

TO PROBATE OR NOT TO PROBATE

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June 25, 2013

Houston

CHAPTER 1

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. CAN YOU PROBATE THE WILL?	1
A. When did the Decedent die?	1
1. Obtaining Letters after Four Years	1
B. Where did the Decedent die?	1
C. Is it a valid original will?	2
1. Original Attested will	2
2. Self-proved Will	2
3. Holographic Will	3
4. Lost Will / Copy of Will	3
5. Foreign will	3
D. Who is the executor?	4
III. SHOULD YOU PROBATE THE WILL?	4
A. Who are the beneficiaries and who are the heirs?	4
B. Is there a Potential Will Contest?	4
C. Are any trusts created or is it a pour-over will?	5
D. What are the Assets and the Debts of the Estate?	5
1. Insolvent Estate	5
2. Real Property or Mineral Interests	6
3. Ancillary Probate	6
4. Non-Probate Assets	6
E. Do you need to Collect any Assets?	6
IV. TO PROBATE	6
A. Temporary Administration	7
1. An Immediate Necessity	7
2. Will Contests	7
B. Probate Will as Muniment of Title	7
C. Order of No Administration	8
D. Independent Administration	8
1. No Executor Named in the Will	8
2. Consent to Independent Administration	8
E. Dependent Administration	8
1. Bond Requirement	9
2. Creditors and Claims	9
F. Other Reasons to Probate the Will	9
1. Exempt Property Allowance	9
2. Family Allowance	9
3. Homestead	10
V. NOT TO PROBATE	10
A. No Probate Assets	10
B. Insolvent estate	10
C. Family Settlement Agreements	11
VI. CONCLUSION	11

TO PROBATE OR NOT TO PROBATE

I. INTRODUCTION

Most clients that walk in your office with a will in hand presume that the will can be probated and that it should be probated. Before advising a client regarding whether it can and should be probated, it is necessary to gather information about the Decedent and his estate as well as review the will itself. The purpose of this paper is to provide an outline of some things to contemplate before advising a client whether a will can be probated and whether it should be probated. It may seem foolish to consider not probating a valid will that provides for an independent administration given the ease with which an independent administration can be administered; however, each estate is unique and probating the will may not be necessary or even advisable. Nevertheless, it truly is a rare occasion when a will should not be probated. The important point that the author wants to make is that all options should be considered and the ramifications of probating and not probating a will should be thought through before advising the client.

This paper will not discuss the process in probating a will and the administration of the estate. The focus of this paper is on evaluating the will to see if the client can probate the will and, given that it can, the decisions made prior to preparing the application (or not). Numerous other articles are available that provide excellent step-by-step instructions on the contents of the application, the notice required, the hearing and the administration of the estate upon the will's admission to probate, such as *Estate Administration A to Z*, by Sarah Patel Pacheco and Patrick J. Pacheco and *Introduction to Texas Probate and Administration*, by Craig Hopper and Tina R. Green, updated by Omar J. Leal. Both articles were presented in the 2013 Building Blocks of Wills, Estates and Probate.

Please note that all probate code citations are accompanied with the estates code citations if the section has been revised or redesignated. At the time of writing this paper, some probate code sections had not been revised or redesignated to the estates code.

II. CAN YOU PROBATE THE WILL?

Before the attorney can reach the question of whether to probate the will, the attorney must first determine whether it *can* be probated. This begins with asking the client a few questions about the Decedent as well as examining the will itself.

A. When did the Decedent die?

One of the first questions the attorney must ask the client in determining whether the will can be admitted to probate is the Decedent's date of death.

The answer will determine whether four (4) years have elapsed since Decedent's death. Section 73 provides that a will may not be admitted to probate if more than four (4) years have elapsed since Decedent's death. TEX. PROB. CODE § 73; TEX. ESTATES CODE § 256.003. If more than four (4) years have elapsed, the client may be relegated to an heirship proceeding unless the client can show that she was not in default in failing to present the will for probate in that time frame. *Id.* Under Section 73, default equates to a lack of diligence in failing to probate the will. *See Estate of Campbell*, 343 S.W.3d 899 (Tex. App.—Amarillo 2011, no pet. h). Despite this rule, courts have been liberal in allowing a will to be admitted to probate as a muniment of title after four (4) years have expired in order to create a clear chain of title. *Kamoos v. Woodward*, 570 S.W.2d 6 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); *Chovanec v. Chovanec*, 881 S.W.2d 135 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Needless to say, if the client fails to file the will for probate within four (4) years and the heirs at law are different than the beneficiaries named in the will, it is very likely that a contest to the probate application regardless of whether there is default in failing to present the will for probate. Of course, this will significantly add to the costs in probating the will.

1. Obtaining Letters after Four Years

Section 73 provides that "in no case" can a personal representative obtain letters testamentary if the will is admitted to probate after the lapse of four (4) years. TEX. PROB. CODE § 73; TEX. ESTATES CODE § 256.003. However, if the will has been admitted to probate as a muniment of title within four years of Decedent's death, the applicant may be able to obtain letters of administration. While Section 74 requires that all applications for letters testamentary or of administration must be filed within four (4) years of Decedent's death, an exception is allowed where there exists a necessity to receive or recover funds or property due to the Decedent's estate. TEX. PROB. CODE § 74; TEX. ESTATES CODE § 301.002.

B. Where did the Decedent die?

In the initial client interview, it is necessary to find out where the Decedent resided at the time of her death, where the Decedent died, and the location of the estate assets. This information will help the attorney determine whether the will can be probated in Texas and which county is the proper venue for filing the application. If the Decedent was a resident of the State of Texas, proper venue lies in the county in which the Decedent resided at the time of her death or the county in which the Decedent's principal estate was at the time of her death. TEX. PROB. CODE § 6. If the Decedent was not a resident of the State of Texas and

died outside of Texas, then venue lies in the county where her next of kin resides or in the county in which the Decedent's estate was at the time of her death. *Id.*

C. Is it a valid original Will?

In reviewing the will, it is necessary to determine whether the client has the original will or a copy and whether it has any patent defects in its execution. Carefully examine the will to determine whether it is, in fact, the original. Most estate planners exercise the good practice of signing original documents in blue ink in order to easily identify the original. With today's technology, however, a color copy can easily pass as an original without a careful inspection. Likewise, an old copy of the will can also appear to be the original. This is of importance due to the difference in proof required for proving up a copy versus an original as well as the presumption that the will was revoked if the original is not produced. *Compare* TEX. PROB. CODE § 84(a); TEX. ESTATES CODE § 256.152 *with* TEX. PROB. CODE § 85; TEX. ESTATES CODE § 256.156.

1. Original Attested Will

After examining the will to determine whether it is the original, one must also ensure that the will bears the Testator's signature. This requirement applies to both a written will and a holographic will. *See* TEX. PROB. CODE § 59; TEX. ESTATES CODE §§ 251.051–052. The Testator's signature, however, need not be in her own handwriting and courts have held in numerous cases that a "mark" or other intent to sign the instrument was sufficient to satisfy this requirement. *Mortgage Bond Corp. of New York v. Haney*, 105 S.W.2d 488, 491 (Tex. Civ. App.—Beaumont 1937, writ ref'd) (approving an "X" as a sufficient signature on an attested will); *Barnes v. Horne*, 233 S.W. 859, 859 (Tex. Civ. App.—Austin 1921, no writ) (holding that handwritten letter concluding, "Your brother, Ed," was sufficiently signed); *Orozco v. Orozco*, 917 S.W.2d 70 (Tex. App.—San Antonio 1996, writ denied) (finding that Testator's "mark" placed on will satisfies requisite for valid will). Some courts have held that a signature by initials shall suffice as the Testator's signature in executing the instrument as a will. *Trim v. Daniels*, 862 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Additionally, the code permits a person other than the Testator to sign for her so long as it is done at her direction and in her presence. *See* TEX. PROB. CODE § 59; TEX. ESTATES CODE § 251.051. Furthermore, Texas law does not require that the Testator's signature appear at the foot or end of the document.

Section 59 of the Probate Code requires that a non-holographic will "be attested by two or more credible witnesses . . . who shall subscribe their names thereto." *Id.* The language in this section indicates that both witnesses must both "attest" to the conformity of

the execution requirements and "subscribe" their names to the will. Typically, an "attestation clause" is inserted directly preceding the witnesses' signatures reciting that the statutory execution requirements have been satisfied, but no such attestation clause is required. In order to "attest" that the will was properly executed, the witnesses must sign their names to the instrument in the presence of the Testator. *Davis v. Davis*, 45 S.W.2d 240, 241 (Tex. Civ. App.—Beaumont 1931, no writ).

2. Self-proved Will

A self-proving affidavit provides prima facie evidence that the will was executed in conformity with Texas requirements; that is, the will is presumed valid. *Gasaway v. Nesmith*, 548 S.W.2d 457 (Tex. Civ. App.—Houston [1st Dist.] writ ref'd n.r.e.). Even if the will is later contested, competent testimony contradicting the attesting affidavit does not destroy the prima facie case established by the attestation clause. The contradicting testimony merely raises a fact issue for the trier of facts. *Id.* at 458.

If the will has a self-proving affidavit, examine the affidavit itself to make sure it conforms to the language required under the code. TEX. PROB. CODE § 59(a); TEX. ESTATES CODE § 251.104. The self-proving affidavit is not a part of the will itself and effective as of September 1, 1991, Section 59 provides that "[a] signature on a self-proving affidavit is considered to be a signature to the will if necessary to prove that the will was signed by the Testator or witness, or both, but in that case, the will may not be considered self-proved." TEX. PROB. CODE § 59(b); TEX. ESTATES CODE § 251.105. This amendment was made to Section 59 to overturn prior case law that prohibited the signature on the self-proving affidavit to serve as the Testator's signature to the will. Thus, if the Testator only signs the self-proving affidavit, the will can still be admitted to probate, but the conditions of Sections 84(b) and 88(b) must be satisfied as if the will were not self-proved. TEX. PROB. CODE §§ 84(b), 88(b); TEX. ESTATES CODE §§ 256.152–153. Even if the will at issue was executed prior to September 1, 1993, this amendment to Section 59 is applicable when the Decedent died after September 1, 1993. *Bank One, Texas v. Ikard*, 885 S.W.2d 183, 186 (Tex. App.—Austin 1994, writ denied).

Under the 2011 revisions to section 59, if the will is "simultaneously executed, attested, and made self-proved as provided by Subsection (a-1) of this section, [it] is a 'self-proved will.'" TEX. PROB. CODE § 59(a); TEX. ESTATES CODE § 251.104. Prior to this revision, the self-proving affidavit was signed as a second step to the will's execution. Now, the attestation clause can be written in the form of an affidavit where the Testator and witnesses sign only once.

If the will is self-proved, it is not necessary to

have the attesting witnesses appear and give testimony in order to prove up the will. Rather, only one witness is necessary to prove up a self-proved will and that witness is typically the applicant. *See* TEX. PROB. CODE § 88; TEX. ESTATES CODE §§ 256.151–152. Generally, if you have an original self-proved will, you have a will that can be admitted to probate.

3. Holographic Will

A will wholly in the Testator's handwriting is valid so long as the Testator signed the will. TEX. PROB. CODE §§ 59–60; TEX. ESTATES CODE § 251.052. Whether the client can probate a holographic will is typically dependent on whether the client can produce witnesses to testify as to the Testator's handwriting and signature since the formal execution requirements of a written will do not apply. *See* TEX. PROB. CODE § 84(c); TEX. ESTATES CODE § 256.154.

Regardless of where the Testator signs the document, it will be held valid so long as it expresses approval of the instrument as her Will. *Ajudani v. Walker*, 177 S.W.3d 415, 418 (Tex. App.—Houston [1st Dist.] 2005, no pet. h.) (noting Testator's signature is required on holographic will but the signature's location is of secondary importance); *Luker v. Youngmeyer*, 36 S.W.3d 628, 630 (Tex. App.—Tyler 2000, no pet. h.) (testatrix's use of her name as part of the title of a trust she had previously created was insufficient to constitute a signature to express her approval of the dispositive provisions of the holographic instrument). No attesting witnesses are necessary and it is not necessary to date the document. *Gunn v. Phillips*, 410 S.W.2d 202, 207 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

The holographic will must also satisfy the other general requirements of a will (i.e., that the Testator had capacity and wrote it with testamentary intent). Section 60 of the Texas Probate Code specifically allows the Testator to add a self-proving affidavit to the holographic will at the time of its execution or at any time after. TEX. PROB. CODE § 60; TEX. ESTATES CODE § 251.107. The affidavit must state that it has been "sworn to" by the witnesses and has not merely been "acknowledged" by the witnesses. *Cutler v. Ament*, 726 S.W.2d 605, 607 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Otherwise, proof of a holographic in court requires the testimony of two witnesses to the Testator's handwriting. TEX. PROB. CODE § 84(c); TEX. ESTATES CODE § 256.154.

4. Lost Will / Copy of Will

If the client is unable to locate the original will, it may be possible to probate a copy of the will. *See* TEX. PROB. CODE §§ 81(b), 85; TEX. ESTATES CODE §§ 256.054, 256.156. Under the Probate Code, the requirements to probate a copy of a will are the same as those required to probate a "lost" will. The code

refers to this type of application as one for the probate of a will "not produced in court." *Id.* Of course, to prove up a truly "lost" will is a much more difficult task given that the contents of the will must be established without reference to the document itself. Rather, the material contents of the purported will must be established by testimony of a credible witness that has read the will or heard it read. *Garton v. Rockett*, 190 S.W.3d 139 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

If, after reviewing the instrument, the attorney concludes that the will is a copy, she should obtain an explanation as to why the client is unable to produce the original will. It may be that someone else has the original. If a will is in the possession of a person who has not promptly offered it for probate or is intentionally suppressing it, a beneficiary can compel delivery of the will pursuant to Section 75 of the Texas Probate Code. TEX. PROB. CODE § 75; TEX. ESTATES CODE § 256.003. If delivery is not made or good cause not shown for failure to deliver the will, the person having custody of the will can be arrested and imprisoned until he delivers the will. If the person refuses to deliver the will, he can also be liable to any aggrieved person for damages sustained.

The inability to locate an original will creates a presumption that the will was revoked. *Pearce v. Meek*, 780 S.W.2d 289, 291 (Tex. App.—Tyler 1989, no writ) ("When a will is in the possession of the Testator when last seen, failure to produce the will after the Testator's death raises the presumption that the Testator destroyed the will with the intention of revoking it, and the burden is cast on the proponent to prove the contrary"); *Hoppe v. Hoppe*, 703 S.W.2d 224, 227 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (noting that evidence supporting that the will was left in lawyer's office and that Decedent could have requested will from attorney at any time was sufficient to support jury finding that will was last seen in Decedent's possession or within her control). The will proponent may overcome the presumption by providing clear and convincing evidence that the will was not revoked by the Testator or that someone fraudulently destroyed the will. *In re Estate of Capps*, 154 S.W.3d 242 (Tex. App.—Texarkana 2005, no pet. h.); *Cable v. Estate of Cable*, 480 S.W.2d 820, 821 (Tex. Civ. App.—Fort Worth 1972, no writ).

5. Foreign will

A foreign will is any will executed by the Decedent while domiciled in a state other than Texas. In 2011, the legislature amended Section 84 to the more liberal requirements of probating a foreign will that are found in the Uniform Probate Code. Section 84 now permits a court to admit a foreign will to probate if it was executed in conformity with the laws of the state in which it was executed. TEX. PROB.

CODE § 84(A); TEX. ESTATES CODE § 256.152. This is particularly useful due to the large number of people moving to Texas from other states. In order to determine whether the client can probate the foreign will, the attorney should review the will execution requirements in the state it was executed in.

Sections 103 and 104 of the Texas Probate Code provide that a foreign will of a non-resident Testator may be probated in the same manner as a Texas will. *See* TEX. PROB. CODE §§ 103, 104; TEX. ESTATES CODE §§ 502.001–002. In seeking to probate a foreign will, the attorney should determine whether the will has already been admitted to probate in another jurisdiction and whether a personal representative has been appointed. Various options are available depending on whether it has been probated and the reason behind seeking its admission to probate in Texas. *See* TEX. PROB. CODE §§ 95–99; TEX. ESTATES CODE §§ 501.001–003, 503.002, 505.052, 501.004–005, 504.003, 501.007–008, 503.001, 503.003, 503.001, 503.051–052.

D. Who is the executor?

Typically, the client that brings the attorney the will is the person named as the executor, but not always. Assuming the client produces a valid will and is the person named as the executor in the will, absent a challenge to her suitability, probating the will should be a simple process. The client should understand that even in an independent administration, the probate process can involve a great deal of work and be time-consuming.

When the Testator desires that the executor serve independent of court supervision, the will identifies the designated individual or bank as an “independent executor” and also paraphrases Section 145. *See* TEX. PROB. CODE § 145(b). It is not a requirement that the Testator use the phrase “independent executor” to obtain this type of appointment. *See Stephens v. Dennis*, 72 S.W.2d 630, 632 (Tex. Civ. App.—Eastland 1934, writ ref’d). No particular words or terms of art are necessary so long as the Testator makes it clear that she desires her executor to act free of court control. Note, however, that merely appointing an executor to serve without bond does not, without more, show an intention to make her independent. *Gray v. Russell*, 91 S.W. 235 (Tex. 1906); *Pinkston v. Pinkston*, 270 S.W.2d 250 (Tex. Civ. App.—Waco 1954, writ ref’d n.r.e.).

If the will does not provide for your client to serve as executor, the attorney should inquire as to whether the persons named are able to serve, and if no executor is named in the will, whether it is possible to obtain unanimous consent from all of the distributees that your client serve as the administrator, preferably without bond. *See* discussion under IV.D.1–2 *infra*.

III. SHOULD YOU PROBATE THE WILL?

After concluding that the will can be admitted to probate, now the attorney should consider whether it is advisable to probate the will. More often than not the will should be admitted to probate. In particular, the will must be admitted to probate if there is a need to transfer title to real property (or mineral interests), obtain letters testamentary or of administration in order to collect assets, or have the court set a family allowance.

Nevertheless, just because the will is a valid, self-proved will does not mean that it should be probated. And, just because the will provides for an independent administration does not mean that the applicant should dismiss the option of a dependent administration given certain circumstances. To probate even a simple will is not inexpensive. Consider whether the client will incur unnecessary costs in probating a will.

A. Who are the beneficiaries and who are the heirs?

Possibly the most important section to any beneficiary of the will is the section pertaining to bequests. This section will identify who takes under the will as well as the bequests made by the Testator. Any person or entity named as a beneficiary in a will is an “interested person.” TEX. PROB. CODE § 3(r); TEX. ESTATES CODE § 22.018. In the event of a decision not to probate the will, all such persons must consent and be a party to the agreement.

It is likewise important to note the identity of the Decedent’s heirs at law. TEX. PROB. CODE § 38; TEX. ESTATES CODE §§ 201.001–002. It is helpful to create a chart of the will’s beneficiaries that notes their relationship to the Decedent, their age, current address, and their respective bequests. Likewise, a chart should be made of the identity of the heirs, their relationship to the Decedent, their age, current address, and their respective percentage interests in the estate were it to pass by intestacy. The attorney should note any differences between the beneficiaries under the will and the heirs at law as this could signal a potential will contest.

Additionally, review the will and note whether any of the beneficiaries are minors or whether any charities are given a bequest under the will. The attorney will need to know this information before determining whether an agreement can be reached among the beneficiaries regarding the appointment of an executor (if the will fails to name one or the executor named in the will is otherwise unable to serve). This information is also necessary in considering a family settlement agreement where the parties decide not to probate the will.

B. Is there a Potential Will Contest?

Given the attorney’s review of the will and the

attendant facts surrounding its execution as well as the disposition of property under the will, it may become clear that a will contest is imminent. Some of the circumstances that should signal a will contest include when the will contains an unnatural disposition of assets or a significant change in light of past planning, such as “disinheriting” a child, leaving everything to only one child, or providing that the bulk of the estate pass to a caregiver or other non-family member. Sometimes it is as simple as the client stating that a will contest is inevitable due to previous litigation or acrimony among family members.

If it appears that a will contest is likely and your client is the executor named in the will, then consider quickly filing an application to have the will admitted to probate so that your client can be appointed as the personal representative. Once the application is on file, it can take as little as two (2) weeks to have the hearing and obtain an order admitting the will to probate and appointing your client as the personal representative. *See* TEX. PROB. CODE § 128(a)–(b); TEX. ESTATES CODE §§ 258.001–002, 303.001; *see also* TEX. PROB. CODE § 33(f)(2); TEX. ESTATES CODE § 51.053. This entire process can be done without giving any personal notice to the beneficiaries or other potential contestants. *See id.*

Having the will admitted to probate before a contest is filed is significant. First, the burden shifts to the contestant to defeat the will. *Williams v. Hollingsworth*, 568 S.W.2d 130, 132 (Tex. 1978); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex. App.—Fort Worth 1998, no pet.). Second, the executor is able to defend the will using the assets of the estate to pay for its defense. *See* TEX. PROB. CODE § 243; TEX. ESTATES CODE § 352.052. Of course, if a jury or court finds that the executor defended the will in bad faith, then she will be personally liable for the attorney’s fees paid in its defense. *Id.* Third, the time begins to run on the statute of limitations. A will contest may not be filed more than two years after the will has been admitted to probate, unless one of the contestants is under a disability. TEX. PROB. CODE § 93; TEX. ESTATES CODE § 256.204.

C. Are any trusts created or is it a pour-over will?

Nowadays, a great number of wills contain testamentary trusts. This is particularly common when the Testator’s children are minors at the time of the will’s execution. If the will provides that a portion of the estate should pass to a beneficiary in trust, determine whether the trust terminates at a particular age of the beneficiary. Having already gathered the information regarding the beneficiaries, it will be clear whether the trust will need to be funded or whether the property passes outright. Considering this information, the beneficiaries may not want to have the property pass into a trust. For example, if the beneficiary is

twenty-eight (28) and the trust terminates when the beneficiary reaches the age of thirty (30), the beneficiary may not want to probate the will, which would require a family settlement agreement. Of course, there are numerous other issues to consider when this circumstance arises, such as whether the other beneficiaries will agree and what other ramifications are possible if the will is not probated. Assuming all requisite parties are in agreement, the alternative would be to file for an heirship. As noted below, an independent executor named in a will who is not a beneficiary thereunder does not have standing to object to a family settlement agreement. This same rule applies to a person named as a trustee under the will unless the trustee has a pecuniary interest.

A pour-over will is one that “pours” the entire estate or residuary estate into an existing inter vivos trust. If the will contains a pour-over provision, then the attorney should gather information on what property is held in the trust and whether it is necessary to probate the pour-over will. It is necessary to probate a pour-over will when the trust has not been completely funded prior to the Decedent’s death. If the trust is fully funded and no assets remain outside of the trust, then consider whether the expense in probating the will is necessary.

D. What are the Assets and the Debts of the Estate?

After collecting data regarding the Decedent’s assets and debts, it will be relatively clear whether the estate is solvent or insolvent. If the estate is solvent, then the attorney should consider whether a muniment of title option is available. If the estate is insolvent, many other issues should be considered before filing an application to probate the will.

1. Insolvent Estate

An insolvent estate should be carefully evaluated before deciding whether to probate the will. If the estate is insolvent and has very little assets, it may not be worth the trouble to probate the will. This decision will turn on what assets are available and not just whether the estate is insolvent.

When the estate is insolvent with a number of assets, it may be prudent to proceed under a dependent administration rather than an independent administration. Wise counsel will give careful consideration to this matter as the potential roadblocks for creditors afforded under a dependent administration are not the same in an independent administration. *Compare* TEX. PROB. CODE § 146 *with* TEX. PROB. CODE §§ 298, 301, 309; TEX. ESTATES CODE §§ 355.001, 355.060–061, 355.004, 355.059, 355.051; *Bunting v. Pearson*, 430 S.W.2d 470, 473 (Tex. 1968) (noting that the procedures regarding claims in independent administrations do not apply to dependent

administrations). For example, a creditor in an independent administration need only send a letter in order to present his claim; whereas, in a dependent administration, the creditor must adhere to the strict requirements in the form of his claim, the method of presentment, and the time of presentment. As discussed in more detail below, administering an insolvent estate can be very complex but, despite the additional costs and time involved, an insolvent estate can be more effectively administered in a court-supervised administration.

2. Real Property or Mineral Interests

It is a rare occasion when the will should not be admitted to probate, at least as a muniment of title, when the Decedent owned real property or mineral interests. Of course, this decision will turn on whether the real property is encumbered by a lien or other debt. Nevertheless, if a surviving spouse uses the real property as her residence, even in a simple estate, it is necessary to probate the will in order to create a clear chain of title. Unfortunately, this is sometimes overlooked until the surviving spouse dies. Then, the beneficiaries under the surviving spouses' will may have to probate two wills, but may face a statute of limitations problem. *See* discussion under II.A. *supra*.

If the estate includes real property located in counties other than the county of original probate, certified copies of the will and order admitting the will to probate should be filed in the deed records of that county and all counties in Texas where the Decedent owned property. This will help clarify the chain of title for future disposition.

3. Ancillary Probate

An ancillary probate is a probate proceeding required to transfer title to real property outside of the Decedent's state of residence. In some states, the ancillary probate procedure is simple and allows for the mere recording of authenticated copies of the will and the order admitting the will to probate in order to give effect to the transfer of title. This is similar to the ancillary probate permitted under Texas law. *See* TEX. PROB. CODE §§ 95–99; TEX. ESTATES CODE §§ 501.001–003, 503.002, 505.052, 501.004–005, 504.003, 501.007–008, 503.001, 503.003, 503.001, 503.051–052. Or, the process can involve opening an estate and having a personal representative appointed. If an estate must be opened, it will be necessary to obtain local counsel to handle the process. It is beneficial to consult with local counsel as soon as the attorney is made aware that the Decedent owned real property outside of Texas to determine what steps must be taken to transfer title or sell the property.

4. Non-Probate Assets

Finally, in collecting information regarding the assets and debts, do not fail to collect information regarding the non-probate assets. Generally, non-probate assets include those assets which do not pass through the estate or under the will of the Decedent. The most typical non-probate assets are life insurance, employee benefits payable to a named beneficiary other than the Decedent's estate, and bank accounts held as joint tenants with rights of survivorship or payable on death. The attorney should confirm that the non-probate assets do not come into the estate. For example, if the designated beneficiary is deceased and no alternate is named, then the asset would be paid to the estate in most cases. In some instances, the Decedent designated the estate as the beneficiary, which would require the appointment of a personal representative in order to collect the asset.

E. **Do you need to Collect any Assets?**

Generally, the duties of a personal representative are to collect the assets, pay the debts, and distribute the remaining property in accordance with the terms of the will. On the list of assets, the attorney should note whether a personal representative with letters testamentary is necessary to collect any of the assets. The surviving spouse may not need letters if all of the assets are jointly owned and all of the non-probate assets have designated beneficiaries. In this instance, it would not be necessary to probate the will if no real property was owned by the Decedent. Likewise, if the same circumstances were present and the Decedent owned real property, then it may only be necessary to probate the will as a muniment of title.

Nevertheless, if any of the assets collected would result in having a check made payable to the estate, then an estate account would need to be opened, which can only be done by a personal representative with letters.

IV. TO PROBATE

Having concluded that the will can be probated and that the will should be probated, the attorney should now consider the various options available. If the Decedent died as a resident of Texas, leaving a valid Last Will and Testament, the options to be considered should include:

- (1) Application for Temporary Administration;
- (2) Probate of will as a Muniment of Title;
- (3) Probate of will and Order of No Administration;
- (4) Probate of a will and Appointment of an Independent or Dependent Executor; and
- (5) Probate of a will and Appointment of an Independent or Dependent Administrator with will Annexed.

A. Temporary Administration

A request for a temporary administration is limited to one of two sets of circumstances: (1) an immediate necessity exists; or (2) a will contest has been filed. Under both circumstances, the temporary administrator will need to post a bond in an amount equivalent to the amount of liquid, non-real estate assets, and twelve months of anticipated income from all estate assets. *See* TEX. PROB. CODE § 131A; TEX. ESTATES CODE §§ 452.001–008. As such, the attorney should confirm that the applicant will qualify for a bond before filing an application for temporary administration. Regardless of the reason for the appointment, the temporary administrator is entrusted with the estate assets in order to preserve the status quo until the assets can be delivered into the control of the permanent administrator. *Nelson v. Neal*, 787 S.W.2d 343, 346 (Tex. 1990). Accordingly, a temporary administrator is limited to the powers specifically conferred upon her in the order of appointment. The requested powers should directly relate to the reason for seeking the appointment, but can be broadened by court order at a later time should the need arise. Note that considering the temporary administration is subject to the same restrictions and requirements of a dependent administrator.

1. An Immediate Necessity

Considering the nature of the Decedent's estate assets, an immediate need for an administrator may be necessary. A temporary administrator may be appointed in the event of an immediate need for someone to take charge of the assets. *See* TEX. PROB. CODE § 131A; TEX. ESTATES CODE §§ 452.001–008. A temporary administration granted on this basis is rare. The applicant must establish that there is an immediate necessity that requires the appointment of a personal representative to handle the assets of the estate. Typically, this situation is present when the Decedent owned an ongoing business and no other person can pay the employees or vendors. The longer the applicant waits to file such an application the more difficult it will be to convince the judge that an immediate necessity truly exists. Under Section 131A, the temporary administration may not exceed a period of 180 days. *Id.*

2. Will Contests

If a will contest is filed prior to the will's admission to probate, then Section 132 provides that the court can appoint a temporary administrator. *See* TEX. PROB. CODE § 132; TEX. ESTATES CODE §§ 452.051–052. The appointment of a temporary administrator pending contest of a will is appropriate when, due to a filed contest, the court is unable to make an appointment of a personal representative. If there is an estate to administer, the court will seek an

agreement among the parties on the appointment of a temporary administrator. If the parties are unable to reach an agreement, the court will make its own appointment. Under these circumstances, the temporary administrator is typically an independent, neutral party.

Once the contest is over, through settlement or trial, a permanent personal representative may be appointed who can take over the administration of the estate. Upon the appointment of the permanent administrator, the temporary administrator will file a sworn accounting of her actions during the course of the temporary administration. Once the sworn accounting is approved, the temporary administrator may be released from his or her bond. TEX. PROB. CODE § 135; TEX. ESTATES CODE § 452.152.

B. Probate Will as Muniment of Title

Probating the will as a muniment of title is used as a means to transfer title to the Decedent's assets without the appointment of a personal representative. When the will is admitted to probate as a muniment of title and the order is duly recorded in the county in which the real property is located, it serves as a link in the chain of title. *See* TEX. PROB. CODE §§ 89A–89C; TEX. ESTATES CODE §§ 257.051–054, 257.001, 257.101–103. This mechanism to probate a will is a very useful option.

In reviewing the will as indicated above, always ask whether an administration is really necessary or whether the transfer of assets can be accomplished by probating the will as a muniment of title. A classic situation where this option is advisable is when the surviving spouse needs to transfer title of the homestead solely into her name and all other assets are non-probate or in her name.

However, this option is not available in all cases. TEX. PROB. CODE §§ 89A–89C; TEX. ESTATES CODE §§ 257.051–054, 257.001, 257.101–103. Probate of a will as a muniment of title is not available when there are debts owing by the estate, exclusive of debts secured by liens on real estate (such as a mortgage on the residence). Even if there are some debts, if the estate is solvent, sometimes it is possible to wait a few months to probate the will in order to pay off the debts. Because the muniment of title process is less cumbersome than even an independent administration, this is an option worth discussing with the client.

Although the order should also serve as a means for collecting assets in addition to title to real property, such as bank accounts or certificates of deposit, distributees often encounter problems with some financial institutions in not accepting an order of a muniment of title. Instead, they will only permit the collection of the asset with letters issued to a personal representative. Therefore, the attorney should consider all of the assets that the beneficiaries anticipate

collecting and whether the order to probate as a muniment of title will suffice.

C. Order of No Administration

Another option available in seeking to probate a will is an application that seeks to probate the will, set a family allowance, and for the court to enter an order of no administration. TEX. PROB. CODE § 139; TEX. ESTATES CODE § 451.001. This option is available in very limited circumstances and only when the Decedent's estate, exclusive of homestead and exempt personal property, is less than the family allowance. Only the surviving spouse, minor children or adult incapacitated children of the Decedent are entitled to file such an application. It is particularly useful in that it permits the court to set aside the entire estate to the family to the exclusion of creditors.

D. Independent Administration

An independent administration is a very cost effective and time efficient way to administer an estate in Texas. It permits the executor to administer the estate and distribute its assets free of court supervision. Probate of the will with a full administration is necessary when the Decedent's property needs to be collected and preserved, debts need to be prioritized and paid to creditors, or assets need to be distributed to the beneficiaries of the estate. If one of the provisions in Section 145(b) – (d) is met, then the personal representative will serve independent of court supervision. Unless the will names an executor who is the applicant, it is necessary to show that an administration is a necessity. It is presumed a necessity when there are two or more unpaid debts of the estate. *Ragsdale v. Prather*, 132 S.W.2d 625 (Tex. Civ. App. 1939, writ ref'd).

1. No Executor Named in the Will

Even if the will fails to name an executor, an independent administration may still be an option. If the will fails to name an executor or the executor is unable to serve, then the applicant may seek a court-created independent administration. *See* TEX. PROB. CODE § 145(d). In order for the court to grant this request, the applicant must obtain the consent of every beneficiary under the will. *Id.*

2. Consent to Independent Administration

If the will does not provide for an independent administration, the applicant must obtain unanimous consent from every distributee under the will in order to open an independent administration. *See* TEX. PROB. CODE § 145(c). Likewise, when the will fails to name an executor or the person named as executor is deceased or otherwise unable to serve, every beneficiary must consent to an independent administration. *See* TEX. PROB. CODE § 145(d).

Alternatively, the Decedent may have had his or her will drafted when the Decedent lived in another state and the will does not clearly provide for independent administration. In those circumstances, it is possible to probate the will and appoint an independent administrator with will annexed. TEX. PROB. CODE § 178(b); TEX. ESTATES CODE § 306.002. In some cases it may prove impossible to obtain all of the beneficiaries' consent regarding the appointment of a personal representative. In the event that unanimous consent is not possible, the only option is a dependent administration. *See below.*

Note that most courts will not appoint a personal representative to serve without bond if one of the beneficiaries is a minor. If the beneficiaries do not get along and do not trust the person applying to serve as executor, then it is unlikely that the applicant can obtain everyone's consent. Furthermore, if the beneficiaries are acrimonious, the applicant may prefer a court-supervised administration to gain the protection of the court through orders approving actions taken by the administrator.

E. Dependent Administration

Most often a dependent administration is opened out of necessity rather than by choice. Typically, this is the case when a will contest has been filed or when one of the beneficiaries is unable (or unwilling) to consent to an independent administration.

A dependent administration is an extremely restrictive method for administering a Decedent's estate. Court approval must be obtained prior to any the personal representative taking virtually any action, including sales of property, payment of debts, execution of contracts, settlement of lawsuits, expenditure of funds, distribution of assets, or any act which obligates the estate. *See* TEX. PROB. CODE § 234; TEX. ESTATES CODE §§ 351.051–052. The personal representative must submit and maintain a bond, file and obtain the approval of annual accounts as well as a final accounting. *See* TEX. PROB. CODE §§ 194, 399, 405; TEX. ESTATES CODE §§ 305.101, 359.001–005, 362.003–004.

Because of the direct supervision by the court, a dependent administration provides the personal representative with protection as to the actions taken because each action must receive prior court approval. *See* TEX. PROB. CODE § 234; TEX. ESTATES CODE §§ 351.051–052. As this option may be the most prudent one in an insolvent estate, it is important to note that a person who was nominated to serve as an independent executor may decline to serve in that capacity but still be appointed as a dependent executor. TEX. PROB. CODE § 145(r).

1. Bond Requirement

If a dependent administration is necessary, regardless of the reason, the attorney should ascertain whether the client can qualify for a bond. The bond will be set in an amount equivalent to the personal property in the estate as well as any anticipated income over the next 12 months. TEX. PROB. CODE § 194(4); TEX. ESTATES CODE § 305.153. Note that the bond amount does not include the value of real property.

2. Creditors and Claims

One of the main reasons to open a dependent administration when the estate is insolvent is that the creditors will be subject to the claims procedures. The rules applicable to creditor's claims in dependent proceedings are set out in Texas Probate Code Sections 298 through 322. (Section 146 applies to the payment of claims in independent administrations.)

The claims process is necessary in order for the personal representative to obtain classification of the claim by the court. The classification of the claim determines its order of payment, and no claim may be paid without prior court approval. If there is not enough money to pay all of the creditors in a particular class, the creditors are paid pro rata. *See* TEX. PROB. CODE §§ 313, 314, 319; TEX. ESTATES CODE §§ 355.064, 355.066, 355.065, 355.101.

Strict adherence to the statutory requirements for presentment of a claim is required. If a creditor fails to timely present its claim, then the claim will be barred. The claims procedure is very complex for administrators and creditors alike. This article will not cover the complex procedures and rules in detail. Instead, please refer to the article *Creditor's Issues – Insolvency and the Estate*, by Nathan K. Griffin, presented to the Dallas Bar Association Probate Trust and Estates Section on February 26, 2013.

F. Other Reasons to Probate the Will

In addition to the reasons identified above, if there is a surviving spouse, minor children or adult incapacitated children, consider the opportunity for the executor or court to set aside exempt property or permit a family allowance. Neither benefit is available unless the will is probated and an administration has been opened. Note that, regardless of whether the will is probated, the homestead rights of a surviving spouse are intact.

1. Exempt Property Allowance

Another reason to probate the will is that the court can order that the exempt personal property be set aside for use by the surviving spouse, minor and unmarried children during administration. *See* TEX. PROB. CODE §§ 271–272; TEX. ESTATES CODE §§ 353.051–052; TEX. CONST. ART. 16, § 49; TEX. PROP.

CODE ANN. §§ 42.001, 42.002 (Vernon 2007 & Supp. 2012). In a solvent estate, the independent executor is required to set aside the exempt property for use during the administration. This right of use terminates when the estate is closed, and the property will then be distributed to the heirs or devisees of the Decedent. *See* TEX. PROB. CODE § 146(a)(4); TEX. PROB. CODE § 278; TEX. ESTATES CODE § 353.152; *Kelley v. Shields*, 448 S.W.2d 135 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

In an insolvent estate, the court is directed to set aside property exempt from creditors' claims after the inventory has been approved by the court. In 1993, the legislature amended Section 271 to permit the exempt property to be set apart prior to the approval of the inventory. TEX. PROB. CODE § 271; TEX. ESTATES CODE § 353.051. The exempt personal property passes to the surviving spouse and children only if the estate is insolvent. *See* TEX. PROB. CODE §§ 278–279; TEX. ESTATES CODE §§ 353.152–153. In an insolvent estate title to the exempt personal property passes to the spouse and children free of all debts, except those debts secured by existing liens, or claims for funeral and last illness expenses presented within sixty days of the issuance of letters of administration. *See* TEX. PROB. CODE §§ 277, 279, 281, 320(a)(1); TEX. ESTATES CODE §§ 353.151, 153, 155, 355.103.

When the Decedent's estate does not contain a homestead or any exempt personal property, the surviving spouse and children may apply to the court for an allowance in lieu thereof. An allowance of up to \$15,000 for the homestead and \$5,000 for other exempt property is permitted for the support of the surviving spouse, minor children or adult incapacitated children. *See* TEX. PROB. CODE §§ 273, 274; TEX. ESTATES CODE §§ 353.053, 353.055–056; *In re: Mays' Estate*, 43 S.W.2d 306 (Tex. Civ. App.—Beaumont 1931, writ ref'd). Such allowance may be satisfied in money, property, or both, and regardless of whether it was bequeathed to another. *See* TEX. PROB. CODE § 274; TEX. ESTATES CODE §§ 353.055–056. The court can order the personal representative to sell property of the estate in order to obtain funds necessary for the payment of such allowance. *See* TEX. PROB. CODE § 276; TEX. ESTATES CODE §§ 353.056.

2. Family Allowance

In addition to the exempt property allowance or allowance in lieu thereof, once the inventory has been approved (or the affidavit in lieu filed with the court), the court shall fix a family allowance for support of the surviving spouse, minor children and adult incapacitated children. The allowance shall be sufficient for their maintenance for one year from the date of death. *See* TEX. PROB. CODE §§ 286–293; TEX. ESTATES CODE §§ 353.101–107. The court will consider whether the spouse or minor children possess

sufficient property of their own from which they are able to provide for their own maintenance in setting the amount of the allowance. *See* TEX. PROB. CODE § 288; TEX. ESTATES CODE § 353.101; *Kennedy v. Draper*, 575 S.W.2d 627 (Tex. Civ. App.—Waco 1978, no writ). Because this allowance is a matter of right, it is not considered an advance and the recipient is not required to pay it back to the estate upon its closing. *See* TEX. PROB. CODE § 290; TEX. ESTATES CODE §§ 353.104–105; *Chefflet v. Willis*, 74 Tex. 245, 11 S.W. 1105 (1889); *Stutts v. Stovall*, 544 S.W.2d 938 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). In order to satisfy the family allowance, the court may order the sale of assets, including an asset that was specifically bequeathed. The form of the family allowance can consist of either money, property, or both. *See* TEX. PROB. CODE §§ 292–293; TEX. ESTATES CODE §§ 353.106–107.

3. Homestead

In your review of the estate assets, the attorney must determine whether any real estate represents the homestead of a surviving spouse, surviving minor children or adult incapacitated children. If a homestead is part of the estate, a necessity for an administration may arise when the surviving spouse is not personally obligated on the homestead's mortgage. It may be necessary to have a personal representative appointed before the mortgage company will discuss the loan and the options available to the surviving spouse. Even though the homestead cannot be construed as an estate asset subject to the control of the representative, many mortgage companies will only communicate with the personal representative of the estate. *See* TEX. PROB. CODE §§ 282–283; TEX. ESTATES CODE §§ 102.002–003; *Thompson v. Thompson*, 236 S.W.2d 779 (Tex. 1951); *Franklin v. Woods*, 598 S.W.2d 946 (Tex. Civ. App.—Corpus Christi 1980, no writ).

It is important to note that the surviving spouse and minor children are entitled to occupy the homestead regardless of whether the homestead is the Decedent's separate property or community property of the Decedent and the surviving spouse. TEX. PROB. CODE § 282; TEX. ESTATES CODE § 102.002. A general creditor of the Decedent cannot require a sale of the homestead or exempt property where there are survivors entitled to these exemptions. Only a purchase money creditor or taxing authority can reach the homestead. *See* TEX. PROB. CODE §§ 270, 277, 281, 320(a); TEX. ESTATES CODE §§ 102.004, 353.151, 353.155, 355.103; TEX. PROP. CODE ANN. § 41.002; *Zwerne-Mann v. Von Rosenberg*, 13 S.W. 485 (Tex. 1890); *Butler v. Summers*, 253 S.W.2d 418 (Tex. 1952); *Franklin v. Woods*, 598 S.W.2d 946 (Tex. Civ. App.—Corpus Christi 1980, no writ). In the event that the purchase money creditor proceeds with a

foreclosure, it may be set aside by the court if a dependent administration is opened. *Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956) (affirming that the power of sale is suspended upon opening of administration).

V. NOT TO PROBATE

Thus far, the paper has addressed whether you can and should probate the will. Now, let's turn to some situations where you should not probate the will. It is rare indeed when, given a valid will and no roadblocks to probate, that the client should choose not to probate a will. The most common situations where this is the best option for the client is when there are no probate assets to collect, when the estate is very small and insolvent, and when all of the necessary parties agree not to probate the will.

A. No Probate Assets

Upon a Decedent's death, she may have no probate assets by virtue of the fact that they are all held in trust or they are all non-probate assets with a beneficiary designation. Non-probate assets include, but are not limited to:

- Joint account held as joint tenancy with rights of survivorship;
- Assets with designated beneficiaries such as retirement accounts, IRAs, and life insurance policies;
- Assets owned with a Pay-on-Death (POD) designation;
- Real property owned as Tenants by the Entirety; and
- Assets owned by the Trustee of the Decedent's Revocable Trust.

Probate assets include those assets titled solely in the Decedent's name with no beneficiary designation or rights of survivorship, the Decedent's portion of assets owned as tenants-in-common, and assets owned as joint tenants without rights of survivorship.

Once the attorney has reviewed the assets of the Decedent and how title to these assets is held, it will be obvious whether there is a necessity for any form of probate. If the Decedent died without owning any real property or other probate assets, probating the will may prove to be an unnecessary expense. Bear in mind that if real property (including mineral interests) is located years later, an application for determination of heirship may be filed; no time limitation applies to a request to determine a Decedent's heirs.

B. Insolvent estate

Having compiled a list of the assets and debts of the estate, it will be clear whether the estate is insolvent. Probating the will as a muniment of title is not an option because there are debts due and owing.

Most of the time, an insolvent estate can be administered more effectively in a dependent administration. Upon further review of the ledger, if the assets are minimal and would be used merely to pay attorney's fees and creditors, then there is probably no reason to probate the will and open an administration. In particular, if the Decedent died without owning any real property, very little personal property, and a mass of debts, the most prudent decision may be to not probate the will. In opening an administration, the client may just be making the creditor's job a bit easier.

C. Family Settlement Agreements

The beneficiaries of an estate are free to allocate the assets of the estate and the payment of expenses from that estate in any way they agree among themselves. *Shepherd v. Ledford*, 962 S.W.2d 28, 32 (Tex. 1997). This includes an agreement to not probate the will. Family settlement agreements allow for an alternative method of administration in Texas. Family settlement agreements are favored by courts, and public policy favors them. *Crossley v. Staley*, 988 S.W.2d 791, 796 (Tex. App.—Amarillo 1999, no writ); *Stringfellow v. Early*, 40 S.W. 81 (Tex. Civ. App.—1897, writ dismissed). A family settlement agreement is not limited to the beneficiaries named in the will, but can include an heir not named in the will. *Leon v. Keith*, 733 S.W.2d 372 (Tex. App.—Waco 1987, writ refused n.r.e.).

If the Testator made a bequest to a charity under the will, note that chapter 123 of the Texas Property Code provides that the Attorney General is a proper party in any proceeding involving a charitable trust, however, such notice is not required in an uncontested probate proceeding. TEX. PROP. CODE ANN. § 123.002 (Vernon 1995). The term "charitable trust" is broadly construed to cover practically any gifts to a charitable entity, even if a traditional express trust is not created. *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. App.—Houston [14th Dist.] 1990, writ denied). A judgment in a proceeding involving a charitable trust over a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust is voidable if the attorney general is not given notice. TEX. PROP. CODE ANN. § 123.004 (Vernon 1995).

Because Section 37 of the Probate Code immediately vests title to the Decedent's property in the beneficiaries of a Decedent's will, the beneficiaries are free to enter into a contract to divide the estate as they agree and enter into an agreement setting forth the terms of their agreement. Under certain circumstances, the family settlement agreement must be approved by the court (i.e., when the will has been probated and the intent is to overturn the probated will or when a minor

is involved and the minor's guardian is also an interested party).

Pursuant to *Estate of Hodges*, an independent executor named in a will who is not a beneficiary thereunder does not have standing to object to a family settlement agreement. 725 S.W.2d 265 (Tex. App.—Amarillo 1986, writ refused n.r.e.). A challenge to court approved settlement agreement can amount to a tortious interference with beneficiaries' rights. *Hartmann v. Solbrig*, 12 S.W.3d 587 (Tex. App.—San Antonio 2000, writ denied).

Will contests are frequently resolved using a family settlement agreement. The State of Texas has long encouraged the use of settlement agreements to resolve litigation involving estates. *Stringfellow v. Early*, 40 S.W. 871 (Tex. Civ. App. 1897, writ dismissed). As long as all interested parties are a party to the settlement, the parties are free to fashion whatever remedy they desire.

VI. CONCLUSION

The author hopes that this article has provided some insightful tips in reviewing the will, assessing the Decedent's estate, and making the determination of whether or not to probate the Decedent's will. Unfortunately, when a person decides not to probate a will based on his own determination, there is little the probate attorney can do. Assumptions regarding the cost and complexity of the probate process loom in the potential client's mind and the instrument remains "stale." Oftentimes, when a person decides not to probate a will that should have been admitted to probate, the "mistake" is not discovered for many years (or at least not until the statute of limitations has passed).

