

COMMON MISTAKES IN PROBATE

COMMON MISTAKES IN APPLICATIONS FOR PROBATE:

1. **The names do not match the will.** In the creation of the style of the case, the decedent's name must appear exactly as it appears in the will. The name of the applicant, if named in the will to serve as Executor, shall be exactly the same. However, if the Decedent or the Applicant go by other names, these may be included as AKA's. These names must be consistent throughout all the documents filed in the case.
2. **The Applicant's street address is not included in the Application.** Do not use a PO Box as the sole address of the Applicant. We must have the physical address. This is necessary for the court in the event the Applicant must be served with Citation, etc.
3. **The last 3 digits of the Applicant's Social Security number and Drivers License number are not included in the Application.** This rule pertains to all initial pleadings in the probate court.
4. **The date of death, age of decedent at death, and place of death are incorrect.** Check this information with the Death Certificate. Also, a copy of the death certificate is required to be filed with the creation of a probate estate.
5. **The Decedent was domiciled in another county within the state of Texas.** Venue for the probate is in the county where the Decedent resided if the Decedent had a domicile or a fixed place of residence in this State. If the Decedent had no domicile in the State of Texas, then the probate may be filed in the county where the Decedent died or the county where the principal property of the Decedent is located. Texas Probate Code §6
6. **Use of the term "Successor" may be inappropriate.** When an application for a successor representative is to be filed, the term "Successor" is used only when requesting the appointment of a representative in the same capacity as the prior representative. If unable to appoint a representative in the same capacity, you will need to file a new application for appointment under the existing cause number.
 - Ex. You have an Independent Administrator and need a successor representative. If you cannot get all the heirs or devisees to agree on a successor "Independent" Administrator, you will file an Application to Appoint "Administrator".

UNCONTESTED HEARING:

As soon as you have filed your Application for Probate, and you have been issued a cause number, you may call the County Judge's office to request a setting on the uncontested docket. You don't have to wait for your citations to run before getting a hearing date. The first available hearing dates could be 3 to 4 weeks away. These hearings are held on Tuesdays & Wednesdays only at 8:30 am on the 4th floor in the Commissioners' Courtroom.

When an Attorney ad Litem is appointed in an estate or guardianship, the attorney of record must notify the ad litem of the date set for the hearing. The attorney of record is required to notify all other parties as well. It is not the court's responsibility.

The papers to be presented and signed at the hearing, which include, but are not limited to, the written testimony of all witnesses, the proposed Order and the Oath, shall be delivered to the Probate Court staff for review no later than 3 business days prior to the hearing. These may be delivered via courier, email, or fax. If the staff doesn't receive the papers on time, the hearing will have to be rescheduled.

On the morning of the hearing, you will need to arrive 10 – 15 minutes prior to the hearing. You will need to meet with your client and go over any documents that they will be signing in the hearing. (DO NOT HAVE THE WITNESSES SIGN THE DOCUMENTS BEFORE THE HEARING! THEY MUST SIGN THEM IN OPEN COURT!) There is a sign-in sheet at the front of the courtroom, for you to sign in when you arrive. Cases are called on a first come, first served basis. When you are called to the bench, you will need to hand your proposed Orders and/or Judgments to the Clerk, at which time the Judge will swear in any persons who will be providing testimony.

When offering evidence in the hearing to probate, you may condense the testimony to only two or three questions. Ask the witness if he has read the document he is about to sign and is every statement contained therein true and correct to the best of their knowledge? It is not necessary to ask the witness to testify to each separate statement contained within the document. In addition to expediting the movement of the probate docket, your clients will experience less anxiety by not having to be confronted with the facts all over again. If there is a Will, ask the witness to identify the will as the Decedent's Last Will and Testament, and whether it has ever been revoked. Then your witnesses will sign their documents in front of the clerk.

All Dependent Administrators and Guardians of the Estate are required to file a corporate surety bond, not a personal surety bond. The Bond amount is set at the hearing appointing the representative and is based on the value of the property listed in the Affidavit of Assets. The minimum bond is \$8500. A Guardian of the Person only may file a personal bond in the amount of \$1000. Before you present the Bond to the court for approval, be sure to check the contents of the bond for accuracy against the Order of Appointment. Check the names on the Bond, the title of the Representative, and the amount of the Bond. Be sure the representative has signed the bond as "Principal." On a corporate bond, be sure that the Texas Resident Agent has signed the bond for the bonding company.

Bonds and Oaths are required to be filed within 20 days from the date of appointment. If the Bond and/or Oath are not timely filed, the court will enter an Order rescinding the appointment of the representative. This will be done without notice to the attorney or the representative. See Texas Probate Code §222(a)(1)(A) and §761(a)(1)

All Independent Representatives and all Dependent Representatives of Probate Estates must file an Inventory, Appraisal and List of Claims within 90 days from the date of qualification. All Guardians of the Estate must file an Inventory within 30 days from the date of qualification.

All Successor Representatives and Successor Guardians of the Estate must file an Inventory, Appraisal and List of Claims based on the assets in the estate on the date the Successor qualifies. See T.P.C. §227 and §765.

All Representatives and Guardians who are required to file an Inventory, Appraisal, and List of Claims and fail to do so within the appropriate time period, and do not obtain an extension from the court, will be removed as the Representative or Guardian, without notice. See T.P.C. §222(a)(1)(B) and §761(a)(2)

COMMON PROBLEMS WITH INVENTORIES:

- 1. The Style of the Case and the representative's name and title is not consistent with the original pleadings.**
- 2. The date of death is incorrect or in the case of a successor representative or a guardian, the date of qualification is incorrect.**
- 3. The inventory does not have enough detail to properly identify the property.**
The real property must have a legal description.
The vehicles must have the make and model and, if possible, the VIN number.
The cash accounts must have the name of the bank or financial institution and the type of account. Do not need to list account numbers.
- 4. The inventory does not indicate whether the property is community property or separate property.**
With community property, only the value of the Decedent's ½ interest should be added into the total.
- 5. The total value of all the property does not add up correctly.**
- 6. The List of Claims includes claims or debts owed "by" the estate instead of claims or debts owed "to" the estate.**
Do not include debts owed by the estate. If you want to list them, do not subtract them from the total value of the estate.
- 7. The inventory is not signed by the representative or guardian.**
The inventory must be signed by the representative or guardian and be notarized.

COMMON PROBLEMS WITH ANNUAL ACCOUNTINGS:

- 1. The Annual Account doesn't state the time period that the Accounting is made.**
- 2. The Annual Accounting is not signed and notarized by the personal representative.**
- 3. A Reconciliation between the value of the Estate at the beginning of the accounting period and the value of the Estate at the end of the account period is not presented.**

4. The beginning balance does not agree with the value listed on the inventory or the ending balance of the previous annual account approved by the Court.

5. The representative does not provide a verification of the funds on deposit in a financial institution at the end of the accounting period.

COMMON PROBLEMS WITH FINAL ACCOUNTINGS:

1. The time period for which the account is made is not indicated.

2. Proper Citation, Notice, or Waiver, if required, is not on file.

3. The Final Account is not signed and notarized by the personal representative.

4. The Accounting doesn't balance.

5. No reconciliation is present.

6. There is no indication of why the estate is being closed.

7. Heirship must be determined before the Estate can be closed.

8. A separate motion and order for discharge of personal representative and release of surety must be presented after the property is distributed to the distributees and receipts from all distributees have been filed.

AMENDED INVENTORIES, ANNUAL ACCOUNTINGS AND FINAL ACCOUNTINGS:

All amended filings must consist of original signatures and be notarized.

SHOW CAUSES:

Once a **Show Cause Order** has been entered, the court will not grant an extension or a continuance. If the documents required are not filed prior to the hearing, the representative and the attorney of record must appear at the show cause hearing and show cause why the required documents have not been filed.

OTHER PROBLEMS:

A **Small Estates Affidavit** must contain all the distributees' signatures as well as the two disinterested witnesses. These signatures must be notarized. The shares of the distributees must include the shares for Community Property, Real and Personal, and Separate Property, Real and Personal regardless of whether the estate consists of such property. A copy of the Death Certificate must also be filed along with a Small Estates Affidavit. An Attorney ad Litem must be appointed to investigate the facts listed in the Small Estate Affidavit and file a Report.

THERE WERE NUMEROUS CHANGES MADE TO THE TEXAS PROBATE CODE DURING THE 2011 LEGISLATIVE SESSION. ALL OF THESE CHANGES BECAME EFFECTIVE SEPTEMBER 1, 2011. I STRONGLY SUGGEST THAT YOU OBTAIN A CURRENT VERSION OF THE TEXAS PROBATE CODE SO YOU WILL BE AWARE OF ALL THE CHANGES THAT HAVE NOW BEEN ENACTED.