DRAFTING CONSIDERATIONS FOR THE UNCONTESTED DOCKET

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TARRANT COUNTY PROBATE COURT ONE

I. Introduction

Legal practice and pleadings change with the times. A century ago, it was proper pleading in a general denial to include the phrase: "*of this he puts himself upon the country*." (Meaning, in modern phraseology, "I want the court or a jury to rule on my position." (see "*Tender of Issue*," Blacks Law Dictionary https://thelawdictionary.org/tender-of-issue/). The same is true of *"may he go hence without day."*

As the law changes, practice must change. When the legislature or the appellate courts divert our path from what we have done before, we must learn new ways.

II. Drafting Considerations - The following is a list of the most-often-seen failures of lawyers to keep current in their orders on the uncontested probate docket:

A. "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA" - While Tex. Rules Civ. Proc. 21c(b) prohibits e-filing of documents containing "sensitive data," most people miss the first part of the rule: "*Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation…"* This means that if the Estates Code or a court rule requires the inclusion of otherwise sensitive data, supplying the require data does not run the filer afoul of the Supreme Court rule.

Many items in probate and guardianship pleadings are specifically required to be included by the Estates Code (e.g. Tex. Est. Code § 1101.001 An application for appointment of a guardian shall contain *(b)(1) the proposed ward's name, sex, date of birth, and address.*) As a result, the provisions of Tex. Rules Civ. Proc. 21c(b) regarding sensitive data *vis-a-vis* a minor do not apply.

Some probate document assembly software programs apparently contain an option to include the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." The consequence of placing this notice on a pleading is to require the county clerk to make the document a "*non-public document*" which cannot then be viewed or used by anyone other than court staff. Surely not the filer's intent.

B. "On this _____ day of _____, 20___," or "Signed this _____ day of _____, 20__" – With a paperless courtroom, all blanks must be filled in by computer annotation. There is no good reason to require the court to fill in the same date in two different places, once at the beginning and again at the end. Unless the order is prepared after the hearing date, all orders should begin with *"On this date…:"*

If at all possible, counsel should fill in all blanks themselves. Since you know well in advance the date on which your application will be heard, there is no good reason for not completing the date line. If you cannot fill in the date yourself (preferred method), provide a space that indicates: "*Signed* _____" rather than requiring the court to make three separate annotations to complete the date.

C. "All of the allegations contained in the application are true" - With typically only one

interested witness, there is no way for the court to determine the truth or falsity of testimony based solely on interested and otherwise unsupported testimony. The preferred allegation is that *"All of the allegations contained in the application comply with the Texas Estates Code."*

D. "wherein _____ is the Applicant and heir to the Decedent's estate" - Three things suggest themselves: 1. This language is usually found in a prefatory section of the order and not in a section where the court is making findings. It is too early for the court to declare this person an heir. That comes later, in the decretal section of the order. 2. One is an heir *to a Decedent*, not an heir "to an estate." 3. Better language: *"wherein _____ is the Applicant and a person interested in the Decedent's estate."*

E. *Non-Standard MERP language* - 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, the Medicaid Estate Recovery Program ("MERP") may have a claim against the estate, preventing the use of a muniment proceeding. Therefore, the court must receive evidence at the hearing that no such claims exists.

The evidence must take the form of one of the statements shown below, included in:

a) the Application to Probate Will as a Muniment of Title,
b) the Proof of Death and Other Facts and
c) the Order Admitting Will to Probate as a Muniment of Title:

1. No Benefits Received: If the decedent did not apply for or receive Medicaid benefits on or after March 1, 2005, include the following statement:

> *"The Decedent did not apply for and receive Medicaid benefits on or after March 1, 2005."*

2. Benefits Received: If it is believed Medicaid benefits were received, a certification must be obtained from the Health and Human Services Commission (formerly the Texas Department of Aging and Disability Services) which administers the Medicaid program in Texas. The required form is available at: *http://www.dads.state.tx.us/services/estate_recovery/TXMERP_CertificationForm.pdf*). The fax or mailing address is on the form. When the Certification is received, it will indicate one of three possibilities, which will dictate the appropriate statement for your pleadings:

A. *No claim is pending and the state does not intend to file a claim.* - If the certification indicates that no claim is pending and the state does not intend to file a claim, attach a copy of any correspondence from HHS or its Contractor and include the following statement as specified above:

> *"The Texas Department of Health and Human Services has certified that no claim is pending and the state does not intend to file a claim."*

B. The estate has *qualified for an exemption or waiver* from recovery. If the certification indicates the estate has qualified for an exemption or waiver from recovery, attach a copy of any correspondence from HHS or its Contractor and include the following statement as specified above:

> *"The Texas Department of Health and Human Services has withdrawn or waived any claim against the Decedent's estate."*

C. MERP intends to file a MERP claim against the Deceased Owner's estate in the amount of $ ____. If the certification indicates either that there is a MERP Claim filed against the Deceased Owner's estate or that MERP intends to file a MERP claim against the Deceased Owner's estate, a Muniment of Title proceeding cannot proceed. A full administration, either independent or dependent, may be required.

F. Letters of Independent Administration - While Tex. Est. Code Ch. 306 does not specifically provide for letters in a decedents estate other than Letters Testamentary or Letters of Administration, the better practice is to specify in the order appointing a court-created independent administration for *"Letters of Independent Administration"* or *"Letters of Independent Administration with Will Annexed."* Less confusion will result than if the independent personal representative only receives *Letters of Administration*, the same as a dependent personal representative, which do not indicate the personal representative's independent status.

G. Will and Codicil - There can be only one last will and testament. *Willbanks v. Montgomery*, 189 S.W.2d 337, Tex. Civ. App. 1945, n.w.h.). Once the will and codicil are admitted to probate, there is no longer any codicil. Codicils become part of the last will. The order should read that the will and codicils are ***collectively*** admitted to probate as the last will and testament. No further reference to any codicils should be me made.

H. *"Independent Co-Executors," not "Co-Independent Executors"* - Tex. Est. Code § 307.002 speaks to the actions of Joint Executors or

Administrators and also variously refers to them as "co-executors" or "co-administrators." Their ability to act with or without court oversight makes them dependent co-executors or independent co-administrators. Hopefully, they would not be "co-dependent."

I. "Joint Guardians," not "Co-Guardians" - The Estates Code, in several sections, mentions "*Joint Guardians*" (see Tex. Est. Code § 1105.104 ('Bonds of Joint Guardians'), § 1154.005 ('Failure of Joint Guardians to File Inventory, Appraisement, and List of Claims'), § 1203.052 (a)(10) ('Removal with Notice'), § 1203.057 ("Removal of Joint Guardian').

In only one section does it mention "co-guardians" and then, only with reference to appointees under the *laws of another state*. Tex. Est. Code § 1104.001 ('Co-guardians appointed under the laws of a jurisdiction other than this state').

J. "Minutes of the Court" - In 2009, the Texas Legislature provided that all references in the Texas Probate Code (now the Texas Estates Code) be changed from the "Minutes of the Court" to the "Judge's Probate Docket. Acts 2009, 81st Leg., ch. 602, § 2; Tex. Prob. Code § 13, Tex. Est. Code § 52.001. That was over eight years ago and still it turns up in many orders.

K. ☐ *Check Boxes* - Lawyers presumably get paid for practicing law. Part of practicing law is knowing what goes into an order. Do not ask the court to draft your orders for you by creating multiple choice forms with check boxes.

L. Check Box Exception: Alternate Listing – A permissible exception to a multiple-choice provision is the provision regarding an Affidavit of Compliance for a Muniment of Title order. The better practice is either to 1) leave a blank ("IT IS FURTHER ORDERED that the filing of a compliance affidavit required under § 257.103 of the Texas Estates Code is hereby _____.") or 2) an alternate listing ("waived/required").

M. Requirement of Bond in Court-Created Independent Administration - While Tex. Est. Code §§ 401.002(b) and (c) provide for the distributees to request that a court-created independent administrator serve without bond, the requirement of bond is a decision for the judge to make. Tex. Est. Code § 405.

A second permissible exception to multiple-choice provision is to provide the court with alternatives: "IT IS FURTHER ORDERED that a bond of $ _____ is hereby required / no bond or other security shall be required."

N. Power of Sale - "(Independent Executor) may sell the real property of Decedent upon consent of the distributees who are to receive any interest in the property"- While Tex. Est. Code § 401.006 does provide that the court may include such a power in the order, this does not supplant the requirement that a judgment must be supported by the pleadings, and a party may not be granted relief in the absence of pleadings to support such relief. Tex. R. Civ. P. 301. *King v. Lyons*, 457 S.W.3d 122 (Tex. App. Houston – 1st Dist. 2014, no pet.). In addition, the pleadings should be in the form of a request, not an ultimatum in the application that "_____ *may sell the real property of Decedent upon consent of the distributees who are to receive any interest in the property."*

O. "It is ORDERED that, upon the payment of taxes, if any are due, this estate shall be dropped from the docket."- Again this language is a relic from a bygone age that gets handed down from old lawyers to young lawyers. The Texas Estates Code is clear on how Muniment of Title practice operates. Leave the extra language out.

P. "IT IS FURTHER ORDERED that upon his death, the Decedent was the owner of the following real and personal property…" Whether this is in an application to probate will and for letters or merely as a muniment of title, unless you have specifically plead for declaratory relief and had a twenty-day return period on your citation, you are not entitled to declaratory relief, either as to the existence of particular property or the characterization thereof.

Q. "IT IS FURTHER ORDERED that there is no necessity for the appointment of appraisers of this Estate." - Appraisers may only be appointed upon the court's own motion or on the motion of an interested person and only then, upon a showing of good cause. Tex. Est. Code Ch. 309, Subch A. Again, such language is unnecessary surplusage.

R. "admitted to probate and recorded" - This language is inappropriate in Texas. The judge signs the order, but the clerk records the documents. This

language seems to assume some kind of self-effectuating action implicit in the order. Not in Texas.

S. Ad Litem Fee and Discharge – Although some form books end an heirship order with a provision awarding the ad litem their fees and discharging them. The policy of this court for well over twenty years, has been and is that a separate order regarding fees is to be submitted by the Attorney Ad Litem after all services have been rendered and that, unless directed otherwise, the ad litem is to be discharged after submitting an application for fees and expenses.

T. "and no further action shall be had in this or any other court" – Again, appointment of an independent personal representative carries with it the statutory freedom from additional actions in court. The two exceptions are: 1) the return of an inventory and 2) the notices to beneficiaries required by Tex. Est. Code § 302. Either leave the language out or be accurate and complete.

> **Note: Because an Affidavit in Lieu of Inventory can only be filed at the option of the Applicant, the court cannot order the filing of such an affidavit and it is not "required by law," so such a reference should not be included in the '*no further action*' decretal clause.**

U. "upon the payment of taxes, if any are due, this estate shall be dropped from the docket." – Another relic from the dustbin of legal and legislative history. This phrase (occurring principally in muniment of title orders) came from a time, more than 40 years ago, when the taxable threshold for estates was $60,000.00 and the courts did not have to report to the Texas Supreme Court on case dispositions. However, because no administration is ever opened in a muniment proceeding, 'dropping the case from the docket' in a time of electronic files makes no sense.

V. Blank Signature Page - Several years ago, an enterprising, but dishonest, legal assistant detached a signature page with the judge's signature (and nothing else but the date) from a filed document. This signature page was then attached to a fabricated order, directing the withdrawal of funds from a frozen account. It also bore a digitally-forged certification stamp. The legal assistant ended up doing several years in prison. Following that incident, this court has made it a practice never to sign an otherwise blank signature page.

W. *Boren* Will – When, in executing a will, the testator and or the witnesses sign the self-proving affidavit, but fail to sign the will and the attestation clause, Tex. Est. Code § Sec. 251.105 saves the will by providing that *"A signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witnesses or both, except that, in that case, the will may not be considered a self-proved will."* This legislative amendment was to overcome the effect of the Supreme Court's ruling in *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).