

PROBATE PROCEDURES AND ALTERNATIVES 2017

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**PROBATE PROCEDURES AND ALTERNATIVES
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I. PRACTICAL THOUGHTS ON THE UNCONTESTED DOCKET

Attorneys often approach the uncontested docket as almost an afterthought. Because it is uncontested, some attorneys feel as though there is little risk in not being as thorough as preparing for a contested hearing or trial.

Several points suggest themselves:

- The prove-up of a will is often the first occasion a family will have to engage the services of an attorney. Admittedly, the need to retain counsel is only semi-voluntary, since there is often some economic driver creating the need for administration.
- It is a 'gateway' opportunity for lawyers to acquire long-term clients.
- One of the most insensitive comments that can be made within an individual's hearing is that their case is a "routine" matter. Probate is a part of the grief process and an opportunity for counsel to help guide the client through a scary and unfamiliar journey. It is often the most important legal matter that the individual has encountered.
- Probate administration is an exacting area of practice. Because it deals with matters where societal evolution is occurring, the law frequently changes and careful attention to legislative and appellate changes in law and procedure is crucial.
- Developing a set of reliable reference materials, particularly in light of the advent of the Texas Estates Code, will help the practitioner in being better prepared and the client being better served.

II. WHOM DO YOU REPRESENT?

An estate is not a legal entity that can sue or be sued. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975). As a result, an attorney does not represent the "estate," but its personal representative.

Generally, an attorney hired by the executors or trustees to advise them in administering the estate or the trust represents the executors or trustees and not the beneficiaries. *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617 (Tex. App.--Houston [1st Dist.] 1993, writ denied).

There is a danger, however, that the attorney for an executor or trustee could undertake to perform legal services as attorney for one or more beneficiaries. If an attorney-client relationship is thereby created, whether expressly or impliedly, then a duty would be created directly in favor of the beneficiary, and the beneficiary would have recourse against the attorney for damages resulting from negligent representation. *Vinson & Elkins v. Moran*, 946 S.W.2d 381 (Tex. App. Houston 14th Dist. 1997, wr. dism.).

For a broader discussion of these issues, see Texas Disciplinary Rules of Professional Conduct Rule 1.06,

Commentary to ABA Model Rules of Professional Conduct (2004) Rule 1.7, example 27 and Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 *Fordham L. Rev.* 1319 (1994).

III. FREQUENTLY USED PROBATE PROCEDURES

A. Probate of Will as Muniment of Title - Tex. Est. Code §257.001-257.103

"Muniments, Munimenta, are authentick Deeds and Writings, by which a man may defend the Title to his Lands."

- A Law Dictionary, or the Interpreter of Words and Terms, used either in the Common or Statute Laws of that Part of Great Britain call'd ENGLAND - London 1708.

1. JUST WHAT IS A "MUNIMENT"?

A. Defined - A muniment (from the Latin *munimentum* "fortification") is documentary evidence indicating title or ownership of an asset. "Muniments of title" literally means written evidence which a land owner can use to defend title to his estate. *Black's Law Dictionary* 1019 (6th ed. 1990). Muniments are defined to be "evidences and writings concerning a man's possession or inheritance, whereby he is enabled to defend the title of his estate; and this word includes all manner of evidences, deeds, charters, etc." *Wellborn v. Carr*, 1 Tex. 463 (Tex. 1846).

B. Examples - A muniment of title could include a death certificate, a deed, a contract, a mortgage, a judgment or some other legal document used to prove title in a particular person.

C. Modern Practice - The sole modern remnant of muniment practice in Texas is the process of admitting a will to probate solely as a muniment of title. Such a proceeding is appropriate if there is no need for a formal administration of an estate or for the appointment of a personal representative, but there is still a necessity to transfer title to those who take under the decedent's will. See Tex. Est. Code §§ 257.001 -257.103.

A will admitted to probate as a muniment of title serves to act as a link in the "chain" of title that would otherwise not exist by reason of the decedent's death. Originally used to clear up title to any real or personal property, an order admitting a will into probate as a muniment of title is now routinely used to transfer all estate assets under certain limited circumstances.

2. OVERVIEW - Tex. Est. Code §257.102 provides that an order admitting a will to probate as a muniment of title "constitutes sufficient legal authority for each person who owes money to the testator's estate, has custody of property, acts as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with the estate, to pay or transfer without administration the

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applicable asset without liability to a person described in the will as entitled to receive the asset.”

To utilize a muniment proceeding, there must be no need to have a formal estate administration. On the other hand, if more than four years have elapsed since the decedent’s death, a muniment of title proceeding can be utilized to settle the estate.

3. NECESSITY FOR ADMINISTRATION - If debts exist at the time of decedent’s death which are not secured by real property (including, for example, even a credit card balance) the use of a muniment of title proceeding is not an option. The persons taking under the will may wish to pay those debts with their own funds, saving the cost of a full administration. Once all unsecured debts are paid, the applicant(s) can then truthfully state no debts are owed by the estate and proceed with the muniment procedure.

In 2017, The application and proof sections of the muniment provisions Tex. Est. Code §§ 257.051 & 257.054 were amended to make a muniment of title proceeding available not just if there were no unpaid debts other than those secured by real estate (Tex. Est. Code §257.001), but also if the court “finds for another reason that there is no necessity for administration of the estate.”

Other situations which may indicate a necessity for administration might include: the need for court-approved inventory to reflect a stepped-up basis of devised property in a taxable estate, the need to take legal action to collect estate assets, the insistence of a stock transfer agent that they can deal only with a personal representative of the estate, a requirement by a title company of letters testamentary to close on a real estate transaction, an insurance company requiring a personal representative of an estate to receive insurance proceeds on the decedent’s life, the need to pursue personal injury litigation for injuries resulting in the decedent’s death, or the need to defend the decedent’s estate from such litigation because of injuries to others.

4. APPLICATION - Tex. Est. Code §257.051 - An application to probate a will as a muniment of title must state and aver the following to the extent each is known to the applicant or can, with reasonable diligence, be ascertained by the applicant:

- A. each applicant's name and domicile, together with the last three numbers of each applicant’s social security number and driver’s license;
- B. the testator's name, domicile, and, if known, age, on the date of the testator's death and the last three numbers of the testator’s social security number and driver’s license;
- C. the fact, date, and place of the testator's death;
- D. facts showing that the court with which the application is filed has venue;
- E. that the testator owned property, including a statement generally describing the property and the property's probable value;

- F. the date of the will;
- G. the name, state of residence, and physical address where service can be had of the executor named in the will;
- H. the name of each subscribing witness to the will, if any;
- I. whether one or more children born to or adopted by the testator after the testator executed the will survived the testator and, if so, the name of each of those children;
- J. that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate; (see “Medicaid Recovery Issues” below);
- K. whether a marriage of the testator was ever dissolved after the will was made and, if so, when and from whom; and
- L. whether the state, a governmental agency of the state, or a charitable organization is named in the will as a devisee.

If any matter above referenced is omitted from the application, the reason for such omission must be explained. Tex. Est. Code § 257.051(b).

5. REQUIRED NOTICE - Like an application for probate of will and issuance of letters testamentary, only posted notice is required Tex. Est. Code § 51.053. The court, however, has the discretion to require additional notice under Tex. Est. Code § 51.151.

6. REQUIRED TESTIMONY – (See Exhibit D-2 for a suggested form of prepared testimony in a muniment of title proceeding) - As with most applications for probate, one witness, usually the applicant, will commonly give “Proof of Death and Other Facts” testimony. However, any individual with personal knowledge of the facts, especially the attorney for the Applicant, may give the testimony.

The Proof of Death required for a muniment of title is similar to that required for an application for letters testamentary, except that no reference to the applicant’s qualification for letters is necessary and the applicant must state that there are no unpaid debts owing by the estate, excluding debts secured by liens on real estate. Tex. Est. Code § 257.054.

If the will is not self-proved, a subscribing witness or two witnesses to the decedent’s signature will be required to prove up the will. Tex. Est. Code § 256.153.

If the will is holographic, one or more disinterested witnesses, familiar with the decedent’s handwriting, will be required in addition to the proof given by the Applicant. Tex. Est. Code § 256.153.

7. MEDICAID RECOVERY ISSUES – MUNIMENTS OF TITLE AND MEDICAID BENEFITS - Claims for Medicaid recovery in Texas are debts of the estate. If the decedent applied for and received Medicaid benefits on or after March 1, 2005, then the Medicaid Estate Recovery Program (“MERP”) may have a claim against the estate, preventing the use of a muniment

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