

TRAVIS COUNTY PROBATE COURT NO. 1 AND NO. 2

200 W. 8th Street – P.O. Box 1748
Austin, Texas 78767



Revised for October 1, 2023

The Uncontested Docket: When the Decedent Dies With a Will

Counselors,

Welcome to the Travis County Probate Courts. As you know, representing a client who is handling the estate of a loved one is an important responsibility. The families who come through the Probate Courts are going through a difficult time. Both Courts are 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.

We 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, Presiding Judge, Probate Court No. 1
Nicholas Chu, Presiding Judge, Probate Court No. 2

I. ADMINISTRATIVE

A. Hearing Schedule. To set a hearing for a will prove-up in Court No. 1, email probateone.hearings@traviscountytexas.gov; for Court No. 2, email probatetwo.hearings@traviscountytexas.gov. ***Neither Court will 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 in Court No. 1 at 8:30, 8:45, and 9:00, and at 9:00, 9:15, and 9:30 for Court No. 2. Proceedings that must be heard on the record are scheduled on Tuesdays and Thursdays at 9:15 a.m. for Court No. 1 and 9:45 for Court No. 2. 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.

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; all other uncontested-docket record cases are heard on Thursdays. 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 20-30 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 Probate Court or on the Probate Courts' website. This document includes information about what needs to be done and how.

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 Courts' "**Check 10 Key Points in the Will**" handout, available at the Probate Court and on the Probate Courts' website. *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 Courts require 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 <i>name, state of residence, and physical address where service can be had</i> 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 <i>(Witness addresses are no longer required. Three cheers!)</i>	✓	✓
• 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 – <i>if so, see EC §§251.051-251.056</i>	✓	✓
• Whether a marriage of decedent was ever dissolved after the will was made <i>and, if so, when and from whom</i> – <i>if so, see EC §§123.001-123.002</i>	✓	✓

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 §256.157, 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 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 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.

- **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).

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 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.”*

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 some 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:

Dyana Limon-Mercado
 County Clerk, Travis County, Texas
 By _____ Deputy

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

1. All orders

- Do not include a finding in the order that “the allegations contained in the application are true.” The Court will make all of its findings explicitly, rather than by reference to another document, especially since applications sometimes include allegations that will not be proved up during the hearing.
- Extra information. Unless you have also requested a declaratory judgment upon proper application and notice, **do not** include extra information such as property descriptions, the names of distributees, or the family history of distributees. This type of information can be determined only in a declaratory judgment action.
- 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.
- Terminology. 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, appraisal, and list of claims, or an affidavit in lieu of inventory, appraisal, 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 courts do 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 Courts' "**Check 10 Key Points in the Will**" handout.

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 Courts' "**Check 10 Key Points in the Will**" handout.

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.
- 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 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). The Court further requires service on or affidavits from all beneficiaries of the will, regardless of whether the will was previously admitted.

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, both Courts require (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 Probate Courts' website.

- 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 and beneficiaries of the 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 mornings. ***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 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.