Probate of Non-Standard Wills – The Will Says What?

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In a perfect world, all wills would be properly executed by the Decedent and witnessed by two competent disinterested witnesses who would have appeared before a notary public to "self-prove" the will. The Will would name an independent executor and would waive bond. In the real world, an attorney is often presented with the imperfect will. The outline below addresses the requirements of who can make a will, the requisites of a will, the probate of the will, the appointment of an executor and disqualification of certain persons to serve, waiver of bond, creation of an independent administration and special issues such as codicils, lost wills and gifts to ineligible beneficiaries.

I. Who can make a Will? Any person described as follows can make a will (*TEC §251.001*):

A. 18 years of age or older; or

B. A member of the Armed Services; or

C. Married or has been married; and

D. Of sound mind; and

E. Has testamentary intent

II. What are the requisites of a will? The requisites of a valid will depend upon whether the will is a holographic will or an attested will and are set out as follows (*TEC §251.051*):

A. Holograhic. A holographic will is a will that is wholly in the handwriting of the Testator and signed by Testator.

B. Attested Will. If a will is not wholly in the handwriting of the Testator, it must be signed by the Testator or at the Testator's direction and attested to by two credible witnesses in the presence of the Testator

C. Who can be a witness?

i. Must be 14 years of age or older
ii. Competent
iii. Interested Witness, (a person who is named as a beneficiary under the Will)

a. A Will attested to by an interested witness is still valid, but if you cannot prove the Will without the Witness' testimony, then the

bequest to the witness is void. The bequest is not void if the Witness would have been entitled to a share of the estate if there was no Will (intestate). The Witness shall be entitled to as much share as shall not exceed the value of the bequest in the Will. *(TEC §254.002)*

b. If the testimony of the Interested Witness can be corroborated by a disinterested witness, then the gift is not void. *(TEC §254.002)*

III. What Proof is Required to Probate a Will? The amount and kind of proof required to probate a will depends upon whether the will is self-proven, whether it is attested or holographic, and the availability of witnesses.

A. Self Proven Will – No additional proof is required of the execution and formalities of the Will.

i. The self-proving affidavit can be signed when the Will is signed or after the Will is signed.
ii. The form for a self-proving affidavit is located at *TEC §251.104* and *§251.1045* – must be in "substantially" the same form.
iii. What if the Witnesses and Testator only sign the self-proving affidavit but not the Will? It is still a valid Will. You can use the signatures on the affidavit to prove the will, but then it is not self-proven.

B. Not self-proven Will.

i. Attested Will (*TEC* §256.153)
ii. Testimony of 1 or more witnesses in court; or
a. If all Witnesses are nonresidents or are all unable to attend court, then by deposition upon written questions; or

b. If no opposition to the Will is filed: then 2 witnesses to the handwriting of 1 or more of the witnesses or the Testator in open court; or,

c. If only 1 witness to the handwriting is found, then the testimony of 1 witness to the handwriting of the witnesses or Testator in open court; or

d. If all witnesses are dead, in the military or beyond the court's jurisdiction, then by testimony of 2 witnesses to handwriting of 1 or both witnesses or the Testator in open court or by deposition upon written questions; or

e. If diligent search is made and only 1 witness can testify, then by 1 witness in open court or by deposition.

C. If the will is a holographic will, then it can be proven by 2 witnesses to the handwriting of the Testator. If the witnesses are nonresidents or are unable to attend, then by deposition upon written questions.

IV. Period for Probate (*TEC §256.003*):

A. Generally a will must be filed for probate within four years from date of death

B. If after four years, you can probate the Will as a Muniment of Title but cannot get Letters issued. You must show that the Applicant was not in default for failing to offer the Will within 4 years. If after four years, you must also serve all heirs at law with personal citation. The application must be brought within 4 years but the hearing can be after the 4 year period.

V. Executor (*TEC §304.001*):

The court must appoint the person selected by the Testator <u>unless</u> they are disqualified.

A. Disqualifications (*TEC §304.003*)

i. Incapacity
ii. Convicted felon, unless pardoned or civil rights restored by court
iii. Non-resident, unless they designate a resident agent for service of process
iv. Corporation, unless it is authorized to act as a fiduciary under Texas law - usually this is a Texas or National Bank with trust powers. Some foreign banks and banks without trust powers do not qualify.
iv. A person whom the court finds to be unsuitable.

B. Order of Persons Qualified to Serve (*TEC§304.001*)

i. Person named in the Will as executor
ii. Surviving spouse
iii. Principal devisee
iv. Any legatee
v. Next of kin in order of descent
vi. A creditor
vii. Any person of good character residing in the country
viii. Any person not disqualified

NOTE: If more than one person is equally qualified, then the court will pick the one that is most likely to administer the estate advantageously or may appoint more than one applicant.

C. Waiver of Right to Serve (*TEC §304.002*)
A spouse or an heir can waive the right to serve and designate another person to serve and the court may grant letters to that person.

D. Independent Administration – *See TEC§401.001*
Any person who can make a will can provide that no action shall be had in the county court except probating the will and returning an inventory.
How does one create an Independent Administration?

i. Testator states in the will that he/she is appointing an independent executor or Testator can state that no other action shall be had in the county court other than probating the will and filing an inventory.
ii. If Testator does not provide for an independent administration then all of the distributees in the will can designate and request that the executor serve as Independent Executor. The court shall order an independent administration unless it finds that it is not in the best interest of the estate.
iii. If no executor is named, or if the named executor is deceased or disqualified, the distributees can designate a person to serve and request independent administration. The court shall order an independent administration unless it finds that it is not in the best interest of the estate.
iv. All distributees must be served with citation and notice of the application unless the distributee waives the issuance of citation or enters an appearance.

E. Who must consent to Independent administration? All distributees must consent:

i. Incapacitated distributee – the guardian will consent or, if no guardian, then a guardian ad litem may be appointed by the Court.
ii. Testamentary Trust - all persons who are first entitled to receive income determined as of the date of death of the Decedent. The consent of the Trustee is not required.
iii. Life estate - life tenant as of the date of death
iv. If a Will requires a distributee to survive decedent by a number of days, they are presumed to have survived
v. It is presumed that no distributee will disclaim
vi. Deceased distributee – the personal representative of a deceased distributee estate may consent.

VI. Lost Will. May a will that cannot be produced in court be admitted to probate? (*TEC §256.156*)

An original will that is not produced in court may be admitted to probate if sufficient proof is offered. In addition to all of the proof required of the execution and formalities of a will, the Applicant must prove its contents. This can be done with a copy of the will by a credible witness who has read the will, has heard the will, or can identify a copy of the will. The Applicant must also prove the cause of its non-production sufficient to satisfy the court that it cannot by any reasonable diligence be produced. *Estate of Catlin,* 311 S.W.3rd 697. The court will also require personal service of citation and notice on the Decedent's heirs at law (or waivers of citation).

VII. Probate of Will as Muniment of Title (*TEC§257.001*):

A will may be probated as a muniment of title without the issuance of letters testamentary if you prove there are no debts, excluding debts secured by liens on real estate and there is no necessity for administration. If after four years from date of death, you must serve all heirs at law with notice and citation.

VIII. Codicils

A codicil must be proven with the same evidence as the original will. If the codicil republishes the will, then you only have to prove the codicil. If the codicil is self-proven and the will is incorporated by reference in the codicil, then the will is self-proven.

IX. Joint Will

If a will is a joint will and the original cannot be produced in court, then it must be proven in the same manner as a lost will. Otherwise, it may be probated the same as a will that is not a joint will.

X. Divorce (*TEC§123.001*)

If a Testator divorces after the will is signed, then all gifts to the former spouse and relatives of the former spouse who are not relatives of the Decedent, lose their gifts and any right to be appointed Executor unless a new will is prepared after the divorce.

XI. Pretermitted Child (*TEC §255.051*)

If a child is born after the will is signed and is not provided for otherwise, the child will take their intestate share.

XII. Void Gifts to Attorney

A gift to an attorney, his employee, spouse or relative of the attorney or employee who drafts the will or supervises the drafting of the will is void unless the testator is their spouse or relative.

XIII. Void Gifts to Person who Commits Homicide

A beneficiary who murders the Decedent does not inherit and cannot serve as executor.

XIV. Bond (*TEC§305.001*)

The court must fix bond in an amount equal to value of all personal property plus one year of income, <u>unless:</u>

A. Testator may waive bond in the Will

B. Distributees may request Waiver of Bond under §401.005

C. Safekeeping Agreements can be made to reduce the amount of bond

D. Corporate fiduciaries are not required to have a bond.