Check 10 key points *in the Will*

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
1. Was the will **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*." In addition, a will could be valid with only one "witness" *plus a notary who witnessed the signing of the will*. **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.
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. 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 • 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.

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 <u>and</u> 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. The Court requires that, within three business days of filing the application, you ***physically file the copy of the will your client brought in to you.*** <u>*The Court will not set a hearing until you file the will copy.*</u> d. **Special form of Posting, <u>plus</u> either Personal Service <u>or</u> 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.*
3. Are there any **<u>codicils</u>**?	If there are any codicils: a. Is anything in this checklist affected by what is in the codicil(s)? b. You must mention "Codicil" in **both the text <u>and</u> 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 **<u>self-proved</u>**?	**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). **<u>If the will was executed on or after September 1, 2011</u>**, 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. **<u>If the decedent died on or after September 1, 2011 AND the will was executed outside of Texas</u>**, 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 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:* • *<u>In your application or in a separate motion</u>*, ♦ 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. • <u>*In your proposed order*</u>, 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. 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).*** c. *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. *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 decedents. 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.

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 Lubbock County Court 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.
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.**
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.***

9. Does the will indicate that the executor seeking letters should serve <u>without bond</u>? **"§ 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 **<u>the Court</u>** to waive bond when the testator did not is EC §401.005. For applications filed before September 1, 2019, § 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*. However, in 2019, the law was changed to allow the Court to waive bond in both circumstances for all applications filed on or after September 1, 2019. 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). ***<u>The procedure:</u>*** 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. Newly revised EC §401.005 allows the Court - unless the court finds that it would not be in the best interest of the estate - to waive bond when the will fails to do so if all distributees agree to the waiver of the bond. As a result, you no longer need to have all named executors decline to serve in order to get an independent executor appointed to serve without bond. If you proceed under the above scenarios, be sure that the requests you prepare for the distributees include everything necessary.

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 Lubbock County 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 attorney assumes the risk of a malpractice action for not having done the heirship. If there is a **total intestacy**, the Lubbock County 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 Lubbock County 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 Lubbock County 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 Lubbock County 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 Lubbock County 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.