witness is unavailable would not be sufficient. This, too, is not a new requirement, but the greater clarity in the Estates Code highlights the requirement.
- **Consider your questions carefully.** Be sure you ask the right questions so you will have all the necessary proof once you get the responses. Too frequently, attorneys need to redo depositions because key questions are not asked, with the added costs and delay of reposting. 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.

- **Deposition procedures.** Although the Estates Code specifies the required notice, the Code does not specify the deposition procedures. For the deposition itself, use the procedures set out in the Texas Rules of Civil Procedure. As an example, here's an outline of the process for a written deposition in a typical uncontested will probate with no other parties:
  - ✓ After the posting period has run, the deposition officer takes the deposition and records the testimony of the witness under oath.
  - ✓ The deposition officer prepares, certifies, and delivers the completed deposition to the attorney who requested it.
  - ✓ The attorney e-files the completed deposition *at least a week before* the scheduled hearing.
- **Q&A, Q&A, Q&A – not QQQ & AAA.** The Court ***strongly*** prefers that the deposition officer record each answer immediately following the question asked, rather than having answers refer to questions that are on some previous page.
- **The person whose deposition is being taken needs to actually answer the questions, not simply sign typed answers provided by the attorney.** Although witnesses who testify during uncontested probate hearings do sign testimony that was prepared in advance, depositions are different. When an attorney is leading a live witness through previously prepared testimony, it is not uncommon for the witness to add to or correct the testimony prepared by the attorney. When a witness is simply signing a prepared document, additions and corrections are less likely to be made.
- **Affidavits aren't depositions.** It is never sufficient to file written affidavits in place of testimony in open court.
- **Scheduling an uncontested hearing when there's a deposition.** The Court needs to review the responses, not just the questions, before the hearing. So schedule a hearing date far enough out that you can *e-file the responses* ***at least a week before*** the scheduled hearing.

APPENDIX C

Cause No. C-1-PB-_____-_____

ESTATE OF	**§**	**IN THE PROBATE COURT NO. 1**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

Motion for Alternate Method of Proof of Will by Deposition of Subscribing Witness

To the Honorable Judge of the Court:

Applicant states that all of the witnesses to Decedent's Will, offered to this Court for Probate, are nonresidents of Travis County or the witnesses who are residents of Travis County are unable to attend court.

Under Texas Estates Code Section 256.153(c)(1), Applicant moves the Court to permit proof of the Will by the sworn testimony of one of the witnesses to Decedent's Will by written or oral deposition taken in accordance with Texas Estates Code Section 51.203 or the Texas Rules of Civil Procedure.

WHEREFORE Applicant prays that the Court permit proof of the Will of Decedent by the testimony of one of the witnesses to Decedent's Will by written or oral deposition taken in accordance with Texas Estates Code Section 51.203 or the Texas Rules of Civil Procedure.

_____
Attorney for Applicant
State Bar No. _____
[contact information,
including the required email address]

Cause No. C-1-PB-_____-_____

ESTATE OF	**§**	**IN THE PROBATE COURT NO. 1**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

Order as to Alternate Method of Proof of Will by Deposition of Subscribing Witness

On this day, the Court heard Applicant's Motion that Decedent's Will be accepted in Probate upon proof of the Will by the sworn testimony of one of the witnesses to Decedent's Will by written or oral deposition taken in accordance with Texas Estates Code Section 51.203 or the Texas Rules of Civil Procedure.

It is THEREFORE ORDERED that the Will of Decedent be admitted into Probate upon proof of the Will by the sworn testimony of one of the witnesses to Decedent's Will by written or oral deposition taken in accordance with Texas Estates Code Section 51.203 or the Texas Rules of Civil Procedure.

_____
Presiding Judge

APPENDIX D

Cause No. C-1-PB-_____-_____

ESTATE OF	**§**	**IN THE PROBATE COURT NO. 1**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

Motion for Alternate Method of Proof of Will When No Subscribing Witness Available to Testify in Person or by Deposition

To the Honorable Judge of the Court:

Applicant states the following:

- All of the witnesses to Decedent's Will, offered to this Court for Probate, are nonresidents of Travis County or the witnesses who are residents of Travis County are unable to attend court.
- None of the witnesses to Decedent's Will are able to testify by written or oral deposition taken in accordance with Texas Estates Code Section 51.203 or the Texas Rules of Civil Procedure so far as the Applicant knows.

Under Texas Estates Code Section 256.153(c)(2), Applicant moves the Court to permit proof of the Will by the sworn testimony of two disinterested witnesses familiar with the signature or handwriting of Decedent.

WHEREFORE Applicant prays that the Court permit proof of the Will of Decedent by the sworn testimony of two disinterested witnesses to the signature or handwriting of Decedent.

_____
Attorney for Applicant
State Bar No. _____
[contact information,
including the required email address]

Cause No. C-1-PB-_____-_____

ESTATE OF	**§**	**IN THE PROBATE COURT NO. 1**
	§	
_____,	**§**	**OF**
	§	
DECEASED	**§**	**TRAVIS COUNTY, TEXAS**

Order as to Alternate Method of Proof of Will When No Subscribing Witness Available to Testify in Person or by Deposition

On this day, the Court heard Applicant's Motion that Decedent's Will be accepted in Probate upon proof of the Will by the sworn testimony of two disinterested witnesses who are familiar with the signature or handwriting of Decedent.

It is THEREFORE ORDERED that the Will of Decedent be admitted into Probate upon proof of the Will by the sworn testimony of two disinterested witnesses who are familiar with the signature or handwriting of Decedent.

_____
Presiding Judge

APPENDIX E

Small Estate Affidavits

Travis County Probate Court No. 1

Texas Estates Code Chapter 205 dealing with Small Estate Affidavits often generates confusion. Banks, insurance companies, title companies, and others often tell people to file a Small Estate Affidavit (SEA) without thinking about the limited situations in which an SEA can be approved. People then fill out a form without reading the statute and or understanding Texas intestacy law. They pay a $301 filing fee and expect approval. But many SEAs are denied for problems that can't be fixed, and the applicants lose their filing fees. Many other SEAs can't be approved as filed.

Small Estate Affidavits are <u>not</u> easy! To prepare an SEA the Court can approve, you'll need to meet all of the statutory requirements. The complexity of the Code poses many pitfalls for non-lawyers and lawyers alike. *So . . . .*

1. Before filing an SEA, definitely look at the quick lists below.
2. We also strongly recommend that you review the detailed checklist on pages 2-4 as well as the charts on pages 5-7 regarding Texas rules for who takes what property when the decedent didn't have a will (rules for descent and distribution). We know this material is dense. A completed SEA can't be approved unless it meets all of the requirements in Chapter 205 of the Texas Estates Code and follows all the rules for descent and distribution in Chapter 201. These requirements and rules are complex, and the checklist is designed to answer the questions people have when trying to fill out an SEA that can be approved.
3. Heirs may fill out an SEA without the assistance of an attorney, but an attorney's advice may prevent wasted time and money if a small estate affidavit is not appropriate or may prevent having an SEA denied that could have been approved if prepared correctly.

<u>When CAN'T you do a Small Estate Affidavit?</u>

- **An SEA can't be approved if decedent had a will.**
- **An SEA can't be approved if decedent's total assets were more than $75,000, not including homestead and exempt property.** See checklist #8 on pages 2-3.
- **An SEA can't be approved unless the assets are worth more than the debts.** See checklist #8-10 on pages 2-3. When comparing values, do not consider homestead and exempt property as assets, and do not consider as debts any mortgages or debts secured by exempt property.
- **An SEA can't be approved if the decedent owned real property *unless <u>both</u> of the following are true*:**
  - ✓ The real property was decedent's homestead property, ***<u>and</u>***
  - ✓ ***Everyone*** who will inherit ***any*** interest in the real property ***was homesteading with decedent*** on the date of decedent's death. See checklist page 3, second bullet.

  Note that the Court will always check the real property records before approving an SEA.
- **An SEA can't be approved if you can't locate an heir or if heirs refuse to sign the SEA (or have someone who has legal authority sign for them).**
- **An SEA can't be approved in Travis County unless decedent was residing in Travis County on the date of death or other facts indicate Travis County is the appropriate place to file.** See checklist page 2, #5.

<u>What are the most common mistakes people make when filling out an SEA?</u>

- **Mistake: not using the required form.** See checklist page 2, #1.
- **Mistake: leaving blanks when the form requires an answer.** The Court can't approve an SEA if needed information is missing. Before getting signatures, carefully check all pages to make sure you've answered **<u>all</u>** necessary questions.
- **Mistakes in filling out the chart in Section "I" of the form** (see checklist #8 on pages 2-3):
  - ✓ **Not listing assets with enough detail to identify them.**
  - ✓ **Listing assets with "unknown" value.**
  - ✓ **Not including <u>facts</u> to show <u>why</u> each asset of a married decedent is "separate" or "community" property.**
- **Mistakes in filling out the chart in Section "L" of the form** (see checklist #15 on page 4 and charts on pages 5-7):
  - ✓ **Not listing all heirs and not getting the shares right in the heirship chart.**
  - ✓ **Not filling out <u>all required columns</u> in the heirship chart. *Always*** fill out ***both*** "separate property" columns and ***also*** fill out the "community property" column if decedent was married.

Updated February 15, 2019

Travis County Small Estate Affidavit (SEA) Checklist

This checklist explains the basics, but the list does not cover everything included in Chapters 201 and 205.

1. **Use the most recent Small Estate Affidavit (SEA) form on the Travis County Probate Court's website.** The Court requires that applicants use the SEA form that is available on the Court's website because having applicants use that form helps ensure an SEA will include all necessary information,. If needed, include extra pages to provide additional information. *The SEA must be completed by persons who have actual knowledge of all stated facts.*
2. **Death Certificate.** The Travis County Probate Court requires a death certificate to be filed with all probate applications, including SEAs. An easily readable copy is fine. Cross out the social security number.
3. **Can't be filed within 30 days of decedent's death.** Wait long enough to be sure you have *all* bills.
4. **County where decedent resided.** An SEA should be filed in the county where decedent resided if decedent had a domicile or fixed place of residence in Texas. If that's not Travis County, add facts to support venue in Travis County. Granting an SEA is in the Court's discretion; it is unusual for the Court to approve an SEA for a decedent who did not have a fixed place of residence in Travis County.
5. **No Will.** By statute, an SEA can't be used when decedent left a will. All distributees must swear that the decedent died without a will. If decedent had a will, you will need to use a different probate procedure.
6. **No Administration.** An SEA can't be approved if a petition for appointment of a personal representative is pending or has been granted or if it appears that an administration is needed. If there's *any* question about whether you need an administration, consult with an attorney.
7. **Decedent's Estate Assets.**
   - **List everything.** The SEA must list *all* of decedent's known estate assets – not just some of them. ***Assets are any property owned that has monetary value***, including cash or bank accounts, real estate, vehicles, and household furnishings.
   - **Indicate value.** Indicate the value of each asset as precisely as possible, using values at the time the affidavit is signed. An SEA ***can't*** be approved with any asset of "unknown value" because it is impossible to know if total assets are $75,000 or less, and it might be impossible to know if the estate is solvent. With paperless accounts, finding some values can be challenging. If a financial institution will not provide a precise value, you might be able to get the institution to provide an approximate amount or a range that would be sufficient to allow an SEA to be approved. Estates Code Chapter 153 also provides a method by which you can request a Court order to get access to account information in appropriate situations.
   - **Limited estate.** The SEA must show that the total estate assets are $75,000 or less, not including the homestead (see next page) and exempt property (see next page).
   - **Provide sufficient detail.** Describe each asset with enough detail to make it clear exactly what property is being transferred by affidavit. For example, give VIN numbers for cars and give the last four digits of any account numbers, along with the name of bank or other entity holding the funds.
   - **If decedent was married at the date of death,** you must also add the following in the "additional information" column on the SEA form:
     - ✓ State whether *each* asset was decedent's community property or decedent's separate property. See definitions on the form.
     - ✓ For each asset, give the *facts* that explain *why* the asset was community or separate property. ***For real property, indicate the <u>date</u> the real property was acquired, in addition to other facts.***
     - ✓ For each asset that was community property, indicate in the "additional information" column the total value of the asset; you will list the value of decedent's interest in the "value" column.
   - **Exempt property.** If decedent is survived by a spouse, minor children, or unmarried adult children who lived with decedent, you should consider which assets are "exempt." *If you claim any assets are exempt, you **must** indicate which assets you claim as exempt in the "additional information" column in the chart in Section "I" of the SEA form.* "Exempt property" is not the easiest concept, and defining

which assets are "exempt" is beyond the scope of this limited checklist. Exempt assets are those that are exempt from forced execution under Chapter 42 of the Texas Property Code and that would be eligible to be set aside under Estates Code Section 353.051 if decedent's estate were being administered. Exempt assets include home furnishings, farm animals, and some other property, as well as decedent's pension benefits and IRAs. Insurance benefits are also exempt. You may need to do some research or consult with an attorney regarding which assets are exempt.

- **Real property: homestead to homestead.** The only real property that can be transferred by an SEA is decedent's **homestead** property. Even then, real property can't be transferred by an SEA unless the real property ***will be inherited only by person(s) homesteading with the decedent at the time decedent died*** – decedent's surviving spouse and/or minor child(ren) who resided on property with decedent. If this is the case, the SEA must include sufficient facts to support the homestead exemption ***and*** must also include the street address of the property and, if possible, the legal description.

8. **Decedent's Debts / Liabilities.**
   - **List everything.** The SEA must list all of decedent's existing debts and other liabilities, including all credit card balances, doctor or hospital bills, utility bills, etc. – *anything* owed by decedent or decedent's estate and not paid off *as of the date the SEA will be signed*. The SEA must list any attorney's fees paid or to be paid for preparation of the SEA. If attorney's fees are not listed as an estate liability, whoever paid the fees is responsible for those fees; the SEA will not have the estate reimburse that person for those fees. If there are no debts or liabilities, indicate "none." ***This section can't be left blank!***
   - **Provide sufficient detail.** Indicate the amount of each liability as precisely as possible, describing the debt or other liability with sufficient detail so that it is clear who the creditor is. Also indicate at least the last four digits of any known account numbers.

9. **Solvent.** The total of estate assets – *not including homestead and exempt property* – must exceed the total of known liabilities (not including debts secured by homestead and exempt property). If they do not, the SEA must be denied. Distributees can pay off enough debts so that the assets exceed the remaining liabilities.

10. **Medicaid.** The SEA must indicate whether decedent applied for and received Medicaid benefits on or after 3/1/2005. If so, you must either (1) list as a liability the amount owed to Medicaid or (2) file a Medicaid Estate Recovery Program (MERP) certification that decedent's estate is not subject to a MERP claim or (3) include additional information proving that a MERP claim will not be filed. For more information, see https://hhs.texas.gov/laws-regulations/legal-information/your-guide-medicaid-estate-recovery-program.

11. **Family history.** The SEA must state the facts about decedent's marital and family history in sufficient detail to show both who inherits decedent's property under Texas law as well as the shares of those heirs under Texas law. As long as you fill out the form carefully and *completely*, Section "K" of the form will lead you through the appropriate questions, except for relatively unusual situations.

12. **List all heirs/distributees.** After you have filled out Section "K" of the form completely, figure out who the heirs are under Texas law and list all of the heirs in Section "L" of the form.
    - To figure out who the heirs are, look at the charts on pages 5-7of this handout, which summarize Texas rules regarding descent and distribution based on Texas Estate Code Chapter 201. Decide which of the following four charts applies to decedent, and then look at *everything* included in that chart:
      1. Married Person with Child[ren] or Other Descendants
      2. Married Person with No Child or Descendant
      3. Unmarried Person with Child[ren] or Other Descendants
      4. Unmarried Person with No Child or Descendant
    - If any heir died ***after*** the decedent, contact the Court.
    - In Section "L" of the form, list the name, address, phone number, and email address of every heir/distributee of decedent's estate. ***You must list heirs for <u>every</u> type of property, even if you don't think decedent owned property of a particular type.***

13. **Minor heirs.** The Travis County Probate Court will not approve an SEA with a minor heir unless all estate assets the minor heir(s) will inherit can be placed in the registry of the Court until the heir turns 18.

14. **List correct inheritance shares.** In Section "L" of the Court's approved SEA form, you must list the shares of each distributee **in every possible type of property**. In every SEA, fill out ***both*** "separate property" columns, *even if you did not list any real property*. If decedent was married when he or she died, you must also fill out the "community property" column. To figure out shares, see the appropriate chart on pages 5-7 of this handout.
    - **If decedent was married at the date of death**, the SEA must state the shares of each distributee in all three types of property: separate personal property, separate real property, and decedent's share of the community property. (The surviving spouse will retain his or her own share of the community property.) *It is never sufficient to say that there was no separate property or no separate real property.*
    - **If decedent was single at the date of death**, there is no community property. Put "NA" in the community property column – *but always fill out **both** separate property columns*.

15. **Signed and sworn to by <u>all</u> distributees.**
    - **If you need more than one signature page**, use as many signature pages as needed, but *note that every signature page **<u>must</u** include all the italicized, boxed statements regarding what the distributees are swearing or affirming, what the distributees are requesting, and what those who sign the affidavit could be liable for*. See the italicized paragraphs in the box above the distributees' signature lines on the Court's SEA form (at the top of page 7 of the pdf version of the form).
    - **Every distributee who has legal capacity** must sign and swear to the affidavit before a notary.
    - **Is there a minor or otherwise incapacitated distributee?** If warranted by the facts, the natural guardian or next of kin of any minor distributee or the guardian of any other incapacitated distributee may sign and swear to the affidavit on behalf of the minor or otherwise incapacitated distributee. *The fact that someone is signing and swearing on behalf of someone else must be clear from the signature.*
        - ✓ For a minor, if SEA Section "K" does not show why the person has the authority to sign on the minor's behalf, provide proof the person signing for the minor is the minor's natural guardian or next of kin.
        - ✓ For an otherwise incapacitated distributee, provide letters of guardianship as proof that the person signing has authority to do so.
    - **Is there a distributee who survived decedent, but who is now deceased?** If no personal representative has been appointed for a now-deceased heir, you can't use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship. If a personal representative has been appointed, the personal representative can sign on behalf of the now-deceased heir's estate. In that case, the fact that the personal representative is signing on behalf of the estate must be clear from the signature. In addition, you must provide Letters Testamentary or Letters of Administration as proof that the person signing has authority to do so.
    - **Is there a missing heir?** If you do not know where to find an heir, you can't use the Small Estate Affidavit probate procedure and must file an Application to Determine Heirship. Note that an applicant for determination of heirship must be represented by an attorney.

16. **Sworn to by two disinterested witnesses:** Two disinterested witnesses must each sign and swear to the affidavit before a notary. These witnesses must be able to swear to *all* of the facts included in the SEA, not only the family history facts. Disinterested witnesses are witnesses who have no interest in decedent's estate and who do not inherit from decedent under the laws of descent and distribution of the State of Texas. As noted in the boxed, italicized statement on the SEA form above each disinterest witness's signature, these witnesses – along with the distributees/heirs – are liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

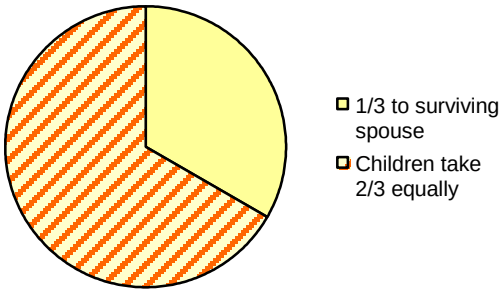
17. **Possible hearing.** The Court usually does not require a hearing on SEA applications, but in some circumstances the Court may require a hearing before an SEA will be approved. If a hearing is needed, the Court will contact you to set a hearing. Do not set a hearing unless the Court has asked you to do so.

Texas Descent and Distribution[1]

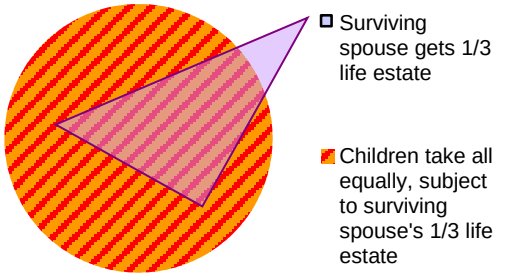
The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

1. Married Person with Child[ren] or Other Descendants

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(b))

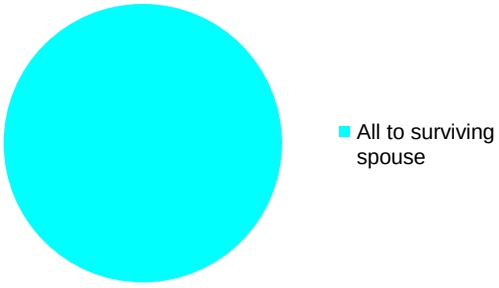


B. Decedent's separate real property (EC § 201.002(b))

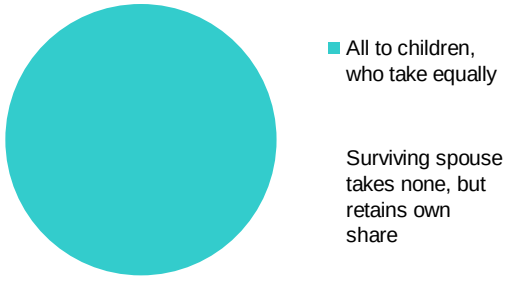


All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (EC § 201.003(b)(2))



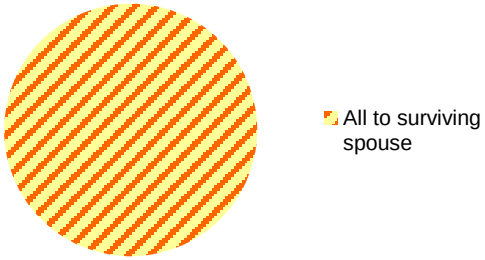
C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))



[1] The charts in this handout illustrate the general rules of descent and distribution under Texas law. In addition to the statutory references noted throughout, see the following Texas Estates Code (EC) provisions, among others: § 201.101, Determination of Per Capita with Representation Distribution (fka per stirpes); § 201.051 et seq., Matters Affecting Inheritance (including Adoption [§ 201.054] and Collateral Kindred of Whole and Half Blood [§ 201.057]); Advancements, §§ 201.151 & 201.152; and Requirement of Survival by 120 Hours, §§ 121.052 & 121.053 (see also §§ 121.151-121.153).

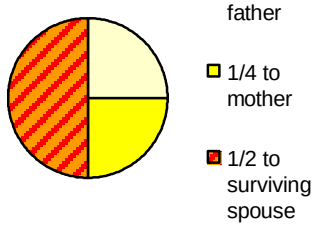
2. Married Person with No Child or Descendant

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))

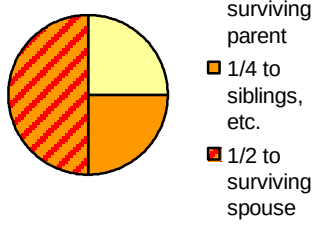


B. Decedent's separate real property (EC § 201.002)

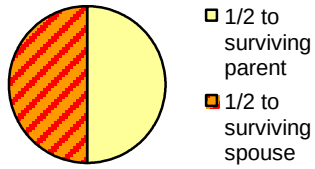
If decedent is survived by **both** mother and father. EC §§ 201.001(c) & 201.002(c)(2) & (3).



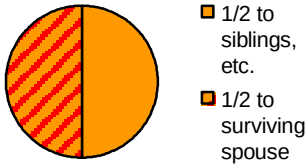
If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC §§ 201.001(d)(1) & 201.002(c)(2) & (3).



If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC §§ 201.001(d)(2) & 201.002(c)(2) & (3).

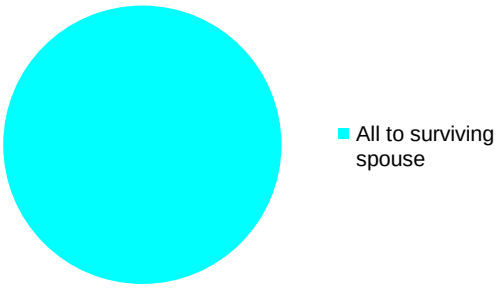


If decedent is survived by neither parent, but **is** survived by sibling(s) or their descendants. EC §§ 201.001(e) & 201.002(c)(2) & (3).

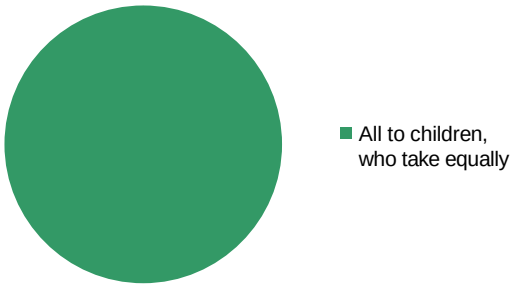


If decedent is survived by no parent, no sibling, and no descendant of a sibling. EC § 201.002(d).

C. Decedent's share of community property (EC § 201.003(b)(1))



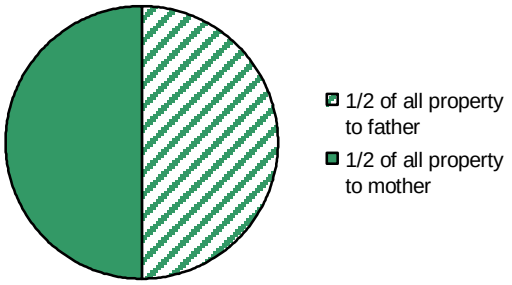
3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))



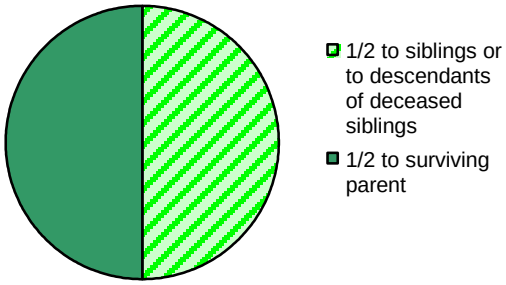
4. Unmarried Person with No Child or Descendant

All property passes depending on who survived the decedent:[1]

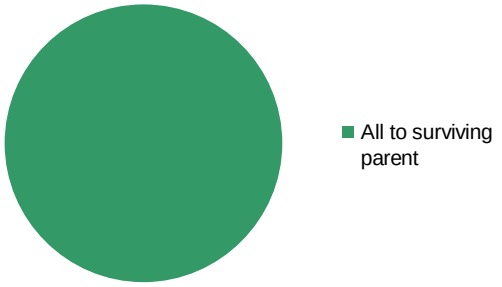
If decedent is survived by **both** mother and father. EC § 201.001(c).



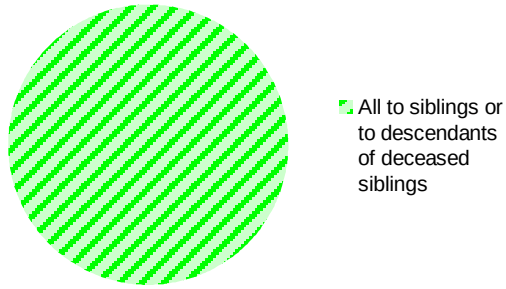
If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC § 201.001(d)(1).



If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).



If decedent is survived by **neither parent**, but **is** survived by sibling(s) or their descendants. EC § 201.001(e).



[1] If none of the four situations above applies, see EC § 201.001(f)-(h).

APPENDIX F

Case Name: _____ **EFFECTIVE 9.01.17**

Sec. 202.005. Application for Determination of Heirship.	**Sec. 301.052. Application for Letters of Administration. (4 years)**
1. DECEDENT'S: • name • date of death • place of death if not definitely known to the applicant, all the material facts and circumstances that might reasonably tend to show the time or place of the decedent's death or the name or residence of the heir	**1. DECEDENT'S:** • name • date of death (**less than 4 years before filing date)** • place of death • last 3 digits of SSN • last 3 digits of DL # (if known)
. APPLICANT'S: • name • domicile • relationship, if any, to the decedent	**2. APPLICANT'S:** • name and last 3 digits of SSN and DL# • domicile • relationship, if any, to the decedent
3. VENUE: facts necessary to show that the court with which the application is filed has venue	**3. VENUE:** facts necessary to show that the court with which the application is filed has venue
4a. HEIRS (for each): • names • physical addresses (**no** P.O. boxes) where service can be had on heirs (if not definitely known to applicant, all material facts & circumstances that might reasonably tend to show address for service) • whether adult or minor • relationship to the decedent • true interest of the applicant and each of the heirs	**4b. HEIRS (for each):** • names • adult or minor • physical address of heir if known (**not** a P.O. box) (or state that address is not known) • relationship to the decedent
5a. CHILDREN: All children born to or adopted by the decedent have been listed	**5b. CHILDREN – also:** (if known by applicant at time files the application) • **state** whether one or more children were born to or adopted by decedent; if so: • name, date, and place of birth of each child
6a. MARRIAGE: • **each of decedent's marriages has been listed** • the date of the marriage • the name of the spouse • date & place of termination if the marriage was terminated • other facts to show whether a spouse has had an interest in the decedent's property	**6b. MARRIAGE – also:** (if known by applicant at time files the application) • whether decedent was ever divorced • if so, when and from whom
7. INTESTATE • whether the decedent died testate • if so, what disposition has been made of the will	7. **INTESTATE** • that decedent died intestate
8a. PROPERTY: • general description of property belonging to decedent's estate or held in trust for the benefit of the decedent	**8b. PROPERTY – also:** • whether decedent owned property • if so, statement of the property's probable value
9. OMISSION OF REQUIRED INFORMATION? explanation for omission from application of any information required by section	
10. MEDICAID. If no administration requested then Application must include language regarding not receiving Medicaid benefits	**10. NEED FOR ADMINISTRATION:** • that a necessity exists for administration of estate • *allegation of facts* that show that necessity
	11. APPLICANT NOT DISQUALIFIED by law from acting as administrator and is entitled [or whoever seeking to serve]
Heirship request in the prayer?	**Administration request in the prayer?**
§202.007 Verification?	
If you are not seeking administration and the applicant is <u>not</u> an heir, the Court requires that the application include a physical address (no P.O. Box) for service on the applicant	**If the proposed administrator is <u>not</u> an heir**, the Court requires that the application include a physical address (no P.O. Box) for service on the administrator

APPENDIX G

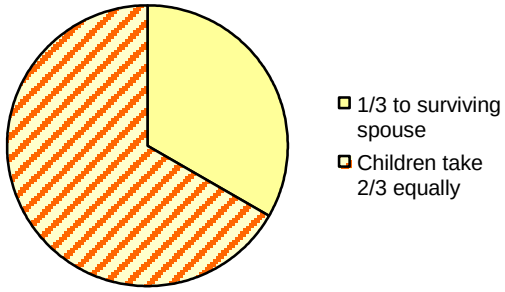
Texas Descent and Distribution[1]

The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

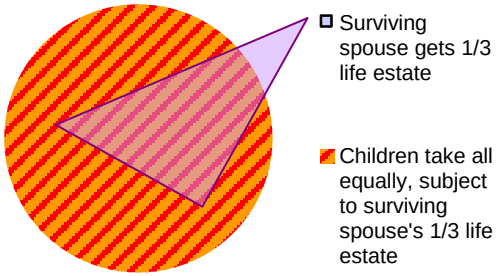
Compliments of Judge Guy Herman, Travis County Probate Court No. 1

1. Married Person with Child[ren] or Other Descendants

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(b))

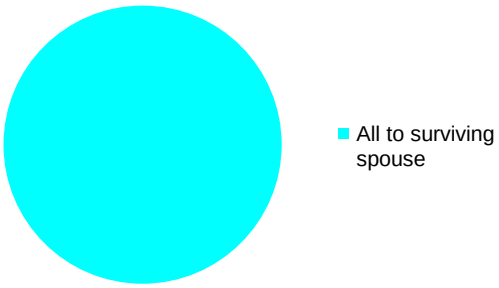


B. Decedent's separate real property (EC § 201.002(b))

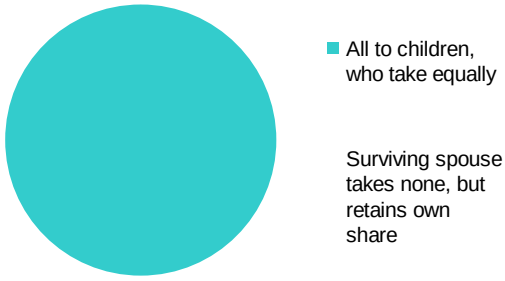


All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (EC § 201.003(b)(2))



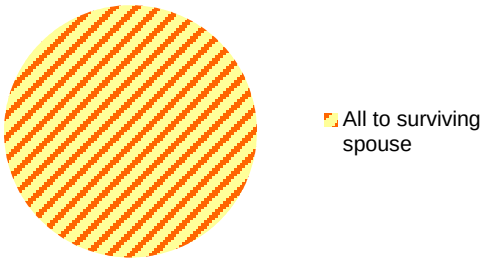
C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))



[1] The charts in this handout illustrate the general rules of descent and distribution under Texas law. In addition to the statutory references noted throughout, see the following Texas Estates Code (EC) provisions, among others: § 201.101, Determination of Per Capita with Representation Distribution (fka per stirpes); § 201.051 et seq., Matters Affecting Inheritance (including Adoption [§ 201.054] and Collateral Kindred of Whole and Half Blood [§ 201.057]); Advancements, §§ 201.151 & 201.152; and Requirement of Survival by 120 Hours, §§ 121.052 & 121.053 (see also §§ 121.151-121.153).

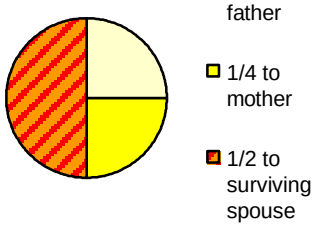
2. Married Person with No Child or Descendant

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))

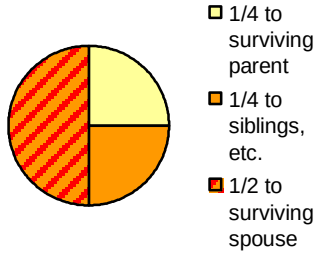


B. Decedent's separate real property (EC § 201.002)

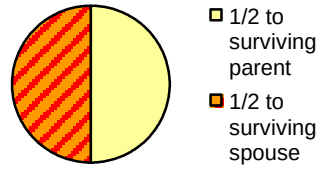
If decedent is survived by **both** mother and father. EC §§ 201.001(c) & 201.002(c)(2) & (3).



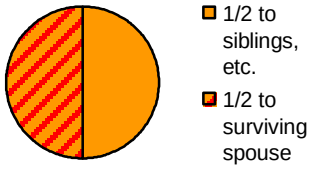
If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC §§ 201.001(d)(1) & 201.002(c)(2) & (3).



If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC §§ 201.001(d)(2) & 201.002(c)(2) & (3).

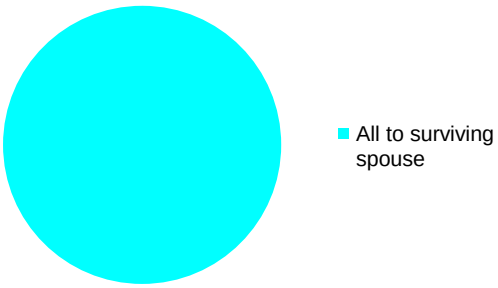


If decedent is survived by neither parent, but **is** survived by sibling(s) or their descendants. EC §§ 201.001(e) & 201.002(c)(2) & (3).

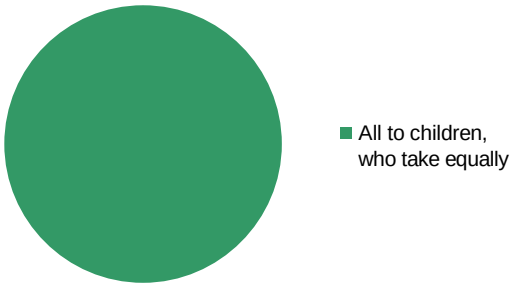


If decedent is survived by no parent, no sibling, and no descendant of a sibling. EC § 201.002(d).

C. Decedent's share of community property (EC § 201.003(b)(1))



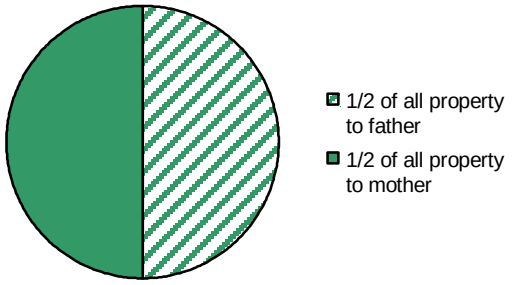
3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))



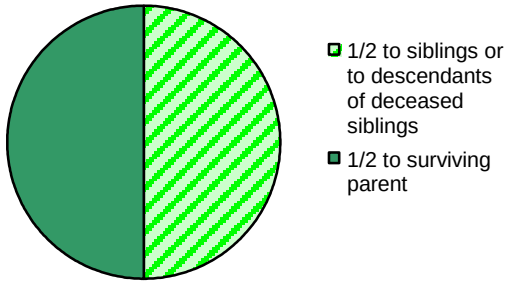
4. Unmarried Person with No Child or Descendant

All property passes depending on who survived the decedent:[1]

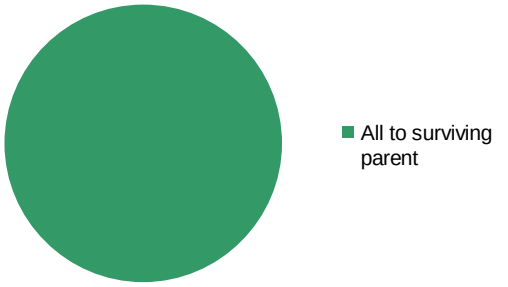
If decedent is survived by **both** mother and father. EC § 201.001(c).



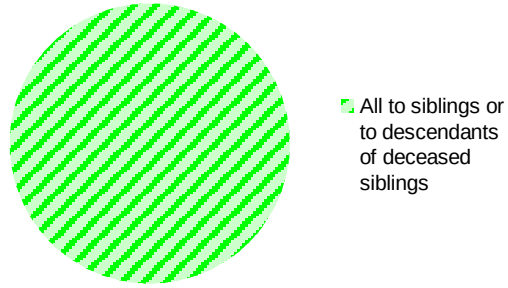
If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC § 201.001(d)(1).



If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).



If decedent is survived by **neither parent**, but **is** survived by sibling(s) or their descendants. EC § 201.001(e).



[1] If none of the four situations above applies, see EC § 201.001(f)-(h).

APPENDIX H

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

Revised for January 4, 2019

The Uncontested Docket: When a Client Dies Without 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, and this Court is committed to ensuring that the probate process is as smooth as possible. This guide and the other handouts referred to in it are designed to help you understand how the docket works in Travis County when your client dies without a will (intestate). After a brief overview of some administrative procedures, this guide highlights some basic requirements of the Texas Estates Code (EC) pertaining to the two most common probate proceedings for decedents who die without a will – determination of heirship and letters of administration – and shows how you can avoid the most common mistakes made by lawyers. The guide then addresses the options you have when a witness is unable to appear in court. Finally, the guide includes pie graphs illustrating Texas laws of descent and distribution – and related examples of heirship charts.

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 your legal expertise.* For example, although the guide includes selected pleading tips for different probate proceedings, it does not address which proceeding is appropriate given your client's situation. Although the most common proceedings involving intestacy are addressed in this guide, other possibilities are not included (e.g., Small Estate Affidavits under EC Chapter 205, which could be the most cost-effective proceeding for an intestate decedent if the statutory requirements are met). Second, this guide is not a substitute for the Estates Code. Everything in this guide is consistent with the Estates Code, but this basic guide makes no pretense about being comprehensive.

Guy Herman, Probate Judge

I. Administrative

A. Document checklist. Every heirship proceeding requires the following documents:

- an application (combined with an application for administration, if applicable),
- service of citation on – or waiver from – all non-applicant heirs who have not made an appearance and any additional persons requiring notice under EC §202.008,
- the affidavit of service of citation (or attorney's certificate) always required by EC §202.057,
- an affidavit of citation by publication,
- a proof of death and other facts,
- testimony from two disinterested witnesses concerning the identity of heirs, to be signed after the hearing (two documents with proposed testimony – one for each of the two witnesses),
- a death certificate (with social security number redacted), and
- an editable electronic version of the heirship chart that will be included in the judgment declaring heirs. The Court prepares the Judgment, but we use information from you about the heirs – and copying and pasting saves time.

You may need to submit documents other than the above, depending on the circumstances. Two examples: If seeking administration, you also will always need an oath for each administrator. For an independent administration you will need the necessary sworn consents from all of the heirs.

B. Attorney Ad Litem. In every determination of heirship, the Court will automatically appoint an attorney ad litem to represent the decedent's unknown heirs and, if any, known heirs whose whereabouts are unknown and known heirs suffering legal disability. See EC §202.009. You do not need to request the appointment of

the attorney ad litem. With mandatory e-filing, you also no longer provide the clerk's office with a copy of the application for the attorney ad litem. (But please do contact the court if no ad litem has been appointed within two weeks after the application is e-filed. Note that an ad litem will not be appointed until the required ad litem deposit is paid.) ***The attorney ad litem's presence is required at the hearing.***

C. Hearing Schedule. For all heirships, the Court requires that you email an heirship hearing request form to the Court at heirships@traviscountytx.gov. Request forms for the uncontested and regular dockets are available on the Court's website: https://www.traviscountytx.gov/probate/hearings-schedule. The checklists towards the bottom of the forms will help you determine whether your case belongs on the uncontested or the regular docket. Uncontested heirship proceedings are scheduled Tuesdays at 9:15 a.m., except for the day after a county holiday.

D. Submission of Documents. The Court reviews, before the hearing, documents for probate prove-up hearings – not only for uncontested-docket hearings, but also for most regular-docket probate prove-ups. By reviewing documents in advance, the Court can ensure that hearings go more smoothly for participants who are already dealing with the stress of someone's death. **For detailed information about when and how to submit documents, please see the Court's handout *Submitting Paperwork for Will Prove-ups and Heirships: When & How?*,** available at the Court or on the Court's website (https://www.traviscountytx.gov/images/probate/Docs/Submitting_paperwork_will_prove-ups_heirships.pdf). This document includes information about what needs to be done and how:

- When you e-file the application.
- Before setting an heirship hearing.
- As soon as you set the heirship hearing.
- ***At least*** one week before the hearing date. *(Earlier is helpful!)*

II. Applications

A. Heirships & Administrations

1. **If an administration is needed**, the Court strongly prefers that an application for the determination of heirship also contain an application for administration, either independent or dependent. Under EC §401.003(b), a hearing for an independent administration cannot be held *before* an heirship hearing. If it is necessary to begin administration before a determination of heirship proceeding can be held, the only option given EC §401.003(b) is a dependent administration. In that case, the Court requires that the heirship proceeding take place no more than 60 days after the dependent administration is opened, except in unusual situations.

2. **If any heirs are minors,** the Court ***will not*** grant an independent administration when a decedent dies intestate. A dependent administration is the only option when minor heirs are involved and an administration is needed.

3. **If the decedent died more than four years before the application will be filed,** the applicant cannot request an administration (except in rare cases). See EC §§202.006 & 301.002.

4. **For a determination of heirship plus administration,** file one application titled "Application for Determination of Heirship and Letters of [Independent, if applicable] Administration." ***Remember that there are two sections of the Estates Code that set out what must be included in the application.*** The requirements for an heirship application are set out in §202.005, and the requirements for an application for letters of administration are found in EC §301.052. If applicable in an independent administration, the application should also request that bond be waived. See the box that follows regarding required consents.

> **Required consents:**
>
> If the applicant requests an independent administration, the consent of *every* distributee is required. EC §401.003. The distributees must also consent to any waiver of bond. EC §401.005. The Court encourages lawyers to incorporate the consents of non-applicant distributees into the waivers of

citation, thereby reducing the number of documents that must be executed and e-filed. To have an independent administration without bond, each consent must:

- specifically consent to an independent administration, requesting that no other action shall be had in the court in relation to the settlement of the decedent's estate other than the return of an inventory, etc.,
- designate "x" as independent administrator (and waive own right to serve),
- waive bond, if that's what the application requests, and
- if combined with the waiver of citation – as preferred – include that language as well.

If requesting power of sale, that request can be included in the consents as well.

B. Application for Determination of Heirship

1. Statutory Requirements. The Court does check to see that **all** statutorily required information is included in the application, and the Court will require an amended application if required information is missing and the mistake cannot be corrected by adding information in the proof of death or the judgment. See EC §§202.004-202.005 and – if seeking administration – also see EC §§202.006 & 301.052.

Here's the information that must be included in <u>all</u> heirship applications:[1]

- the name of the decedent (sufficiently similar to the death certificate that the Court knows it is the same person)
- the date and place of death
  - ✓ if the date or place of death is not definitely known to the applicant, set out all the material facts and circumstances within the knowledge and information of the applicant that might reasonably tend to show the date or place of death
  - ✓ if the date or place of death given in the application does not match the death certificate, you must explain any differences
- needed information about decedent's heirs (see #3 below, "Information about decedent's heirs")
- a *<u>statement</u>* that *all children* born to or adopted by the decedent have been listed,
- a *<u>statement</u>* that *<u>each</u> marriage* of the decedent has been listed with
  - ✓ the date of the marriage
  - ✓ the name of the spouse
  - ✓ if the marriage was terminated, the date and place of termination

    NOTE: if you're seeking administration, the application must also explicitly state whether (or not) the decedent was ever divorced and, if so, when and from whom
  - ✓ any other facts that show whether a spouse has an interest in the property of the decedent, including any common-law spouse
- whether the decedent died testate and, if so, what disposition has been made of the will
- a general description of all property belonging to the estate of the decedent or held in trust for the benefit of the decedent

  NOTE: if you're seeking administration, the application must also include a statement of the property's probable *<u>value</u>*
- an explanation for the omission of any of the above information that is not included in the application

Here's the <u>additional</u> information that must be included if you're seeking an administration:

- the applicant's name and domicile
- the last three numbers of the applicant's driver's license number and social security number, if applicable
- the applicant's relationship to the decedent, if any
- if known by the applicant at the time the applicant files the application, the last three numbers of the decedent's driver's license number and social security number

[1] "I]f the date or place of the decedent's death or the name or physical address where service can be had of an heir is not definitely known to the applicant," the application must state "all the material facts and circumstances with respect to which the applicant has knowledge and information that might reasonably tend to show the date or place of the decedent's death or the physical address where service can be had [on] the heir." EC §202.005(3).

> "*If an applicant does not state the last three numbers of the decedent's driver's license number or social security number . . ., the application must state the reason the numbers are not stated*." EC §301.052(b).

- facts necessary to show that this court has venue
- a statement that a necessity exists for administration of the decedent's estate ***and an allegation of the facts that show that necessity*** (or, under EC §202.006, you may request that the court determine whether there is a need for administration)
- a statement that the applicant is not disqualified by law from acting as administrator

2. **Affidavit.** Estates Code §202.007 requires that the application be supported by each applicant's affidavit verifying the application. That section sets out the necessary language.

3. **Information about decedent's heirs, preferably in chart form.** The following information about decedent's heirs must be included. See EC §202.004 (all heirship cases) and §301.052 (if also seeking administration). The Court prefers that the information be set out in chart form; see sample charts on pages 10-11 of this handout.

Here's the information that must be included about the heirs in all heirship applications:

- the name of each of decedent's heirs
- the physical address where service can be had on each of decedent's heirs
- the relationship of each heir to the decedent

  If there is a surviving spouse, the relationship information for each child or descendant of the decedent must also indicate who the other parent is. For decedents dying on or after 9/1/1993, the distribution of community property differs depending on whether all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. See EC §201.003 and samples 1 & 2 on page 10.
- whether each heir is an adult or a minor
- the true interest of the applicant and each of the heirs in the decedent's estate

  See EC chapter 201 and the charts and graphs on pages 10-14 of this handout. ***When the decedent leaves a surviving spouse, interests must be given for all types of property, whether or not you think there is any – that is, give shares for separate personal property, separate real property, and community property.*** Fractional interests should be indicated by fractions rather than percentages. Please finish-out the fractions as well. For example, **do not** put "1/3 of 2/3 of the separate personal property." Rather, the Court prefers that you use the fraction "2/9." (If you want to *also* include information about how you got to the final fraction, that's fine.)

Include the following additional information about the heirs if you're seeking an administration:

- the ***birth date*** and ***place of birth*** of each child that was born to or adopted *by the decedent*

Birth dates of minor heirs: heirship applications given TRCP Rule 21c.

- ✓ If you are requesting administration and any heir is a child born to or adopted *by the decedent,* the Estates Code (§301.052(7)) requires that you include the child's birth date in the application. Because inclusion of the birth date is required by statute, TRCP Rule 21c(b) does not prohibit the application being filed with the un-redacted birth date, even if the heir is a minor. But TRCP Rule 21c(d)(1) does require that you designate the document as containing sensitive data.
- ✓ On the other hand, do not include birth dates of any minor heirs who are *not children born to or adopted by the decedent* (for example, a grandchild of the decedent). Because the statute does not require that you include the birth dates for these heirs, TRCP Rule 21c requires that the information not be given if the heir is a minor. Instead, we will collect the birth dates of those minor heirs as part of the dependent administrator's general information form that is kept with the Court and not filed.

4. **What if some of the information is not definitely known by the applicant?** As noted in the footnote on page 3, if the date or place of death or the names or residences of all the heirs are not definitely

known to the applicant, the application must include all the material facts and circumstances within the knowledge and information of the applicant that might reasonably tend to show that information. EC §202.005(3). If anything else is not included, add "an explanation for the omission" as required by EC §202.005(8).

Some common mistakes found on heirship applications:

- **Characterization of property when the decedent leaves a surviving spouse.** Absent a declaratory action, the Court will not decide what types of property a decedent owned. Consequently, when a decedent leaves a surviving spouse, the Court's judgment will indicate each heir's interest in ***every possible type*** of property. For separate property, statutory shares can differ for personal property and real property. EC §201.002. For community property, statutory shares are identical for personal property and real property. EC §201.003. Therefore, when a decedent leaves a surviving spouse, an heirship application must indicate each heir's interest in each type of property for which the shares are different: separate personal property, separate real property, and community property.
- **Community Property Issues.** Estates Code §201.003(c), which dictates distribution of the community estate when a decedent had children from a prior marriage, can be misunderstood if read too quickly. That section specifies that one-half of the community estate is retained by the surviving spouse and the other half passes to the deceased spouse's children or descendants." This language does ***not*** mean that the surviving spouse is entitled to one-half of the ***decedent's share*** of the community estate. Remember that each spouse owns a one-half interest in the community estate and that a judgment declaring heirs distributes only the ***decedent's share*** of the community estate, not the entire community estate. Therefore, in a cell indicating the surviving spouse's share of decedent's community property, the only correct entries are either "***all***" or "***none, but retains [his or her] 1/2 interest in the community estate***."

III. Citation

> **Necessary parties: Estates Code §202.008.** Remember that each of the following persons must be made a party to a proceeding to declare heirship: unknown heirs, known heirs, and "each person who is, on the filing date of the application, shown as owning a share or interest in any real property described in the application by the deed records of the county in which the property is located."

A. Citation by publication. The Estates Code requires citation by publication in all heirship proceedings. EC §202.052; see also EC §51.054. ***Although the Clerk prepares the citation, in Travis County it is the attorney's responsibility to secure publication in one of the local general-circulation papers and to obtain an affidavit of publication executed by the publisher.*** The publisher's affidavit – with the newspaper clipping – must be e-filed before the hearing is set.

NOTE: If the decedent lived in another county for a substantial part of his or her life, then citation by publication in that county may also be necessary depending on the individual facts of the case.

B. Service of citation on or waiver of citation from all non-applicant heirs who have not made an appearance. Estates Code §§202.051-202.0560 require service of citation on or waiver of citation from all non-applicant heirs. See below for requirements. Also see §202.008 regarding others who may require notice.

1. Adult non-applicant heirs. All adult non-applicant heirs must be served with citation ***unless*** they have executed valid waivers of citation or have made an appearance in the case. You do not need to take the same approach with all heirs.

- **Waivers of Citation.** Adult heirs may waive citation.

> *Waivers may be combined with EC chapter 401 consents for an independent administration.* As noted above, the Court encourages lawyers to incorporate the consents of non-applicant distributees into their waivers of citation, thereby reducing the number of documents that must be executed and e-filed – but make sure each document includes *everything* necessary.

- **Personal citation.** When an heir does not waive citation and has not made an appearance in the case, the Court strongly recommends personal citation instead of citation by certified mail. The cost for citation is the same, and there is less risk that the citation will need to be redone; see next bullet. ***Note that the Estates Code does not permit the use of private process servers for citation on heirs within the State of Texas.*** EC §51.051(b)(1).
- **Citation by certified mail.** The Estates Code allows citation by certified mail under §202.051, prepared by the clerk's office and sent by the constable. (Remember that citation by definition begins in the clerk's office; an attorney cannot produce a citation.) ***Note, however, that the citation is not valid unless the signature on the green card is the signature of the person being served. If it is not, citation must be redone.***

2. **Minor heirs younger than 12 years of age.** For heirs younger than 12 years of age, citation can be served on the parent, managing conservator, or guardian. See EC §202.051. A natural parent or a guardian of a minor younger than 12 years of age may waive citation on behalf of the minor in that parent's or guardian's capacity as parent or guardian. EC §202.056.

3. **Minor heirs aged 12 through 17.** The Court requires that minors aged 12 through 17 must either (1) be personally served with citation or (2) attend the heirship hearing. The Court does not allow them to be served by certified mail. The Estates Code does not allow anyone to waive citation on behalf of a minor who is 12 years or older, and a minor is not competent to sign a waiver. See EC §§202.054, 202.056, & 51.201.

4. **Section 202.057 certificate or affidavit and required back-up.** Estates Code §202.057 requires that the applicant file:
   - copies of all required citations along with proof of service, and
   - a sworn affidavit from the applicant – or a certificate signed by the applicant's attorney – stating that all required citation was served, including names of persons who were served or who waived citation. See EC §202.057(a)(2) for specifics. ***Note that an affidavit or certificate is <u>always</u> required, regardless of what citation was done.***

> **For applications filed on or after 9/1/2017, the affidavit or certificate must include additional information if any waivers are filed on behalf of distributees younger than 12.** If any waivers are filed on behalf of distributees younger than 12 years of age, a compliant §202.057 certificate or affidavit must now include "the name of the distributee ***and the representative capacity of the person who waived citation required to be served on the distributee***." EC §202.057(a)(2)(C)(ii), emphasis added.

IV. <u>Documents that Reduce the Expected Testimony to Writing</u>

Under Estates Code §202.151, the Court requires all oral testimony in a heirship proceeding to be reduced to writing and subscribed and sworn to by the witnesses after the hearing. Therefore, you should prepare written testimony in advance, as described below. The witnesses will sign their testimony before a deputy clerk after the hearing. Section 202.151 presupposes live testimony, and the Court strongly prefers live testimony. But if a necessary witness cannot attend the hearing, you may follow the procedures outlined in the section VI below, entitled "When witnesses are unable to appear in court."

For the 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.
The Clerk's stamp includes the following:

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

A. Proof of Death and Other Facts (POD). The POD should prove-up the allegations in the application that will not be proved by the disinterested witnesses who will testify as to the identity of the heirs. This information is usually provided by the applicant, but it can be presented by anyone with *personal knowledge* of the facts presented.

1. The following information is required to be in the POD for the heirship:

- State the name of the decedent, and indicate when and where the decedent died.
- State the underlying *facts* that show why the Court has jurisdiction and venue. Usually this requirement is fulfilled because the decedent was domiciled and had a fixed place of residence in Travis County. EC §33.001. (A statutory probate court has exclusive jurisdiction over probate and administrations in counties where there is such a court. EC §32.005. Having venue under EC §33.001 grants the court jurisdiction.)
- State whether decedent had a lawful will and, if so, what disposition has been made of the will.
- Give a general description of the property belonging to the estate of the decedent.
- State whether a necessity exists for administration.
  - ✓ If the application requests letters of administration, then the POD should state a need for administration, sufficient to "prove to the court's satisfaction that a necessity for an administration of the estate exists." EC §301.153(a).
  - ✓ If you are applying for a determination of heirship only, then the POD should indicate why there is no need for administration **and** why there is no Medicaid claim against the estate. See the Court's handout at https://www.traviscountytx.gov/images/probate/Docs/medicaid.pdf, *"How to Address Medicaid for Muniments and Determination of Heirship with No Administration.*"

2. Add the following information to the POD if also requesting administration. The proof required for the granting of letters of administration is found in EC §§301.151 & 301.153.

- The application was filed within four years after decedent's death.
- The proposed administrator is entitled to letters and is not disqualified.
- **DO NOT** include in the POD any language regarding citation. Seldom does a witness have knowledge about whether citation has been properly served. The Court will decide on its own whether citation is proper.

B. Statements of facts concerning the identity of heirs, for each of two disinterested witnesses.

The Court requires testimony of two disinterested witnesses regarding the identity of decedent's heirs. Written testimony should be prepared in advance, either in Q&A form or in the form of a statement. *Although the testimony must be prepared and submitted in advance, the witnesses will not sign the written testimony until immediately after the hearing, when the witnesses sign the testimony before a deputy clerk.* Parts of §203.002 of the Texas Estates Code provide a useful format for the testimony necessary for establishing a testator's heirs – see numbers 1-5. *Depending on the facts*, numbers 6-8 may also be needed. Instead of the notary's signature block, use a signature block for the deputy clerk, as shown in the box at the previous page. Include a statement that the witnesses are disinterested.

Preparing a comprehensive statement in advance will also help you fully develop the heirship facts such as information about previous marriages (including possible common-law marriages), information about predeceased children or siblings and their descendants, and information about parents. You may also discover that a potential heirship witness does not know enough to serve as a witness.

V. Heirship Charts for the Heirship Judgment

As soon as an heirship hearing is set, email an editable electronic version of the heirship chart to the Court at heirships@traviscountytx.gov (Word or rtf preferred). The Court prepares all heirship judgments, but having an editable ***heirship chart similar to the ones on pages 10 and 11*** makes the process smoother. The chart should include the names of all heirs, their relationship to the decedent, and their interest in the estate. You don't need to include places of residence in the chart you email to the Court because that information is no longer required in an heirship judgment (but note that the Estate Code does require that the application include the physical address where service can be had on each of decedent's heirs).

VI. When Witnesses Are Unable to Appear in Court in an Heirship Proceeding

Estates Code §202.151 presupposes live testimony for all heirship proceedings. Because an attorney ad litem has been appointed, you have more options if a witness is not able to provide live testimony in an heirship proceeding than you have in a probate matter in which there is no opposing party or attorney of record on whom to serve notice and copies of interrogatories. If a witness is not available in an heirship case, EC §202.151(b) provides that depositions may be taken in accordance with EC §51.203 **or** in accordance with the Texas Rules of Civil Procedure. ***Affidavits and other statements that do not comport with all requirements of the Estates Code or all requirements of the Rules of Civil Procedure constitute inadmissible evidence.***

A. For all depositions in heirship proceedings.

1. **Consider your questions carefully.** Be sure you ask the right questions so you will have all the necessary proof once you get the responses. Too frequently, attorneys need to redo depositions because key questions are not asked, with the added costs and delay of reposting. Get the attorney ad litem's input about the necessary questions in advance, and add all questions the ad litem wants to ask the deponent.

2. **Depositions for a Proof of Death and Other Facts when you are requesting administration.** If you are taking testimony for a Proof of Death and Other Facts by deposition and you are requesting an administration, note that a deposition can be used for POD testimony ***only if*** it is "proved under oath to the satisfaction of the court that the witness is unavailable." Estates Code §301.155. Therefore, include in your POD deposition questions that, when answered, will show the underlying facts to make that required proof. Simply stating that the witness is unavailable would not be sufficient. This is not a new requirement, but the greater clarity of the Estates Code made it more obvious.

3. **Q&A, Q&A, Q&A – not QQQ & AAA.** The Court ***strongly*** prefers that the deposition officer record each answer immediately following the question asked, rather than having answers refer to questions that are on some previous page.

4. NOTE: **The person whose deposition is being taken needs to actually answer the questions, not simply sign typed answers provided by the attorney.** Although witnesses who testify during uncontested probate hearings do sign testimony that was prepared in advance, depositions are different. When an attorney is leading a live witness through previously prepared testimony, it is not uncommon for the witness to add to or correct the testimony prepared by the attorney. When a witness is simply signing a prepared document, additions and corrections are less likely to be made.

5. **Affidavits aren't depositions.** It is never sufficient to file written affidavits in place of testimony in open court.

6. **Scheduling an uncontested hearing when there's a deposition.** The Court needs to review the responses, not just the questions, before the hearing. So schedule a hearing date far enough out that you *can e-file the responses* ***at least a week before*** the schedule heirship hearing.

B. Depositions taken in accordance with the Texas Estates Code. As noted above, EC §202.151(b) provides that testimony in an heirship proceeding may be taken in accordance with EC §51.203:

> **§51.203. Service of Notice of Intention to Take Depositions in Certain Matters.**
>
> (a) If a will is to be probated, or in another probate matter in which there is no opposing party or attorney of record on whom to serve notice and copies of interrogatories, service may be made by posting notice of the intention to take depositions for a period of 10 days as provided by Section 51.053 governing a posting of notice.
> (b) When notice by posting under Subsection (a) is filed with the county clerk, a copy of the interrogatories must also be filed.
> (c) At the expiration of the 10-day period prescribed by Subsection (a):
> (1) the depositions for which the notice was posted may be taken; and
> (2) the judge may file cross-interrogatories if no person appears.

1. **Notice required.** If you are proceeding under §51.203, you can't skip the posted notice.
2. **No commissions – but still a posting period of 10 days plus a Monday.** Although commissions are no longer required, notice of the intention to take depositions must be still be posted for the statutory period. Pay attention to the return date; an untimely deposition will need to be redone.
3. **File the interrogatories with the notice.** A copy of the interrogatories must be filed with the notice.
4. **Cross-interrogatories from the judge?** Under §51.203, the judge may file cross-interrogatories. (Currently, the court is not looking at depositions during the posting period.)
5. **Deposition procedures.** Although the Estates Code specifies the required notice, the Code does not specify the deposition procedures. For the deposition itself, use the procedures set out in the Texas Rules of Civil Procedure. As an example, here's an outline of a process for a written deposition in a typical uncontested probate with no other parties:
   - After the posting period has run, the deposition officer takes the deposition and records the testimony of the witness under oath.
   - The deposition officer prepares, certifies, and delivers the completed deposition to the attorney who requested it.
   - The attorney e-files the completed deposition at least a week before the scheduled hearing.

C. Depositions taken in accordance with the Texas Rules of Civil Procedure. Carefully look at **all** related TRCP rules. *This handout flags only a few of the requirements and procedures.*

1. **Depositions on Written Questions are governed by TRCP, Rule 200.1 et seq.** Also see Rule 203 on Signing, Certification, and Use of Oral and Written Depositions. The notice of intent to take the deposition by written questions, along with the attached questions, must to be served on the witness and all other parties, including the ad litem, at least 20 days before the deposition is taken. By the paperwork deadline, you must e-file the notice, along with proof of its service 20 days before the taking of the deposition. The deposition officer must "take the deposition on written questions at the time and place designated; record the testimony of the witness under oath in response to the questions; and prepare, certify, and deliver the deposition transcript in accordance with Rule 203."
2. **Oral Depositions, including Oral Depositions by Telephone or Other Remote Electronic Means, are governed by TRCP Rule 199.1.** Again, also see Rule 203 on Signing, Certification, and Use of Oral and Written Depositions. Note that the "oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial." TRCP 199.5(d). ***Among other things, that means the attorney ad litem must participate in the oral deposition.***

VII. Sample Charts for Applications and Judgments

The following samples illustrate the chart form that makes it easier to verify that all necessary information is included and that the shares are calculated correctly. **Obviously, the actual chart should vary given the circumstances.** These charts are examples only and do not illustrate all – or even most – of the possibilities. See Estates Code Chapter 201 and the illustrations on the following pages of this paper. The Estates Code no longer requires that a *judgment* list the places of residence of each heir, but does require that the application include the physical address where service can be had on each of decedent's heirs.

Sample 1. Decedent is survived by spouse and by one minor child from a prior marriage.

Distributee's Name, Address, and Relationship to Deceased	Share of Separate Personal Property	Share of Separate Real Property	Share of Decedent's Community Property
Jill Doe Adult Surviving Spouse [physical address where service can be had]	1/3	Life estate in 1/3 of all separate real property	NONE, but retains her 1/2 interest in the community estate
Jane Doe Minor, [+ required birth date in the application (*not in judgment)*] Daughter from previous marriage [physical address where service can be had]	2/3	ALL, subject to the surviving spouse's 1/3 life estate	ALL

Sample 2. Decedent is survived by spouse and by two adult children from that marriage.

Distributee's Name, Address, and Relationship to Deceased	Share of Separate Personal Property	Share of Separate Real Property	Share of Decedent's Community Property
John Doe Adult Surviving Spouse [physical address where service can be had]	1/3	Life estate in 1/3 of all separate real property	ALL
Debbie Doe Jones Adult Daughter of deceased & John Doe [physical address where service can be had]	1/3	1/2, subject to the surviving spouse's 1/3 life estate	NONE
John Doe, Jr. Adult Son of deceased & John Doe [physical address where service can be had]	1/3	1/2, subject to the surviving spouse's 1/3 life estate	NONE

Sample 3. Decedent is survived by spouse and both parents, but is not survived by any child or other descendant.

Distributee's Name, Address, and Relationship to Deceased	Share of Separate Personal Property	Share of Separate Real Property	Share of Decedent's Community Property
John Doe Adult Surviving Spouse [physical address where service can be had]	ALL	1/2	ALL
Elizabeth Jones Adult Mother of deceased [physical address where service can be had]	NONE	1/4	NONE
Joseph Jones Father of deceased [physical address where service can be had]	NONE	1/4	NONE

Sample 4. Unmarried decedent is survived by one child. Decedent was predeceased by a second child, whose two children are still living. One is a minor.

Distributee's Name, Address, and Relationship to Deceased	Share of All Property
Debbie Doe Jones Adult Daughter of deceased [physical address where service can be had]	1/2
Jane Doe Adult Granddaughter (child of John Doe*) [physical address where service can be had]	1/4
George Doe Minor [birth date NOT required in application; not *Decedent's* minor child] Grandson (child of John Doe*) [physical address where service can be had]	1/4

*Additional information about John Doe, the predeceased child, needs to be set out elsewhere in the Application and Judgment.

Sample 5. Unmarried decedent is survived by no child or descendant and by no parent, but is survived by two siblings.

Distributee's Name, Address, and Relationship to Deceased	Share of All Property
Debbie Doe Jones Adult Decedent's sister [physical address where service can be had]	1/2
David Doe Adult Decedent's brother [physical address where service can be had]	1/2

Sample 6. Unmarried decedent is survived by no child or descendant, by only one parent, and by three siblings.

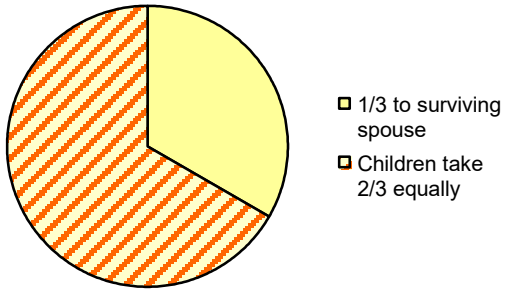
Distributee's Name, Address, and Relationship to Deceased	Share of All Property
George Doe Adult Decedent's father [physical address where service can be had]	1/2
Debbie Doe Jones Adult Decedent's sister [physical address where service can be had]	1/6
David Doe Adult Decedent's brother [physical address where service can be had]	1/6
Damian Doe Adult Decedent's brother [physical address where service can be had]	1/6

Texas Descent and Distribution[2]

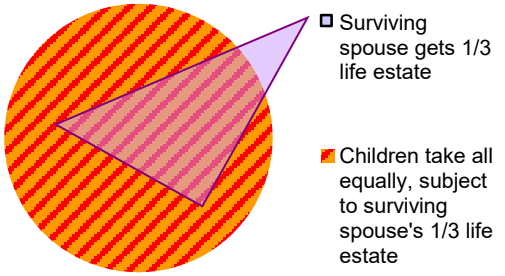
The Legal Effect of Not Having a Will (for decedents dying after 9/1/1993)

1. Married Person with Child[ren] or Other Descendants

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(b))

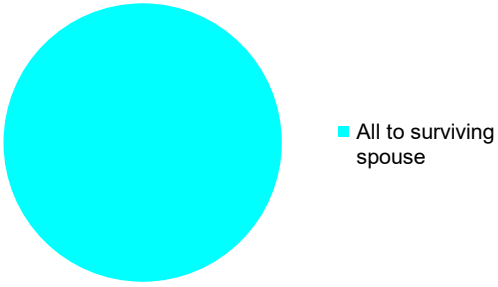


B. Decedent's separate real property (EC § 201.002(b))

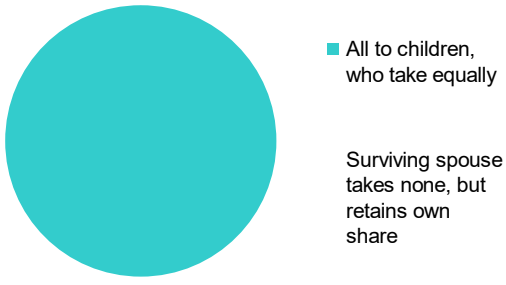


All separate real property will be owned outright by decedent's child[ren] or other descendants when surviving spouse dies.

C. Decedent's share of community property when all surviving children and descendants of deceased are also children or descendants of surviving spouse. (EC § 201.003(b)(2))



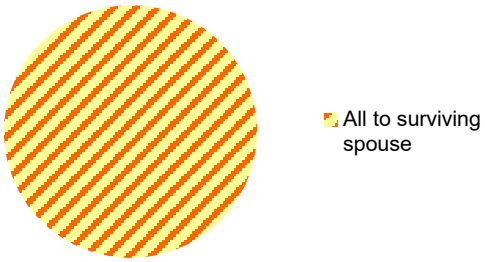
C. Decedent's share of community property when there are children or other descendants from outside of the existing marriage on the date of decedent's death (or if decedent died before September 1, 1993) (EC § 201.003(c))



[2] The charts in this handout illustrate the general rules of descent and distribution under Texas law. In addition to the statutory references noted throughout, see the following Texas Estates Code (EC) provisions, among others: § 201.101, Determination of Per Capita with Representation Distribution (fka per stirpes); § 201.051 et seq., Matters Affecting Inheritance (including Adoption [§ 201.054] and Collateral Kindred of Whole and Half Blood [§ 201.057]); Advancements, §§ 201.151 & 201.152; and Requirement of Survival by 120 Hours, §§ 121.052 & 121.053 (see also §§ 121.151-121.153).

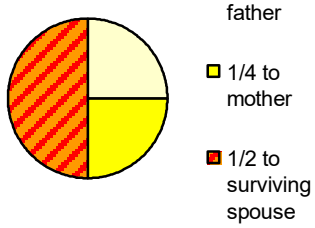
2. Married Person with No Child or Descendant

A. Decedent's separate personal property (all that is not real property) (EC § 201.002(c)(1))

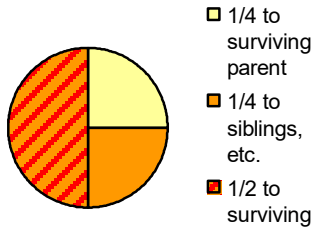


B. Decedent's separate real property (EC § 201.002)

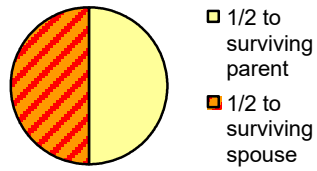
If decedent is survived by **both** mother and father.
EC §§ 201.001(c) & 201.002(c)(2) & (3).



If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants.
EC §§ 201.001(d)(1) & 201.002(c)(2) & (3).



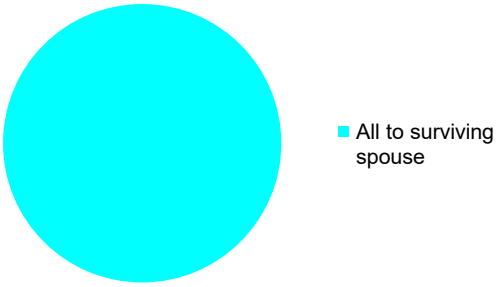
If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants.
EC §§ 201.001(d)(2) & 201.002(c)(2) & (3).



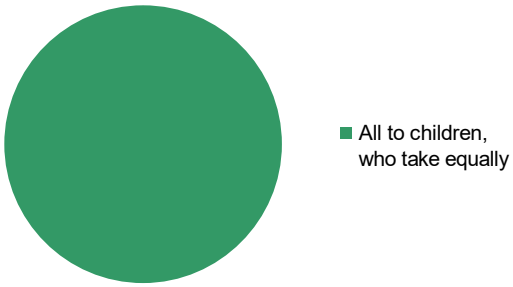
If decedent is survived by neither parent, but **is** survived by sibling(s) or their descendants.
EC §§ 201.001(e) & 201.002(c)(2) & (3).

If decedent is survived by no parent, no sibling, and no descendant of a sibling.
EC § 201.002(d).

C. Decedent's share of community property (EC § 201.003(b)(1))



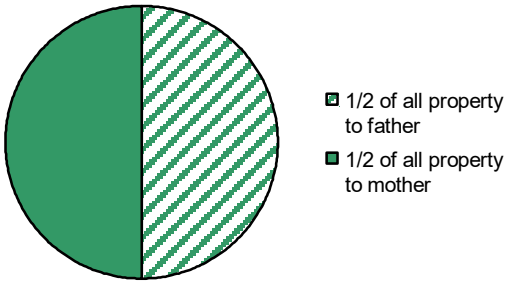
3. Unmarried Person with Child[ren] or Other Descendants (EC § 201.001(b))



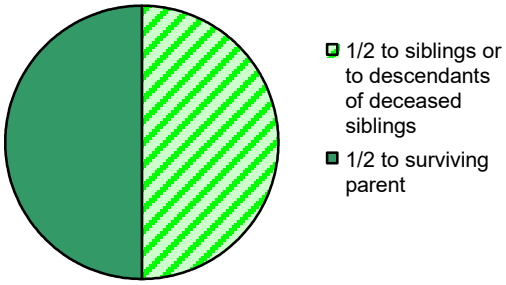
4. Unmarried Person with No Child or Descendant

All property passes depending on who survived the decedent:[1]

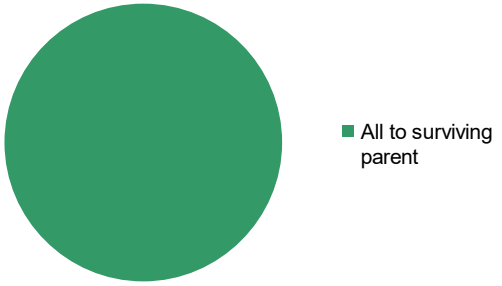
If decedent is survived by **both** mother and father. EC § 201.001(c).



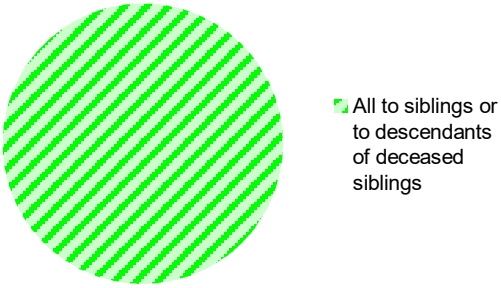
If decedent is survived (1) by mother **or** father **and** (2) by sibling(s) or their descendants. EC § 201.001(d)(1).



If decedent is survived by mother **or** father, **but is not** survived by any sibling(s) or their descendants. EC § 201.001(d)(2).



If decedent is survived by **neither parent**, but **is** survived by sibling(s) or their descendants. EC § 201.001(e).



[1] If none of the four situations above applies, see EC § 201.001(f)-(h).

APPENDIX I

The Ad Litem Manual for Heirship Proceedings

Prepared by
The Honorable Steve M. King
Tarrant County Probate Court Number One

Tarrant County Courthouse
100 West Weatherford, Rm. 260-A
Fort Worth, TX 76196-0241

Revision Date of Judge King's paper – January 2007

January 2007

Adapted for Travis County Probate Court No. 1
by
Clint Alexander & Christy Nisbett, October 2008
Updated by Wade Lamb, July 2014

Note: *Please use this Ad Litem Manual for Heirship Proceedings when you are serving in cases filed in Travis County Probate Court No. 1.*

Table of Contents

A. Introduction

All heirship determinations require (1) the appointment of an Attorney Ad Litem and (2) citation by publication. Texas Estates Code §202.009 (hereafter "EC"); Tex. R. Civ. Proc. 244.

> *If you are appointed as an Attorney Ad Litem in an heirship proceeding in Travis County, you should become familiar with the Court's handout, "The Uncontested Docket: When a Client Dies Without a Will," available on the Court's website and in the Court Coordinator's office. Although designed for an Applicant's attorney, the document covers information every Attorney Ad Litem in this Court should know.*

The following materials are designed to assist you—the practitioner acting as Attorney Ad Litem—in adequately representing your clients, even though (in most instances) you will never meet them and (in some instances) they won't "exist" except in legal fiction.

Two general situations will be addressed: Proving Up the Obvious vs. Solving an Old Mystery. In many cases, you will be merely verifying straightforward family facts. In other cases, the existence of living or predeceased heirs will not be disclosed, either because of ulterior motives or honest ignorance. In yet other situations, the existence of heirs "on the other side of the family" will simply be a mystery.

1. The "Plain Jane" Case

In the typical "Plain Jane" case, your principal job is to confirm that (a) the application is correct, (b) there appears to be no controversy in the proceeding, and (c) the Applicant has carried his/her burden of proof. Your checklist for these cases is relatively simple. These are by far the most common cases, and for them you will receive no more than the $450.00 deposit as your fee.

2. The "Mystery" Case

If it appears that there are heirs whose very existence as well as whereabouts are unknown, you have become a genealogist/skip tracer. Keep your time, and understand what resources are available to pay your potentially increased fee. Your checklist is constrained by what the judge considers to be a reasonable effort in locating the "missing" heirs given the facts (including the size of the estate).

B. Statutory Basis for Heirship Proceedings

Heirship is the relationship between a Decedent (a person who dies owning or entitled to property and who leaves no will, or whose will fails to effectively dispose of all his or her property) and an Heir (the person designated by the applicable Laws of Descent and Distribution to receive the property). *See* EC Chapters 201, 202.

1. Application. *EC §§202.004, 202.005.*

A representative, a person claiming part of the estate, or a secured creditor can apply to the Court to determine heirship. The application should contain the information listed in EC §202.005(1)-(8), and shall be supported by an affidavit stating that all facts are true and that nothing has been omitted.

2. Necessary Parties. *EC §202.008.*

All unknown heirs, known heirs, and persons shown by deed records to own any real property in the estate shall be made a party to the proceeding.

3. Citation. *EC §§202.053 et seq.*

This citation is different from the service required for an administration.

a) Travis County Probate Court No. 1 requires personal service on—or an appropriate waiver from—all distributees whose names and addresses can be found with reasonable diligence.

> *A parent, managing conservator, guardian, Attorney Ad Litem, or guardian ad litem of a distributee who is at least 12 years of age but younger than 19 years of age* ***may not waive the citation*** *required to be served on the distributee under this section. EC §202.056. Nor is such a distributee competent to waive. Consequently, these distributees must be personally served.*

b) Publication service on all unknown heirs and heirs whose addresses cannot be found in the county of the proceeding and the county of the decedent's last residence.

c) Posted citation in the county where proceedings are commenced and where decedent last resided, except where publication is used as in (b).

4. Appointment of Attorney Ad Litem

A court must appoint an Attorney Ad Litem to represent all unknown heirs. EC §202.009(a). A court may appoint an Attorney Ad Litem for all the living heirs whose names or whereabouts are unknown or who are incapacitated, if, in the court's discretion, it finds that the appointment is necessary to protect the interests of any living heirs or incapacitated persons. EC §202.009(b).

Except as provided by EC §202.009(b), the judge of a probate court may appoint an Attorney Ad Litem in *any* probate proceeding to represent the interests of a person having a legal disability, a nonresident, an unborn or unascertained person, or an unknown heir. Each Attorney Ad Litem appointed under this section is entitled to reasonable compensation for services in

the amount set by the court and to be taxed as costs in the proceeding. EC §53.104.

5. Evidence in Heirship Proceedings

a) As a general rule in an heirship hearing, Travis County Probate Court No. 1 requires the live testimony of two disinterested witnesses who have personal knowledge regarding the family history of the decedent and heirs. This includes information regarding the identities and relationships of family members, births, deaths, and marriages, and the order of deaths and marriages.

b) Evidence Reduced to Writing. Travis County Probate Court No. 1 requires all evidence from an heirship hearing to be reduced to writing and subscribed and sworn to by the witnesses. EC §202.151.

c) Should a witness not be able to provide live testimony, the testimony of the witness may be given by deposition, either written or oral, taken in accordance with the Texas Rules of Civil Procedure, except as modified by the Estates Code. *If depositions are used, the Attorney Ad Litem must participate in the deposition process so that that the opportunity to cross-examine the witnesses is preserved.* The methods for using depositions in a probate proceeding are summarized in the Court's document *"The Uncontested Docket: When a Client Dies Without a Will,"* which can be found on the Court's website and in the Court Coordinator's office.

d) Affidavits of heirship and judgments concerning heirship or family identity, as authorized by EC §203.001, are prima facie evidence of such matters, but only if they have been of record in the records of a county or district court for at least five years by the time the instant heirship proceeding is commenced.

Any errors contained in such recorded instruments may be proved by interested parties during the heirship proceeding. *Id*. This provision is not exclusive of any other methods of proof available under other rules or law. *Id*.

What this means is:

(1) affidavits of heirship filed expressly for the current proceeding are inadmissible and essentially a waste of time. *Compton v. WWV Enterprises*, 679 S.W.2d 668 (Tex. App.—Eastland 1984, no pet.)

(2) Recorded documents such as birth, marriage, and death certificates are admissible because of Tex. Evid. Rule 902(1) ("Domestic Public Documents Under Seal").

(3) Written statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, etc. are specifically excepted from the hearsay rule, Tex. Evid. Rule 803(13), but are subject to the twenty-year authentication requirement of Tex. Evid. Rule 901(b)(8).

(4) On the other hand, oral statements of reputation concerning personal or family history, Tex. Evid. Rule 803(19), are hearsay exceptions without any authentication requirement other than a demonstration of personal knowledge. Tex. Evid. Rule 901(b)(1).

e) The lack of specifics regarding testimony in the heirship provisions of the Estates Code would indicate that, beyond requiring "that level of proof which would create in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,"[1] the judge or juror in an heirship proceeding is to be guided by his or her own sense of what is right, just, and true.

6. Heirship Judgment. EC §202.201.

To be a final judgment, the order declaring heirship must include:

a) The names and places of residence of all heirs;

b) The respective shares and interests in the real and personal property of the estate;

> *NOTE: No heirship judgment of Travis County Probate Court No. 1 will reflect only community property and no separate property, nor will it reflect only personal property and no real property. It is extremely common for additional property to be discovered. If the new property is not addressed in the judgment, another heirship hearing would be necessary. Make sure the suggested form of judgment categorically includes the division of every type of property.*

c) Whether the proof is deficient in any respect.

If all of the above elements are present, the judgment is final and may be appealed. EC §202.202. However, an heirship judgment that does not include all the elements required by EC §202.201 is not a final judgment. *Estate of Loveless*, 64 S.W.3d 564, 570 (Tex. App.—Texarkana 2001), subsequent appeal after remand, 2003 Tex. App. Lexis 676 (Tex. App.—Texarkana 2003).

C. Scope of "Heirship Determinations"

In this Court, "heirship determinations," for purposes of EC §202.009 ad litem appointments, will include:

1. heirship determinations incident to either a dependent or an independent administration;

[1] *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994),

2. heirship determinations where no administration is sought or pending;

3. heirship determinations pursuant to declaratory judgment actions where it is necessary to determine heirs because of intestacy under a will, trust, or other instrument, etc.

D. Duty and Standing of the Attorney Ad Litem

It is the duty of Attorney Ad Litem to defend the rights of his involuntary client(s) with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *See, e.g. Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.—Houston 1975, writ ref'd n.r.e.) (quoting *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.—San Antonio 1926, writ dism'd)); *Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005, pet. denied).

The Attorney Ad Litem in an heirship proceeding appointed under EC §53.104 has both standing and authority to oppose the appointment of a temporary administrator and apply for the appointment of an independent third-party administrator, to the same extent as if his clients had been present. *Estate of Stanton*, 202 S.W.3d 205, 208 (Tex. App.—Tyler 2005); EC §§22.018, 256.051, 301.051, 452.006.

E. Pointers on Different of Types of Cases

1. The "Plain Jane" Case

Pigeonhole the situation: if it is simple to start with, it should end up that way. If it is complicated, learn how to chart your findings and explain the complications so the judge can understand it.

It is not your job to duplicate all efforts made by the Applicant's attorney. You are to simply check the other guy's homework, not do it all over.

Grade their homework: Is it right? YOU do not do the spadework unless it turns out there are unknown heirs.

2. The "Mystery" Case

On the other hand, if there is an allegation or any indication that there are heirs whose whereabouts or identities are unknown, you have become an investigator or a genealogist/skip tracer.

The only known surviving heirs may be from one side of the family, and there may be no one who can easily tell you who the other heirs might be. While it is nigh impossible that there are no heirs on a particular side of a family, it may not be possible, given the constraints of the information, your abilities, or the available resources of the estate, to track down the whereabouts of those heirs whose whereabouts are unknown (within a billable timeframe that is reasonable).

The secret is to determine where the "tipping point" is between devoting billable time to the search and the hope of discovering answers. When in doubt, schedule a conference with the Court and the other counsel to get your marching orders in a clear fashion.

Caveat: Anyone trying to suppress information regarding the "black sheep" of the family will, of course, present you with a straightforward picture of a happy family—minus the black sheep.

In complicated cases, a fair amount of deductive reasoning and intuition (or genealogical research experience) must sometimes be employed.

Using appropriate forms to record your data, obtain as much additional information as possible to build a "family tree," including identity and location information of all family members (not just heirs), with dates and references to documentation.

Having every little scrap of information recorded and easily available can be invaluable. If the record keeping gets too cumbersome, specialized genealogy programs such as *Family Tree Maker*© can be useful.

In an appropriate situation – and on prior approval by the Court – professional forensic genealogists may be retained. (Don't forget that a professional who understands genealogical research may be less expensive than a lawyer who does not.)

F. Due Diligence

As with all ad litem appointments, common sense must be employed, given the size of the estate and the apparent simplicity or complexity of the facts. At a minimum, the Attorney Ad Litem in an heirship proceeding, should do the following.

1. After Your Appointment

a) Contact the Applicant's attorney to get the following:

(1) copies of the pleadings;

(2) the death certificate and any other "official" documentation affecting descent and distribution (divorce decrees, judgments of adoption, termination orders, etc.) (you don't need to get certified copies, but you might look at them for comparison purposes);

(3) the names and contact information of family members and disinterested witnesses who might be knowledgeable of the facts of heirship.

b) Verify with the clerk's office that the decedent did not have a will on deposit. (Rare, but not impossible, and the clerks have a different index.)

c) Review all relevant pleadings, documents, waivers, and citations, including the order appointing you and the published citation.

d) File an Answer on behalf of your clients. Doing so "joins the issues" and properly gets you in court. See Appendix A.

e) Personally interview the Applicant to verify the heirship facts and obtain the names and whereabouts of persons knowledgeable of the heirship facts.

f) Contact at least two disinterested persons, if not all of the persons known to have knowledge of the heirship facts – not just the one(s) you may be referred to by the family – and verify the information provided. Telephone interviews are OK as long as you can determine to whom you are really talking.

> *Note: If possible, try to get to someone who has no particular reason to try to please the Applicant.*

g) After about three hours of billable time are spent, you may want to check back with the Court for guidance as to how much time should be spent, even in a complicated case.

h) Make an independent determination whether the information provided is sufficient and whether there are heirs not listed in the application, whether intentionally or unintentionally omitted, who may be minors, otherwise incapacitated, or whose identity or whereabouts may be unknown. ***It is always necessary for the ad litem to ask the impolite questions***: whether there were any other marriages, whether there were any other children (born in or out of wedlock), etc. (The Smell Test: If it smells, find out where it has been swimming and how long it has been dead.)

i) If the issue of common-law marriage or the lack thereof presents itself, the ad litem should look for affidavits of "single-hood" by the alleged common-law spouse to obtain or retain public assistance, health insurance, life insurance, military benefits, social security. Note that if there's an alleged common-law spouse, the hearing needs to be on the regular docket, not the uncontested docket – even if "everyone" seems to agree.

j) Prepare a written report of your findings when you have completed your investigation. See Appendix B. This report must be e-filed at least three work days before the scheduled hearing and should contain the following

(1) a statement of whether you agree or disagree with the application for determination of heirship;

(2) a skeletal recitation of the documents reviewed and persons consulted;

(3) a distribution chart, fully showing how all interests devolve upon the heirs.

Thought for the Day: Statutory probate courts have crowded dockets. If the Judge has to try to decipher a convoluted family tree/pedigree chart (whether drawn on butcher paper or created by specialized software), chances are you may be coming back for a chambers conference to complete the hearing.

k) If you have located an heir whose name or whereabouts was previously unknown, include all contact information for each such individual in your report, with a copy of the report to all counsel. EC §202.151.

At this point, if you have found an "unknown heir," the Applicant should be preparing an amended application to determine heirship. If they are unwilling to do so, consider seeking security for costs, EC §53.052, or setting a conference with the Court.

If these newly discovered heirs want you to represent them, you may well have a conflict of interest among your clients. Consider requesting the Court to appoint another ad litem, so you may withdraw and enter an appearance on behalf of your new clients.

l) Confer with Applicant's attorney as to an appropriate date for the hearing on the application. As a general rule, heirship cases in Travis County Probate Court No. 1 are heard on the Tuesday morning uncontested docket at 9:15 or 9:30.

Cases that may need extra testimony should be set on the regular docket (remember that "regular docket" is not a synonym for "contested docket"). As noted above, for example, heirships with an alleged common-law spouse should be set on the regular docket, not the uncontested docket. Heirships with a declaratory judgment should be set on the regular docket or at 10:00 a.m. on a Tuesday (the "special cases" part of the uncontested docket), depending on the complexity of the declaratory judgment. If there's any other reason that you think the case might need be heard on the regular docket, please talk to the Applicant's attorney, the Court, or both. If you uncover an unusual fact situation – or the situation is not what it appears – find some way to plead it.

m) Confer with Applicant's attorney about your fees if you plan to ask for more than the $450 deposit. The Judge will decide how much to award, but Applicant's attorney should not be surprised by your request. See next pages for more about fees.

n) If you have never attended an heirship hearing at the Travis County Probate Court, go watch several heirship hearings at the uncontested docket to get an idea of the flow.

o) Review the proposed order when the Court sends it to you, usually the day before the hearing. Make sure it accurately reflects the names and locations of the heirs and correctly calculates the distribution. Compare the judgment with your notes and report.

2. Hearing Day –Before the Hearing

a) Check in with the Court Administrator or whatever Court staff member is at the table in the hall.

b) Introduce yourself in person to the witnesses. Please arrive in time that you can visit with them briefly before the hearing. (Obviously, you should have spoken with them before.)

c) If you're running late, call the Court Coordinator or the Applicant's attorney, or both. The hearing can't go on without you – and no other attorney can appear for you.

3. Hearing Day – During the Hearing

a) While in a hearing, the best attorneys are aware of the Court Reporter and how to make it easier for the Court Reporter to hear them and the witnesses. Some concrete advice about how to help the Court Reporter hear you and the witnesses:

(1) Neither the attorneys nor their witnesses should stand with their backs to the Court Reporter, as this makes transcription very difficult.

(2) Neither the attorneys nor their witnesses should talk while someone else is talking because the Court Reporter cannot accurately transcribe the simultaneous testimony of two witnesses.

(3) The attorneys should abide by the rules of decorum in the courtroom and communicate these rules to their clients because the Court Reporter cannot accurately transcribe the testimony of one witness if there is too much background noise.

b) When the attorney for the Applicant passes the witness, NEVER simply say: "No questions." If nothing else, ask: "Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?" But even in Plain Jane cases, that's not enough if the Applicant's attorney has not asked sufficient questions to prove the heirship facts – if that happens, you need to fill in the record.

c) And if you have anything but a Plain Jane case, you need to ask questions. For example, ask about relationships that might have lasted more than a few months. Ask about any claims of paternity or court proceedings for paternity or legitimization. Ask about any direct knowledge of children put up for adoption or about deceased siblings who had children. See the following suggested cross-examination questions. ***Obviously, the relevance of particular questions will depend on the specifics of the case.***

(1) Are you aware of any relationships the Deceased had that lasted for more than one year?

(2) Do you know if any of these relationships resulted in the birth of a child?

(3) Are you aware of any claims of paternity or paternity actions brought in court against the Deceased?

(4) Are you aware of any legitimation claims or court proceedings for legitimation brought against Decedent?

(5) Do you have any direct knowledge of paternity/marriage/children?

(6) Do you recall any discussions or have direct knowledge regarding deceased siblings/ nieces/nephews?

(7) Do you recall any discussions about or have direct knowledge of the Deceased admitting to being the father of ….

(8) Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?

c) If there will be a bond, elicit sufficient testimony on the nature and extent of the Estate to enable the Court to set the bond.

d) Train wrecks. If something unexpected happens and the order is not going to be signed at the hearing, or the hearing otherwise turns into a train wreck, try to think fast and see if some of the work can be salvaged. For example, maybe the Court will hear early testimony and rule on the application "subject to" whatever curative matters still need to get done. Maybe the Court can hear some of the testimony, have it reduced to writing, and not have to repeat that testimony in the future.

G. Time Records and Fee Applications

1. It is the Court's duty to ensure that estates of decedents pay only for "reasonable and necessary" attorney's fees and expenses. See EC §352.051. Many courts, including Travis County Probate Court No. 1, have adopted written policies regarding attorneys fees. This Court's fee standards are available on the Court website and in the Court Coordinator's office.

2. Determine early on whether you have a "Plain Jane" or a "Mystery" case. If it's a Plain Jane case, you will receive no more than the $450 deposit as a fee unless the Court determines that additional time is required due to the circumstances of the particular matter.

3. If you have a "Mystery" case, schedule a conference with the Court and all other counsel to get some idea of how far you can go (time-wise) and any procedural suggestions you might get.

4. Keep your time in both types of case, just in case things get unexpectedly complicated.

> ***Going It Alone.*** *Only the ad litem is appointed, not the law firm: When an ad litem is appointed, the Court's intent is that the appointed attorney act personally as an officer of the Court. The attorney's law firm is not the appointee. An ad litem may not be*

compensated for time expended by other attorneys, unless the Court has made a specific finding that the other attorney's services were reasonable and necessary under a particular extenuating circumstance. Goodyear Dunlop v. Gamez, 151 S.W.3d 574, 588 (Tex. App.—San Antonio 2004, no pet.)

5. After you have spent about three hours on the case, unless you can see the light at the end of the tunnel, check signals with the Court.

6. If you have had a "Plain Jane" case, you do not need to file an Application for Payment of Fees. The Court will hear testimony about your fees and will designate the fees in its heirship order (and on a separate "pink sheet," used to report the fee payment to the Office of Court Administration).

7. If you have had a "Mystery" case, e-file at least several days before the scheduled hearing an itemized Application for Payment of Fees with a narrative of time expended and services rendered.

H. Dealing with the Clerk's Office and the Court

1. The Clerk's Office

Remember, the clerk is a separately-elected public official and is not an employee of the Court. Just because you tell something to someone in the clerk's office doesn't mean the Court automatically knows about it – and vice versa. Similarly, if you want the Court to know about something you've e-filed, email or drop off a copy of whatever it is you filed – or at least tell the Court what you've e-filed.

2. Court Staff

If you get to know the Court's staff and their functions, you will know where to go to get a problem addressed. For Travis County Probate Court No. 1, see the "Whom to Call at Travis County Probate Court No. 1" document on the Court's website and in the Court Coordinator's office.

3. Paperwork

a) Applicants are required to follow the Court's "Guidelines for Uncontested-Docket Paperwork," posted on the Court's website and available in the Court Coordinator's office. Because the Court reviews all documents prior to the hearing in uncontested matters, it is important that all paperwork be in the file prior to the hearing. This policy ensures that hearings go more smoothly for participants who are already dealing with the stress of someone's death. Attorneys benefit as well from smoother hearings and can avoid having errors pointed out in front of clients.

An Attorney Ad Litem should be familiar with the Court's paperwork guidelines and should follow them. *An Attorney Ad Litem* ***must file an answer*** *(ideally, soon after being appointed) and also* ***must file the ad litem report no later than three work days before the scheduled hearing****.*

I. Distribution of the Estate: Specific Concerns

1. Shares of the Estate should be noted as fractional interests ("1/3") rather than as percentages ("33.33%). Fractional listings are more definite than decimal listings.

2. How Did We Get Here? Like your Junior High math teacher told you, you should "show your work" in your Distribution Chart. If one set of cousins gets 1/5 each and another set gets 1/10 each, indicate the predeceased ancestor that made it be that way. Don't make the judge guess. (See samples in "*The Uncontested Docket: When a Client Dies Without a Will*," available on the Court's website and in the Court Coordinator's office.)

3. Imbedded Heirships. If you are running down the list of heirs and determine that one of the heirs has survived the Decedent, and then subsequently died, the trail ends there for this proceeding. For purposes of this case, the relevant determination is whether that deceased heir has had an estate administration opened or not. If so, any distributive share is payable to the personal representative of the estate. If not, the distributive share of the deceased heir is payable to the estate of the deceased heir.

Do not attempt to "double-up" and go on to determine the heirship of an heir who survived, but then died unless a separate heirship proceeding has been filed on that heir's behalf. The Court can act only within its jurisdiction, and that jurisdiction (for these purposes) is determined by the pleadings and citation for the person whose heirship is being determined. An attempt by the Court to act outside of or beyond its jurisdiction produces a void result. *Kowalski v. Finley*, 2004 Tex. App. Lexis 8393 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

4. Half-Blood and Whole-Blood Distributions. High divorce rates and serial marriages make the necessity of half-blood and whole-blood distinctions a common possibility. See EC §201.057. (Our CLE on heirship determinations goes over some helpful examples.)

5. Heirship and Disclaimers. The order showing the identity of the heirs and their respective shares of the estate will not reflect any disclaimers or transfers executed pursuant to EC SEC. 122.002 *et seq.*, *Welder v. Hitchcock*, 617 S.W.2d 294 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

a) A declaratory judgment action is the proper vehicle to determine if a disclaimer or transfer is effective for estate planning, tax

purposes or for creditor avoidance. *Tate v. Siepielski*, 740 S.W.2d 92, 93 (Tex. App.--Fort Worth 1987, no writ). Such an action may be validly joined with the heirship proceeding to properly place before the Court the legal effect of the disclaimer (in which case, make sure the case is set on the regular docket, not the uncontested docket). Otherwise, it is asking the Court to render judgment on the legal effect of the disclaimer by taking several shortcuts – without sufficient citation, pleadings, testimony, and evidence.

b) In *Welder*, supra, the appellants argued the language of the disclaimer statute created a legal fiction ("as if the person disclaiming had predeceased the decedent") requiring a different distribution – one showing the effect of the disclaimer as a part of the heirship determination. The Corpus Christi court of appeals rejected this argument, holding such an argument would require (a) a finding that the Legislature intended to partially alter the order of descent and distribution set out in EC §201.101 by the enactment of the disclaimer statute, and (b) a finding that the effect of the disclaimer was to re-order and affect the distribution of the entire estate rather than "the property subject thereof," referring only to the property over which the disclaimant had authority by inheritance. The court in *Welder* held that, by enacting the probate code's predecessor to EC §§122.002-122.106, the Legislature intended to affect only to whom a disclaimed share descends, and not the manner in which an entire estate is to be distributed.

6. The Slayer's Rule. Heirs convicted (or, in a wrongful death suit, found by a civil court) of "willfully bringing about the death of the Decedent" do not forfeit their right to inherit under EC §201.058. However, under Tex. Ins. Code §21.23 there is statutory exception to this rule, imposing a forfeiture. In addition, the courts of Texas have recognized the equitable right of a family member to seek the imposition of a constructive trust against the ownership interest of one who willfully brings about the death of a family member. See Branyon, *The Slayer's Rule Revisited*, 1996 Advanced Estate Planning and Probate Course, State Bar of Texas, and *Bounds v. Caudle*, 560 S.W.2d 925, 1977 Tex. Lexis 302, 21 Tex. Sup. Ct. J. 92 (Tex. 1977); *Medford v. Medford*, 68 SW3d 242 (Tex. App.—Fort Worth, no pet., 2002); *Mowbray v. Avery*, 76 S.W.3d 663 CC 041102, and *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 2002 U.S. Dist. Lexis 16889 (E.D. Tex. 2002) (discussing ERISA).

7. DNA Evidence and Heirship. A whole new world of proof is out there, but it is inaccessible if you do not follow the right procedures. Twenty-first century genetic testing is available for use in heirship proceedings, but it must be accessed by instituting a Uniform Parentage Act proceeding under Tex. Fam. Code Chap 160 with the heirship proceeding. *See* EC Chapter 204. Otherwise, you are stuck with the nineteenth century evidentiary standards of the Estates Code. For an extended discussion (and forms), see King, *Blood Will Out: The Use of DNA Evidence in Texas Estate Proceedings*, 30th Annual Advanced Estate Planning and Probate Course, State Bar of Texas 2006.

J. Miscellaneous Practice Pointers

1. ***Really*** learn and understand the rules of intestate distribution. See the last pages of "*The Uncontested Docket: When a Client Dies Without a Will*," available on the Court's website and in the Court Coordinator's office.

2. Have the Applicant's attorney furnish you with all necessary documentation and information. The Applicants must bear the burden of proof; let them do the heavy lifting.

3. Ask for documentation – get the best proof at the most reasonable expense.

4. Feeling a lack of cooperation? Have a feeling they are hiding something? Ask for a conference with the Court and all other counsel. Do not just go along to get along.

5. On the other hand, don't contest something just because you are unsure of how to proceed.

6. Be professionally skeptical. As President Reagan quoted to Gorbachev during the U.S.-Russia disarmament talks in the 1980s: "Doveryay, no proveryay" (Trust, but verify).

7. See through prejudice and ignorance of the law. People are often defensive about what they perceive to be embarrassing family situations or lifestyles. The children of a deceased "black sheep" of the family may have been emotionally "written off" by the other family members with the rationalization "We were never close to them." Adopted-out children born out of wedlock are sometimes conveniently forgotten.

8. When you think you're done, you're not done. Think through the process and make sure you're not counting on someone else to do what you should have done.

9. Don't rely on the Applicant's counsel or Court personnel to tell you how and when to do your job.

10. Don't make work or churn the file for more billable time, but stay on top of what needs to be done.

Appendix A – Answer of Attorney ad Litem in Heirship Proceeding

No. C-1-PB- ____-_____

In the Estate of	§	In the Probate Court No. 1
	§	
_____,	§	of
	§	
Deceased	§	Travis County, Texas

Answer of Attorney ad Litem in Heirship Proceedings

NOW COMES _____, appointed by this Court as attorney ad litem for the unknown heirs of the above-referenced Decedent and any known heirs suffering legal disability and known heirs whose whereabouts are unknown, and denies each and every allegation in the Application to Determine Heirship and demands strict proof thereof.

The undersigned prays that the applicant take nothing and that all costs of court be adjudged against the applicant.

Dated: _____.

_____
Attorney Ad Litem for Defendants
[Attorney data]

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this the ____ day of _____, 20___.

Name
Address (repeat as necessary)
CMRRR #

_____
[Attorney name]

Appendix B – Report of Attorney ad Litem in Heirship Proceeding

No. C-1-PB- ____-_____

In the Estate of	§	In the Probate Court No. 1
	§	
_____,	§	of
	§	
Deceased	§	Travis County, Texas

Report of Attorney ad Litem in Heirship Proceedings

NOW COMES _____, appointed by this Court as attorney ad litem for the unknown heirs of the above-referenced Decedent and any known heirs suffering legal disability and known heirs whose whereabouts are unknown, and makes this report as follows.

1. **I am of the opinion that the listing of the heirs of the Decedent as shown in the Application is true, correct, and complete; that the respective shares are correctly reflected; and that there are no unknown heirs, minor heirs, incompetent heirs, or heirs with a legal disability, other than shown in the Application.**
2. I reviewed the Application for Determination of Heirship *[or as appropriate]*, together with all other documents on file in this case, and met *[talked with]* with the attorney for Applicant herein.
3. I filed my Answer on behalf of the unknown heirs, known heirs suffering legal disability, and known heirs whose whereabouts are unknown on _____.
4. I contacted the following persons to obtain or verify the Decedent's personal history and family background and to determine the existence and location, as applicable, of any unknown heirs of the Decedent:
   A. _____ (relation to Decedent)
   B. _____ (relation to Decedent)
   [Etc.]
5. **I have attached a chart showing the correct distribution of the shares of the Estate of the Decedent.**

Dated: _____

Respectfully submitted,

_____
Attorney Ad Litem for Defendants
[Attorney data]

Certificate of Service

I certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name
Address (repeat as necessary)
CMRRR #

_____
[Attorney name]

APPENDIX J

Standards for Court Approval of Attorney Fee Applications

The Probate Court has formulated the following standards to assist attorneys with drafting fee applications in typical probate and guardianship cases. By understanding how the Court evaluates fee applications, attorneys will be better able to comply with Court standards, reducing the need for consultations between attorneys and Court personnel regarding problems with specific applications. These standards are not absolute rules; the Court will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Court has considered not only the Texas Estates Code, the Texas Rules of Disciplinary Procedure, and applicable case law, but also comments from the Judicial Liaison Subcommittee of the Austin Bar Association's Probate and Estate Planning Section. The Court appreciates opportunities like this one to work closely with the Bar to further the administration of justice in Travis County.

I. Attorney's Fees

It is the Court's duty to ensure that estates of decedents and wards pay only for "reasonable and necessary" attorney's fees and expenses. See Estates Code § 352.051 (decedent's estates) and § 1155.102 (guardianship estates). As set forth in Rule 1.04 of the Texas Rules of Professional Conduct,[1] "[f]actors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) the fee customarily charged in the locality for similar legal services;

"(4) the amount involved and the results obtained;

"(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

"(8) Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered."

A. Court-Approved Fees for a Fiduciary's Attorney

The table below sets forth what the Court believes are appropriate rates for court-approved fiduciaries' attorney's fees **for work performed on or after April 1, 2018**. Attorneys should be aware, however, that the Court may depart from these rates in certain circumstances. For example, a particularly difficult probate or guardianship matter may require special expertise that should be compensated at an hourly rate higher than the attorney's standard hourly rate under the Court's guidelines. *Similarly, the Court will adjust an attorney's hourly rate downward in situations in which the estate is so small that the requested fee would consume most of the estate.* Moreover, the Court will reduce an attorney's fee when the time the attorney expends on a particular matter far exceeds the amount normally expended by attorneys on similar matters or, in those rare instances, when it comes to the Court's attention that a lawyer is not performing up to the standards of those licensed for an equivalent length of

[1] Rule 1.04 codifies the factors set out by the Texas Supreme Court in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

time. Be advised that it is a particular lawyer's **experience in probate and guardianship law** that determines his or her hourly rate, not the number of years the lawyer has been licensed.

To assist the Court in determining a particular lawyer's hourly rate, each attorney who is new to the practice of probate or guardianship law before the Court should submit his or her resume with that lawyer's first fee application. Similarly, an attorney who believes that his or her experience before the Court qualifies for a rate increase should submit a letter to the Court detailing the reasons that such an increase is appropriate.

Years Practicing Probate and Guardianship Law	Court-Approved Rate
0 – 2 years	up to $185/hour
3 – 5 years	$185 – 225/hour
6 – 10 years	$225 – 275/hour
11 – 20 years	$275 – 375/hour
20+ years	$375 – 400/hour

In determining how lawyers will be paid within the practice categories above, the Court will consider the extent of the lawyer's experience in the area of law involved as well as Board Certification in Probate and Estate Planning. In the 20+ category, the Court will pay the highest rate to those few lawyers whose experience and mastery of probate, estate planning, and guardianship law qualify them as experts in these areas.

B. Attorney Ad Litem and Guardian Ad Litem Fees

Formulating standards for the compensation of reasonable attorney's fees for an attorney ad litem or guardian ad litem is challenging not only because of the variety of factors set forth in Rule 1.04 of the Texas Rules of Professional Conduct, but also because of certain factors over which the Court has limited control.

In the case of court-appointed counsel for indigent parties, for example, the Court must heed Travis County budgetary considerations. Because an estate is unavailable or unable to pay fees, the Court approves fees under a budget approved and overseen by the Commissioners Court. Thus, attorneys who are assigned Court appointments in probate and guardianship cases with an indigent party should not expect to be reimbursed at their regular hourly rates because the Court's annual budget limits the amounts it can pay for such services. Ordinarily, the Court compensates attorneys ad litem involved in County-pay cases a total of $300 for the first three hours of reasonable and necessary work and then at a rate of $100 per hour for reasonable and necessary time over three hours. The hourly rate for guardians ad litem in indigent cases is similar to that paid to attorneys ad litem, although it is common for the total fees to be higher for guardians ad litem, especially when the guardian ad litem initiates the Court proceedings.

When an ad litem can be compensated from a solvent estate, the Court's award of reasonable attorney's fees usually begins with the Court determining if the representation provided by – **and reasonably required of** – the ad litem is "typical" or "normal." In a "typical" or "normal" case, the Court ordinarily awards **total** fees of $525 to an attorney ad litem **for appointments made after February 1, 2018**.[2] In determining whether representation is "typical" or "normal," the Court considers matters such as the type of case,

[2] For an appointment made before February 1, 2017, the Court ordinarily awards total fees of $450 in a "typical" or "normal" case.

the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical fee. In general, attorneys ad litem and guardians ad litem should expect to receive a fee that is less than the fee of the applicant's attorney unless special factors are present.

C. Fees when an Attorney is also the Fiduciary

In those rare situations in which the Court appoints an attorney as a fiduciary in a guardianship or administration, the attorney normally must elect either to seek payment calculated on the statutory probate or guardianship commission formula or to obtain reimbursement for attorney's fees. If the guardianship or administration is particularly complex, the Court may approve dual compensation upon request of the attorney, preferably at the time of appointment. Dual compensation would include payment at the appropriate hourly rate for legal work done in the case and a separate commission for work done as a personal representative or as a guardian under § 352.002 or § 1155.001-1155.008 of the Estates Code, respectively. To be entitled to dual compensation, the attorney fiduciary must adhere to the following guidelines:

1. There must be full disclosure of the attorney-fiduciary's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made later. If the request is after the time of appointment, notice of the motion and hearing shall be given to all interested parties who have made an appearance in the case.
2. The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal and non-legal work.
3. Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian/personal representative services and may seek attorney's fees **for legal services only**. Applications for attorney's fees should give a detailed account of the **legal services** the attorney-fiduciary rendered to the probate or guardianship estate. Attorney-fiduciaries will not be paid attorney's fees for **fiduciary services**. For example, they will not be paid an attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the Court. Should the attorney believe the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low (see Estates Code §§ 352.003 and 1155.006), then he or she should submit, with the annual or final account, contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. Note that the hourly fee approved by the Court for attorney fiduciary services (between $50-75 per hour, depending on the complexity) is significantly less than the Court-approved legal rates for attorneys.

D. Fees When Guadianship Case Filed in Bad Faith or Without Just Cause

Estates Code Sec. 1155.054(d) provides: "If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate."

The Court suggests that all counsel mention this statute in every initial interview with a potential guardianship applicant or other party. Bad faith henceforth can be penalized, and the time to recognize that is before a bad faith application or objection gets filed.

II. Paralegal/Legal Assistant Charges

The Court recognizes that many attorneys rely on paralegals and legal assistants for gathering information and reviewing and preparing documents. The Court will approve reimbursement for reasonable and necessary "**specifically delegated substantive legal work**"[3] that is done by a paralegal. Because "substantive legal work" does not include clerical or administrative work, **this court will not allow recovery of paralegal time for such non-substantive, secretarial services even if such services are performed by paralegals or legal assistants (or attorneys).** *See, e.g., Gill Sav. Ass'n v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 705 (Tex. App. Dallas 1988, writ denied). Secretarial services are included in the attorney's overhead, for which an attorney is reimbursed as part of his or her hourly rate.

The Court will reimburse an attorney **for paralegal/legal assistant work** at a rate between $50 and $110 depending upon the following factors:

- certification as a paralegal by the NALA, or recognition as a PACE-Registered Paralegal, or successful completion of a legal assistant program, or possession of a post-secondary degree (B.A. degree or higher);
- number of years experience in the probate, estate planning, and guardianship field;
- Texas Board of Legal Specialization certification in Estate Planning and Probate Law; and
- number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

A legal assistant certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization is eligible for a $25 per hour increase above the hourly rate the Court would otherwise approve. In appropriate circumstances, a paralegal/legal assistant with special qualifications, such as a masters degree in accounting or a law-related field, may also be eligible for a $25 per hour increase. Further, if particular litigation requires special expertise that a paralegal/legal assistant is qualified to perform and has performed in the past, the Court might approve up to a $25 per hour increase above the court's standard rate, but only if a request in writing is made to the Court **before** work is done.

To better evaluate these factors in determining the appropriate rate for each paralegal/legal assistant, the Court requests that attorneys submit to the Court the resumes of each paralegal/legal assistant for whose work they will seek reimbursement from the Court and a short statement of any relevant qualifications that do not appear on the resume. The Court will maintain these resumes and information sheets. If an attorney believes that the billing rate for a paralegal or legal assistant should increase because of newly acquired credentials, the attorney should submit a letter to the Court detailing the reasons that such an increase is appropriate.

III. Billing

A. Minimum Billing Increments

We ask attorneys to bill in .1 hour increments. The Court doesn't permit .25 hours as a minimum billing increment because many tasks (opening and reviewing a bill, sending a short email, etc.) take only a few minutes. It overreaches to always claim 15 minutes for anything you do. The Court can't find that .25 hours is universally reasonable and necessary when the task may have taken considerably less time.

[3] In 2005, the State Bar of Texas Board of Directors and the Paralegal Division of the State Bar of Texas defined a paralegal as a person whose work involves "the **performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work,** which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such a person, an attorney would be required to perform the task." http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/Paralegal_Committee.htm (emphasis added).

B. No Block Billing

If the application lists a series of legal services as one entry, the Court may determine how long each service took, or the attorney may be required to file an amended application with this information.

C. Timing of Application

The Court understands that the cash-flow situations at law firms differ, leading some firms to bill more frequently than others. In general, the Court does not want to direct the timing of fee applications other than to suggest its preference that bills be submitted at least once a year. But do note that the Court will not approve fees that are beyond the statute of limitations for collecting those fees.

D. Content of Fee Application

To ease its review of fee applications, the Court asks attorneys to include the following in all of their fee requests:

- **The title (or subtitle) of <u>both</u> the application and the proposed order should indicate the time period covered by the bill.** For example, "Order Approving Attorney Fees, March 1, 2017 to March 31, 2017."
- Clearly identify all of the following for each billed service:
    1. The date the service was rendered.
    2. The attorney or the paralegal/legal assistant performing the service. Do not use initials unless the application identifies which initials correspond to which individuals.
    3. A sufficiently detailed description of the service.
    4. The time involved.
    5. The the amount billed for that service.
- Somewhere in the application, indicate the hourly rate for each attorney or paralegal/legal assistant whose services are being billed.

E. Proposed Orders

- **Proposed orders <u>must</u> include blanks where the amounts to be awarded will go.** The Court is going to think about what is reasonable and necessary. It will not approve a pre-printed amount and will ask you to re-submit a proposed order with blanks.
- As noted above, indicate the time period covered by the bill **in the title (or subtitle)** of the proposed order.

IV. Guidelines for Specific Types of Charges

A. Travel

In determining how to reimburse attorneys for travel time, the Court follows two general rules. First, travel time from an attorney's office to the courthouse to attend hearings is normally reimbursed at the attorney's approved rate. If, however, the attorney resides or has an office outside the Central Texas area, the attorney's travel time to the courthouse from his home or office will be reimbursed at half of the attorney's approved rate. That attorney will also be entitled to mileage reimbursement at the I.R.S. rate.

Second, the Court expects that most clients will ordinarily visit their attorney's offices for consultations and document execution. Therefore, the Court will reimburse attorney travel-time to visit clients only (1) if that client is a ward and the attorney is the Court-appointed guardian, guardian ad litem, or attorney ad litem or (2) if some emergency or other special circumstance requires the attorney to visit the client at home. Such special circumstances should be described in the fee application to be reviewed by the Court. If the Court approves the visit, the Court will reimburse attorneys at their full, approved rate or at the appropriate County-pay rate in indigence cases.

B. Legal Research

The Court expects attorneys who practice in this Court to be familiar with general probate and guardianship matters; therefore, the Court will not reimburse attorneys for basic legal research in these areas. Thus, for example, the Court will not reimburse an attorney for research into the application requirements for the probate of a will as muniment of title, an independent or dependent administration, a determination of heirship, or a guardianship. However, the Court will reimburse attorneys for costs associated with necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.

The Court considers the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Court does not reimburse for those costs.

C. Preparation of Fee Applications

It is the general practice of attorneys to include in their overhead the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompany the invoices. Even though the Court is cognizant that Court authority must be obtained for the approval of fee applications in certain circumstances, the Court believes that the estate of a decedent or ward should not be taxed with the attorney's billing costs. Therefore, this Court, like the majority of statutory probate courts in the state, will not reimburse attorneys for the costs of preparing invoices and the fairly standardized fee applications and orders that accompany them.

D. Conversations with Court and Clerk Staff

The Court's staff is a vital source of information and assistance to the legal community. The Court is proud of its accessibility to the lawyers and the public that have questions about uncontested matters – procedural and substantive – in probate and guardianship law. The Court and its staff attempt to answer these questions and to provide guidance where appropriate. Bearing in mind that the Court requires all personal representatives to have counsel, the Court does not believe it appropriate for the Court to have discussions with personal representatives outside the presence of their counsel. Please do not suggest to a client that it is appropriate to call the Court for a consultation or an explanation of what is going on in the estate being administered by that client. Again, the Court and its staff have no problem discussing these matters with an attorney.

However, we do not think it is appropriate to charge an estate for the time the Court spent providing the personal representative's attorney with assistance. Nor will the Court reimburse attorneys for time spent in discussions with the Court Auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Court will reimburse the attorney for the time spent responding to that request. Or, if the fee application

reveals special circumstances requiring the attorney to seek guidance from the Court, the Court will award attorney's fees.

It continues to be the long-standing practice of this Court not to reimburse attorneys from probate and guardianship estates for calls to the Clerk's office. While the Court understands that a problem arising in the Clerk's office may frustrate an attorney, the Court does not believe that an estate should be required to pay for the attorney's time spent redressing such a problem. The Court urges attorneys to communicate concerns directly to the Clerk's office so that systemic improvements can be made to prevent the recurrence of any such problems. Moreover, the Court urges adherence to the common practice of including a proposed order with all applications and paying the fee for a copy of the signed order. This step, coupled with payment of the correct filing and posting fee, if required, will help ensure that attorneys receive copies of all orders and will reduce the necessity for calls to the Clerk's office to check on the status of a particular order.[4] Alternatively, the attorney can check Probate Court records on the Clerk's website using the case name or cause number, and can review and print copies of all scanned pleadings and orders. The Clerk's website is http://www.traviscountyclerk.org/eclerk/Content.do?code=P.13.

E. Copies and Faxes

From its experience reviewing fee applications and from consultation with commercial copying companies, the Court recognizes that attorneys pass through different costs to their clients and that significant variation exists in the price charged for copies, ranging from attorneys who include copies as overhead reimbursed as part of their hourly rate to those charging $.30 per page. Cognizant of the need for uniformity in reimbursements for copy costs and mindful of the rates for commercial copying in Travis County, the Court has determined that it will reimburse attorneys up to $.15 per page. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk if the fee application indicates this fact. In no case, however, will the Court pay any copying costs not accompanied by a statement of the charge per page and the number of copies.

Fax charges have presented a unique problem for the Court. Some attorneys charge for faxes, others do not. Of those that do charge, some attorneys charge a set fee based on the fact that a fax was sent, others charge on a per-page basis for faxes sent. Some attorneys charge a set fee based on the fact that a fax was received, others charge on a per-page basis for faxes received. Some attorneys charge only for long distance faxes, others charge for both long distance and local faxes. Commercial entities that fax documents set their fees based on external market factors and a profit motive not usually associated with the recovery of expenses in the practice of law. Faced with these myriad and frustrating variations in pricing, the Court has determined that the best practice is to consider faxes as a part of attorney overhead and to include it as part of an attorney's hourly rate. Therefore, the Court will not pay for fax transmissions. It will,

[4] Often, the Court receives calls from an attorney's office wondering if it has signed a particular order. Many times these calls concern orders that have a time requirement regulating when the Court can address them. It is a waste of both the attorney's and the Court's resources to have an attorney call the Court for the status of orders for which a statutorily mandated time requirement has not run. Be assured, the Court makes every attempt to promptly sign orders when they are ripe for review. Throughout the day, the Court sends the signed orders to the Clerk's offices for filing. The Court knows that attorneys can have difficulties getting copies of some orders and that they are often told that the orders are "with the Court." However, it is not the practice of the Court to keep signed orders or to ignore pleadings needing court action. More often than not, a signed order is in the Clerk's office despite a deputy's protestations to the contrary. The Court has no control over this problem. The Court can only sign orders and deliver them to the official record keeper. If an attorney has problems obtaining copies of orders, the Court suggests that the attorney deal with the appropriate authority at the Clerk's office.

however, pay long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls (for which it will pay the actual long distance charges).

V. Costs Necessitated by Misfeasance or Malfeasance

The Court does not believe that guardianship or probate estates should be charged with any attorney time or mileage for resolving problems or attending hearings necessitated by the misfeasance or malfeasance of client or attorney. For instance, if a personal representative sells property without Court approval and there are attendant costs associated with rectifying the situation, the Court believes the personal representative should be personally responsible for any added expense. Likewise, show-cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing, including service and filing fees assessed by the Clerk.

VI. Court Action on Fee Applications

The Court holds all attorney-fee applications for 10 days to give other parties an opportunity to file objections to those applications. If no objections are filed, the Court will consider the applications on submission and without a hearing, unless the amount of fees requested is significant or the Court has questions about the propriety or reasonableness of the fees. In such cases, the Court will request that the application be set for a hearing.

Fee requests should be filed as applications for payment of fees or for reimbursement of fees (if already paid by the representative) **and not as claims against the estate**. The Court has found that a representative is likely to rubber stamp his or her attorney's fee request without exercising independent judgment, resulting in an inherent unfairness to the estate. If the representative chooses to disregard the Court's policy and file the fee application as a claim, the Court will – in every case – require a hearing under Estates Code § 355.056 and § 1157.056.