TEN(+1) CHECKPOINTS WHEN PROBATING A WILL

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Parts of these materials incorporate commentary on the Probate Code by Professor Stanley M. Johanson in *Johanson's Texas Probate Code Annotated* (West 2017) and by Judge Guy Herman, Presiding Judge of Travis County Probate Court No. 1, available at the court's website, www.co.travis.tx.us/probate. Both resources are highly recommended for further guidance.

Statutory references are to the Texas Estates Code (TEC).

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1. Is the Will valid?

A. Attested Wills

Requirements :

1. Testator **18 years old** (or married, or in the armed forces)

2. Testator of **sound mind**

3. **Signed by the Testator** or by someone at his direction and in his presence

4. **Signed by two attesting witnesses** over age 14

5. **Each witness signs *in Testator's presence***

TEC §§ 251.001, 251.051.

The following things are not necessary for a valid Will (but highly desirable):

- that the witnesses know the document is a Will (whether a document is a Will is determined in court by looking at the contents of the document)
- that Testator sign in the witnesses' presence (Testator can sign earlier)
- that witnesses sign in each other's presence
- that the testator sign at the end of the Will (signature can be anywhere)

A Will may (but need not) contain an **attestation clause**, appearing below Testator's signature and above the witnesses' signatures, which recites facts proving valid execution of the Will. (Example: "The undersigned confirm that the Testator declared to us that the foregoing instrument was her Will, and she asked us to serve as witnesses thereto. She then signed the Will in our presence, we being present at the same time. We now sign the Will as attesting witnesses in testator's presence, being of the opinion that the testator is of sound mind and at least 18 years of age.")

Attestation clauses are prima facie evidence of the facts recited, and are sufficient to "prove up" the Will even if an attesting witness dies, or later develops a faulty memory, or later contradicts the facts stated in the clause.

B. Holographic Wills

A holographic Will is a handwritten, unwitnessed Will, and is valid if ***wholly in the handwriting of the Testator*** and ***signed by the Testator.*** (And if Testator was 18/married/military and of sound mind.) TEC § 251.052.

C. Oral Wills

… are **no longer valid** under Texas law.

2. Was the Will modified or revoked?

A **Codicil** is a later amendment or supplement to a Will, and must be executed with the same formalities as a Will. If you have a Codicil, make sure your paperwork mentions both the Will and Codicil.

A Will can be **revoked** (1) **by a subsequent Will** revoking prior Wills or (2) **by physical act** (burning, tearing, shredding). Check to see whether the Will you are offering for probate is the most recent one.

Partial revocations of *attested* Wills (e.g. crossing out a section, changing names) are not permitted, except by a duly-executed Codicil. TEC § 253.002. Any alteration is disregarded and the Will is admitted to probate as originally executed. Partial revocations of *holographic* Wills are permitted, if made by the Testator's own hand.

It is possible for a Testator to have more than one valid "last Will" **(plural Wills)** provided the later one does not contain a clause revoking previous Wills. The Wills are read together, with the later Will treated as a Codicil. Terms of the later Will revoke by implication any conflicting terms in the prior one.

3. Do you have the original Will?

If you don't have the papers with the "wet ink signature", you can still prove up the Will by satisfying four requirements:

(1) **valid execution** as in any other case;
(2) **cause of the Will's non-production** must be proved (because of a presumption that a Will was revoked if the original is lost);
(3) **reasonable diligence** has been used to locate the Will; and
(4) **contents must be proved** by someone who has read the Will, heard it read, or can ***identify a (xeroxed) copy.***

TEC § 256.156.

All of your paperwork should refer to the instrument as "Copy of Will". Only the original should be referred to as "the Will".

You must notify all the decedent's heirs of the Application to probate the copy, and such notice must be by personal service. Citation by posting is not sufficient. TEC 256.054, 258.002.

4. Is the Will self-proved?

Texas law recognizes that most probates are uncontested matters in which no one challenges a Will's validity. To save time and effort in probate, a **self-proving affidavit** can be appended to a Will as a ***substitute for live testimony of the attesting witnesses in court*** and contains statements that the attesting witnesses would testify to in court. The affidavit can be signed any time after the Testator signs, but is usually done at a ceremony in an attorney's office before a notary.

A self-proving affidavit must be in "substantially" the same form as stated in TEC §§ 251.104 or 251.1045. ***Check the wording*** of the self-proving affidavit in the Will – do not assume that it is correct.

Before September 1, 2011, self-proved Wills required a ***two-step*** process. Step 1: Testator and witnesses sign the Will. Step 2: Testator and witnesses, after being sworn, sign the self-proving affidavit before a notary.

After September 1, 2011, a Will can be made self-proved by a ***one-step*** process described in TEC § 251.1045.

Common problems that make Wills not self-proved:

- Blank lines for the names of the testator or witnesses were not filled in by the notary in the notary's statement at the end of the affidavit
- The witnesses have not signed the affidavit (notary cannot print their names on signature line)
- The witnesses have not sworn to the statement (making it not an affidavit)
- The affidavit does not have a notary seal
- Affidavit doesn't indicate that the witnesses were at least 14 years old

Holographic Wills only: Can be made self-proved by attaching to the Will an affidavit by the Testator that the instrument is his Will; that he has not revoked it; that he was of sound mind and at least 18 years old (or married or in the military) when he wrote it. TEC § 251.107.

If a Will contains an attestation clause without a self-proving affidavit, then witness testimony is required to prove up the Will. No attestation clause is needed if the Will is self-proved, because the information in the clause is contained in the self-proving affidavit.

If an attested Will is not self-proved, then you need witness testimony at court to prove up the Will. The witness testimony can come from either (1) ***one of the subscribing witnesses,*** or (2) if the subscribing witnesses live out of county, are unable to attend court, are dead, or cannot be located, and no opposition to the Will is filed, by ***two witnesses as to the signature of the Testator or of any attesting witness.*** TEC § 256.153.

A subscribing witness must prove the following:

1. What happened when the Will was signed that proves the Will was duly executed (i.e. signed by Testator or at his direction, witnessed by two persons, who sign in Testator's presence – see TEC § 251.051)
2. At the time the Will was executed, Testator was of sound mind
3. At the time the Will was executed, Testator was at least 18 years old (or lawfully married, or in the armed forces)
4. At the time the Will was executed, each witness was at least 14 years old.

Non-subscribing witnesses must prove the following:

1. The signature on the Will was Testator's or one of the witness' (if this is accomplished there arises a presumption of due execution)
2. At the time the Will was executed, Testator was of sound mind
3. At the time the Will was executed, Testator was at least 18 years old (or lawfully married, or in the armed forces)

If a holographic Will is not self-proved, then the Will may be proved by ***two witnesses*** who can ***identify the Testator's handwriting.*** (And 18/married/military and sound mind.) TEC § 256.154.

If a Will has a valid self-proving affidavit but the Will itself is missing signatures necessary for valid execution, the signatures on the self-proving affidavit can be used to make the Will valid, but the Will may not then be considered a self-proved Will. TEC § 251.105. Proof of due execution must then be provided pursuant to TEC § 256.153.

If a Will was prepared **out of state** and has a self-proving affidavit that does not comply with the requirements of section 59, it can still be offered as a self-proving Will if the affidavit complies with the requirements of the jurisdiction where it was prepared. TEC § 256.152(b).

5. What is the date of death?

General rule: You must probate a Will **within four years from date of death**. TEC § 256.003.

Exception: You can probate beyond four years from date of death, if:

1. You prove that the party probating the Will is not "in default" (negligent) by waiting so long; and
2. All heirs-at-law are notified and given the opportunity to contest probate of the Will. TEC §§ 258.051.

6. Is an administration of the estate necessary?

An administration of a decedent's estate is generally necessary if:

- there are **debts** against the estate,
- it is desired to **partition** the estate among the distributees, or
- it is **necessary to receive or recover** funds or other property owing to the estate.

If the estate has no debt (or the family pays it off prior to probate) and has no need to recover money or property from anyone, the Will can be admitted to probate without administration and without appointment of an executor.

After the fourth anniversary of the decedent's death, an administration is not permitted unless necessary to receive or recover property due a decedent's

estate. (Or to prevent real property in the estate from becoming a danger to health, safety, or welfare, and the applicant is a municipality.) TEC § 301.002. The court may not grant letters testamentary, but may grant letters of dependent administration. TEC § 256.003. Special proofs and notices are required beyond four years from date of death. TEC § 258.051.

Presumption: after four years, can probate as muniment of title only. TEC § 301.002.

A. Probate of Will as Muniment of Title

If the estate has **no debt, other than debts secured by liens on real estate** (such as a residential mortgage), a Will can be probated as a **"muniment of title"** (proof of title) to the decedent's assets. TEC § 257. The Will and the order admitting the Will to probate can be recorded in the deed records to show the new owners of real estate, or can be used to collect assets held on the decedent's behalf, such as bank accounts.

Caution: Make sure the Will unmistakably identifies the new owners by name. (Often a surviving spouse.) If not, you can combine an application for probate as muniment of title with a petition for declaratory judgment under TPC § 89C to determine which persons take under the Will. But in such a case it is probably easier just to get an executor appointed.

B. Probate of Will and Order of No Administration (very uncommon)

A surviving spouse, or someone acting on behalf of minor children or adult incapacitated children, may file an application to probate the Will with an Order of No Administration under TPC § 139 if the total value of the decedent's estate, excluding the homestead, is less than the amount to which the surviving spouse, minor children, or adult incapacitated children would be entitled as their family allowance under TPC §§ 286-287.

7. Does the Will authorize an independent administration?

In Texas, a Will may provide that no action shall be held in the courts other than (1) **probating the Will** and (2) filing an **inventory, appraisement, and list of claims** owing to the estate. TEC § 401.001. ***Other than these two steps***, the estate is administered independently, ***without court supervision or involvement***, in the same way as a trust.

An independent administration is permitted:

1. **If so stated in the Will**

   A well-drafted Will typically contains language mirroring TEC 401.001, but using the magic words "independent administration" is sufficient, as is language manifesting the same intent (e.g., "no court action", "least possible court involvement", naming a person as "independent executor").

2. *Or* if **all distributees of the decedent agree** to an independent administration.

   If a person dies intestate, or the Will does not authorize an independent administration, all interested parties can agree to permit an independent administration.

General Rule: An independent administrator has the power to do, without court order, anything a court-supervised (dependent) administrator may do with a court order, provided that the act relates to either (1) ***preservation of estate assets*** (e.g., taking possession, custody, or control of estate property, or purchasing insurance for estate property), or (2) ***proper settlement of the estate*** (e.g., paying debts, taxes, or expenses, or distributing assets to beneficiaries).

Exception: Under TEC §§ 356.001, 356.002, & 402.052, an independent administrator may sell estate property (real or personal) only if it is necessary to pay debts or expenses, unless a Will grants the independent executor a **"power of sale"** which authorizes him/her to sell real estate at discretion. The distributees of an estate may also consent to give the independent administrator a power of sale. TEC § 401.006.

It is standard practice for attorney-drafted Wills to include an explicit power of sale or to provide that "In addition to having all the rights, powers, and privileges of independent executors under the laws of Texas, the executor shall

have all of the rights, power, and privileges that are given to trustees under the Texas Trust Code." A trustee's statutory powers include a power of sale.

8. Who is the applicant, and who is the executor?

Typically, the applicant to probate the Will is also the first named executor in the Will.

Texas law requires that the applicant to probate a Will be either an executor named in the Will or an "**interested person**". TEC § 256.051. ***If the applicant is not one of the named executors***, you should explain in the application how the person is "interested" as defined by TEC § 22.018.

If the person who is to serve as executor is not the first-named executor in the Will, then you need to explain in your Application and Proof what happened to the first-named executor. The person may be deceased, may decline to serve, or may be disqualified.

If any executor declines to serve, you must file a notarized document by the person so stating.

Under TEC § 304.003, a person is disqualified from serving as executor or administrator if the person is:

1. **Incapacitated** (e.g. a minor or person of unsound mind)
2. A **convicted felon**
3. A **non-resident of Texas who has not appointed a resident agent to accept service of process** and filed the appointment with the court
4. A **corporation not authorized to act as a fiduciary** in Texas
5. A **person the court finds unsuitable**

   The court has wide discretion to determine who is unsuitable. Someone with a conflict of interest, a non-felony criminal record, substance abuse issues, etc. might be found unsuitable if brought to the court's attention.

9. Does the Will permit the executor to serve without bond?

Default rule: ***Executor or Administrator must post bond.*** TEC § 305.101(a). The bond amount is generally equal to the amount of the decedent's non-real estate assets and is intended to protect the estate's creditors and beneficiaries.

An executor may be bonded through a bondsman, insurance company, or specialized court surety company such as Jurisco.

A Will may (and usually does) provide that the executor is to serve without bond. TEC § 305.101(b). Corporate fiduciaries, such as banks, are exempt from the bond requirement. TEC § 305.101(c).

If the Will names an executor(s) but does not provide for an independent administration, the distributees may all agree to an independent administration and allow the named executor to serve without bond under TEC §§ 401.002, 401.005.

If the Will does not name an executor, or the named executor(s) is deceased, disqualified, or unWilling to serve, the distributees may all agree to an independent administration, designate an executor, and allow the executor to serve without bond under TEC §§ 401.003, 401.005.

If the Will names an executor and provides for an independent administration, but does not waive bond, then the court cannot waive bond unless (1) all executors named in the Will decline to serve *as named in the Will* and (2) all distributees consent to an independent administration without bond under TEC §§ 401.003, 401.005. The distributees may designate an independent administrator who is the same person named as an executor in the Will and who previously declined as named in the Will. (The point of this procedure is that the distributees can evade the Testator's apparent requirement of a bond.)

10. Is there a partial intestacy?

A well-drafted Will invariably contains a **residue clause** ("… rest, residue, and remainder …") disposing of all remaining estate property, known or unknown, not included in specific bequests. If a residue clause is omitted, the Will may still be worded in such a way as to dispose of all possible estate property (e.g., "all my property in equal shares to X and Y"). Otherwise, some of the estate passes by intestacy to the heirs at law.

Even if the Will specifically disposes of all *known* property owned by the decedent, a partial intestacy exists when the Will fails to address all *possible* property rights of the decedent. (Testator may have unknowingly inherited property rights or may have forgotten about some of what he owned.)

If there is a partial intestacy, it is usually necessary to identify the heirs at law by filing an Application to Determine Heirship in addition to the probate application.

10(+1). Where should you file the Will?

A. Proper county

1. Texas resident – place of residence

The Will should be filed "**in the county in which the decedent resided**, if the decedent had a domicile or fixed place of residence in this state". TEC § 33.001.

"Domicile" and "fixed place of residence" are synonymous.

"Domicile" means (a) residence in fact, coupled with (b) the purpose to make the place of residence one's permanent home. The period of time that the decedent resided in the county is irrelevant so long as the act and the intention to acquire a domicile coexist.

For practical purposes, the **most important evidence of residence is the one listed on the death certificate**. If the county of residence named in the death certificate is not the county where you intend to file the Will, then you must present evidence to the court that explains the discrepancy.

2. Non-resident of Texas

a. Died in Texas – county where principal assets are located, or county of death.

b. Died outside Texas – county where "nearest of kin" reside. If no such kin, county where principal assets are located.

Generally, if a decedent had a domicile in a different state, then the most important factor is to determine the state in which the decedent had most of his tangible assets (e.g. real estate). You typically want to probate the Will in that state first, then do an *ancillary probate* in other states as needed.

B. Proper court

1. If there is a statutory probate court, file there.

Statutory probate courts are only in large counties: Harris, Dallas, Bexar, Travis, Tarrant; and are formally called a "Probate Court".

2. If no statutory probate court, then (usually) in a county court at law.

Call the County Clerk for further information. Sometimes the County Court may continue to hear probate cases even if there is a county court at law (e.g. Coryell County, McLennan County). If there is more than one county court at law, then a local rule usually assigns probate cases to one of them.

3. If no county court at law, then in County Court.

The County Judge hears uncontested matters, and transfer contested matters to district court or assign a probate judge.