

# **DADDY DIED. WHO'S GOT THE WILL & WHO SIGNS WHAT?**

Or

Dead men tell no lies.

# **DADDY DIED. WHO'S GOT THE WILL & WHO SIGNS WHAT**

Jack Wilhelm is an oil and gas attorney located in Austin, Texas. He is licensed to practice law in Texas, Louisiana, Arkansas, and Illinois. He has had the pleasure of working with many field and in house landmen in many different oil and gas companies.

# DADDY DIED. WHO'S GOT THE WILL & WHO SIGNS WHAT

Everyone has a will –

Either you wrote your own will (testate succession)

or

The State (State law, not federal law) writes one for you (intestate succession)

**REMEMBER:** It can be a pretty emotional time – a loved one has died!

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Why do people write their own wills rather than let their property devolve by the laws of intestate succession?

- Sometimes to minimize federal estate taxes (think death tax)
- To make special provisions for minor children and relatives with special needs
- Because you want your assets distributed in a manner other than provided for by law
  - Real estate can be an afterthought (more later)

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A few facts about wills –

1. They mean nothing until the author of the will actually dies (can be revoked at any time; provisions are not effective until there is a death)
2. For a will to be valid a Court of Law has to say it is valid (Probate Court order admitting the will to probate)
3. You cannot go back and ask the author of the will what was intended – the author is dead!

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**If you are still alive you may need the following:**

- 1. A general power of attorney authorizing someone to make decisions on your behalf in the instance of your incapacity (but not death – powers of attorney lapse upon the death of the principal) A will that designates someone to serve as the executor of the estate is not a current creation of a power of attorney.**
- 2. A medical power of attorney authorizes someone to make medical decisions on your behalf if you are in the hospital and incapacitated.**
- 3. A medical directive (sometimes called a living will) gives direction to physicians as to the level of care you desire during a terminal illness.**
- 4. A do not resuscitate order (sometimes attached to hospital bed of the terminally ill)**

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## **Powers of Attorney**

1. To authorize real estate transactions, they must be in writing. There is a model form included in the Texas Statutes (and attached to this paper)
2. **The Estates Code requires that they be recorded in the official records of the county for the land in question (which means it must be acknowledged) – but that never happens**
3. Can be specific or general
  1. A specific power to sell the Jason Sebastinas' beachfront home in the Algarve of Portugal would not authorize the attorney in fact to execute binding oil and gas leases; a power to trade stocks and bonds would not be a power to negotiate oil and gas leases
  2. General: a very broad authority (to do any and every act, and exercise any and every power that I might, or could do....)
4. **Powers of Attorney expire upon the death of the principal !!!!!!!**

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**ESTATES CODE Sec. 751.151. RECORDING FOR REAL PROPERTY TRANSACTIONS REQUIRING EXECUTION AND DELIVERY OF INSTRUMENTS.** A durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a release, assignment, satisfaction, mortgage, including a reverse mortgage, security agreement, deed of trust, encumbrance, deed of conveyance, **oil, gas, or other mineral lease**, memorandum of a lease, lien, including a home equity lien, or other claim or right to real property, must be recorded in the office of the county clerk of the county in which the property is located not later than the 30th day after the date the instrument is filed for recording.



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Some specific signature blocks:

For Jason Sebastinas

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Jason Sebastinas, by Jack M. Wilhelm, his agent  
/s/ Jack M. Wilhelm

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Jason Sebastinas, by Jack M. Wilhelm, his attorney-  
in-fact pursuant to that certain Power of Attorney  
dated December 14, 2017.

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Intestate Succession –

If you die without a will, property is distributed by intestate succession. Stated another way, the Estates Code writes a will for you.

1. If you have a will but it does not dispose of all your property, that not mentioned in the will pass according to the laws of intestate succession.
2. Remember, the author of the will is dead; so, appropriately probate courts are reluctant to “guess” what he or she intended. The “don’t know” default is to follow the laws of intestate succession.

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Okay, so you are dead. What do you do now?

- A. Nothing; you are dead. Rest in peace . If you did not write a will while you were alive, it is probably too late unless you intend to resurrect yourself within 4 years.
- Someone, however (usually a spouse or child) gets what looks to be a will out of your home records and takes it to a lawyer – and the “probate process” begins.

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So, what happens.

1. An application to probate the will is filed in the county where the dead guy resided or owned property (either a probate court or a county court)
2. The application has attached to it what appears to be the “real will” – not a photocopy & the Court keeps this “real will.”
3. An affidavit called a proof of death and other facts – identifying death and location of death, residence, marital status, children, and other things required by statute.
4. The application is made by an “interested” individual (usually represented by a lawyer) such as a surviving spouse or a child.

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- Then there is a hearing before a judge
  - The Applicant appears and is put under oath
  - Necessary information is gleaned from the applicant (under oath)
  - The will is either admitted to probate (determined to be valid) or rejected (not controlling, no good, a fake, or whatever) –
    - The order admitting the will to probate
  - If admitted to probate the court appoints an estate manager called the independent executor – usually designated by the will but the court can appoint a third party
  - The independent executor gets a document called “letters testamentary” – this is the ticket that he shows to third parties, such as you, that he/she is in control
    - *Each original letters testamentary costs \$10 so people really really like to use photocopies*

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What is the independent executor supposed to do.

1. *Close down the estate* and distribute the assets; pay debts of the estate; pay taxes owed by the estate
2. The independent executor is supposed to “wind things down”
3. The estate or probate code of the governing state sets limitations on what the executor can or cannot do without the approval of the local court
  1. cannot execute oil and gas leases without court approval.
  2. *Without court approval, you should have the heirs of the deceased sign an oil and gas lease – the great “get around”*

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TEX. ESTATES CODE Sec. 358 et seq.

## **Sec. 358.051. AUTHORIZATION FOR LEASING OF MINERALS.**

(a) The court in which probate proceedings on a decedent's estate are pending may authorize the personal representative of the estate, appointed and qualified under the laws of this state and acting solely under court orders, to make, execute, and deliver a lease, with or without a unitization clause or pooling provision, providing for the exploration for and development and production of oil, other liquid hydrocarbons, gas, metals and other solid minerals, and other minerals, or any of those minerals in place, belonging to the estate.

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Why does it take so long?

1. Hard to find assets (our friends at Compushare)
2. Federal Estate Taxes
  - Minimum of 1 year to Estate Tax
  - Closing Letter
3. Independent Executor has an independent life
4. The grieving process



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Here is a trap -

1. Without probate authority, an executor is not supposed to execute an oil and gas lease
  - a. So, get a court order (timely and expensive)
  - b. Or, get the executor and the heirs to sign the document
2. What happens if the executor executes a lease without court authority
  - a. It is no good
  - b. You can ask the court to order the independent executor to apply for authority to execute the lease – but the court may set different terms than that negotiated by the executor
    - Those new terms may be the current bonus and royalty rates not those in effect at the time the executor negotiated the invalid lease

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Some signature blocks  
for the Estate of Jack M. Wilhelm

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Jason Sebastinas, *Individually* and as Independent  
Executor of the Estate of Jack Wilhelm, deceased  
/s/ Jason Sebastinas

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Jason Sebastinas, *Individually* and as Independent  
Administrator of the Estate of Jack Wilhelm,  
deceased

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Tricks and traps –

1. How do you know if a will is valid -
  - A. It must have been admitted to probate
2. What do you file in the official records –
  - A. Authenticated copy of will & authenticated copy of order admitting will to probate

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What is the difference between a probate court and a county court that is acting like a probate court –

- A. Large counties have statutory probate courts (Harris, Tarrant, Bexar, Dallas, Travis)
- B. In smaller counties, probate matters are handled by the County Court at Law (think Corpus Christi, Tyler, Montgomery County)
- C. In real small counties, probate matters are handled by the County Court Judge (Leon, Robertson, La Salle, McMullen, Martin, Howard)

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What is an Ancillary Probate Proceeding.

- This occurs when the decedent (think, dead-guy) has had his or her will probated in another state (think, Illinois).
- The will still needs to be probated in Texas if the decedent (dead-guy) owned real estate
- Texas has a simple procedure that does not require a hearing. TEX. ESTATES CODE Sec. 501 et seq.

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- Okay, so you died without a will
  - The State writes a will for you
- First, determine if the property is separate or community property. Separate property is that property 1. Inherited, 2. Acquired prior to marriage, or 3. Acquired by the use of separate funds. Community property is property acquired during a marriage and is owned  $\frac{1}{2}$  by each spouse. There is a presumption that property acquired during a marriage is community property. The name on the deed is NOT controlling. Example: While married, I acquire a mineral lease in my name only. That mineral lease is the community property of my wife and me.

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- **Community property** is a marital regime that originated in civil law jurisdictions (e.g. Spanish and French heritage) and is now also found in some common law jurisdictions. That states of the United States that recognize community property are primarily in the West.
- In a community property jurisdiction, most property acquired during the marriage (except for gifts or inheritances)—the *community* – is owned jointly by both spouses and is divided upon divorce or death. Community property is automatically presumed by law in the absence of specific evidence that would point to a contrary conclusion for a particular piece of property.

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- Separate property
  - To children with 1/3 life estate to wife
  - If no children, ½ to wife and ½ to parents or siblings
  - If no parents or siblings, all to wife
- Community Property
  - To spouse if no children or if ALL children are also the children of the surviving spouse
  - Otherwise, ½ community share to children



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- Affidavits of Heirship
  - A great tool
  - Are they truthful
- An affidavit of heirship does not control over a will
- Be sure and identify all heirs. If a will but no probate, then you will have to deal with the testate and intestate heirs
- Identify spouses with specificity. Dates of marriage and divorce are important in determining whether property is community or separate property
  - Presumption that all property purchased during a marriage (even that in your name only) is community property
- Beware of the predeceased children. Their children represent them in the intestate inheritance (not the predeceased child's devisees under his or her will)

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## Trusts

1. A formal written agreement in which the Settlor vests ownership rights (title) to a trustee on behalf of one or more beneficiaries.
2. Unless restricted by the trust agreement, the trustee has the power to sell, lease and encumber real property. TEX. PROP. CODE §101 et seq.
  1. i.e. sign an oil and gas lease.

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/s/ Jack M. Wilhelm

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Jack Wilhelm, as Trustee of the Wilhelm Family  
Trust

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## Quick Quiz

1. Can an Executor execute an Oil and Gas Lease?
  1. No, unless they obtain Court approval.
2. Can a Trustee execute an Oil and Gas Lease?
  1. Yes, unless the trust agreement restricts this power.
3. Can the holder of a POA execute an Oil and Gas on behalf of the Principal?
  1. Yes, if the POA authorizes it.