Harris County Probate Courts

10 KEY POINTS TO LOOK FOR IN THE WILL

	Key Points to Check	How it Affects Paperwork, Related Testimony, etc.
1.	**Was the will validly executed?**	Don't forget to check the obvious question of whether the will was validly executed. If not, none of the rest of this list is relevant. See requirements in §59(a): "Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator." Remember that according to §59(b), "[a] signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or the witnesses, or both, but in that case, the will is not self-proved. See #4 below about self-proved wills. In addition, a will could be valid with only one "witness" plus a notary who witnessed the signing of the will. In that case, the will is not self-proved.
2.	**Is the will (and any codicil) an <u>original</u> and not a copy?**	You will need to do a variety of things differently when the will or a codicil is a copy: a. **Additional information required in Application, Proof, and Order.** See TPC §§81(b) & 85. • *The Application* must state (a) the cause of the will's non-production, (b) that reasonable diligence has been used to locate the original will, (c) that the testator did not revoke the will, and (d) include the names and addresses of all intestate heirs along with their relationship to the decedent. • *The Proof of Death and Other Facts* must include testimony that proves each of the above four points. See *In re Estate of Wilson, 252 S.W.3d 708 (Tex. App. – Texarkana 2008, no pet.*

h.), where evidence was insufficient to rebut the presumption of revocation.

- *The Order* must include a finding that the applicant has overcome the presumption that the original will has been revoked.

b. **"Copy" mentioned in all paperwork. The text <u>and</u> the title** of the Application, the Order, and the Oath must indicate that a copy of a will (or codicil) is being probated. For example, "Order Admitting Copy of Will and the Original First Codicil to Probate and Authorizing Letters Testamentary." The **text** of the Proof also needs to mention the copy.

c. **Posting <u>and</u> Personal Service or Waivers of Service.** Pursuant to TPC §128(b), in addition to the regular posting required when probating a will, all of decedent's intestate heirs must be personally served or waivers must be obtained from all of decedent's intestate heirs.

d. **Testimony.** Please refer to TPC §85 for the additional proof required to prove up a will not produced in court. Be prepared to provide live testimony of witnesses or witness testimony by deposition on written questions.

e. **Hearings.** Hearings to probate a copy of a will are scheduled with the regular probate of wills docket.

3. **Are there any codicils?**

If there are any codicils:

a. Is anything in this checklist affected by what's in the codicil(s)? If so, follow the suggestions given.

b. You must mention "Codicil" in **both the text and title** of the Application, Order, and Oath. For example, "Order Admitting Will and Codicil to Probate and Authorizing Letters Testamentary." You also need to mention the codicil(s) in the **text** of the Proof.

c.

4. **Is the will <u>self-proved</u>?**

Section 59(a) of the Texas Probate Code provides a form for a self-proving affidavit that must be substantially followed. The following are common flaws that make wills not self-proved (although other flaws are possible):

- **The witnesses have not actually signed or otherwise subscribed the affidavit. (the**

If the will is not self-proved, you need to do several things differently:

a. Modify your standard forms to indicate that the will (or codicil) is not self-proved, but is validly executed (assuming, of course, that it is).

b. In the Application, also set out how you're going to prove up the will – either the testimony of one subscribing witness to the will, or, if a subscribing witness is unable to attend the hearing, the testimony of two disinterested witnesses who are familiar with the signature of the decedent.

A subscribing witness must prove the following:

1. What happened when the will was signed that proves the will was duly executed.

notary can't print their names on the signature line.)

- **The witnesses have not sworn to the statement, thus preventing it from being an affidavit.**
- **The affidavit does not carry a notary seal. (Often a problem if you are probating a copy.)**

2. At the time the will was executed, the testator was of sound mind.
3. At the time the will was executed, the testator was at least 18 years old (or had been lawfully married or a member of the armed forces).
4. At the time the will was executed, the witnesses were each at least 14 years old.

Disinterested witnesses must prove the following:

1. At the time the will was executed, the testator was of sound mind.
2. At the time the will was executed, the testator was at least 18 years old (or had been lawfully married or a member of the armed forces).
3. The signature on the will was decedent's.
4. The witness does not take under the will or by intestacy.

c. Have the necessary witnesses present to testify at the hearing and have their testimony ready to be signed and sworn.

5. **Is any devisee a state, a governmental agency of the state, or a charitable organization?**

Again, modify your forms; never use the standard boilerplate when it is not accurate.

6. **Is the person who will serve as <u>executor</u> the <u>first-named</u> executor in the will? If not, what happened to the executor(s) with priority?**

When the person who will serve as executor is not the first-named executor in the will, your Application – and your Proof – must explain what happened to the first-named executor and all others who will not serve but who have priority over the executor(s) who will. If any executor is declining to serve, you need to have that person's notarized declination. For example, if you are seeking letters for the fourth-named executor, you might state that "X," the first-named executor, died on _____ date, with his will probated in Harris County, Cause No. ; "Y," the second-named executor, lacks capacity (which you'll need to prove at the hearing); and "Z," the third-named executor, will file a notarized declination to serve.

7. **As set out in the will, what, <u>exactly</u>, are the <u>names</u> of**
   - **The decedent**
   - **The executor who will serve?**

In all pleadings, **always begin** with the exact names as they appear in the will for the testator, executor, and any beneficiaries mentioned in the pleadings. Then, if needed, put "A/K/A," "N/K/A," or "F/K/A" depending on the circumstances, followed by the additional or corrected name(s) that you need to include. **Even in the Order, the executor's name as it's given in the will must come first, with "now known as" names following.**

Be sure to watch for spelling errors made in either the will or the documents your office prepares. If the testator misspelled a name, then all other documents must carry that mistake with an

"A/K/A" to correct the typo that the testator missed. Alias problems and spelling errors that you miss in the application can require reposting (depending on the circumstances). You may want to put on appropriate testimony about the different names unless the differences are self-explanatory.

8. **Does the will indicate that the executor seeking letters should be <u>independent</u>?**

If the will doesn't indicate that the executor who is seeking letters should be independent, start by modifying your forms so you're not using inaccurate boilerplate.

Check to see if the will indicates that the executor for whom you seeking letters should be independent:

- **No court action**
- **"independent"**
- **"least possible court involvement," etc.**

If you're seeking independent administration when the will does not state that the executor who will serve should be independent, indicate the statutory basis of your request. See §145. Then be sure to get sufficient requests from **all** of the distributees.

Definitely look at what the will says about the executor who will serve. It is not uncommon that a will makes the first-named executor independent, but does not make the alternate executors independent (whether intentionally or not).

If there is a minor beneficiary, the Courts do not ordinarily approve an independent administration under §§ 145(c) or (d). 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.

9. **Does the will indicate that the executor seeking letters should serve without bond?**

The only provision that allows the Court to waive bond when the will does not is §145(p), which allows the court to waive bond when an independent administration is created pursuant to §145(c), (d), or (e).

"Sec. 195. When no bond Required.

(a) By Will. Whenever any will probated in a Texas court directs that no bond or security be required of the person or persons named as executors, the court finding that such person or persons are qualified, letters testamentary shall be issued to the persons so named, without requirement of bond.

(b) Corporate Fiduciary Exempted From Bond. If

Therefore, if the will doesn't waive bond for the executor who will serve, the only way to avoid bond is to proceed under §145(p), coupled with either §145(c) or (d). (Subsection (e) applies only if the decedent dies intestate.)

a. §145(c) and (p). Subsection (c) applies when the executor who will serve is named in the will, but the will does not provide for that executor to be independent. If this is your case, all of the distributees may agree on the advisability of having an independent administration and may request that the executor named in the will serve as independent executor without bond under Probate Code §145(c) and (p).
b. §145(d) and (p). Subsection (d) applies "where no executor is named in the decedent's will, or in situations where each executor named in the will is deceased or is

a personal representative is a corporate fiduciary, as said term is defined in this Code, no bond shall be required."

Here, too, definitely look at what the will says about bond *for the executor who will serve*. It is not uncommon that a will waives bond for the first-named executor, but does not waive bond for alternate executors (again, whether intentionally or not).

disqualified to serve as executor or indicates by affidavit filed with the application for administration of the decedent's estate his inability or unwillingness to serve as executor." In these situations, all of the distributees of decedent may collectively designate "a qualified person, firm, or corporation" to serve as independent administrator without bond under Probate Code §145(d) and (p). **If you proceed under §145(d), you will be requesting independent administration with will annexed.** All of the paperwork should reflect this request.

What if the will makes your executor independent, but doesn't waive bond for that executor? If all distributees agree in writing, the court may waive the bond. If any of the distributees are dead, or are minors, you may want to confer with the court about how to proceed.

10. **Does the will dispose of all property? Is there a partial intestacy because there isn't a residuary clause?**

If there is a partial intestacy, the best practice is to mention the intestacy. The will may be admitted to probate. Thereafter, the personal representative or a distributee may need to take further action.