

Who are Your People: Descent and Distribution

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Probate, Trust & Estates Section
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Select Ad Litem Issues In Probate Litigation

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INTRODUCTION

The purpose of our outline is to review select issues facing the Attorney *Ad Litem* (AAL) in probate litigation involving heirship. In this outline, we review the initial legal work involved after the AAL is appointed by a Court (Probate Court); misperceptions of the role of the AAL and the realities of dealing and interacting with the Probate Court, an attorney for an applicant (Applicant's Counsel), parties, and witnesses; select legal issues that arise in such litigation; the AAL's role at a Probate Court hearing; and compensation of the AAL. This outline concludes with the conclusion of AAL representation itself.

An extremely useful and entertaining source of information about AAL representation in guardianship and heirship proceedings is *The Ad Litem Manual 2010* (revision date - April, 2010), written by the Honorable Steve M. King, Judge of Tarrant County Probate Court Number One, referenced herein as "King."¹

Because our focus is on the subject of heirship litigation, our outline does not cover AAL issues in such practice areas as adult guardianships, removal of community administrators, mental health commitments, and trust litigation.

I. INITIAL LEGAL WORK INVOLVED FOLLOWING PROBATE COURT APPOINTMENT

After appointment by the Probate Court, the AAL must engage in certain legal work as part of the professional, effective and ethical representation of an AAL client (AAL Client).

A. Carefully Review the Probate Court Order of Appointment

1. Determine the identity of the AAL Client, including his/her exact name (if you represent a named individual) and legal status.
2. Identify the nature of the AAL representation.
3. Review and secure pertinent documents from the case file at the County Clerk's office, inasmuch as the initial paperwork received from the Probate Court or any other source might not include all citations, notices, pleadings, and correspondence pertinent to the case and the AAL representation which are of record. Moreover, if the docket sheet for the case file is posted online, check that

¹ This vital paper is updated periodically by Judge King and can be accessed at http://www.tarrantcounty.com/epc01/lib/epc01/Ad_Litem_Manual_2010.4.pdf

docket sheet from time to time. The citation issued with respect to the case is of critical importance; the AAL must examine it carefully to determine if it is accurate and gives proper notice of the heirship proceeding.

B. Initial Pleading

1. If the local Probate Court or bar association has a sample AAL initial pleading, usually in the form of a general denial, the AAL should consult it in drafting and filing with the County Clerk the initial pleading of the AAL.
2. If no such pleading is available, the AAL should either consult with attorneys who practice in the heirship area for guidance or use the initial pleading in an heirship matter attached as Appendix 2 to our outline. Of course, this pleading should be modified so as to make it consistent with the identity of AAL Client and the nature of the representation.

C. Initial Communication with Applicant's Counsel and (If Possible) the AAL Client

1. To initiate the case leading toward judicial determination of heirship, counsel for Applicant will have drafted and filed with the County Clerk a pleading necessitating or requesting appointment of the AAL by the Probate Court. So, the AAL must contact Applicant's Counsel as soon as possible after the appointment.
2. Initial matters to cover with Applicant's Counsel:
 - a. Exchange contact information with one another, and obtain contact information for the client of Applicant's Counsel (Applicant [whether one or more]), all other parties, and the disinterested witnesses who will testify later at the Probate Court hearing.
 - b. Get some idea of whether the case is urgent to Applicant so that the AAL investigation might be completed in a timely fashion.
 - c. Request that Applicant's Counsel contact Applicant, other parties and witnesses to advise them of the AAL's appointment.
 - d. Arrive at an understanding of the nature of the case, scope of the AAL investigation, and appropriate compensation for the professional services rendered by the AAL.
3. Unless (a) the whereabouts of the AAL Client are unknown, (b) the AAL Client is a person with a significant disability that would prevent effective communication,

or (c) the AAL Client is an unborn or otherwise unascertained person, then the AAL should immediately contact the AAL Client to exchange contact information, explain the AAL role in the case, and review any appropriate pleadings, including the paperwork the AAL has drafted or plans to draft on behalf of the AAL Client.

4. If the AAL Client is a person whose whereabouts are unknown, a significantly disabled person, a minor without a parent who can assist in the investigation, or an unborn or otherwise unascertained person, then the task of the AAL is to examine all pertinent pleadings and heirship documents and to interview the Applicant, disinterested witnesses, and any other relevant parties to the litigation.

II. MISPERCEPTIONS AND DEALING AND INTERACTING WITH THE PROBATE COURT, APPLICANT'S COUNSEL, PARTIES, AND WITNESSES

Anyone who accepts an AAL appointment may have to confront and diplomatically deal with one or more misperceptions of the AAL's role, as well as to deal and interact with the Probate Court, Applicant's Counsel, parties to the litigation, and any disinterested witnesses.

A. Misperceptions of the Role and Duty of an AAL

An AAL has a duty to defend the rights of an involuntary client the same as if that client had expressly employed the AAL. *Madero v. Calzada*, 281 S.W.2d 328, at 330 (Civ. App.-San Antonio 1926, dismissed). In an ideal world, everyone participating in the case will understand that the AAL must take all reasonable steps to become familiar with the decedent's background, family, marital issues (if any), and heirs. Sadly, this is not an ideal world; the reality is that, all too often, the AAL must explain his or her role and duty to a skeptical audience. In such conversations, the AAL may be dealing with one or more of the following misperceptions:

1. Obstructionist Attorney

The AAL is perceived as someone mysteriously foisted upon the unsuspecting Applicant for the purpose of throwing monkey wrenches into an heirship case, thereby obstructing what would otherwise be a short, inexpensive, and controversy-free proceeding.

2. Unnecessary Attorney

The AAL is perceived as unnecessary to the resolution of the heirship of a decedent, particularly in what appears to be an open and shut case. Such a misperception can often be traced to the Applicant's Counsel, who has not fully explained the role and duty of the AAL, or has possibly slighted that role and those duties.

3. Greedy Attorney

It is bad enough that Applicant's Counsel has to be paid for what seems to be unnecessarily tedious, prolonged, and expensive work, but it is even worse to pay the legal fees of another attorney, the AAL, whom Applicant had not even hired to do the job in the first place, yet who still expects to be paid!

4. Friendly Collaborative Attorney

Why doesn't the AAL "get with the program" and be a team player in what should be a collaborative process, and in the process ignore seemingly minor heirship discrepancies?

B. Dealing and Interacting With the Probate Court

1. Expectations of the Probate Court

Although Probate Court personnel will not do the AAL's job, it is entirely appropriate for the AAL to check with staff whenever (a) scheduling a hearing, (b) ensuring that the AAL paperwork is on file, (c) clarifying the scope of the AAL's representation, and d) carefully reviewing any relevant Probate Court policy covering everything from Courtroom conduct to unwritten but real expectations of the AAL. It is always good if the Probate Court has high expectations of an AAL's professional conduct.

2. Guidance

If the AAL is not receiving cooperation from Applicant's Counsel, and/or has unsettled issues about the documents furnished or the witnesses interviewed, it is a good idea to first resolve such problems with Applicant's Counsel. If the matter is still not working out, the AAL should schedule and notify Applicant's Counsel of a Probate Court conference. It is amazing how much cooperation may be achieved and how many otherwise intractable issues may be resolved once the Probate Court is aware of and addresses any such issues in a conference.

3. Knowledge of the Law of Intestacy and Pertinent Heirship Issues

It goes without saying that the AAL must know the Texas law of intestacy and be acquainted with issues that often arise in heirship cases, some of which are covered below. Acting in a lazy and/or unprepared manner as an AAL is unprofessional, disserves the AAL Client, and lowers the Probate Court's expectations of the AAL.

C. Dealing and Interacting with Applicant's Counsel

1. An Attorney's Cooperation Travels Smoothly Along a Two-Way Street

Just as Applicant's Counsel should rightfully expect the AAL to act professionally and work diligently so that the case progresses to an correct heirship determination, the AAL should expect the following cooperation from Applicant's Counsel, including:

- a. Furnishing copies of all documents the AAL needs to review, such as birth and marital records, military documents, divorce proceedings, and death certificates;
- b. Making sure that Applicant and any disinterested witnesses who will testify are reasonably available to AAL during the investigation;
- c. Forewarning Applicant's Client and all witnesses that the AAL will be in contact with them, so that the investigation may be thereby conducted efficiently and with due diligence; Applicant's Counsel must be open to discussion and assistance when problems arise, such as the unprepared or unenlightened witness, gaps in heirship facts, or incomplete or ambiguous documentation.

2. Method of Communication

In the authors' experience, most attorneys find email and other forms of Internet communication both fast and convenient when reviewing a legal case with other counsel of record. Moreover, if the AAL is a solo or small firm practitioner who is out of the office all or a good part of the day and does not have staff, it is a good idea to exchange cellular telephone numbers with Applicant's Counsel.

3. Inexperienced Applicant's Counsel

Applicant's Counsel may not be familiar with heirship law, the Probate Court procedure involved, or certain issues that arise in heirship matters. This inexperience comes to the fore when the AAL searches for information, documents, or interviews witnesses as part of the investigation. Just as the AAL is expected to be familiar with intestacy law and heirship issues, the Applicant's Counsel should likewise be familiar with such law and issues and be prepared to answer reasonable requests for information during the investigation by the AAL. However, as noted above, not all attorneys have experience with these legal issues. Although it is not unusual in such cases for Applicant's Counsel to be mentored by the AAL, it is critical that the AAL's guidance be clear and that Applicant's Counsel's work be performed *only* by Applicant's Counsel.

D. Dealing and Interacting with Parties

1. Expectations

The Applicant and other parties interviewed by the AAL are nearly always the decedent's family. Naturally, the family has a positive bias toward the case and the heirship determination which is pled. To avoid any undue misperceptions as to the role and duty of the AAL, the AAL should explain to Applicant, other parties, and witnesses that the investigation must be independent and thorough for the benefit of the AAL Client. Since the Applicant is already represented by an attorney, it is only fair that the AAL Client enjoy that same benefit.

2. Useful Information

Notwithstanding the built-in bias of a decedent's family, the decedent's family members will often be very helpful to the AAL in the AAL's investigation, that is, in explaining the overall family and marital history, family dynamics, decedent's character and reputation, and potential dysfunctional strains within the family affecting heirship. Moreover, interviewing such persons gives the AAL an invaluable insight into the background and knowledge of the disinterested witnesses. Inasmuch as most of the documents the AAL needs are often in the control and possession of parties to the litigation, it is advisable for the AAL to compile a list of such documents not previously furnished before interviewing a party so that they can be produced for inspection, if possible.

3. Tough Questions

The AAL is expected by the Probate Court to act professionally and to adhere to all ethical standards and Probate Court practices and procedures. The AAL's role includes asking what are sometimes tough questions involving a party's family. Such unpleasant issues might include the existence of nonmarital children, common law relationships, heirs or beneficiaries with various addictions, and the unmasking of other "family secrets." To the extent that the AAL must investigate such matters, each party should be advised that a full and honest discussion will result in a professional investigation, one which will, hopefully, simply confirm the heirship facts stated in the heirship application.

E. Dealing and Interacting with Witnesses

1. Scope of Information Needed

Appendix 2 to our outline is an Heirship Information Form for use in heirship cases. Although it may not necessarily fit within a particular case, the Heirship Information Form is a good guide to the information an AAL should expect to obtain from disinterested witnesses in many situations.

2. Nature of the Interview

Frequently, the AAL interviews a disinterested witness over the telephone. Depending upon time constraints, it may be more efficient to go to the home of the witness, or to ask the witness to meet at the law firm of Applicant's Counsel or AAL. It goes without saying that waiting until the day of the hearing to conduct an AAL's interview is not professional conduct.

3. Evaluation of the Witness or Information Furnished

Even if a particular witness and the information within the personal knowledge of that witness closely tracks the pertinent heirship facts in the case, some folks are better than others at testifying to such facts. It is wise to review with Applicant's Counsel which witness should be the "lead-off" witness. This is frequently the case where the heirship testimony of the first witness will be substantively the same as the testimony of a subsequent witness. In other words, attorneys in heirship determinations generally prefer to call as their first witness someone who is a good communicator, which not only makes the heirship hearing run more

smoothly but also shortens the testimony of the less articulate witness. Frequently in these situations, after identifying any subsequent witness, both Applicants's Counsel and the AAL can ask, "If I were to ask you the same questions I asked [*Name of Prior Witness*], would your answers be substantially the same?"

III. SELECT ISSUES THAT ARISE IN HEIRSHIP LITIGATION

A. Heirship Chart: King Appendix Ak

A chart which clearly sets forth the Texas law of intestacy can be found in King Appendix Ak, which is based entirely upon Texas Probate Code (TPC) §38 (Separate Property) and TPC §45 (Community Property). More importantly for the AAL, the various categories of a decedent's heirs are identified, such as parents, a surviving spouse, children, siblings, and more remote descendants. It behooves the AAL to have copies of this intestacy chart and of the pertinent TPC provisions in the file, ready for any new Probate Court appointment.

B. Parents and Children

1. Maternal Inheritance

TPC §42(a) states that a child is the child of his biological or adopted mother; that he and his issue inherit from her and from her descendants, ascendants, and collaterals; and they inherit from him and his issue. Pertinent provisions of the Texas Family Code (TFC) delineate the establishment of this parent-child relationship. Specifically, a mother-child relationship arises under these circumstances:

- a. a woman gives birth to the child;
- b. a legal adjudication of the woman's paternity; or
- c. the woman adopts the child.

Tex. Fam. Cod Ann. §160.201(a)(1-3)(Vernon 2008).

2. Paternal Inheritance

TPC §42(b) states that a child is the child of his biological father if the child is born under the circumstances described by TFC §160.201; is adjudicated to be the father's child by court decree as provided by TFC Chapter 160; was adopted by the father; or, if the father executed an acknowledgment of paternity as provided by TFC Subchapter D, Chapter 160, or a like statement

in another jurisdiction. Specifically, then, a father-child relationship arises under these circumstances:

- a. an unrebutted presumption of the man's paternity of the child under TFC §160.201;
- b. an effective acknowledgment of paternity by the man under TFC Subchapter D, unless that acknowledgment has been rescinded or successfully challenged;
- c. an adjudication of the man's paternity;
- d. the man adopts the child; or
- e. the man consents under TFC Subchapter H to assisted reproduction by his wife, which results in the child's birth.

TFC §160.201(a)(1-5)(Vernon 2008).

3. Child Without a Presumed Father

TPC §42(b) states that a person who claims to be a decedent's biological child may petition the Probate Court for a determination of the right of inheritance. For a potential biological child to so inherit, the Probate Court must find by clear and convincing evidence that the purported father was the child's biological father. The Texas Family Code refers to such children as "children without a presumed father." TFC §160.204. According to case law, there is a four-year statute of limitations for heirship proceedings. See *Cantu v. Sapenter*, 937 S.W.2d 550, at 553 (Tex.App.-San Antonio 1996, writ denied).

4. Adopted Child

A close reading of the two Texas statutes involving inheritance rights of adopted children is critical. According to TPC §40, an adopted child (and the child's descendants) may inherit from and through its parent(s) by adoption and (*except as provided by TFC §162.507(c)* dealing with adopted adults) its natural parent(s). The natural parent(s) and their kin may not inherit from and through the adopted child.

However, according to TFC §161.206, in litigation involving termination of the parent-child relationship, "the child retains the right to inherit from and through the parent *unless the court otherwise provides*" (emphasis added).

Inasmuch as TFC § 161.206 suggests that a Texas Family Court can eliminate inheritance rights, the AAL should review the termination decree to determine whether it contains a provision eliminating a child's right to inherit from the child's natural parents. If that decree does not so terminate inheritance rights, or if the parent-child relationship is not terminated in legal proceedings, such as when the child's parents die and the child is subsequently adopted, then TPC §40 governs and inheritance rights are thereby preserved.

Concerning limitations, the Texas Supreme Court has ruled that the discovery rule does *not* apply to suits brought by adopted children. In *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997), an adopted child learned in 1989 of the existence of her biological mother and grandmother. Her mother had died in 1969, and her grandmother had died in 1982. When she tried to make a claim in 1991 for a share of her grandmother's estate after that estate had been distributed and closed, the Court said that this adopted child's inheritance rights, usually preserved in other types of cases by the discovery rule, were overridden by the need for finality of probate proceedings and the need to maintain confidentiality of adoption records. *Id.* at 418-420.

5. Adopted Adult

TFC §162.507 stipulates that an adopted adult may inherit from and through the adoptive parents, but *not* from and through the biological parents. Likewise, a biological parent may not inherit from or through the adopted adult. No TPC provisions address the inheritance rights of an adopted adult.

6. Equitable Adoption

In cases of equitable adoption or adoption by estoppel, heirship issues arise when an individual claims that he or she was raised by a decedent "like a child," even though no formal adoption proceedings were involved. By virtue of this legal doctrine, a child can inherit from (but not through) the foster parents, if such a relationship legally exists. There are two ways to successfully establish equitable adoption:

- a. Defective statutory adoption; or
- b. An unperformed agreement to adopt.

Cavanaugh v. Davis, 235 S.W.2d 443 (Tex. App.-Dallas, 1992, writ denied).

The equitable adoption of a child must be proved by a preponderance of the evidence. *Moran v. Adler*, 570 S.W.2d 883 (Tex. 1978). Moreover, it is vital to show an oral or written agreement to adopt, and the parties must have relied upon that agreement.

C. Spouse

1. TPC §38(b) deals with separate property title passing to a surviving husband or wife, and TPC §45 provides for the intestate inheritance of the community estate of the spouses.
2. The issue in these cases is whether the decedent was survived by a spouse. A marital relationship may exist if an unrelated adult of the opposite sex with lived with the decedent at the time of or within a short time before death, particularly where there is no ceremonial marriage. The surviving party to an informal marriage (also known as a “common law marriage”) has the same right to inherit as the surviving spouse of a ceremonial marriage. *In re Glasco*, 619 S.W.2d 567 (Tex. Civ. App.-San Antonio 1981, no writ).
3. Informal marriage requires that the parties agree to be married prior to living together, that they live together, and that they hold themselves out as husband and wife. TFC §2.401.
4. If an action to establish a common law marriage is not commenced within two years after the parties ceased to live together, a presumption arises that the parties had not agreed to be married. TFC §2.401(b).
5. In Texas, a person is either married (formally or informally) or not married. So, the fact of separation or abandonment affecting a marital relationship has no bearing on the question of heirship. The existence of an undissolved marriage is sufficient to support a surviving spouse’s inheritance right, despite the evidence that the husband had abandoned his wife some years before the wife died. *Wooten v. Carmichael*, 267 S.W.2d 344 (Tex. Civ. App. 1924, no writ).

6. Same sex marriages are not recognized in Texas, so inheritance rights are unavailable to surviving partners in such relationships. According to TFC §3.401, the term “spouse” means a husband who is a man or a wife who is a woman. Persons of the same sex who enter into a civil union or similar relationship in another state are not spouses according to Texas law.
7. In all cases, the AAL should carefully check both marriage and divorce records as to any decedent, including any index of informal marriages, supplemented by interviews of parties and disinterested witnesses.
As will be discussed later, checking deed and other records at the office of the county clerk might disclose the existence of a spouse or other heir identified on a transfer document, heirship affidavit, or the like.

D. Siblings

1. TPC §41(b) states that, when an inheritance passes to a intestate decedent’s collateral kindred, if part of the collaterals are of the whole blood, and the other part are of the half blood, each of the half blood heirs inherit only half as much as each of the whole blood heirs. However, if all of the heirs are of the half blood, then they share equally.
2. Good examples of half-blood and whole-blood distributions among siblings are found in the Paragraph 5 of the King article, pages 42 and 43.
3. Not only siblings are encompassed within the legal definitions of “collateral kindred,” but also are potential heirs as a decedent’s aunts, uncles, nieces, nephews, and cousins. *Black’s Law Dictionary* 741 (8th ed. 2004). Unlike a lineal descendant determined in a straight line from decedent to descendant, a collateral heir is an “offshoot,” if you will, whereby an heir is related to the decedent by his or her relation to a person other than the decedent, like the foregoing relatives.

E. Aliens

TPC §41(c) provides that the mere fact that a claimant or a person through whom he claims is or has been an alien is immaterial as to the heirship question.

F. Convicted Persons

A beneficiary of all or any portion of life insurance proceeds of a decedent who is

convicted and sentenced as a principal or accomplice in willfully bringing about the death of the insured shall not be entitled to his or her death benefits. TPC §41(d). Although this provision applies only to life insurance proceeds, Texas courts may impose a constructive trust as part of the “Slayers Rule” for other types of inheritable assets. In a case of first impression, a court ruled that, to prevent unjust enrichment gained as a result of a wrongful act, a constructive trust can be imposed on one who willfully and wrongfully brings about the death of the decedent. *Pritchett v. Henry*, 287 S.W. 2d 546 (Tex. Civ. App.-Beaumont 1955, writ dismissed w.o.j.).

G. Suicides

The estates of those who take their own lives pass by Texas laws of descent and distribution just as in cases of natural death. TPC §41(d).

H. Genetic Testing

TPC §§53A-53E allow genetic testing to determine legal right to heirship through a petition brought for that purpose. These 2007 TPC amendments recognize the validity of modern genetic testing as applied to an heirship determination. See King, *Blood Will Out: The Use of DNA Evidence in Texas Estate Proceedings*, 30th Annual Advanced Estate Planning and Probate Court, State Bar of Texas 2006.

I. Unavailable Heir

When the AAL is appointed to represent “unknown heirs,” “living heirs whose names or whereabouts are unknown,” or an “unascertained person,” it is clear that the AAL Client is unavailable. There are various means by which to locate an unavailable heir, especially if at least minimal information is available, such as a name, address, or telephone number. Here are some AAL practice tips for locating an unavailable heir:

1. Interview the parties and disinterested witnesses, as well as carefully review all documentary evidence furnished in the course of the investigation.
2. Hire a private investigator to conduct a search; however, in view of the likely cost of such a course of action, few cases will warrant that means of inquiry.
3. Review King, Appendix E (page 63): “Tips for Finding the Elusive Person (Living or Otherwise).” Also review his discussion of checking with the Social Security Administration for locating a missing person (King, page 40).

4. If you have the name of an unavailable heir, try www.google.com; www.freality.com (directory; reverse lookups); www.whiteyellowpages.com (directory); and www.people.yahoo.com (directory).
5. If you have any information as to where the unavailable heir was born, currently resides, or may have lived or had a business, try www.appraisaldistrict.net/county.asp (web addresses for Texas county appraisal districts), www.texasonline.com/portal/tol (State of Texas site for licenses, etc.), www.taxnetusa.com (property tax data), and www.vitalrec.com (vital record information available on a nationwide basis, such as birth records, death records, and marital records).
6. Although the foregoing means of locating unavailable heirs are not exhaustive, other potential online sites to search for such an heir include www.premium.searchsystems.net; www.docusearch.com; www.knowx.com; www accurint.com; and www.lexis.com. Most such sites have a nominal fee, but they may be worth the expense.
7. In cases of either an unavailable heir or multitudinous heirs, the authors have used the services of a local genealogist who has proved helpful to other attorneys as well, and we would be glad to share this person's name and contact information with you.

J. The Minor or Otherwise Disabled Heir

An heir who is under eighteen years of age, a "special needs" person, or any other person with a significant disability, might be the AAL Client. In such cases, it is advisable to talk at length with the "next friend" of the heir, or with the Applicant or any other family member who is familiar with and responsible for the AAL Client and/or with any portion of the decedent's estate. Even though the nature and extent of the duties of AAL in heirship matters is always case sensitive, the AAL with this type of AAL Client should be especially curious as to the characterization of assets (separate or community property), the type of assets, and any plans made for the AAL Client's future when the decedent's estate is ultimately distributed.

K. Recorded Instruments as Prima Facie Evidence of Heirship

Although live testimony is the means by which evidence is usually adduced for an heirship hearing, other evidence is recognized in TPC §52 as prima facie evidence of heirship,

consisting of either (1) a statement of facts concerning the family history, genealogy, marital status, or the identity of a decedent's heirs, if the statement is contained in either an affidavit or any other instrument legally executed and notarized, or (2) a judgment of a court of record, *so long as* (3) that affidavit of heirship or other instrument has been recorded for five years or more in the deed records of the Texas county in which a decedent's real or personal property is located at the time the suit is instituted, or in the deed records of the decedent's domicile or fixed place of residence at death. TPC §52A contains a form that may be used in such proceeding to establish a valid affidavit of facts concerning the heirs of a decedent where title to the decedent's real property is at issue. According to King, page 38, various instruments evidencing heirship include:

1. Affidavits of heirship, unless they were created specifically for the hearing. *Compton v. WWV Enterprises*, 679 S.W.2d 668 (Tex. App.-Eastland 1984, no pet.).
2. Birth, marriage, and death certificates admissible under Tex. Evid. Rule 902(1).
3. Written fact statements concerning personal or family history which may be found in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, etc., which are admissible because of Tex. Evid. Rule 901(b)(8).

IV. THE ROLE OF THE ATTORNEY AD LITEM AT THE PROBATE COURT HEARING

A. Initial Considerations

The AAL should be prepared to examine witnesses and review evidence and report heirship findings to the Probate Court at the hearing. The AAL should consult Probate Court policy as to whether the report is to be written or oral.

B. Parties to the Proceedings

According to TPC §49(b), the parties to a determination of heirship proceeding include:

1. Unknown heirs of the decedent;
2. All persons named in the heirship application as heirs of the decedent; and

3. All persons who are, at the date of the filing of the heirship application, shown by the deed records of the county in which any of the real property described in such application is situated to own any share or interest in any such real property.

C. Heirship Evidence

In the hearing, the AAL must be certain that all of the information which must be set forth in the Application (according to TPC §49(a)) is on the record, to-wit:

1. Decedent's name and time and place of death;
2. Names and residences of the decedent's heirs, the relationship of each heir to the decedent, and the true interest of the Applicant and each of the heirs, if any, in the estate of the decedent;
3. All the material facts and circumstances within the Applicant's knowledge and information that might reasonably tend to show the time or place of death or the names or residence of all heirs, if the time or place of death or the names or residences of all the heirs are not definitely known to the Applicant;
4. A statement that all children born to or adopted by the decedent have been listed;
5. A statement that each marriage of the decedent has been listed with the date of the marriage, the spouse's name, and if the marriage was terminated, the date and place of termination, and other facts to show whether a spouse has had an interest in the decedent's property;
6. Whether the decedent died testate and if so, what disposition has been made of the will;
7. A general description of all the real and personal property belonging to the decedent's estate; and
8. An explanation for the omission of any of the foregoing information that is omitted from the Applicant's application.

D. Cross-Examination

The content and length of the AAL cross-examination of a party and witnesses is case sensitive, but the following are some typical queries to consider:

1. Mr. Smith, may I ask you a few questions about the heirs of the Decedent, John Jones?
2. Do you recall speaking to me on August 9, 2010, about Mr. Jones' family and marital history?
3. Are you are aware that I was appointed by this Probate Court to represent [unknown heirs] [missing heirs] [minor heirs] [other] of Mr. Jones?
4. How many years did you know the Decedent, and how did you become acquainted with the Decedent during that time?
5. In the course of my investigation, it appears that Applicant, Mrs. Mary Jones, was married to the Decedent, for 15 years, is that correct?
6. How many children were born or adopted incident to their marriage?
7. Would you please tell the Court the names and ages of those children?
8. Did any of Mr. Jones' children predecease the Decedent?
9. Did Mr. Jones ever take any children into his home at any time for the purpose of adoption?
10. To the best of your personal knowledge, did anyone ever come forward during Mr. Jones' lifetime and try to establish paternity, that is, claim Mr. Jones was their father?
11. And based upon your long acquaintance and friendship with Mr. Jones, do you believe you would know if he had ever had any children other than those you identified?
12. As far as you know, Mr. Jones never put up any of his children for adoption, did he?
13. Was John Jones married to Mary Jones when he died?
14. Was Mr. Jones ever previously married, to the best of your knowledge?
15. Based upon your personal knowledge and the length of time you knew Mr. Jones, did you ever know whether any children other than those you have identified in your testimony were ever born to or adopted by him?
16. Has anyone to your personal knowledge ever come forward during Mr. Jones' lifetime claiming to be his spouse, other than Mrs. Jones?

17. Has anyone to your personal knowledge ever come forward during Mr. Jones' lifetime claiming to be a child of his, other than Tom, Dick, and Harriett Jones?

18. Then, did you know Mr. Jones well enough to testify under oath as to the identity of his legal heirs?

19. And are John Jones' legal heirs Mary Jones and his children, Tom, Dick, and Harriett Jones?

20. THANK YOU; I HAVE NO FURTHER QUESTIONS OF THIS WITNESS, YOUR HONOR.

E. The AAL Report to the Probate Court

After hearing all of the testimony and reviewing any other evidence, the Probate Court will ask the AAL to make a report. This report should include a brief review of the pleadings, set forth the inquiries made and the persons to whom the AAL spoke, cover other pertinent heirship information, and conclude with the AAL's investigative findings and the amount of time the AAL has expended so that the Probate Court may award the AAL an appropriate fee therefor. In this connection, review such professional charges with Applicant's Counsel prior to the Probate Court hearing.

V. COMPENSATION OF THE ATTORNEY AD LITEM

A. Determining the Reasonableness of Attorney's Fees

TPC § 34A grants the Probate Court discretion in setting reasonable compensation for an AAL. The factors a court may consider in determining the reasonableness of attorneys fees are:

- Time and labor involved
- Nature and complexities of the case
- Amount of money involved
- Attorney's responsibilities
- Whether the attorney lost other employment because of the appointment
- The benefits the client received

- Contingency or certainty of compensation²
- Whether the employment is casual or for an established or constant client.

Dalworth Trucking Co. v. Bulen, 924 S.W.2d 728 at 738 (Tex.App.-Texarkana 1996, no writ).

Reviewing courts have found abuse of discretion where trial courts have awarded AAL fees in excess of the hours worked, plus the hours estimated necessary for post-trial matters, multiplied by the amount submitted as a reasonable hourly fee. *DaimlerChrysler Corp. v Brannon*, 060000146CV (Tex.App.-Texarkana 2001).

In *Dalworth Trucking Co. v. Bulen*, a decedent killed in a vehicle collision was survived by his minor child and his spouse (*Dalworth* at 731). The trial court awarded the plaintiff, the decedent's surviving spouse, \$1.3 million in compensatory damages, \$1 million in punitive damages, and the AAL appointed to represent the minor child a fee of \$100,000.00 (*Id.*). The defendants appealed the award of punitive damages and argued that the attorneys fees awarded were excessive (*Id.*).

On appeal, the reviewing court applied the factors listed above to the work the AAL performed to determine the reasonableness of the fees awarded (*Id.* at 738). The AAL testified that, to earn his \$100,000.00 fee at his hourly rate of \$150.00, he participated in a ten-day trial, and attended 20 depositions, several conferences, and a mediation (*Id.*). The AAL submitted a time statement to the court that listed 207 hours worked, although in testimony, the AAL estimated that he spent two to three times that (*Id.*). He argued that his \$100,000.00 fee was reasonable because he lost other employment because of the time spent as an AAL in this matter, that his skill and experience contributed to the child's recovery, and that the fee was understood to be, in part, a contingency (*Id.*).

The appellate court did not find that a contingency award was reasonable because the AAL argued that the contingency was merely understood and was not specified in the order appointing him (*Id.* at 738, 739). The court calculated that, at the AAL's \$150.00 hourly rate,

² For an AAL to be awarded fees on contingency, the order appointing the AAL must state that the AAL's fees are contingent upon success. *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728 (Tex App.-Texarkana 1996, no writ).

with 199 pretrial and trial hours of the matter, he had earned a fee of \$29,850.00³ (*Id.* at 738). The appellate court thus found insufficient evidence to support the award of the AAL's \$100,000.00 fee and found an abuse of discretion by the trial court (*Id.* at 739).

Based on the AAL's testimony of hours actually expended, projections of time to be spent on appeal, as well as mileage incurred by the AAL in connection with the case, the court reduced the AAL's fee to \$40,000 (*Id.*). Despite the list of factors a court may consider in an award of fees, it appears that the most important factor a court weighs is the amount of time an AAL spends on a particular matter. In *Dalworth*, the only factors the court listed as considerations are those that are quantifiable. However, it always pays for an AAL to represent the client zealously, to the full extent of his or her abilities. It is interesting to note that, in addition to the factors listed above, a court will consider other factors such as mileage incurred.

B. Source of Attorney's Fees

TPC § 34A provides that compensation for the AAL's services is to be taxed as costs in the proceeding, but the TPC does not specify against whom these costs must be assessed. (*Estate of Jason Randall Frederick*, 311 S.W.3d 127 at 131, (Tex.App-Ft. Worth 2010, no pet. h.). Although there is some case law supporting the theory that attorney's fees must be taxed against the estate (see *Ajudani v. Walker*, 232 S.W.3d 219 at 224, (Tex. App.-Houston [1st Dist.] 2007, no pet.), the award of attorney's fees is solely within the court's discretion. (*Estate of Jason Randall Frederick* at 131.)

Under TPC §12(a), when the TPC does not otherwise expressly contain provisions regulating costs in ordinary civil cases, a court must apply ordinary civil provisions. The rules of civil procedure provide that costs are generally assessed in favor of the successful party and against the non-prevailing party; however, the court may assess costs differently for good cause stated on the record. (Tex. R. Civ. P. 131; *Estate of Jason Randall Frederick* at 135.)

VI. CONCLUSION OF THE ATTORNEY AD LITEM REPRESENTATION

A. Retention of Documents

The AAL should retain all notes, documents, and evidence of heirship for some period of time, preferably beyond the period of the statute of limitations for heirship matters and

³ The 199 hours the reviewing court used to calculate the AAL's fee does not include eight hours of estimate post-trial work, which would bring the AAL's hours to 207, as he included in his time statement

should retain copies of pleadings, telephone records, emails, etc. covering the case for which the AAL was appointed.

B. Discharge

In most cases, the Probate Court will discharge the AAL orally, on the record, at the conclusion of the heirship hearing and/or in the Order signed at that hearing. The statutory duties of the AAL come to an end after such discharge, and unless the Probate Court desires to continue the AAL appointment for a specific purpose, the AAL has no further obligation to the AAL Client after the Probate Court hearing.

APPENDIX 1

NO. PR-_____

ESTATE OF

§

IN THE PROBATE COURT

_____,

§

NUMBER ____ OF

DECEASED

§

DALLAS COUNTY, TEXAS

ORIGINAL ANSWER OF ATTORNEY AD LITEM

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES _____, duly appointed attorney ad litem for _____, a minor, in the above entitled and numbered cause, and generally denies the allegations in the First Amended Application for Determination of Heirship (Application) filed herein and demands strict proof thereof.

WHEREFORE, the attorney ad litem prays that Applicant take nothing by that Application, and that all costs of Court be adjudged against Applicant.

Respectfully submitted,

Attorney Ad Litem
State Bar No. _____
Firm Name
Firm Address
Telephone: _____
Fax: _____

CERTIFICATE OF SERVICE

I certify that on _____, a copy of the foregoing Answer has been forwarded to all counsel of record pursuant to the Texas Rules of Civil Procedure.

APPENDIX 2

Heirship Information Form

Information Regarding Decedent

Full Name _____

Address _____

Birthdate _____ Date of Death _____

Do you have the decedent's death certificate? _____ If so, please provide us a copy.

Last residence address of decedent _____

How many times was decedent married? _____

Did the decedent have a Last Will and Testament? _____ If so, please provide us a copy.

Marriage One

Date of marriage 1 _____ County and state of marriage 1 _____

Reason marriage 1 ended _____ End date of marriage 1 _____

Name of spouse 1: _____

Number of children born/adopted of marriage 1: _____

Full name of child 1 _____

Residence address of child 1 _____

Date of birth _____ County and state of birth _____

Full name of child 2 _____

Residence address of child 2 _____

Date of birth _____ County and state of birth _____

Full name of child 3 _____

Residence address of child 3 _____

Date of birth _____ County and state of birth _____

Marriage Two

Date of marriage 2 _____ County and state of marriage 2 _____

Reason marriage 2 ended _____ End date of marriage 2 _____

Name of spouse 2: _____

Number of children born/adopted of marriage 2: _____

Full name of child 1 _____

Residence address of child 1 _____

Date of birth _____ County and state of birth _____

Full name of child 2 _____

Residence address of child 2 _____

Date of birth _____ County and state of birth _____

Full name of child 3 _____

Residence address of child 3 _____

Date of birth _____ County and state of birth _____

Did the decedent have any other marriages or children, including children who predeceased him?
If so, please list information below:

Information Regarding Heirs

Parents of Decedent

Father's Full Name _____

Address _____

Birthdate _____ Date of Death _____

Mother's Full Name _____

Address _____

Birthdate _____ Date of Death _____

Siblings of Decedent

Full Name _____

Address _____

Birthdate _____ Date of Death _____

Full Name _____

Address _____

Birthdate _____ Date of Death _____

Full Name _____

Address _____

Birthdate _____ Date of Death _____

Full Name _____

Address _____

Birthdate _____ Date of Death _____

Did the decedent have any other children, brothers, or sisters who predeceased? If so, please list:

Disinterested Witnesses

Witness 1

Full Name _____

Address _____

Relationship to decedent _____

Witness 2

Full Name _____

Address _____

Relationship to decedent _____

Debts of Decedent

Did the decedent have any unpaid debts? If so, list:

Institution: _____

Amount: \$ _____ Type of debt _____

Institution: _____

Amount: \$ _____ Type of debt _____

Institution: _____

Amount: \$ _____ Type of debt _____

Assets of Decedent

Real Property

Address _____

Do you have a copy of the deed? _____

Address _____

Do you have a copy of the deed? _____

Address _____

Do you have a copy of the deed? _____

Personal Property

Please describe the general nature of the personal property of the decedent:

Did the decedent own any special items of personal property? (For example, a Rolls Royce or a valuable collection) If so, please list:
