

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
Copyright © Steve M. King
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.....	1
1. The “Plain Jane” Case	1
2. The “Mystery” Case	1
B. Statutory Basis for Heirship Proceedings	1
1. Application.	1
2. Necessary Parties.....	1
3. Citation.	1
4. Appointment of Attorney Ad Litem	1
5. Evidence in Heirship Proceedings.....	2
6. Heirship Judgment.....	2
C. Scope of “Heirship Determinations”	2
D. Duty and Standing of the Attorney Ad Litem	3
E. Pointers on Different of Types of Cases.....	3
1. The “Plain Jane” Case	3
2. The “Mystery” Case	3
F. Due Diligence	3
1. After Your Appointment	3
2. Hearing Day –Before the Hearing.....	5
3. Hearing Day – During the Hearing	5
G. Time Records and Fee Applications.....	5
H. Dealing with the Clerk’s Office and the Court.....	6
1. The Clerk’s Office	6
2. Court Staff	6
3. Paperwork.....	6
I. Distribution of the Estate: Specific Concerns.....	6
J. Miscellaneous Practice Pointers	7
Appendix A – Answer of Attorney ad Litem in Heirship Proceedings	8
Appendix B – Report of Attorney ad Litem in Heirship Proceedings	9

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 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 dismissed)); *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 legitimization claims or court proceedings for legitimization 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: “Doveray, 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]