Probate in Calhoun County Texas

June 1,2015

No probate matter will be set on the docket until the Court has reviewed the file. All documents required in any probate shall be submitted at least one week prior to setting the matter on the docket. The Proof of Death, Depositions, any witness testimony, the Order and the Oath should be filed although the document is not executed until after the probate hearing.

SELF-PROVED WILLS

All wills must comply with the Estates Code. The Estates Code requires that it be signed by the testator and two subscribing witnesses. As a norm, the Estates Code requires testimony from live witnesses, affidavits are not acceptable. The exception to live testimony is the self-proved will. The **self-proved will** eliminates the necessity of courtroom testimony by the subscribing witnesses. However, the affidavit of a self-proved will must be **sworn and under oath.** Moreover, the affidavit must carry a notary seal. The Estates Code requires the witnesses to state that (1) the testator was under no constraint or undue influence, (2) the testator was 18 years or older, and, (3) of sound mind.

Partial Intestacy

If a will fails to dispose of all property, there is a partial intestacy which may require a Declaration of Heirship. The applicant shall notify the court in the application that there is a partial intestacy as appropriate.

NON-SELF-PROVED WILLS

As stated above, the Estates Code presupposes live testimony for all proceedings. In addition, all testimony must be: (1) committed to writing at the time the testimony is taken; (2) subscribed and sworn to in open court by the witness; and (3) filed by the clerk. The written testimony must be filed before the probate hearing. The witness does not sign the document until after he/she has testified.

With non-self-proved wills, one subscribing witness testimony is sufficient. If the subscribing witnesses have moved and cannot attend the probate hearing or, if attending the hearing would be too burdensome, testimony may be provided by written or oral deposition, taken in accordance with the Texas Rules of Civil Procedure, except as modified by the Estate Code. The alternative to the deposition is the testimony of two disinterested witnesses to the signature.

If the applicant is providing two disinterested witnesses, there must be **Motion for Alternate prove-up** and an order granting the motion for the Judge to sign. The motion will state that there is no written opposition filed to such will on or before the date set for the hearing thereon. The Estate Code allows for one disinterested witness to the signature provided that a diligent search has been made for two witnesses sworn to and satisfies the court.

A subscribing witness must prove the following:

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

Disinterested handwriting 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 decedents.
4. The witness has sufficient knowledge to testify to all of the above.
5. The witness does not take under the will.

EXECUTOR

When the person who will serve as executor isn't the first named executor in the will, your documents and your proof for the court must explain what happened to the first named executor and all others who will not serve but who have priority over the executor who will.

a. Person declining to serve: need person's notarized declination in the file.
b. Person is dead: death certificate or published obituary.

c. **Person is convicted felon: need sentencing order or other proof of conviction.**
d. **Person is incompetent: need guardianship cause number or letters from doctor.**
e. **Person was divorced from decedent after the date of the will: need divorce decree**
f. **Person is a minor: need birth certificate.**

INTESTATE PROCEEDINGS and the Declaration of Heirship

All intestate proceedings require a Declaration of Heirship proceeding. The Declaration of Heirship can be combined with the probate. In the Declaration of Heirship, the court will require the appointment of an Attorney Ad Litem to represent unknown heirs and heirs with disabilities. A deposit of Five Hundred Dollars ($500.00) must be made with the County Clerk for attorney fees whenever a Motion for Attorney Ad Litem is filed with the clerk. (Attorneys may make arrangements with other attorneys to provide gratuitous ad litem services, but the court must be notified of this arrangement.) The applicant must provide two disinterested witnesses **who** can identify the decedent's heirs. The witnesses must testify in open court, and the applicant's attorney must prepare a written statement of the witnesses' testimony, phrased as court testimony (§256.157). The testimony must include the fact that the witness does not take under the will or by intestacy.

The Estate Vests Immediately

Est §101.001, Estate Code, provides: If a person dies leaving a lawful will:

(1) All the person's estate that is devised by the will vests immediately in the devisees:

(2) All powers of appointment granted in the will vest immediately in the donees of those powers; and

(3) All of the person's estate that is not devised by the will vests immediately in the person's heirs at law.

Est §101.001(b) provides: The estate of a person who dies intestate vests immediately in the person's heir at law.

All of the estate is subject to debts, whether the decedent left a valid will or did not leave a will (§101.001).

Notice

Est §258.003, Estate Codes, provides that "A court may not act on an application for the probate of a will until service of citation has been made in the manner provided..."

When there is a valid will, posting is sufficient notice to all interested parties in the probate of said will.

Est §51.151(b) provides that "citation or notice issued, served and returned in the manner specified by a court order...has the same effect as if the manner of service and return had been specified by this title."

Whenever there is any intestacy, notice must be served on all heirs, both known and unknown. If there is a will but the person has not devised all the property, a partial intestacy is created. Whether there is a complete absence of a will or whether there is a will but a partial intestacy, a person's estate not devised by the will vests immediately in the person's heirs at law. To subsequently divest a person of his or her property requires due process of law. The court will not act on an application for the probate until service of citation has been made in the manner provided by law.

That Pesky Unknown Heir

The ever present truth in intestacy is that there is always the issue of the unknown heir. When the judge asks "Is there an unknown heir", invariably the attorney for the applicant says "no" because he does not know of an unknown heir. But the unknown heir is always "unknown". This, apparently, is a legal presumption and an ever present issue. There is always this pesky unknown heir that must have his/her day in court. Notice by publication and the appointment

of an Attorney Ad Litem are required. Every attorney should keep this in mind to avoid malpractice litigation.

MUNIMENT OF TITLE

In applications for **Muniment of Title** the estate must be free from debt, other than any debt secured by lien on real estate. This includes any debt to Medicaid. Therefore, the evidence must prove that decedent did not apply for and receive Medicaid benefits after March 1, 2005, and that the Medicaid Estate Recovery Program has no claim against the estate; if decedent did apply for Medicaid but there is no debt, the applicant will explain why there is no debt. The will cannot be probated as Muniment of Title until that debt is paid.

If there is a question on the construction of the will, or a question regarding those persons who are entitled to receive property under the will and the person's shares or interest in the estate, or if a person who is entitled to the property under the provisions of the will cannot be ascertained solely by reference to the will, the applicant may probate the will as Muniment of Title as a declaratory judgment but must request **a declaratory judgment,** in which case **Notice** must be posted for **twenty days** before the Court can act upon it. Whenever the will, for example, leaves all my property to "my children" without identifying the children, then there must be a declaratory judgment. If there is a partial intestacy under the will, the heirs must be personally served with citation, unless they sign a waiver, and the unknown heir must be **notified by publication** and an attorney ad litem must be appointed. Est §257.101.

Probate of Copy of Lost Original Will

When the Last Will and Testament cannot be found, then the rules of notice are more stringent. When an original will cannot be produced, the legal presumption is that the testator has revoked the will. The Court will **not** grant the application unless the applicant offers sufficient evidence to rebut that presumption and proves to the Court that the will was not revoked. The order must include a term that says that the applicant has overcome the presumption that the original will has been revoked.

If the lost will is not admitted into probate and if the applicant then wishes to ask for an appointment as Administrator of the Estate, the Court will require an application for the Declaration of Heirship and the appointment of an **attorney ad litem as required by law.**

The applicant must provide a disinterested witness **who** can identify the decedent's heirs. This witness must testify in open court, and the applicant's attorney must prepare a written statement of the witness's testimony, phrased as court testimony (§256.157). The testimony must include the fact that the witness does not take under the will or by intestacy.

The proof of death and other facts must contain sufficient information to prove to the Court (1) the cause of the will's non-production, (2) reasonable diligence used to locate the original will, (3) evidence that the testator did not revoke his will, and (4) when there is no copy of the original will, testimony proving the contents of the will.

Est. §256.054 requires that an application for the probate of a lost will must include information concerning the reason the original instrument cannot be produced and must also include the names of the devisees included in the lost will and the names of the individuals who would inherit if the copy of the lost will were not admitted to probate.

All persons who are named as devisees in the lost will must be personally served with citation under Est §258.002 or must execute an affidavit waiving citation. Est 258.002 requires "the clerk shall issue a citation to all parties interested in the estate." The citation shall be served on **all heirs;** of course, this includes all those named in the will and all those not named in the will. The Clerk shall post and issue citation to all parties interested in the estate, which citation shall contain substantially the statements made in the application for probate as well as the time when, place where, and the court before which such application will be acted upon.

The statutorily required citation is insufficient to advise heirs of their right to object to an application to probate a lost will. As authorized by Texas Estates

code §51.15, explicit notice of their right to object should be given to all heirs, either attached to all citations prepared by the Clerk or included as part of all waivers of citation, i.e., waivers of citation must contain substantially the same language that the Clerk will attach to the citation. The Clerk must attach to each citation issued under Texas Estates Code §258.00 the "Notice of Application to Probate Copy of Lost Will or Codicil or Lost Will or Codicil without a Copy" informing all persons interested in the estate of their right to object to the probate. When the heir signs an affidavit waiving citation, it shall contain language used by the Clerk found in the attachment "Notice of Application to Probate Copy of Lost Will or codicil or Lost Will or Codicil without a Copy"; it is not sufficient for the affidavit to refer to an attached notice.

Probate Four Years After Death of Testator

An applicant has four years to file for probate. As discussed above, the heir inherits upon death under intestacy law. To probate a will after four years without notice can actually dispossess a person's property without due process of law.

As in the probate of a lost will, both posting and personal service is required. Personal service goes out to every interested person. The Citation shall contain language as required in lost will applications. The notice 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, 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.

When an applicant seeks to probate a will more than four years after the testator's death, Texas Estates Code §§258.051 and 258.053 require that specified notice by service of process must be given or affidavits waiving the notice must be delivered to the Court before the probate of testator's will:

1. **Personal notice of citation or affidavits waiving same are required (1) for each of the testator's heirs whose address can be ascertained by the applicant with reasonable diligence or (2) if another will of the testator has already been**

admitted to probate, for each beneficiary of the testator's previously probated will instead of the testator's heirs.

2. The notices or affidavits must contain a statement that the testator's property passes to the testator's heirs if the will is not admitted to probate (or, if another will for the testator has already been admitted to probate, to the beneficiaries of that will).
3. The clerk shall attach to each citation, including the citation by posting, the "Notice of Application to Probate a Will More than Four Years after the Testator's Death".
4. The notices or affidavits must contain 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.
5. Affidavits must also include the statement that the heir (or beneficiary) does not object to the offer of the testator's will for probate. The affidavit itself must explicitly include all of the points addressed in the "Notice of Application to Probate a Will More than Four Years after the Testator's Death."
6. If the address of any of the testator's heirs cannot be ascertained by the applicant with reasonable diligence, the Court must be notified and, pursuant to §258.002 and permission must be granted to serveby_pjuhlkation.