Check 10 key points *in the Will*
to get all the paperwork right for letters testamentary

Key Points to Check	How to Check & How it Affects Paperwork, Related Testimony, etc.
1. Was the will **validly executed**?	Don't forget to check the obvious question of whether the will was validly executed. See requirements in Texas Estates Code ("EC") §251.051: Except as otherwise provided by law, a last will and testament must be: (1) in writing; (2) signed by: (A) the testator in person; or (B) another person on behalf of the testator: (i) in the testator's presence; and (ii) under the testator's direction; and (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence. Remember that according to EC §251.105, "[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*." Emphasis added. See #4 below about self-proved wills. In addition, a will could be valid with only one "witness" *plus a notary who witnessed the signing of the will*. In that case, the Court strongly prefers that the notary be the subscribing witness in court. If the notary cannot appear in court, the court requires both (1) that the notary sign an affidavit with typical subscribing-witness information (modified to accurately state the notary's role) and *with an attached copy of the relevant log book* **and** (2) that the one subscribing witness testify in court (or two disinterested handwriting witnesses testify in court, with a motion & order for alternative proof). See #4 below about self-proved wills. **What if the "will" is not validly executed?** If a purported will was not validly executed, none of the rest of this list is relevant because an invalidly executed will cannot be probated. In that case, if probate is necessary, there will need to be a determination of heirship, or a small estate affidavit, or a probate of an earlier will, depending on the circumstances. Note that if there's *any* possible argument that a purported will was validly executed, the Jefferson County Probate Court requires that the beneficiaries have notice so they have an opportunity to argue the will is valid.
2. Is the will (and any codicil) an **original** and not a copy?	**How do you know?** In these days of good copiers – including color copiers – and notary stamps instead of raised seals, it's not always easy to tell whether a will is the original will. Do take time to look at *all pages* of the will and see whether all pages of the will are originals. As you see more originals and copies, you can develop a pretty good eye. Don't simply take the client's word; in Jefferson County, it's not unusual for clients to swear a will is an original – but then find the actual original elsewhere after being told that what they thought was an original is a copy. Some hints follow below, but no checklist will always lead you to a definitive answer: • A raised notary seal is proof for that page of the will, at least! • Most stamped notary seals will smear with a careful spit test, but be sure to check whether everything else smears, too: ✓ If *only* the seal smears, it's probably an original (or at least that page is). ✓ If *everything* smears or if *nothing* smears, there's a pretty good chance it's a copy – so carefully check the other hints. • Original signatures often can be felt on the front or back side of the paper (slightly raised or slightly indented – or both). • If all signatures are in black, take a second look. • Blue ink is more likely an original, but not definitely given color copiers. • Copied signatures can look somewhat spotty– but that can also happen with different pens. • If different pages are on different types of paper, take a second look.

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2. Continued: Is the will (and any codicil) an **original** and not a copy?	**What if the will or a codicil is a copy?** When the will or a codicil is a copy, you will need to do a variety of things differently: a. **Additional information required in application, proof, and order.** See EC §256.156. • *The application* must state (a) the cause of the will's non-production, (b) that reasonable diligence has been used to locate the original will, and (c) that the testator did not revoke the will. • *The proof of death and other facts* must include testimony that proves each of the above three points. See *In re Estate of Wilson*, 252 S.W.3d 708 (Tex. App. – Texarkana 2008, no pet. h.), where evidence was insufficient to rebut the presumption of revocation. In addition, "the contents of the will must be substantially proved by the testimony of a credible witness who has read either the original or a copy of the will, has heard the will read, or can identify a copy of the will." EC § 256.156(b)(2). • *The order* must include a finding that the applicant has overcome the presumption that the original will has been revoked. b. **"Copy" mentioned in all paperwork**. **The text and the title** of the application and the order must indicate that a copy of a will (or codicil) is being probated. For example, "Order Admitting Copy of Will and Original First Codicil to Probate and Authorizing Letters Testamentary." The **text** of the proof and the oath also needs to mention the copy. c. By administrative order, the Court requires that you **physically file the will copy you are seeking to probate within three business days of filing the application.** Having the actual document helps the Court properly evaluate the will copy being offered for probate. *The Court will not set a hearing until you file the will copy.* d. **Either Personal Service or Waivers of Service.** EC §258.002 requires citation to all parties interested in the estate when there's a copy of a will, *which includes both heirs who would take if the lost will is not probated and devisees named in the will.* e. If you are having some or all of the decedent's intestate heirs sign waivers, we recommend that you use the Court's notice form as a guide when drafting waivers since all waivers must clearly show that the heir signing the waiver knows about all of the points addressed in the notice. f. **Heirship testimony**. In addition to the testimony contained in the proof of death and other facts discussed above, the Court requires the testimony of one disinterested witness who can identify the decedent's heirs-at-law. This witness will testify in open court, and the applicant's attorney needs to prepare a written statement of the witness's testimony. Parts of EC §203.002 – phrased as testimony rather than as an affidavit – provide ideas for the type of testimony necessary to

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	establish a testator's heirs; see numbers 1-5, and then 6-8 as needed given the facts. Also include a statement that the witness does not have an interest in the estate. **Hearing time**. When you schedule a hearing, tell the clerk you are probating a copy of a will or codicil.
3. Are there any **codicils**?	If there are any codicils: a. Is anything in this checklist affected by what is in the codicil(s)? If so, follow the suggestions given. b. You must mention "Codicil" in **both the text and the title** of the application and the order. For example, "Order Admitting Will and Two Codicils to Probate and Authorizing Letters Testamentary." You also need to mention the codicil(s) in the **text** of the proof and the oath. c. The posted citation must mention all codicils. In the title of the application, be sure to specify accurately which instruments are being filed for probate. Otherwise, there is a risk that the clerk will not see the documents being filed and will post them incorrectly, which will require reposting – with resulting costs and delay.
4. Is the will **self-proved**?	**How do you know if the will is self-proved?** Before pleading that a will is self-proved, be sure it is. The answer can depend on the date of decedent's death or the date of the will. Whatever those dates, a will is self-proved if it includes a self-proving affidavit in substantial compliance with §251.104 of the Estates Code (EC). The following are common flaws that make wills not self-proved ***under §251.104***: ✓ Blank lines for the names of the testator and/or witnesses have not been filled in by the notary *in the notary's statement at the end of the affidavit*. ✓ The witnesses have not actually *signed* or otherwise subscribed the affidavit. (The notary cannot print their names on the signature line.) ✓ The witnesses have not ***sworn*** to the statement, thus preventing it from being an affidavit. ✓ The affidavit does not carry a notary seal. (Often a problem if you are probating a copy of an older will.) Even if a will is not self-proved under §251.104, it still might be self-proved depending on the date of the will (in all cases) and on the date of decedent's death (if the will was executed outside of Texas). **If the will was executed on or after September 1, 2011**, a will is also self-proved if it was simultaneously executed, attested, and made self-proved as provided by §251.1045 – the "one step" will execution procedure. Substantial compliance with the form set out in §251.1045 is required for the will to be self-proved under this section. **If the decedent died on or after September 1, 2011 AND the will was executed outside of Texas**, there are two other ways a will can be considered self-proved: (1) Under the above facts, a will is considered self-proved under §256.152(c) if the will or an affidavit attached to the will provides everything set out in §256.152(c) – which tracks the Uniform Probate Code requirements. A few of the *differences between §251.104 and §256.152(c):* ✓ §256.152(c) does not require *witness* ages ✓ §256.152(c) does not require a statement that the testator asked the witnesses to sign ✓ §256.152(c) requires the witnesses to state that the testator was under no

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4. Continued: Is the will **self-proved**?	constraint or undue influence ✓ §256.152(c) requires the *testator* to state that he was 18 or over, of sound mind, and under no constraint or undue influence (2) Under the above facts, a will is considered self-proved if the will is self-proved according to the laws of the state or foreign country of the testator's domicile *at the time of execution*. See §256.152(b). *To show that a will is self-proved under this provision, you must do all of the following:* • *In your application or in a separate motion*, ✓ state the jurisdiction where the testator was domiciled at the time the will was executed, ✓ ask the Court to take judicial notice of the laws regarding self-proof of that jurisdiction *on the relevant date* (with a statutory citation), ✓ allege that the will is self-proved according to that law, and ✓ attach as an exhibit a copy of the statute regarding self-proof for that jurisdiction *on the date the will was executed*. The statute must indicate on its face that it is from the jurisdiction; in other words, it is not sufficient to simply type the text of the statute into a document. It would be sufficient to download the statute from Westlaw, Lexis, or another legal database or to photocopy a printed statute that includes reference to both the jurisdiction *and* the relevant date. • *In your proof of death and other facts,* prove that the testator was domiciled in the alleged jurisdiction at the time the will was executed. (As with all proofs, do **not** have the witness state that the will was self-proved; the Court will make that determination. Also do not request in the proof that the Court take judicial notice of the laws regarding self-proof of foreign jurisdiction.) • *In your proposed order,* make sure there isn't any inaccurate boilerplate language. **What if the will is not self-proved?** If the will is not self-proved, you need to do several things differently: a. Modify your standard forms to indicate that the will (or codicil) is not self-proved, but is validly executed (assuming, of course, that it is). b. In the application, also set out how you're going to prove up the will – either the testimony of one subscribing witness to the will, or, if a subscribing witness is unable to attend the hearing, the testimony of two disinterested witnesses who are familiar with the signature of the decedent. c. By the paperwork deadline, give the Court your proposed testimony for proving up the will: *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). 4. At the time the will was executed, the witnesses were each at least 14 years old. *Disinterested witnesses must prove the following:* 1. At the time the will was executed, the testator was of sound mind.

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	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 the decedent's. 4. The witness does not have an interest in the estate. d. Have the necessary witnesses testify at the hearing.
5. Is any devisee a **state**, a **governmental agency** of the state, or a **charitable organization**?	Again, modify your forms: never use the standard boilerplate when it's not accurate. It is helpful to also indicate whether the charity, etc., is named as contingent or direct devisee and – if a contingent devisee on the face of the will – whether the charity, etc., takes given the circumstances. (Absent a declaratory judgment, information about whether a contingent devisee takes cannot be included *in the order*.)
6. Is the person who will serve as **executor** the **first-named** executor in the will? If not, what happened to the executor(s) with priority?	When the person who will serve as executor is not the first-named executor in the will, your application and your proof must explain what happened to the first-named executor and all others who will not serve but who have priority over the executor(s) who will. If any executor is declining to serve, you need to have that person's notarized declination in the file before the hearing. For example, if you are seeking letters for the fourth-named executor, you might state that "X," the first-named executor, died on ___ date, with his will probated in Jefferson County Cause No. _____; "Y," the second-named executor, lacks capacity (which you'll need to prove at the hearing); and "Z," the third-named executor, will file a notarized declination to serve. The following are examples of the types of proof Jefferson County requires when any named executor with priority will not serve: • **Person is declining to serve**: need person's *filed* notarized declination. • **Person is dead**: The court prefers a copy of the death certificate of the named executor with priority. If the death certificate is not available, the applicant must provide either (1) the cause number and jurisdiction where the executor with priority died or (2) a published obituary. • **Person is convicted felon**: need sentencing order or other proof of conviction. • **Person is incompetent**: need guardianship cause number, if any, or letters from one or two doctors. (Only one letter is required if the letter is sufficiently specific.) • **Person was divorced from decedent after the date of the will**: need divorce decree. • **Person is a minor**: need birth certificate.
7. As set out in the will, what, **exactly**, are the **names** of • **the decedent**? and • **the executor who will serve**?	In all pleadings, **always begin** with the **exact names as they appear in the will** for the **testator**, **executor**, and any beneficiaries mentioned in the pleadings. Then, if needed, put "A/K/A," "N/K/A," or "F/K/A" depending on the circumstances, **followed by** the additional or corrected name(s) that you need to include. **Even in the order, the executor's name as it is given in the will must come first, with even "now known as" names following.** Watch for spelling errors made in either the will or the documents your office prepares. If the testator misspelled a name, then all other documents must carry that mistaken name *first* with an "A/K/A" to correct the typo that the testator missed. Alias problems and spelling errors that you miss in the application can require reposting (depending on the circumstances), which could increase your cost and delay your hearing. Note that if you need to use A/K/A/ or similar acronyms in the application and order, you might also need to put on appropriate testimony about the different names unless the differences are self-explanatory.

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8. Does the will indicate that the executor seeking letters should be **independent**?	**Does the will make the executor seeking letters independent?** Check to see if the will indicates that the executor *for whom you are seeking letters* should be independent: • "no court action" • "independent" • "least possible court involvement" • etc. Definitely look at what the will says *about the executor who will serve*. It is not uncommon that a will makes the first-named executor independent, but does not make alternate executors independent (whether intentionally or not). **What if it doesn't?** If the will **does not** indicate that the executor who is seeking letters should be independent, start by modifying your forms so you are not using inaccurate boilerplate. If you are seeking independent administration when the will does not state that the executor who will serve should be independent, indicate the statutory basis of your request in your application, proof, and order. See EC Chapter 401. Then be sure to get sufficient sworn requests from **all** of the distributees. If there is a minor distributee, the Court will not approve an independent administration under EC §401.002.
9. Does the will indicate that the executor seeking letters should serve **without bond**? "§ 305.101. Bond Generally Required; Exceptions. (a) Except as otherwise provided by this title, a person to whom letters testamentary or of administration will be issued must enter into a bond before issuance of the letters. (b) Letters testamentary shall be issued without the requirement of a bond to a person named as executor in a will probated in a court of this state if: (1) the will directs that no bond or security be required of the person; and (2) the court finds that the person is qualified. (c) A bond is not required if a personal representative is a corporate fiduciary."	**Does the will waive bond for the executor seeking letters?** Here, too, definitely look at what the will says about bond *for the executor who will serve*. It is not uncommon that a will waives bond for the first-named executor independent, but does not waive bond for alternate executors (again, whether intentionally or not). **What if it doesn't?** When the will does not waive bond, the statute that allows **the Court** to waive bond when the testator did not is EC §401.005. And 401.005 allows the Court to waive the bond **only** when an independent administration is created under 401.002 or 401.003 – and **not** when the independent administration is created *by the testator under 401.001*. Here's what that means if you have a will that does not waive bond for the personal representative who will serve: **A. When the will names an executor, but does not create an independent administration and does not waive bond,** proceed under EC § 401.002(a) & 401.005. Under 401.002(a), the court can appoint someone as an independent executor when all the distributees of the estate agree on the advisability of having an independent administration and consent to the nomination of the person named in the will. Under 401.005, the court can waive bond when an independent administration is created pursuant to 401.002(a). ***The procedure:*** All of the distributees of the will must consent to the named executor serving as the Independent Executor under 401.002(a). In the same consents, also have the distributees request a waiver of bond under 401.005. The consent must be in the form of a notarized affidavit. Don't forget to include waiver of citation language in this affidavit, see 401.004.

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#9 Continued: Does the will indicate that the executor seeking letters should serve **without bond**?	**B. When the will does not name an executor and does not waive bond,** proceed under EC § 401.002(b) & 401.005. Section 401.002(b) applies "where no executor is named in the decedent's will, or in situations where each executor named in the will is deceased or is disqualified to serve as executor or indicates by affidavit filed with the application for administration of the decedent's estate his inability or unwillingness to serve as executor." ***The procedure:*** All of the distributees of decedent may collectively designate "a qualified person, firm, or corporation" to serve as independent administrator without bond under EC 401.002(b) & 401.005. ***If you proceed under 401.002(b), you will be requesting "independent administration with will annexed."*** All of the paperwork should reflect the "will annexed" language. **C. When the will names an independent executor, but does not waive bond,** it gets more complicated. EC §401.005 does not allow the Court to waive bond when an independent administration is created *by the testator* under the will (401.001). Under 401.005, *the Court* may waive the bond only when an independent administration is created pursuant to one of the following sections: 401.002(a) – will names executor, but does not create independent administration 401.002(b) – will names no executor who can serve, and does not create independent administration 401.003 – intestacy To get bond waived here, therefore, you'll need to take steps so you fall within 401.002(b), since that is the only one of the three sections that could apply in this situation. ***The procedure, step 1:*** Have *all* named executors decline to serve. The declinations to serve must be in the form of a notarized affidavit. These declinations will take you to a blank slate so you are able to proceed under 401.002(b). ***The procedure, step 2:*** As with "B" above, all of the distributees of the will can then consent to someone serving as ***the Independent Administrator with Will Annexed*** under 401.002(b) and also request the person to serve without bond under 401.005. The distributees can choose anyone they want, including the person who was named in the will to serve as the independent executor. If they do choose the person who was named in the will, that person would simply decline to serve as executor *as named in the will* but would accept the appointment as independent administrator with will annexed. The consent must be in the form of a notarized affidavit. Do not forget to include waiver of citation language in this affidavit, see 401.004. If you proceed under any of the above scenarios, be sure that the requests you prepare for the distributees include everything necessary. If any of the distributees are dead, or are minors, you may want to confer with the Court about how to proceed.

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10. Does the will dispose of all property? Is there a partial **intestacy** because there is no residuary clause? This problem is more common with holographic wills, but we have seen it even with lawyer-prepared wills.	If there is a partial **intestacy**, the best practice is to mention the intestacy. What you do next depends on the situation. • **When the will creates an independent administration for the executor who will serve**, the Jefferson County Probate Court allows the applicant to decide whether to seek an heirship to determine the heirs for the property that does not pass under the will (unless there is a total intestacy). Of course, if there is no heirship proceeding, the independent executor assumes the risk that the intestate property will be distributed incorrectly, and the lawyer assumes the risk of a malpractice action for not having done the heirship. If there is a total intestacy, the Jefferson County Probate Court requires that the applicant combine a determination of heirship with the will probate. • **When the applicant is requesting independent administration under EC §401.002**, the Jefferson County Probate Court requires that the applicant combine the will probate with an heirship proceeding to determine who receives the property that does not pass under the will and to determine the heirs who will need to join the beneficiaries in the §401.002 request(s). • **When there will be a dependent administration**, the Jefferson County Probate Court requires an heirship proceeding for the intestate property. The court prefers to hear the heirship proceeding and the will probate at the same time, with a combined order. The court will allow the will to be probated first if there's a need for administration before the heirship can be completed, but in that case the court requires that the heirship proceeding be heard within 60 days of the date letters are granted. In insolvent estates, an heirship may not need to be done, but the Jefferson County Probate Court will not waive the heirship until the insolvency is proved during the dependent administration. • **When you are probating the will as a muniment of title**, the Jefferson County Probate Court requires a declaratory judgment as provided by Chapter 37, Civil Practice & Remedies Code because the "person who is entitled to property under the provisions of the will cannot be ascertained solely by reference to the will." EC §257.101. The applicant needs to seek both (1) a declaration that there is a partial intestacy and (2) an heirship proceeding to determine the heirs that will take the property that passes by intestacy. An attorney ad litem needs to be appointed to represent unknown heirs. The application with the declaratory judgment must be posted for twenty days before the court can act upon it.