



HOW TO AVOID FALLING OFF THE CLIFF

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WOMEN AND THE LAW

SECOND ANNUAL LAW SYMPOSIUM

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/// OBJECTIVES

1. Discuss necessary steps for probating a Will /
2. What to do when there is no Will /
3. Consider scenarios when issues arise in the probate process /

A dark, semi-transparent background image showing a group of people in business attire sitting around a table, reviewing documents and talking. The image is dimmed to allow the text to stand out.

Procedure when you have a Will



SCENARIO 1 – VALID WILL



APPLICATION FOR PROBATE OF A WILL

Texas Estates Code § 251.051

A Will is valid if it is:

- ❖ In writing
- ❖ Signed by the testator in person or signed by another person on behalf of the testator in the testator's presence and under the testator's direction
- ❖ Attested by two or more credible witnesses who are at least 14 years of age who sign the Will in the testator's presence



WHAT TO LOOK FOR IN A WILL

1. Self-Proved – A Will is deemed self-proved if it includes a self-proving affidavit

- **Tex. Est. Code § 251.104 and Tex. Est. Code § 251.1045**

2. Executor Named

- **Tex. Est. Code § 256.051**

3. Independent, Without Bond, Authority to Sell

- **Tex. Est. Code §§ 401.002(a), 401.005 and 402.052**

4. Foreign Will

- **Tex. Est. Code Chapter 501**

WHAT THE APPLICATION MUST INCLUDE UNDER TEX. EST. CODE. § 256.052

- ❖ Each applicant's name and address
- ❖ The last three numbers of each applicant's driver's license and social security number (if issued)
- ❖ The testator's name, domicile, and age on the date of death
- ❖ The last three numbers of the testator's driver's license and social security number (if known)
- ❖ The fact, date, and place of testator's death
- ❖ Facts showing proper venue
- ❖ That the testator owned property and the property's probable value
- ❖ The date of the Will

WHAT THE APPLICATION MUST INCLUDE

- ❖ The name, state of residence, and physical address where service can be had of the executor named in the Will, if not the Applicant
- ❖ The name of each witness to the Will
- ❖ Whether any children were born to or adopted by the testator after the Will was executed and name(s) of such child(ren)
- ❖ Whether a marriage dissolved after the Will was made and, if so, from whom and when
- ❖ Whether the state, a government agency of the state, or a charitable organization is named in the Will as a devisee
- ❖ The executor named in the Will is not disqualified by law from accepting letters testamentary – Applicant is not a convicted felon, is otherwise not disqualified by law from serving or accepting Letters Testamentary, and Applicant is entitled to such Letters. *But see Section 304.003(b)*

/// What if the Applicant is not a Texas resident?

Under Texas Estate's Code § 304.003, Applicant will need to appoint a **Resident Agent** to accept service of process in the proceeding with respect to the estate and file that appointment with the Court.



You've Filed the Application Now What?



You've Filed the Application, Now What?

- ❖ **County Clerk will prepare and issue a citation** – This is posted on the outside of the courthouse for ten days /
- ❖ **The Court will hold a hearing after the ten days expires** – The Applicant will need to testify regarding the circumstances of the decedent, the estate, and the Will. Testimony also needed regarding the qualification of the Executor /
- ❖ **The Court will admit the Will to probate and letters testamentary can be issued once the Executor qualifies** – The Applicant will need to sign a Proof of Death and Other Facts and the Executor must sign the Oath /

SCENARIO 2 – EXECUTOR IS DISQUALIFIED



SCENARIO 2 – EXECUTOR IS DISQUALIFIED

Decedent named his brother, Willy, to be the executor of his Will and did not name any alternate executors in the Will ...

- ❖ About a year ago Willy was found to be incapacitated /
- ❖ Willy does not want to serve /
- ❖ Willy predeceased the decedent /
- ❖ Willy is a convicted felon /
- ❖ Willy is not a resident of Texas /

SCENARIO 2 – EXECUTOR IS DISQUALIFIED

Texas Estates Code § 304.003

- ❖ Persons who cannot serve as an executor:
 - ❖ An incapacitated person /
 - ❖ A person who is a convicted felon / *But see Section 304.003(b)*
 - ❖ A person who is a nonresident /
 - ❖ A corporation not authorized to act as a fiduciary in this state /
 - ❖ A person whom the court finds unsuitable /

SCENARIO 2 – EXECUTOR IS DISQUALIFIED

All distributees of the decedent may agree on the advisability of having an independent administration and collectively designate a qualified person to serve as independent administrator § 401.002.

- ❖ Independent Administrator with Will Annexed /
- ❖ Consent to Sell /
- ❖ Waive Bond /

SCENARIO 3 – NO SELF PROVING AFFIDAVIT



SCENARIO 3 – NO SELF PROVING AFFIDAVIT

Proof Required for Probate of Will – Texas Estates Code § 256.152

- Testator did not revoke the Will;
- Testator executed the Will with the formalities and solemnities and under the circumstance required by law to make the Will valid; and
- At the time of executing the Will, the testator was of sound mind; and
 - Was 18 year of age or older;
 - Was or had been married; or
 - Was a member of the armed forces of the United States.

SCENARIO 3 – NO SELF PROVING AFFIDAVIT

Decedent has a Will, but...

- ❖ No self-proving affidavit /
- ❖ Only one witness signed self-proving affidavit /
- ❖ Notary failed to sign or place notary seal /
- ❖ Self proving affidavit was left completely blank /

SCENARIO 3 – NO SELF PROVING AFFIDAVIT

Will Signed by Two Witnesses

Sworn Testimony or Affidavit of Subscribing Witnesses

- ❖ Show witnesses the Will, including date of the Will /
- ❖ Confirm who was present on that date /
- ❖ Confirm testator declared the document to be testator's Will /
- ❖ Confirm witnesses saw testator sign Will /
- ❖ Confirm witnesses signed in testator's presence /
- ❖ Confirm testator was of sound mind when signed Will /
- ❖ Confirm testator was at least 18 years of age when signed Will /
- ❖ Confirm each of the witnesses were at least 14 years of age /

SCENARIO 3 – NO SELF PROVING AFFIDAVIT

Will Signed by Two Witnesses

BUT Subscribing Witnesses are Unavailable

- ❖ Confirm witnesses are familiar with decedent's signature and how /
- ❖ Show witnesses the Will, including the date of the Will /
- ❖ Confirm whether signature on Will is the decedent's /
- ❖ Confirm testator was of sound mind on the date Will was signed /
- ❖ Confirm testator was at least 18 years of age when signed Will /
- ❖ Confirm witnesses do not have an interest in or a claim against decedent's estate /

SCENARIO 4 – HOLOGRAPHIC WILLS



SCENARIO 4 – HOLOGRAPHIC WILLS

Will written entirely in decedent's own handwriting

- ❖ Entire estate disposed /
- ❖ Appoints executor /
 - Agreement of distributees
 - Waive bond
 - Consent to sell
- ❖ Signature of decedent /
- ❖ Does not require any witnesses /

At hearing, two witnesses must testify that Will is in testator's handwriting or by deposition if the witnesses are nonresidents of the county or unable to attend court. Texas Estates Code § 256.154

SCENARIO 5 – FOREIGN WILLS



SCENARIO 5 – FOREIGN WILLS

Texas Estates Code Chapter 501 – Probate of Will admitted to probate in another jurisdiction (a.k.a. ancillary probate)

Texas Estates Code Chapter 502 – Only procedure available if Will has not been probated elsewhere

Texas Estates Code Chapter 503 – Clears title to real property and no need for an ancillary administration or letters testamentary

SCENARIO 5 – FOREIGN WILLS

- ❖ At the time of his death, Tommy Testator's domicile was in Oklahoma
- ❖ He owned real property in Bexar County, Texas
- ❖ His Will was executed in Oklahoma
- ❖ The Will was probated in Oklahoma

SCENARIO 5 – FOREIGN WILLS

Texas Estates Code Chapter 501

- ❖ Obtain authenticated copy of Will and Order admitting Will to probate from Oklahoma
- ❖ Application states probate is requested on the basis of authenticated copies
- ❖ No notice or hearing is required
- ❖ No Texas court order needed unless seeking letters testamentary

SCENARIO 5 – FOREIGN WILLS

AUTHENTICATED COPY

1. Be attested by and with the original signature of the court clerk or other official who has custody of the Will or who is in charge of probate records;
2. Include a certificate with the original signature of the judge of the court stating that the attestation is in proper form; and
3. Have the court seal affixed, if a court seal exists.

A dark, semi-transparent background image showing several people in business attire gathered around a table. They appear to be in a meeting, with some looking at documents and others gesturing. The overall tone is professional and serious.

Procedures when there is not a Will

SCENARIO 6 – LOST WILL



SCENARIO 6 – LOST WILL

- ❖ Tommy Testator was not the most organized person and was always losing things
- ❖ When Tommy Testator died his family was unable to find his Will
- ❖ Now the family needs your help with how to proceed

SCENARIO 6 – LOST WILL

Probate of Lost Will

- ❖ Modification to the Application, Proof of Death and Order /
- ❖ Clerk to issue different citation /
- ❖ Personal service on decedent's resident heirs required /
- ❖ May need to overcome presumption of revocation if Will last seen in testator's possession /

SCENARIO 6 – LOST WILL

Application for Probate of Lost Will

- ❖ Basic procedure for application is followed /
- ❖ Reason why Will cannot be produced /
- ❖ Contents of the Will /
- ❖ Name, address, age and relationship to decedent of each devisee /
- ❖ Name, address, age and relationship to decedent of each heir at law /

~~SCENARIO 6 – LOST WILL~~

To your surprise, Tommy Testator's sister, Sally, kept copies of all Tommy's important documents ...



~~SCENARIO 6 – LOST WILL~~

Non-Production

- ❖ Cause of non-production must satisfy the court that the Will cannot be produced by any reasonable diligence /

Reasonable Diligence

- ❖ Generally, includes searching the testator's books and papers, safe deposit box, contacting drafting attorney, contacting county clerk(s) /

Contents Proved

- ❖ Must be provided by testimony from someone who read the original or a copy of the Will, heard it read, or can identify a copy /

SCENARIO 8 – THERE IS NO WILL



SCENARIO 8 – THERE IS NO WILL

Intestacy - Application for Determination of Heirship

- ❖ The court will determine who decedent's heirs are and heirs' interests in decedent's estate

Administration - Application for Appointment of Administrator

- ❖ The court will appoint person to serve as administrator of decedent's estate, if necessary

SCENARIO 8 – THERE IS NO WILL

Application for Determination of Heirship

- ❖ Decedent's name, date of birth, and place of death /
- ❖ Names, dates of birth, and physical addresses of each heir /
- ❖ Relationship of each heir to the decedent and their interest in the community and separate property of the estate /
- ❖ That all children born to or adopted by the decedent are listed /
- ❖ The date of all marriages, spouses' names, and the dates any marriages terminated /
- ❖ The decedent died without the Will /
- ❖ Supported by affidavit that states all allegations are true and no material fact or circumstance has been omitted /

SCENARIO 8 – THERE IS NO WILL

Application for Appointment of Administrator

- ❖ Applicant's name and address /
- ❖ Last three numbers of decedent's and of the applicant's driver's license and social security number /
- ❖ Fact, date, and place of decedent's death /
- ❖ There is a need for administration /
- ❖ Whether the appointment of an appraiser is needed /
- ❖ Administrator is not disqualified by law from accepting letters of administration /

SCENARIO 8 – THERE IS NO WILL

Attorney Ad Litem

- ❖ Following a motion, the court will appoint an attorney ad litem to represent the interests of the heirs who are unknown.
 - File Answer
 - File Report

Affidavit of Service of Citation

- ❖ After all citations are served on heirs, or all Waivers of Citation are filed, the applicant must file an Affidavit of Service of Citation affirming that citations were served as required or waived.

SCENARIO 8 – THERE IS NO WILL

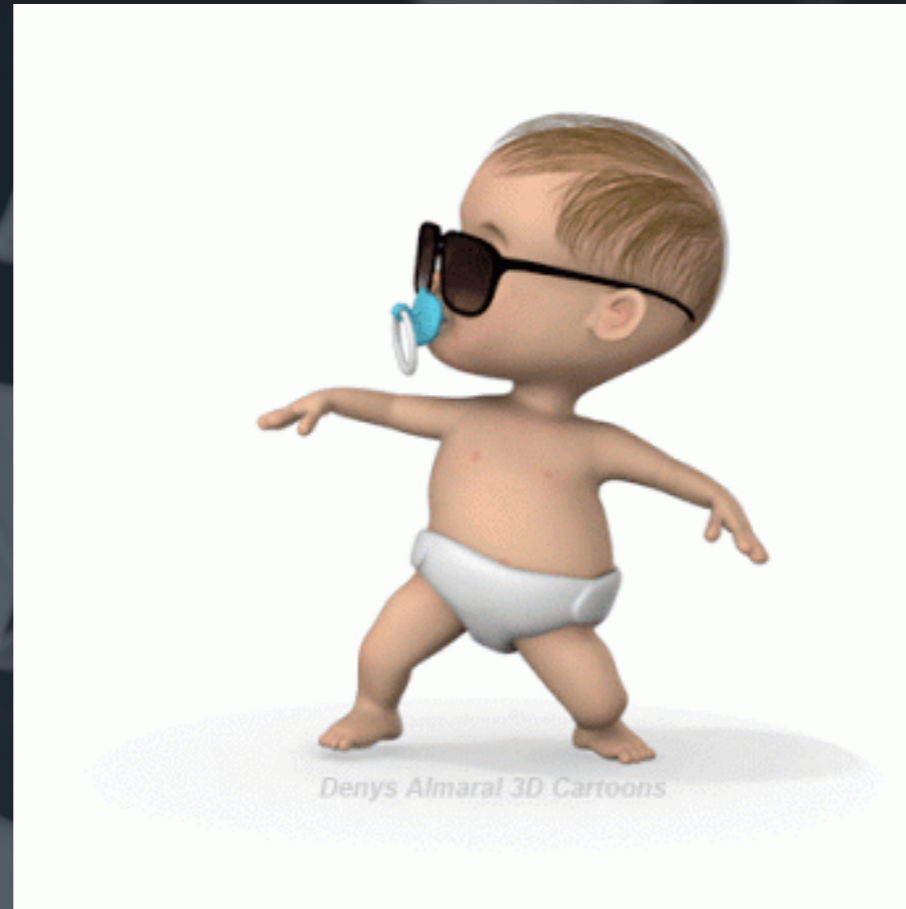
Witnesses

- ❖ Two disinterested and credible witnesses must execute an affidavit regarding decedent's heirs and family history.
- ❖ One disinterested witness may be allowed if only one witness can be found after diligent search.

Judgment Declaring Heirship

- ❖ Determines the heirs of the decedent and each heir's interest in the community and separate property of the estate.

SCENARIO 8 – THERE IS NO WILL MINOR OR INCAPACITATED HEIR



SCENARIO 8 – THERE IS NO WILL

Minor or Incapacitated Heir

- ❖ Cannot waive citation
- ❖ Cannot agree to independent administration
- ❖ Guardianship or 1301 Management Trust
- ❖ Alternatives to guardianship

SCENARIO 8 – THERE IS NO WILL

THERE'S NO AGREEMENT



SCENARIO 8 – THERE IS NO WILL

There's No Agreement

- ❖ Dependent Administration
- ❖ Temporary Administrator Pending Contest
- ❖ Third-Party Administrator

SCENARIO 9 – SMALL ESTATE AFFIDAVIT



SCENARIO 9 – SMALL ESTATE AFFIDAVIT

Requirements

1. County may have a form
2. 30 days have elapsed since date of decedent's death
3. No petition for appointment of administrator is pending or has been granted
4. Value of estate on date of death does not exceed \$75,000 excluding homestead and exempt property
5. Filed in county where decedent resided
6. May need to provide redacted death certificate

SCENARIO 9 – SMALL ESTATE AFFIDAVIT

Requirements...Become Tricky

Assets

- ❖ Any property owned having monetary value
- ❖ Cannot say “unknown” value
- ❖ Total must be less than \$75,000

Liabilities

- ❖ Must list all debts and liabilities
 - Credit cards, doctor/hospital bills, utility bills
 - Anything that remains unpaid

Solvent Estate

- ❖ Assets, not including homestead and exempt property, must exceed total known liabilities
 - Consider paying off debts

SCENARIO 9 – SMALL ESTATE AFFIDAVIT

Requirements...Become Tricky

Medicaid

- ❖ Must state whether decedent applied for and received Medicaid benefits on or after March 1, 2005
 - List amount owed – is estate still solvent?
 - File MERP certification that decedent's estate is not subject to MERP claim

Family and Marital History

- ❖ Must provide sufficient detail to show who inherits community property and separate property

SCENARIO 9 – SMALL ESTATE AFFIDAVIT

Requirements...Become Tricky

Heirs

- ❖ All heirs must be identified
- ❖ Interest in estate must be stated
- ❖ SEA will not be approved unless all estate assets inherited by minor heir can be placed into the registry of the court

Two Disinterested Witnesses

- ❖ Must swear to all facts, including assets and liabilities
- ❖ No interest in estate
- ❖ Liable for damages or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit

SCENARIO 9 – SMALL ESTATE AFFIDAVIT

Requirements...Become Tricky

Homestead – Real Property

- ❖ ONLY real property that can be transferred by SEA is the homestead

Further Requirement

- ❖ Property cannot be transferred unless the real property will be inherited by an heir who was homesteading with the decedent at the time the decedent died
 - Surviving spouse
 - Minor child
 - Adult child living with decedent in decedent's home

NOW YOU KNOW HOW TO AVOID FALLING OFF THE CLIFF

And this will not be you trying to handle a probate matter in the future...



DAVIS SANTOS

THANK YOU

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