

— YOUR ROADMAP TO —

ESTATE & PROBATE

.....

LITIGATION IN TEXAS



THE ASHMORE LAW FIRM, P.C.

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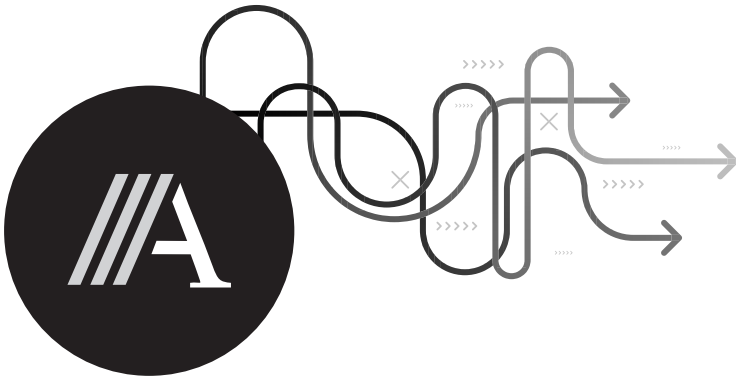
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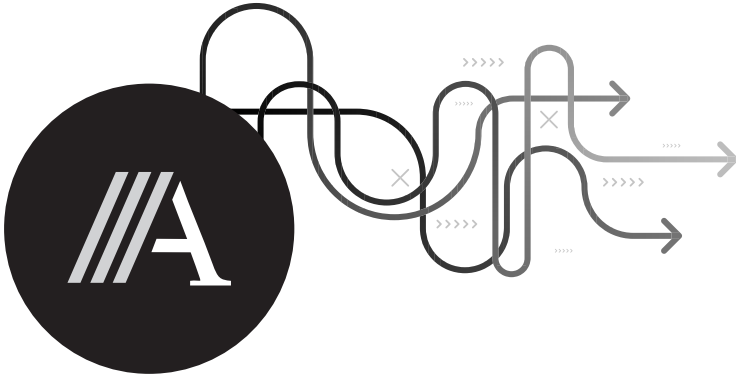
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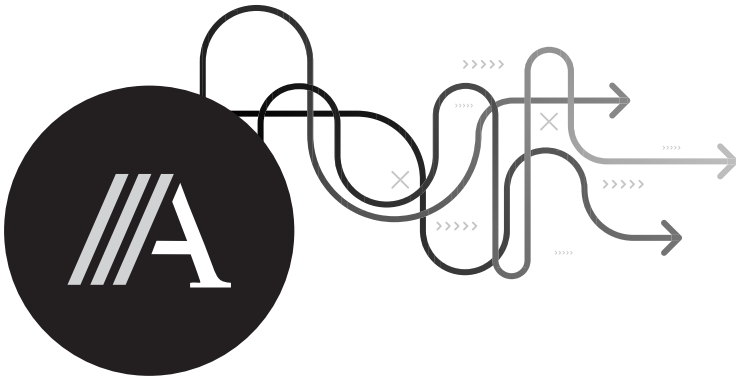
Disclaimer

This book is not designed to provide specific legal advice, as each case is unique. The subject matter is for informational purposes only and is based upon Texas law. For specific legal advice regarding your case, consult with a qualified probate litigation lawyer who will be able to review your situation and the factors involved.



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Introduction

Dealing with the passing of your loved one is hard enough, yet never in your wildest dreams did you imagine that the aftermath would be so difficult. You may have been surprised and outright suspicious when you found out you were excluded from your loved one's Will. Your loved one may have changed his or her Will without telling you, but the changes just don't seem to make sense.

Unfortunately, this is a time that often brings out the worst in people. Families that get along often find that after the death of a loved one, everything changes. Discussions regarding the estate and disposing of assets may become heated. The executor may be ignoring your calls. You may even be at the point where you cannot talk with your family members without getting into a fight. There is no doubt that you are



ready for this trying situation to be over so that you can move forward with your life.

You may have picked up this book because you have a suspicion that the Will created by your loved one is not valid. The Will might not make sense or could be completely different than what your loved one told you would happen with the estate. Maybe you are concerned that you are not receiving the inheritance in which you are entitled. You may even be under the impression that the fiduciary (the executor or trustee) is not performing his or her duties correctly.

Whatever has caused you to start reading this book, we want to assure you of one thing – this guide was written specifically for people like you. It is meant to educate you on the issues relating to probate litigation and to help you understand your rights.

By reading this book, you will find out if your rights are indeed being protected. This book is written in a straightforward manner, allowing you to quickly and easily obtain the information you need in order to make the next move. Each chapter covers pertinent topics that will either put your mind at ease or prompt you to look into probate litigation.

Chapter one will help you identify if your loved one's Will is valid. This is one of the first steps in identifying a problem with an estate. In this chapter, we will explain the purpose of the Will, some of the key components included in this crucial document. This chapter will also discuss what happens if you suspect the Will is not valid.

In the second chapter of this book, you will find the requirements for signing a Will. In the State of Texas, a formal

Will must meet certain requirements, or it could be considered invalid.

In chapter three, you will find out what goes into contesting a Will. We will go through the most common situations that make a Will invalid and the process of contesting it.

In chapter four, we will cover whether the fiduciary (the executor or trustee) is doing his or her job. We will explain the role of the fiduciary, including some of his or her key functions. The fiduciary has certain duties under the law, which we will go over in this chapter. You will also learn some of the reasons you could have a case against the executor or trustee.

In chapter five, we will provide advice on how to select a qualified probate attorney. If you are facing issues relating to probate, trying to handle the case on your own is not a good idea. You need to work



with a qualified probate lawyer who will be able to walk you through the process and ensure that your rights are protected. Choosing the right lawyer to represent you is not a simple task. Just because an attorney claims he or she handles probate litigation does not mean that they have the appropriate experience. This area of law is narrow and focused. What does that mean? It means you need to be selective in the hiring process and choose the lawyer who is best suited to handle your particular case.

Even though we have been practicing in this area of law for a long time, we still recognize that the mere term “probate litigation” can cause your eyes to glaze over and your mind to wander to something a bit more interesting. We know that

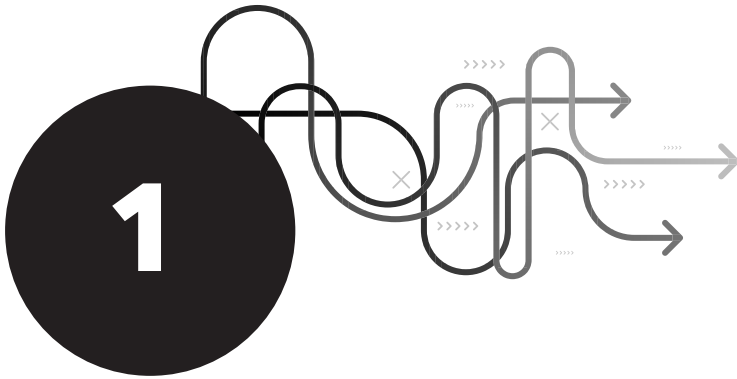
most people do not frequently use words like “bequest,” “unduly influenced,” and “testamentary capacity.” That is why you will not find a lot of legalese in this book. Instead, we will explain each and every topic in a way that everyone can understand. If we must throw a legal term in here and there, we will be sure to thoroughly explain its meaning.

Time is of the essence when it comes to contesting a Will. Keep in mind that you have four years to probate the Will, however:



In the State of Texas, you only have **two years** from the time the Will was admitted to the Probate Court to contest it.

Two years might seem like plenty of time, but it can go by fast. You need to make sure you are able to gather all of the necessary evidence to convince the court that you are an heir of the estate and are entitled to an inheritance. That is not a quick and easy task. You only have one chance to prevent someone from taking the inheritance that belongs to you!



Is the Will Valid?

Your father recently passed away. He and your stepmom lived in Dallas, Texas and were married for 15 years. Your stepmom had 2 children from her previous marriage. You were all very close. Your dad was very open and clear on how his estate would be distributed at his death and that you were appointed as his Executor. He was a very proud man and made it known that he had taken care of everything. Shortly after his passing you and your stepmom went to visit a probate attorney. It felt as if you were punched in the gut when the probate attorney reviewed the Will and told you that it was not valid. How could that be and what did that mean??? There are various ways that you can create a Will, however, keep in mind there could be devastating consequences in the future if it is not prepared in accordance with the requirements in Texas.

- You can purchase a Will kit online and hope that it is valid in the State of Texas.

- You can scribble your last wishes on a napkin at the bar, as long as you are sober. (And again, hope it's valid in Texas).
- You may think you can grab your phone and give a long video dissertation on how you want your assets disposed of when you die, but good luck with that. This method is currently not valid in the State of Texas.
- Speak with an estate planning attorney (hint hint best option)



But, How do you Know if the Will is Valid?

Unfortunately, many people die with the belief that they have put their affairs in order. They take the time to create a Will so that their family members will know their intentions, yet too many people fail to take the proper steps in creating a Last Will and Testament. Consequently, their Wills are not valid. Although there are various ways you can attempt to create a valid Will in Texas, unintentionally selecting an invalid method may lead to an unintended distribution of your estate.



This is why it is so important to speak with a qualified estate planning attorney to create or review your estate planning documents to ensure their validity.

Before we get in too deep talking about the requirements of a valid Will in Texas, let's step back and examine the purpose of this document. Below are our "must have" parts of a Will.

THE TOP 10

MUST HAVE PARTS OF A WILL

Although every Will is different, each should have the following provisions and information:

1 Heading, Marital History, & Children

- Heading** – This section should state your full name, county of residence, and a declaration that you intend for this to be your Will.
- Marital History** – This section should state whether you are married, divorced, widowed, or in a common law marriage.
- Children** – This section should state how many children you have and if you have any adopted children or step children.

2 Debts & Taxes

This provision should state exactly how debts are to be paid and which assets are used to pay them.

3 Disposition of Assets

This provision is what we consider the "meat" of the Will. It should state exactly who you want to receive your assets and how your assets should be distributed.

4 Guardianship

It is important to list the guardian of the person and estate of your minor child/children. If you do not choose someone, a court will decide.

5 Executor & Trustee

This provision should list the person or persons you want to manage your assets and make sure the right people receive them.

6 Executor & Trustee Powers

You should always list the powers you want your Executor and Trustee to have. If you do not list these powers, the simplest of tasks, such as selling your house, will not be easily accomplished.

7 No Contest Provision

In order to address the possibility of any person – whether related to you or not – attempting to oppose the provisions or probate of your Will, we include a Will Contest Provision. While some less experienced attorneys view this as optional, we consider this provision to be non-negotiable and require it to be in every Will we prepare.

8 General Provisions

These are "catchall" provisions that will vary depending on your situation. For example, a General Provision may include language stating how your estate could be impacted by a divorce.

9 Definitions

This provision defines certain words and phrases in order to eliminate any potential ambiguity.

10 Trusts

A Trust is optional and does not need to be included in every Will. However, if you have children under the age of 18, consider including a Minors' Trust in your Will.

Please take special notice of #7 on the previous page, the No Contest Provision, which is worth another mention. As stated, this is a nonnegotiable provision that is included in every Will we prepare. When considering whether to contest a Will, it is imperative that you speak with a qualified Probate attorney in order to make sure you do not trigger this provision. If this provision is triggered, the person contesting the Will could potentially receive nothing from the estate. We have seen this happen too many times when a family member meets with an inexperienced attorney in probate matters who files a pleading, which triggers this provision. Again, you must speak with an experienced probate attorney to determine a work around to this No Contest Provision.

The “Meat” - A.K.A. the Vital Parts of a Will



A Last Will and Testament is supposed to let everyone know how to:

- Dispose of your property after you die.
- Appoints the executor, guardian and/ or trustee.
- Outlines how your assets and property will be administered.

The items listed below are what we consider the “meat” of the Will. Without the proper drafting of these provisions, The State of the Texas and a judge take control.

Bequests



The word “**bequest**” refers to the act of giving personal property through a Will. Below are examples of 3 types of bequests that you may find in a Will.

1. **Conditional Bequest:** Sometimes, a Will might have a conditional bequest. That means the bequest takes effect upon the happening or nonoccurrence of a specific event. The movie *Bachelor* with Chris O’Donnell is a prime example. In this movie, O’Donnell’s character is told that the only way he can receive his grandfather’s \$100 million estate is if he is married by 6:05 PM on his 30th birthday. While that might be an extreme example, it does illustrate a conditional bequest.
2. **Specific Bequest:** This stipulates that specific items are left to specific individuals. For example, “*I specifically bequeath my watercolor painting titled “Lilies in the Meadow” to my nephew Timothy Doe.*”
3. **Residuary Bequest:** This is the bequest that states who gets the remainder of the property left in your estate after all debts are paid and all other bequests are made.

Appointments of Executors, Guardians or Trustees



Executor: The person who is in charge of settling someone's affairs.

It is a big job with a lot of responsibility. In fact, we often tell people this is the most “thankless” job. If you were appointed the executor, get ready for some work. You will have to protect your loved one's property and ensure that all debts and taxes have been paid. Your work does not stop there. You will also have to see to it that whatever is left, is transferred to the right people.



Guardian: The Person that is appointed to take care of any minor child.

When someone dies and leaves children who need to be cared for, it makes a tragic situation that much worse. A Will may specify who gets guardianship of the children upon the parent's death. A guardian may be in charge of caring for the child or the child's property. Sometimes a person will be appointed to look after the minor's property, which is referred to as a “guardian of the estate.” Choosing a guardian is not easy. It can lead to hurt feelings, resentment, and confusion after the parent passes away. If you are in

this situation, keep in mind that your loved one probably put a lot of thought into this decision and had a reason for choosing a particular guardian.



Trustee: The person who holds legal title to the assets to distribute them as required under the terms of the testamentary trust found in the will.

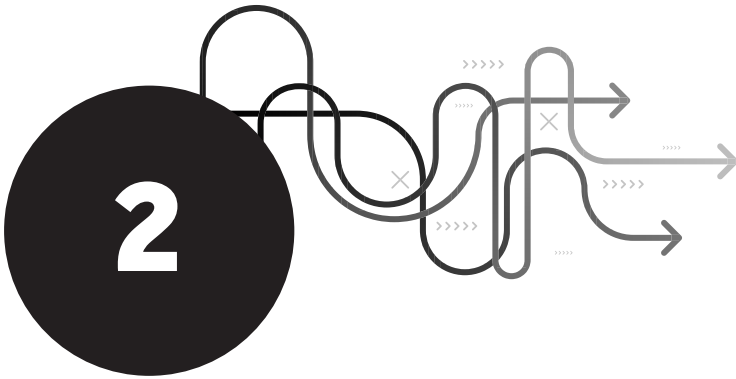
A Will may also appoint a Trustee to hold legal title to the assets. The Will also provides the terms of the Trust and designates the Beneficiary who is to receive the distributions. The Trustee distributes the assets as needed and required under the terms of the Will.

Administration of Assets and Property

This is the portion of the Will that discusses who gets what upon your loved one's death. It is one of the main purposes of a Will and is also the area that results in a lot of conflict among beneficiaries. This part of the Will talks about how the assets and property are to be transferred and to whom. You can see how it can get a little tricky.



We will talk more in the upcoming chapter about whether or not a Will is valid, which will help you determine if you are truly getting the inheritance your loved one intended.



Requirements of Signing a Will

A Will must meet certain requirements in the State of Texas. If you want to read the exact statute, you can research the Texas Estates Code.

Below are requirements that must be met when creating a Will in our state:

1. **Free will:** What does this mean?

It means no one can force you or anyone else to create a Will. Creating a Will has to be something you decide to do. Sadly, many old-



er individuals are put in a situation where they have no choice or are forced against their wishes to make changes to their Will. Someone might make them do so by using emotional or even physical force. Even though they didn't want to change the Will, they were made to do so anyway.

2. **Sound mind:** Another term used to describe “sound mind” is capacity. You must have the mental capacity

to be able to create a valid Will. You have to have the ability to reason and make decisions. There are many circumstances that arise in which the elderly are taken advantage of by others. Their health is failing and their mental ability isn't what it used to be. A family member, caregiver or other greedy individual might jump on this situation and persuade your elderly loved one to make changes to his or her Will. Often these changes are detrimental to everyone who would have otherwise received an inheritance.

3. **Legal age:** Of all the requirements of a Will, this one is the most straightforward. According to Texas law, if you want to draft a Will, you must be at least 18 years old, or married, or serving in the armed forces. Not too complicated, is it?
4. **Signatures:** A Will has to be signed by the person who is creating it. However, someone else at his or her instruction and in his or her presence can sign it.
5. **Witnesses:** A Will also has to be witnessed by two people, at least 14 years of age or older, in front of a notary. These witnesses must sign the Will in the presence of the creator of the Will and they must watch the creator of the Will sign it (unless it is a holographic Will).

Do You Think the Will Might Not Be Valid?



We commonly hear the following statements from people who contact our office:

“My father’s Will doesn’t make sense.”

“My mother told me she was going to do something different with the estate than what is written in her Will.”

“My relative only started visiting my dad when he became very ill. Now she’s inheriting everything. It seems odd.”

“My mother was so forgetful. How could she possibly understand the changes she was making to her Will?”

“My father was in the hospital on heavy medication. How was it possible for him to sign a Will just a few days before his death?”

As you are reading this book, you might be questioning the validity of your loved one's Will. He or she might have told you one thing about the intentions of the estate, but the Will might have been completely different. You might suspect that someone influenced your loved one or that he or she did not know what was going on at the time the Will was drafted. Of course, people do have the right to change their Wills. After all, the assets are theirs and they have the power to decide who gets what upon their passing. However, you know your loved one and if you are feeling uneasy about what was written in the Will, there is probably a reason.



Chapter three of this book will help you make sense of what might have gone wrong, but it is always best to talk with a qualified probate attorney. Every situation is different. The circumstances you are facing are not going to be the same as someone else. Simply reading information and searching the Internet is not enough. You need to discuss your situation with a professional. A lawyer will be able to look at your specific circumstance and help you determine if you are being treated fairly and if you have gotten the inheritance that was intended for you. He or she will also be able to examine the factors involved when the Will was written or modified, so that any questionable behavior can be identified.

Here at The Ashmore Law firm, whenever we help someone draft a Will, we ask specific questions and require the testator (the person making the Will) to provide his or her

signature. In addition, we ensure that the answers are given in front of two witnesses and a notary. The witnesses and notary cannot have an interest in the estate. They are not a beneficiary, executor, or trustee. We do this because it is essential to show the person was in the proper state of mind at the time the Will was created.

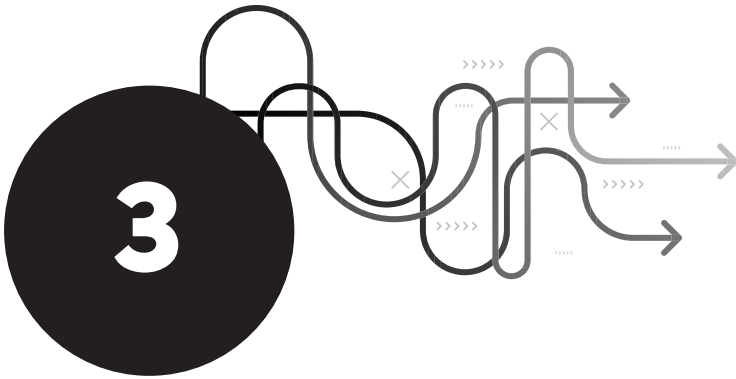


There are 7 important questions we ask before someone signs a Will:

1. Is your name Jane Doe?
2. Have you reviewed this, your Last Will and Testament, and does it dispose of your property in the way you would like?
3. Do you know what your property consists of, or, in other words, do you know what you own?
4. Do you know who the objects of your bounty are, or, in other words, do you know who your family members are?
5. Are you signing this Will of your own free will and without anyone's influence?
6. Are you of sound mind?
7. Are you at least 18 years of age or older?

It is important the person making the Will is able to answer “yes” to each of these questions and be able to answer follow up questions, if appropriate. If not, it could indicate he or she is not in the position to be making a Will at this time. Lawyers are supposed to ask these types of questions, so they can ensure that the testator is able to create a Will. If you believe your loved one’s Will is not valid, it is important that you seek the assistance of a qualified probate litigation attorney.

If after reading this chapter, you believe your loved one’s Will might not be valid, you may be able to contest it. As we mentioned previously, there is only a small window of opportunity to file a Will contest, which will be discussed in the next chapter. That means you need to take immediate action. The next chapter will also provide more insight into what makes a Will invalid and will discuss the process of contesting a Will.



Contesting a Will: What You Need to Know

Your mother recently passed away. She lived in Dallas, Texas. She had 3 children, 2 lived out of state and you lived in Austin, Texas. You would come to Dallas a couple of times a month to visit with your Mom and you would talk on the phone at least 4-5 times a week. You and your mom would talk about her accounts and investments. You have noticed over the last few months your mom started slowing down and becoming more and more forgetful. You knew it was time to hire a caretaker to go to mom's home every day to help out. Eventually, it became necessary for the caretaker to stay nights. You noticed when you would call to talk to your mom, she was never available. You started getting calls from mom's friends. When they would go visit, the caretaker would never leave mom's side. In fact, many times, the caretaker would answer the questions. Mom's friends said mom was becoming more and more isolated. After mom passed away, you were mortified to learn that all of her investments

were gone, and the house had been deeded over to the caretaker's daughter. You also found out the residuary bequest in mom's estate left everything to the caretaker. Your head was spinning as you searched for a probate attorney.



After you overcame the initial shock of the passing of your loved one, you may have finally sat down with your family to review the Will. You may have discussed the details with your loved one before his or her death, so you pretty much knew what the Will would say. Maybe your loved one told you that you would inherit certain property, jewelry, or other assets upon his or her death. To your surprise, once the Will was read, things were completely different than what you had anticipated. Your instincts are telling you something is wrong, that this is not how it was supposed to be. However, there it is in black and white – how your loved one's estate would be distributed. So, what can you do?

Sadly, the older population is often taken advantage of by caregivers, family members and other people close to them. Those who should be watching out for the elderly individuals in their lives may be the very ones who are trying to gain something for their own benefit. This is especially



true when a large estate is involved. Ulterior motives begin to develop, and greed sometimes takes over. If your “gut” is telling you the way the Will was set up just does not coincide with your loved one's wishes, you need to dig a

little deeper. He or she may have been unduly influenced or not had the mental capacity to make changes to the Will. Fraud may have occurred during the creation of the Will or your loved one's signature may have been forged. All of these issues would make the Will invalid. Let's take a closer look at these issues.

What Makes a Will Invalid?

1. **Undue influence.** This perhaps is one of the most heart-breaking reasons why a Will might not be valid. Basically, undue influence can be defined as a situation where the decedent (the person who has passed away), made the Will based on someone else's wishes and not their own. As reflected in our story above, someone saw an opportunity to influence your mom (the decedent), whether by intimidation, physical threat, or some other tactic, and took it. Generally, this would be someone who was close to your loved one. In *Rothermel v. Duncan*, 369 S.W.2d 917 (Tex.1963), The Texas Supreme Court set out the factors that determine undue influence when contesting a Will. According to the Texas Supreme Court, the following elements are used when identifying undue influence:
 - a. The existence of an influence;
 - b. The use of the influence to either overpower or threaten the testator; and
 - c. The Will would not have been executed if it were not for the influence.

Keep in mind all these elements need to be present for the court to determine undue influence.

2. Lack of mental capacity (A.K.A. testamentary capacity):



The Alzheimer's Association estimates that 5.8 million people of all ages have Alzheimer's disease in the United States. In Texas, 400,000 people age 65 and older have Alzheimer's disease.

Source: Texas Department of State Health Services

This statistic is equal to approximately 1 in 10 older Americans. It is further estimated that this number will increase to nearly 14 million by 2050. Millions more have dementia and other conditions that affect mental capacity.

As we discussed in chapter two, to have a valid Will you must be of sound mind at the time it was signed. What exactly does it mean in terms of proving a Will is invalid? You will need to show your loved one lacked the ability to comprehend the nature and extent of the property that was to be distributed per the Will. It also means your loved one did not have the mental capacity to understand the relationships he or she had to the people who would benefit from the Will and really, the overall

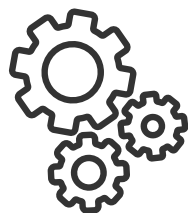
effect the Will would have once it was executed. As people age, their mental abilities may sometimes decline. Some develop conditions, such as dementia or other ailments, which impact their state of mind. Mental illness, alcohol and drugs can also lead to mental incapacity.

In order for your loved one to have sufficient mental capacity, he or she must have:

- Understood he or she was making a Will;
- Recognized the impact the Will would have on those left behind;
- Known the overall nature and extent of his or her property;
- Identified the natural objects of his or her bounty (the people close to or related to your loved one);
- Had sufficient memory to hold all of this information in his or her mind long enough to decide how the estate should be disposed of upon his or her death.

Proving your loved one did not have the necessary mental state when making the Will can be challenging. The court will assume your loved one was competent when the Will was created. If the

Will was created many years ago, you will need to find witnesses and other evidence to show your loved one didn't have the mental capacity to make a Will. Medical experts may even need to be employed to provide their opinions on the mental capacity problems which often



plague the elderly. These experienced nurses and doctors will be able to provide insight into dementia, Alzheimer's, and other mentally debilitating conditions. Your best course of action is to talk with a qualified probate lawyer for advice on how to proceed.

3. **Unnatural distribution:** This is an area that comes under consideration when determining if a Will is valid. If your loved one outlined an unnatural distribution of property in the Will, such as disinheriting a child, the court may decide that he or she was not of sound mind, making the Will invalid. If your loved one wanted to make an unnatural distribution of property, it would need to have been clearly articulated and documented.
4. **Under the age of 18:** Of all the factors that make a Will invalid, this one is the most straightforward. Basically, if your loved one was younger than 18, his or her Will is not considered valid, unless they were married or in the armed forces.
5. **Fraud in the inducement:** Now, this factor probably needs some explanation, as most people do not use "fraud in the inducement" in their everyday vocabulary. Fraud in the inducement has to do with the intentional misrepresentation of facts. If the decedent had known these facts, whatever they might have been, he or she would have made different decisions in regards to the Will. Remember, this is an *intentional* misrepresentation. It does not mean some simple fact was left out by mistake. Instead, it means someone purposely misled your loved one. For example, someone may have told your loved

one a family member or relative, who would most likely have received part of the testator's estate, did not need the money because they had enough of their own. Another example that often



occurs is when one family member starts telling your loved one the family member who would have most likely received part of the testator's estate was stealing from the testator or was speaking ill of them to other family members and relatives. This type of information would probably cause your loved one to go a different direction when distributing his or her assets.

- 6. Forgery:** Not surprisingly, forgery of any kind can cause a Will to be invalid. If your loved one's signature was forged on the Will, you can contest it. Of course, proving a signature is forged is not easy. You will need proof the signature was not your loved one's, which may require a hand writing expert. A qualified probate attorney can explain what would be needed.

If any of the factors we just discussed have hit a little too close to home, it could mean you have grounds to contest the Will. You will need to become familiar with the Will contest process, as there are many steps involved.

The Will Contest Process

Maybe someone close to your beloved family member influenced him or her to change their Will. Or, your loved one just did not have the mental capacity to understand the

modifications made. Whatever the reason you have for suspecting the Will is invalid, it is important you understand the process of contesting a Will.

A Will contest is the term used to describe the procedure to dispute a Will. It is the formal objection made against the validity of a Will. You would contest a Will if you felt that it did not reflect your loved one's wishes and involved one of the elements that makes a Will invalid.

Who can Contest a Will?

First, you must understand that the Texas Estates Code governs Will contests. The law is specific regarding who is allowed to create a Will, but also who is allowed to challenge it. Let's take a quick glance at some portions of the Texas Estates Code relating to who is allowed to contest a Will.



Chapter 55, section 55.001 of the Texas Estates Code states:

“A person interested in an estate may, at any time before the court decides an issue in a proceeding, file written opposition regarding the issue. The person is entitled to process for witnesses and evidence, and to be heard on the opposition, as in other suits.”

Who is an interested person? According to Texas Estates Code chapter 22, section 22.018 interested persons include:

“An heir, devisee, spouse, creditor, or any other having a property right in or claim against, an estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor.”

If you are not sure if you meet the criteria of an interested party, contact a qualified probate attorney. A lawyer who is knowledgeable with the Texas Estates Code will be able to advise you on your eligibility to contest a Will.

Where do you Start?

If you feel you meet the requirements to be considered an interested party and you believe there are grounds to challenge the Will (the reasons mentioned previously that make a Will invalid), the next step would be to contest the proceedings. There is no specific form required to contest the Will; however, you must submit your motion in writing. You will need to specifically explain how you are related to the testator to determine if you have standing and on what grounds you are contesting the Will.



CAUTION: Beware not to trigger a possible no contest provision. Speak with a qualified probate attorney who can assist you in navigating potential no contest language in the Will.

What Happens Next?

What you must understand is the burden of proof changes depending on when the contest is filed. If the contest is filed *before* the Will is admitted to probate, the person who filed the application to probate the Will must prove the Will is valid. However, if you file your contest *after* the Will was admitted to Probate, the burden is on you to prove the admitted Will is not valid. Your evidence and witness testimony must be strong enough to convince the judge your loved one's Will is not enforceable. In this case, the estate will be treated as if the Will you are opposing did not exist. Sometimes only part of the Will is found to be invalid, meaning the other portions of the Will remain valid.

The Clock is Ticking

There is a time limit regarding when you can challenge a Will. According to the Texas Estates Code, you only have two years



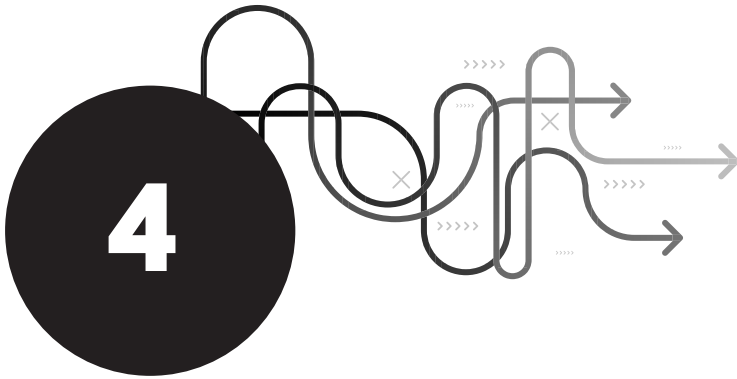
to file a Will contest *after* the Will has been admitted to probate. This time limit is known as the statute of limitations. The statute of limitations can be complicated. For example, after someone dies, the Will can be filed for up to four years after the death, which means you could have until six years after the passing of your loved one to contest the Will.

Of course, there are exceptions to the statute of limitations to contest a Will. Minors may have two years after reaching the age of majority to contest a Will. The exceptions do not stop there, but there is not enough time or space in this book to continue with all of them. Each case is unique and should be treated individually.

Keep in mind challenging a Will is not a simple process and mistakes are often made along the way by loved ones or even inexperienced attorneys. Just like you would never agree to fly on an airplane knowing that the pilot has no experience, you should not attempt to challenge a Will without someone knowledgeable on your side. There is a lot at stake when it comes to contesting a Will and you should not leave your situation up to chance. At the very least, we recommend speaking with a qualified probate attorney to get advice on if or how you should proceed.

While this book has defined and has shown examples of what would make a Will invalid, keep in mind although you feel the Will is invalid based on all of the information you have, a Judge or Jury may feel differently. The ruling may not always be what you expect.





Is the Fiduciary Doing His or Her Job?

Your mother passed away in April of 2018. She designated your brother, Tom, as the Independent Executor in her Will. He was appointed as such in June of 2018 by the probate court. Over the next few months, he communicated regularly with you and your siblings. However, he stopped communicating with you approximately 12 months ago. You have attempted to contact him, as well as his attorney, but have not received any response. At this point, you are not sure what to do. You know your mom had approximately \$1.2 million dollars when she passed away, as she was always very open about her assets with all of her kids. You recently discovered Tom was driving a new car and bought a large new home. You and your siblings have been questioning how he could afford all these new things. You know there must be something you can do to find out what is going on. You know that as the Independent Executor, he does not have the authority to only benefit himself. You also know he **MUST** distribute your

mom's estate according to her Will, which should be equally split between all four of her children. After all, isn't Tom as the Independent Executor considered a Fiduciary?



Fiduciary: (noun) a person to whom property or power is entrusted for the benefit of another.

Fiduciary is a term we use within the legal realm to describe the type of relationship between two parties. This relationship comes with a high level of trust, confidence, and good faith. The fiduciary owes a duty (or responsibility) to the other person in the relationship. Basically, the fiduciary acts primarily for the benefit of another. Under the law, this fiduciary duty is the highest standard of care. This means that a fiduciary cannot put his or her personal interests first and cannot profit from his or her position as fiduciary.



Who is Considered a Fiduciary?

- The Trustee appointed in a Trust is one example. Technically, the Trustee becomes the owner of the property in the estate. The Beneficiary/ies retains no legal title to the assets in the Trust. However, the Trustee has the duty to make decisions in the best interest of the Beneficiary/ies.
- The Executor appointed in a Will is another example of a Fiduciary. Again, this person is required to do what is best for the estate and avoid a situation where a conflict of interest could arise.
- The Administrator appointed by the Court when there is no Will is also considered a Fiduciary.
- The Guardian appointed in a Will or by the Court, is another example of a Fiduciary. This person is required to do what is in the best interest of the minor child or incapacitated person.

Duties of the Fiduciary

Fiduciaries have many duties according to the law:

- 1. Identifies and collects assets:** According to the Texas Estates Code, a personal representative of an estate, which could include a trustee, executor, or administrator, is required to practice “ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of which the estate has claim or title.” In other words, the executor, administrator, or trustee must take steps to make sure all assets have been identified and collected.
- 2. Pays debts that were owed at the time of the decedent’s death:** It is common for someone to pass away still owing a mortgage, loan, or other debt. One of the fiduciary’s responsibilities is to identify these debts and pay what was owed at the time of death in the **priority** pursuant to Section 355.102 and 355.103 of the Texas Estates Code.
- 3. Pays applicable taxes relating to the estate:** The fiduciary must determine what taxes are owed on the estate and pay the applicable amounts.
- 4. Distributes the assets according to the Will:** This duty is relatively straightforward. The trustee, executor, or administrator is required to dispose of the assets and property according to the deceased’s Will, or under the laws in Texas if no Will existed, or under a Trust.

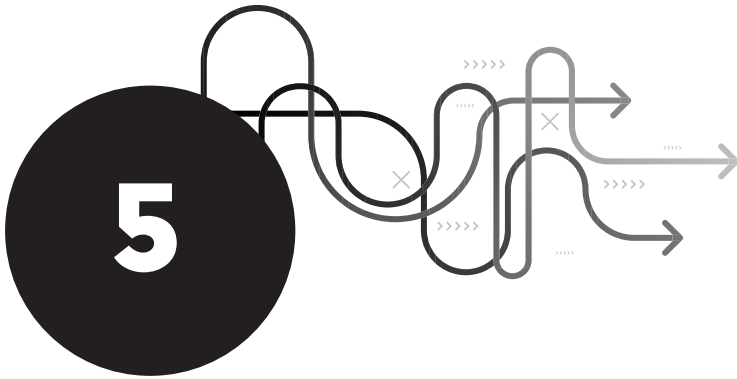


As you can see, the fiduciary has a tremendous amount of responsibility. Your loved one trusted this person enough to handle his or her affairs after death. Sadly, the fiduciary, whether a trustee, administrator, or executor, may not live up to his or her responsibilities. In that case, you may be able to have him or her removed as a fiduciary and may be able to take legal action if the fiduciary does one of the following:

1. **Makes decisions based on personal gain:** The fiduciary is required to put the interests of the estate before his or her own interests. That also means that the fiduciary should avoid situations that would create a conflict of interest.
2. **Fails to meet deadline(s):** There are many deadlines that must be met when probating an estate. Failure to meet one of these deadlines could give you grounds to file suit against the fiduciary.
3. **Knows about assets, but purposely excludes them:** Fiduciaries must account for all of the assets in the estate.
4. **Sits on the estate and does not do anything he or she is supposed to:** The fiduciary has many duties. Choosing to ignore these responsibilities could jeopardize the estate.
5. **Fails to make distributions:** The fiduciary is required to make the distributions outlined in the Will or Trust.
6. **Withholds information:** Keeping secrets from the beneficiaries is a major cause of concern. The fiduciary must ensure that everyone is kept informed regarding the estate.

7. **Mismanages the estate:** The fiduciary position is one of utmost trust. The fiduciary must manage the estate properly.
8. **Is not being responsible to the beneficiaries:** The fiduciary is responsible to the beneficiaries and is required to provide certain duties.

Making the decision to take legal action against the fiduciary is not easy, especially if the trustee, administrator, or executor is a family member or someone close to you. If you are not sure what you should do or how to proceed, it would be best if you talked with a qualified probate attorney. It is also important to speak with a qualified probate attorney as laws frequently change. What may have been allowed a few years ago may now be prohibited, or vice versa. In the next chapter, we will be discussing how to find the right lawyer to help you through your situation.



How to Choose the Right Probate Litigation Lawyer

Before reading this book, you may have thought challenging the validity of a Will was something you could easily do on your own. However, as you can gather from the information you have read up to this point, the probate process itself is very complex, not to mention the procedure to dispute a Will or hold a fiduciary liable for his or her negligence. You should not attempt probate litigation without someone who has knowledge and background in this area of law.

When a loved one dies and there are issues with the estate and/or Will, relationships can become stressed within a family. Disputes erupt, feelings are hurt, and trust is broken – it is an emotional and difficult time for everyone. Due to the personal nature of this time period, you need to ensure that you feel comfortable with your lawyer.



“We recommend choosing your lawyer as you would your family doctor.”

–Gary Ashmore

This person needs to be someone who will understand your situation and guide you through the probate litigation process without creating additional stress in your life. It may seem nearly impossible to find a qualified probate attorney who not only is experienced, knowledgeable, and well equipped to handle your case, but is also personable and empathizes with your circumstance.

The truth is any attorney can probate a Will. Actually, we need to qualify that statement a little more – any attorney can claim he or she can probate a Will, but the law is complex. You have seen firsthand some of the complexities of the Texas Estates Code, including the steps involved and dead-



lines. Therefore, finding the right lawyer for your case is not as simple as calling the law firm closest in proximity to your home. Too much is at stake to risk working with a lawyer who lacks the appropriate experience and resources to help you proceed with probate litigation.

So, how do you know where to find the right attorney? Below are some tips to guide you in the right direction to hiring a qualified probate lawyer.

- 1. Ask an attorney you already know:** One of the best sources of information comes from other attorneys. If you have worked with an attorney before, he or she may be able to refer you to a qualified probate lawyer. It is often difficult for consumers to distinguish between the good lawyers and the not-so-good ones. Those who practice law do not have this challenge. Instead, they know what to look for and typically know the reputation and background of their fellow attorneys.
- 2. Ask a trusted advisor, co-worker, friend, or family member if they have a referral:** If you know someone who has gone through a similar circumstance as you, whether that person contested a Will or pursued action against a fiduciary, find out who represented him or her. Probate litigation is not as common as many of the other areas of law, so don't be surprised if no one has a referral for you.
- 3. Get online:** Without question, online is where most people turn to for information. Most law firms are online, so grab your computer and start searching. Now, you must understand you will be presented with a long list of lawyers, so you need to know what to look for. For example,



do the attorneys have educational and informative articles on their websites? What about videos? Does it look like the lawyers have written books or reports? Do the attorneys have good reviews? These are all great indicators the attorney has a thorough understanding of the law and also has the knowledge necessary to handle your legal matter.

Keep in mind the first few search results are sometimes paid sponsored ads. These are law firms that have paid Google to show up in the first several spots of the search results. These may or may not be the most qualified.

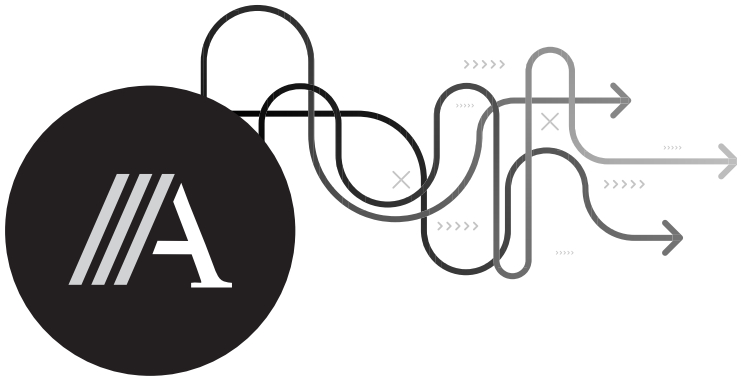
Do not think your work is done once you find possible attorneys to represent your probate litigation case. There are still more things to do. You will need to set up a meeting with each of the attorneys on your list and ask them pertinent questions. While you might feel uncomfortable asking questions, remember a big factor in the success of your case is the attorney who is representing you. We recommend you ask the following questions:

1. **How many years have you been practicing probate litigation?** The answer to this question will give you a good idea as to how much experience the lawyer possesses. It is crucial your lawyer knows the ins and outs of Probate Court and has represented many probate litigation cases over the years.

2. **Are you licensed in the State of Texas?** Okay, we know what you are thinking – “*of course the attorney would be licensed in our state. Why else would he or she be advertising in Texas?*” Do not be too quick to assume the lawyer has the appropriate licensing. We have many stories that would surprise you.
3. **How is your billing handled?** You need to know how the attorney will be compensated for providing you with legal services. Will you be charged an hourly rate or have to pay a retainer? Will the retainer be applied to the work performed or is it nonrefundable? Nothing is worse than being caught off guard with an attorney bill you weren’t expecting.



While these questions should definitely be asked when you first meet with an attorney, you may have additional ones to add to the list. As previously mentioned, you must feel comfortable with the attorney you choose. This person is someone who will be guiding you through one of the most difficult and stressful times of your life. Make sure this person is someone you can count on and trust.



Conclusion

When your loved one passed away, little did you know that was just the beginning of your heartbreak and stress. Suspecting your parent, grandparent, or other family member was influenced to change his or her Will, or that your loved one was the victim of fraud or exploitation, is a devastating thought. It is even worse if someone close to your loved one took advantage of him or her.

Sadly, we commonly hear of stories where the elderly fall prey to their caregivers, the very people they trust. Sometimes, people are threatened by physical force to change a Will or are manipulated by undue influence to change the distribution of the assets.

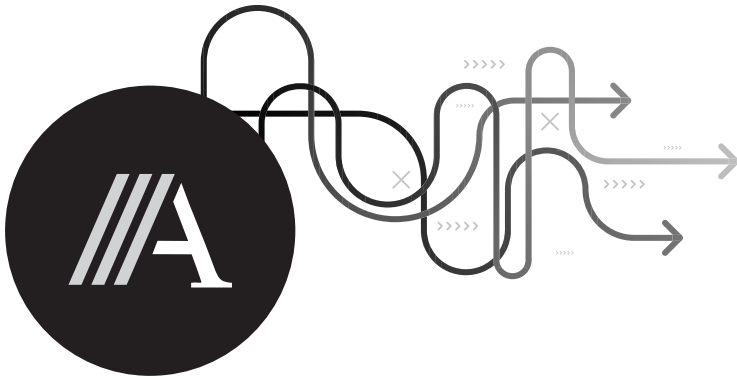
By reading this book, you should have become familiar with what makes a Will valid, including the requirements to create it under free will, with a sound mind and at a legal age. We even explained the typical questions asked by a lawyer when the Will is created. However, as we also discussed, there are many things that make a Will invalid. For example, when

a person was not of sound mind, or when a person is unduly influenced to make or revise a Will. Forgery or fraud also makes a Will invalid.

Probate litigation does not solely involve Will contests. It may involve a fiduciary who has breached his or her duties of a Will or Trust. The position of the fiduciary is one that comes with many responsibilities and a high level of trust. The fiduciary, such as an executor, administrator, guardian, or trustee must put the interests of the estate, beneficiaries, or minor child above their own. The fiduciary must also avoid getting into a situation that creates a conflict of interest. If the fiduciary fails to perform his or her duties, you may be able to pursue legal action. You may also be able to hold the fiduciary responsible for making decisions based on personal gain, failing to meet deadlines, purposely excluding assets from documents, and withholding information from the beneficiaries. These are merely examples of the many reasons you may have a case against the executor, administrator, guardian, or trustee.

Probate litigation is not a widely practiced area of law. Even though an attorney may claim to be able to handle probate litigation, you need to proceed cautiously. The Texas Estates Code is complex and there are many intricacies of the law that attorneys who are not experienced with probate may overlook. Therefore, make sure you know what qualifications to look for when hiring an attorney, including what questions to ask.

There is no question dealing with a Will contest, negligent or non-responsive fiduciary is overwhelming, stressful, and frustrating. Understand you do not have to face your situation alone. A qualified probate litigation attorney can guide you through the process and help you move on with your life.



About The Ashmore Law Firm

As a firm that focuses on probate and estate planning, we know how challenging it can be to lose a loved one. There are legal issues involved, but there are also a lot of emotions and grief related to your loss. A loss of a loved one is a very personal thing, and you need to make sure you can trust the attorney you hire and feel comfortable with this person. You need to take the same steps in hiring a qualified probate attorney as you would in hiring and consulting with your family doctor. You are looking for help in eliminating the pain, as well as answers and a roadmap on how you need to reach the final destination.

At The Ashmore Law Firm, we focus on the three “E’s” – expertise, experience and excellence and have been doing so since 1987. As our client, we view you as a partner and are accountable to you. We will always answer your calls and keep you updated regarding where we are with your probate litigation case.

We are a family-oriented law firm founded by Joseph E. Ashmore, Jr., a former Probate Judge, along with his son, Gary Ashmore and daughter, Lori Ashmore Peters. Together, we have continued the family tradition of providing excellent service to our clients and have employed additional attorneys who share our same values. When you work with our law firm, you are treated as part of the family.

Every one of our clients receives personal attention that can really only be found in a small firm atmosphere. We make it our mission to provide cost-effective services, without compromising the quality of representation that is offered.

Probate involves many areas of law and our attorneys have the backgrounds to help you with a range of legal matters. We provide legal assistance with estate planning, probate administration, guardianship, and mental health law. We also provide family law services that include prenuptial agreements, divorce, spousal support, property division, protective orders, grandparent's rights, and other areas.



As our client, we pledge to treat you and your loved ones as we would treat our own family.



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— YOUR ROADMAP TO

ESTATE & PROBATE

LITIGATION IN TEXAS

IF YOU ANSWERED **YES** TO ANY OF THE FOLLOWING QUESTIONS, YOU MAY NEED TO SPEAK WITH A PROBATE LITIGATION ATTORNEY.

1. *Are you a beneficiary of a Will and the Executor is not making proper distributions?*
2. *Is the Trustee of your Trust not keeping you informed?*
3. *Are you suspicious that a loved one was forced to sign their Will?*
4. *Do you think that a loved one did not have capacity when they signed their Will?*
5. *Were you excluded from a loved ones Will?*



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