

# CLEAR AND CONVINCING EVIDENCE (1/3)

**Question:** Under the Estates Code, what facts are required to be proved by Clear and Convincing Evidence in a Determination of Heirship proceeding?

# CLEAR AND CONVINCING EVIDENCE (2/3)

**Answer:** Only that an illegitimate child is the child of a decedent.

Sec. 201.052. Paternal Inheritance.

(d) If under Subsection (c) the court **finds by clear and convincing evidence** that the purported father was the biological father of the child:

(1) the child... [inherits].

-Nothing else is required to be proven by clear and convincing evidence in a Determination of Heirship proceeding.

-The Code does not require anything to be proven by Clear and Convincing Evidence to have a Will admitted to Probate or to create an Administration.

-Case-law require that some other facts related to inheritance rights be proved by C&CE.

# CLEAR AND CONVINCING EVIDENCE (3/3)

The Estates Code requires only the general civil burden of proof of by a preponderance of the evidence, **with only five exceptions.**

(1) Sec. 113.102. Ownership of Joint Account During Parties' Lifetimes.

C&C evidence required to prove ownership of funds is disproportionate to contributions

(2) Sec. 113.104. Ownership of Trust Account During Trustee's Lifetime.

C&C evidence required to prove trust account does not belong beneficially to the trustee during the trustee's lifetime.

(3) Sec. 201.062. Treatment of Certain Parent-child Relationships.

C&C evidence required to prove paternity to establish heirship/inheritance rights of child.

(4) Sec. 255.451. Circumstances under Which Will May Be Modified or Reformed.

C&C evidence required for judicial modification of a will.

(5) Sec. 361.054. Removal and Reinstatement of P.R. under Certain Circumstances.

C&C evidence of malfeasance of P.R. required for removal.

# IMPOSSIBLE MANDATE (1/2)

**Question:** What mandate required by the Estates Code (twice) is essentially impossible for a lawyer to comply with?

# IMPOSSIBLE MANDATE (2/2)

## Answer:

Sec. 256.053. Filing of Will with Application for Probate Generally Required.

(a) An applicant for the probate of a will **shall file the will with the application** if the will is in the applicant's control.

Sec. 257.052. Filing of Will with Application Generally Required. (MUNIMENT)

(a) An applicant for the probate of a will as a muniment of title **shall file the will with the application** if the will is in the applicant's control.

(b) A will filed under Subsection (a) must remain in the custody of the county clerk unless removed from the clerk's custody by court order.

**Additional trivia:** Who owns the Will of Shoeless Joe Jackson and what is its value?

See, American Heart Assn. v. County of Greenville, 1997 WL 541927 (Sup. Ct., S.C.) 489 S.E.2d 921 (Sup. Ct., S.C., 1997).

# LOCAL SUGGESTIONS (1/1)

Please have your client sign all documents that they will need to sign before the start of the hearing.

Please bring me the Will and all of the documents that you want me to sign before you sit down.

If you have copies that you want conformed, please give these to me as well.

There is no need to ask permission to approach to bring me these documents.

# LOST WILL (1/2)

**Question:** What additional requirements are there when seeking to admit a Will to Probate when you do not have the original Will (but you do have the ability to prove the contents of the Will even though it is now missing)?

**Hint:** It is essentially the same additional requirement that is imposed when you are attempting to probate a Will more than four years after death.

# LOST WILL (2/2)

## Answer:

Sec. 258.002. Citation on Application for Probate of Will Not Produced in Court.

(a) On the filing of an application for the probate of a written **will that cannot be produced in court**, the clerk shall issue a citation to all parties interested in the estate. The citation must:

- (1) contain substantially the statements made in the application for probate;
- (2) identify the court that will act on the application; and
- (3) state the time and place of the court's action on the application.

(b) The **citation required by Subsection (a) shall be served on the testator's heirs by personal service** if the heirs are resident of this state and their addresses are known...

Sec. 258.051. Notice to Heirs.

(a) Except as provided by Subsection (c), an applicant for the probate of a will under Section 256.003(a) (WSC note: wills probated more than four years after death) **must give notice by service of process to each of the testator's heirs** whose address can be ascertained by the applicant with reasonable diligence.

(b) The **notice required by Subsection (a) must:**

(1) contain a statement that:

**(A) the testator's property will pass to the testator's heirs if the will is not admitted to probate; and**

**(B) the person offering the testator's will for probate may not be in default for failing to present the will for probate during the four-year period immediately following the testator's death...**



# ~~NAMES AND RESIDENCES OF~~ SUBSCRIBING WITNESSES (1/1)

## OLD RULE:

Sec. 257.051. Contents of Application Generally. (MUNIMENT)

(a) An application for the probate of a will as a muniment of title must state... :

(7) **the name and residence of:**

**(B) each subscribing witness** to the will, if any...

[PC §81(a)] Contents of Application for Letters Testamentary.

(a) An application for the probate of a will must state...

(5) **the names and residences of each subscribing witness** to the will, if any.

## NEW RULE:

Sec. 257.051. Contents of Application Generally. (MUNIMENT)

(a) An application for the probate of a will as a muniment of title must state...

(8) **the name of each subscribing witness** to the will, if any...

Sec. 256.052. Contents of Application for Probate of Will.

(a) An application for the probate of a will must state...

(8) **the name of each subscribing witness** to the will, if any...

# OLD DIVORCES (1/1)

Sec. 256.052. Contents of Application for Probate of Will.

(a) An application for the probate of a will must state:

(10) whether a marriage of the testator **was ever dissolved after the will was made** and, if so, when and from whom;

Sec. 257.051. Contents of Application Generally.

(a) An application for the probate of a will as a muniment of title must state:

(11) whether a marriage of the testator **was ever dissolved after the will was made** and, if so, when and from whom; and

# ADMINISTRATION MORE THAN FOUR YEARS AFTER DEATH (1/1)

Sec. 301.002. Period for Filing Application for Letters Testamentary or of Administration.

(a) **Except as provided by Subsection (b)** ... an application for the grant of letters testamentary or of administration of an estate must be filed not later than the fourth anniversary of the decedent's death.

(b) **This section does not apply if administration is necessary to:**

**(1) receive or recover property due a decedent's estate...**

*This exception essentially consumes the rule, because the purpose of administration after four years is almost always to gather or to recover property of the estate.*

# MUNIMENTS AND DEBTS (1/1)

Sec. 257.001. Probate of Will as Muniment of Title Authorized.

A court may admit a will to probate as a muniment of title if the court is satisfied that the will should be admitted to probate and the court:

(1) is satisfied that the testator's estate does not owe an unpaid debt, other than

any debt secured by a lien on real estate; **Or**

(2) finds for another reason that there is no necessity for administration of the estate.

(However, note the inconsistency with):

Sec. 257.051. Contents of Application Generally.

(a) An application for the probate of a will as a muniment of title must state...

(10) that the testator's estate **does not owe an unpaid debt, other than any debt secured by a lien on real estate...**

# DISQUALIFICATION (1/1)

Sec. 304.003. Persons Disqualified to Serve as Executor or Administrator.

A person is not qualified to serve as an executor or administrator if the person is:

(1) incapacitated;

(2) a felon **convicted** under the laws of the United States or of any state of the United States unless, in accordance with law, the person has been pardoned or has had the person's civil rights restored;

General Rule of Texas Criminal Law (subject to some exceptions): **successful completion of probation deemed not to constitute a conviction.**

Restoration of rights was common under Art. 42.12, sec. 20, TCCP.

Restoration is more complex following changes made by 42A.111 TCCP, effective January 1, 2017.)

# ORDER OF NO ADMINISTRATION (1/1)

Sec. 451.001. Application for Family Allowance and Order of No Administration.

(a) If the value of the entire assets of an estate, excluding homestead and exempt property, does not exceed the amount to which the surviving spouse, minor children, and adult incapacitated children of the decedent are entitled as a family allowance, an application may be filed by or on behalf of the surviving spouse, minor children, or adult incapacitated children requesting a court to make a family allowance and to enter an order that no administration of the decedent's estate is necessary.

Sec. 451.002. Hearing and Order. [§140]

(a) On the filing of an application under Section 451.001, the court may hear the application:

- (1) promptly without notice; or
- (2) at a time and with notice as required by the court.

(b) On the hearing of the application, if the court finds that the facts contained in the application are true and that the expenses of last illness, funeral charges, and expenses of the proceeding have been paid or secured, the court shall:

- (1) make a family allowance; and
- (2) if the entire assets of the estate, excluding homestead and exempt property, are exhausted by the family allowance made under Subdivision (1):
  - (A) assign to the surviving spouse, minor children, and adult incapacitated children the entire estate in the same manner and with the same effect as provided in Subchapter C, Chapter 353, for the making of a family allowance to the surviving spouse, minor children, and adult incapacitated children; and
  - (B) order that there shall be no administration of the estate.

# JUDICIAL MODIFICATION OR REFORMATION OF WILL (1/1)

## SUBCHAPTER J. JUDICIAL MODIFICATION OR REFORMATION OF WILLS (§§255.451 - 255.455)

Sec. 255.451. Circumstances under Which Will May Be Modified or Reformed.

(a) On the petition of a personal representative, **a court may order that the terms of the will be modified or reformed**, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:

(1) modification of administrative, nondispositive terms of the will is **necessary or appropriate to prevent waste or impairment** of the estate's administration;

(2) the order is necessary or appropriate **to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent**; or

(3) the order is **necessary to correct a scrivener's error** in the terms of the will, **even if unambiguous**, to conform with the testator's intent.

(b) An order described in Subsection (a)(3) may be issued **only if the testator's intent is established by clear and convincing evidence**.

# CRIMINAL OFFENSES (1/2)

**Question:** Which two criminal offenses are created by the Estates Code?



# CRIMINAL OFFENSES (2/2)

## Answer:

Sec. 204.056. Criminal Penalty.

(a) An individual commits an offense if:

(1) the individual **intentionally releases an identifiable sample of the genetic material of another individual** that was provided for purposes of genetic testing ordered under this subchapter; and

(2) the release:

(A) is for a purpose not related to the proceeding to declare heirship; and

(B) was not ordered by the court or done in accordance with written permission obtained from the individual who provided the sample.

(b) An offense under this section is a Class A misdemeanor.

Sec. 505.006. Criminal Penalty...

(a) A foreign corporate fiduciary commits an offense if the fiduciary violates this subchapter.

(b) An offense under this section is a misdemeanor punishable by a fine not to exceed \$5,000.

# LEGISLATIVE ANOMALLY (1/1)

## Sec. 301.151. General Proof Requirements.

An applicant for the issuance of letters testamentary or of administration of an estate must prove to the court's satisfaction that:

(1) the person whose estate is the subject of the application is dead; Text of Sec. 301.151(2) as Amended SB 995:

(2) except as provided by Section 301.002(b) with respect to administration necessary to receive or recover property due a decedent's estate, and Section 501.006 with respect to a foreign will, four years have not elapsed since the date of the decedent's death and before the application; Text of Sec. 301.151(2) as Amended HB 3160:

(2) except as provided by Section 301.002(b)(2), four years have not elapsed since the date of the decedent's death and before the application;

**(Note: 84th Leg. Passed two versions of (2))**

(3) the court has jurisdiction and venue over the estate;

(4) citation has been served and returned in the manner and for the period required by this title; and

(5) the person for whom letters testamentary or of administration are sought is entitled by law to the letters and is not disqualified. Amended 84th Leg., eff. Sept. 1, 2015. See transitional note following Sec. 256.003 and Sec. 301.002.