



## Harris County Probate Courts

### **WHEN THERE IS A PROBLEMATIC WILL KEY POINTS FOR FILING A WILL FOR PROBATE FOUR YEARS AFTER THE DECEDENT'S DATE OF DEATH, WHEN THE ORIGINAL CANNOT BE LOCATED, WHEN THE WILL DOES NOT PROVIDE FOR INDEPENDENT ADMINISTRATION, AND WHEN THE WILL IS NOT SELF PROVED**

- 1. Document checklist:**

    - **An application to probate will and for letters testamentary or application to probate will as a muniment of title;**
    - **Proof of Death and Other Facts;**
    - **Testimony reduced to writing of any witnesses, if necessary;**
    - **Oath; and**
    - **Order probating will and for issuance of letters testamentary or order probating will as a muniment of title.**
  - 2. Is an independent administration desired yet the will does not provide for the appointment of an independent executor?**
  - 3. Are any of the beneficiaries of the will which fails to provide for independent administration minor children?**
  - 4. If the will is filed after four years have elapsed since the Decedent's death, does your application to probate the will include a chart of all heirs, reflecting their interest in separate personal, separate real, and community property as it would be in the event the decedent died intestate?**
- TPC §81(a) covers the requirements for an application to probate a will for letters testamentary; TPC §81(b) covers the additional requirements for probating a copy of a will. TPC §89A(a) covers the requirements for an application to probate will as a muniment of title only; TPC §89A(b) addresses the additional requirements of probating a copy of a will as a muniment of title only.
- An independent administration may be available even when the will does not provide for such so long as all distributees of the decedent agree on the advisability of having an independent administration and collectively request that the named executor in a will act independently. TPC §145(c).
- If there is a minor beneficiary, the Courts do not ordinarily approve an independent administration under §§ 145(c), (d), and (e), unless specifically provided for in the Testator's will. However, depending upon the circumstances, some Harris County Probate Courts have exercised discretion and allowed independent administrations on a case by case basis when: 1) the minor stands to inherit only real property and the fiduciary does not have the power to sell such real property during the course of administration; or 2) the fiduciary is bonded for the child's share of the estate. However, if the fiduciary is bonded in an independent administration, the only ways the fiduciary may be released from their bond upon completion of administration are to prepare and file an accounting of the estate and obtain a judicial discharge or obtain a release from the child once the child has attained the age of majority.
- Include in your application to probate such will a chart listing all known heirs with the following information: name; address; relationship to decedent (if a child, be sure to note the name of the other parent); interest of each heir (in fractions) as it would be if the decedent died intestate. This will enable the court to know who must receive or waive service of process pursuant to TPC §128B. You must provide the age of a child who is a minor.

5. **If the original will is not able to be produced, does your application list all parties interested in such estate?**

Include in your application to probate such will a chart listing all known heirs with the following information: name; address; relationship to decedent (if a child, be sure to note the name of the other parent); interest of each heir (in fractions) as it would be if the decedent died intestate. This will enable the court to know who must receive or waive personal service of citation pursuant to TPC §128(b). You must provide the age of a child who is a minor.
6. **If the will is being probated after four years have elapsed from the Decedent's date of death or if the will is being probated as a will not produced in court, have all of the non-applicant heirs been served or waived service?**

All non-applicant heirs must be either served with citation or waive service. It is helpful to the court to have the waivers in the file prior to the hearing. A parent or legal guardian may waive service for a minor who is under the age of 12 or incapacitated person.
7. **Is all of your testimony reduced to writing?**

The court requires all oral testimony to be reduced to writing and signed in the presence of the clerk at the hearing. Naturally, if you are probating a will after four years have elapsed since the date of death, the testimony should include a statement that the applicant is not in default for failing to timely produce the will. In addition, if either the will is being produced following the expiration of four years since the decedent's death, or if the original will cannot be produced, then the testimony should include facts to support a finding as to their heirs at law of the decedent so that the court can insure that proper service was made on all interested persons.
8. **If the Will is not self proved, how may it be proven up at the hearing?**

TPC §84(b) provides that if the will is not self proved, the witnesses to the will's execution may offer testimony at a hearing or in a deposition, either oral or written. In the event the witnesses to the execution of the will are non-residents of the county or unable to attend court, then two witnesses as to testator's handwriting may offer proof.
9. **What should you do when witnesses are not available to appear in court?**

Deposition on Written Questions – The court recommends this alternate method of providing witness testimony. A Notice of Intention to Take Deposition on Written Questions (with a copy of the questions attached) must be filed and posted for ten (10) days. Concurrently with the filing of the Notice, a certified copy of the Will should be ordered to accompany the questions when they are mailed to the notary public, court reporter, or witness (as the case may be). Please also request (and pay for) the County Clerk to issue a commission to take the deposition on written questions. The commission will be ready after the 10 day notice period has run. The commission, notice, questions, and certified copy of the will should then be mailed to the notary public, court reporter, or witness (as the case may be) with instructions to follow the directions in the commission for returning the questions to the Harris County Clerk.