When the Decedent Dies With a Will

I. GENERAL PLEADING ISSUES

A. Issues for All Documents

1. Basic facts about a will can change how you should 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 on the Court's website.
*Information included in the "10 Key Points" handout is **not** included in this handout.*

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 letter**s 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 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. 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 hearing 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.
>
> 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.

2. Never file multiple pleadings as exhibits <u>or</u> as part of the same e-filed <u>document</u>. (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. 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	✓	✓
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 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 be appointed to represent unknown heirs (statutorily required for all heirships).*

C. The Proof of Death and Other Facts. As required by Estates Code §256.157, a witness needs to testify in open court, unless testimony is offered by deposition. Estates Code §256.157 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 in advance,* ***the witness will not sign the written testimony until after the hearing.***

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, 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 Lubbock County, EC §33.001(1). In that case, add the decedent's physical Lubbock County address.
- 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. 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.

- **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.

2. 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

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.

- Extra information. Unless you have also requested a declaratory judgment upon proper application and notice, ***do not*** include extra information such as property descriptions, the names of distributees, or the family history of distributes. This type of information can be determined only in a declaratory judgment action.

- Exact names and aliases. Whenever you mention the decedent's or executor's name, you must begin ***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.

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.

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.

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 within 20 days after the date of the order.***

- Note that an Appointment of Resident Agent must be signed before a notary.

F. 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. Along with the requirements for probating a will as a muniment of title outlined above, the following are also necessary:

1. 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.

2. Disinterested-witness Heirship Testimony. ***In addition to the POD testimony, 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; ***also include a statement that the witness does not have an interest in the estate.***

3. 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.

4. 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.