

SHOW CAUSE IN PROBATE & GUARDIANSHIP CASES

Presented by



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August 24, 2017

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I. SHOW CAUSE

A. What is a 'show cause' order?

A show cause order is a court order, made upon the motion of an applicant, that requires a party (individual or corporation) to appear in court and provide reasons why the court should not perform or not allow a particular action and mandates this party to meet the prima facie case set forth in the complaint or affidavit of the applicant.

A court issues this type of order upon the application of a party requesting specific relief and providing the court with an affidavit or declaration (a sworn or affirmed statement alleging certain facts). A show cause order is generally used in contempt actions, cases involving injunctive relief, and situations where time is of the essence.

After a motion to show cause is served on the opposing party, that party has a certain number of days by which to prepare a response. Usually a "Show Cause" hearing is set so that a party can explain to the judge the reason why they have or have not complied with a legal duty. At the hearing on the show cause order, if the responding party fails to rebut the prima facie case (evidence sufficient to establish a fact if uncontradicted) made by the applicant, the court will grant the relief sought by the applicant, and an order will be entered.

A show cause order can produce a court order on the requested relief much more quickly than a motion can. A judge may include in a show cause order a temporary restraining order or stay that maintains the status quo as long as the matter is pending before the court.

A show cause order is a creature of the common law, but case law is sparse. See *Texas Mexican Ry. Co. v. Lock*, 63 Tex. 623, 630, 1885 WL 7097 (1885); *Turner v. Turner*, 576 S.W.2d 452 (Tex.App.- Houston [1st Dist.] 1978); *Green v. Green*, 424 S.W.2d 479 (Tex.Civ.App. – Tyler 1968, no writ). Executors and administrators are governed by the principles of the common law, if they do not conflict with the provisions of Texas Statutes. Texas Estates Code §351.001 (formerly Texas Probate Code §32).

A show cause order is preliminary and inconclusive in nature. It is not used to resolve substantive legal issues. It can result in a finding of contempt of court and may subject the offender to removal from the job and sanctions. Texas Estates Code §§252.203, 252.204, 355.113, 359.102, 359.103.

B. Why is a show cause order used?

A personal representative has both the right of possession and the duty to acquire possession of all estate assets. Texas Estates Code §§101.003 (formerly Texas Probate Code §37) provides:

On the issuance of letters testamentary or of administration on an estate described by Section 101.001, the executor or administrator has the right to possession of the estate as the estate existed at the death of the testator or intestate, subject to the exceptions provided by Section 101.051. The executor or administrator shall recover possession of the estate and hold the estate in trust to be disposed of in accordance with the law.

The personal representative "shall collect and take possession of the estate's personal property, records books, title papers and other business papers." Texas Estates Code §351.102 (formerly Texas Probate Code §232). In addition, the personal representative is required to use ordinary diligence to recover possession of all property of the estate provided there is a reasonable prospect of recovering such property. If the personal representative willfully neglects to use such diligence, he will be personally liable. Texas Estates Code §§351.151 (Texas Probate Code §233). The executor's right of possession is not limited by the fact that there are no debts or that the one claiming the property is the sole distributee. *Atlantic Ins. Co. v. Fulfs*, 417 S.W.2d 302, 305 (Tex.Civ.App. –Fort Worth 1967), writ ref'd n.r.e.); *Bloom v. Bear*, 706 S.W.2d 146, 147-148 (Tex.App.-Houston [14th Dis.] 1986, no writ) (Probate

Court was obligated to sign order directing that prospective devisee deliver decedent's property to independent executor). "When a person dies leaving a lawful will, all of his estate vests immediately in the devisees or legatees. But the devisees take subject to the lawful administration of the estate and an executrix in her representative capacity, as part of her full administration of the estate, must secure and collect the assets for the estate in order to comply with the terms of the will and distribute the assets to the parties, including creditors entitled to receive them." *Atlantic Ins. Co.*, 417 S.W.2d at 305 citing *Morris v. Ratliff*, 291 S.W.2d 418, 421 (Dallas Civ.App., 1956, ref. n.r.e.).

See also *In re Estate of Francis J. Hutchins, Deceased*, 391 S.W.3d 578, 588 (Tex.App.-Dallas 2012) stating that a motion is the proper mechanism and no separate independent suit is required to recover.

Upon issuance of Letters Testamentary, the executor should immediately request that any person having possession of assets, records or other property of the decedent's estate turn over such items to the executor. If these informal requests are not successful, the executor has several options, one of which is a show cause order.

In decedents' estates proceedings, show cause orders may be issued:

- to transfer title and complete the sale of property that began before decedent died;
- to take possession of decedent's will or any papers belonging to the estate;
- to require an executor otherwise exempt to give bond;
- for failure to include property on inventory;
- to borrow money for purposes set forth in 351.251;
- to determine liability for nonpayment of a claim
- to foreclose on a mortgage
- for failure to sell property;
- for authority to lease estate property for mineral exploration and development;
- for failure to file an annual account, exhibit, or report;
- for partition and distribution of estate property;
- for revocation of letters;
- for removal of independent executor with notice.

In guardianship proceedings, show cause orders may be issued:

- for requiring a bond or increasing/reducing the amount of bond;
- to borrow money or create a lien on estate property;
- for failure to include property on inventory;
- for failure to apply for sale;
- for failure to rent;
- for leasing minerals;
- for failure to invest on behalf of the estate;
- for failure to file an account, an exhibit, or a report of the guardian of the person; and
- for revocation of letters of guardianship.

Some courts have questioned the use of a show cause order. In *Francis v. Beaudry*, 733 S.W.2d 331 (Tex.App.-Dallas 1987, writ ref'd n.r.e.), the Administrator of an estate filed a Motion to Show Cause requesting the court to order two remaining stock holders of a corporation of which the decedent owed an interest to appear and show cause why they should not be required to pay to the Administrator a certain sum of money allegedly owed to the decedent. The two stockholders appeared, and the court conducted a full trial on the issue and entered a money judgment against them.

Although the court of appeals affirmed the judgment for other reasons, the court specifically commented "in order that future litigants will not be led astray by the procedure used" that the proper procedure would have been to file an original petition rather than a motion to show cause. However, the court noted that the trial court conducted the proceedings as though the motion to show cause was in fact an original petition and that neither of the defendants objected to the procedure or raised any point of error concerning the use of the motion to show cause. This case may be distinguishable from other cases on the basis that the show cause proceeding was used to address what appeared to be

substantive legal issues. See also *Poindexter v. Brandon*, 527 S.W.2d 824 (Tex.App.-El Paso 1975, no writ). Cf. *Motorola Communications and Electronics, Inc. v. Shareholders of Lowery Communications, Inc.*, 988 F.2d 1213, 1213, 5th Cir.(Tex.1993) (original petition should have been filed rather than motion to show cause); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 523, (Tex.App.-Hous. 2012); *Goldstein v. Mortenson*, 113 S.W.3d 769, 781, (Tex.App.-Austin 2003).

Other cases, however, have made no objection to the show cause procedure. In *Powell v. Hartnett*, 521 S.W.2d 896 (Tex.App.-Eastland, 1975, no writ), the Administrator filed a motion requiring an individual to appear and show cause why he should not be required to deliver certain money in his possession alleged to belong to the decedent. The court ordered and directed the individual to turn over the funds to the Administrator. The court specifically stated that the "order does not dispose of the issue of ownership of the money or note, a fact recognized by Powell. It merely places the items under the care and control of the Probate Court until a final determination of ownership be made."

Similarly, in *Brooks v. Norris*, 1997 W.L. 695588 (Tex.App.-Dallas) (not for publication), a judgment creditor whose claim had been allowed by the Administrator and approved by the Probate Court obtained a show cause order against Brooks requiring him to show why he should not be required to vacate the decedent's house and deliver all of the decedent's assets to the Administrator. The Probate Court ordered Brooks to vacate the house and surrender the decedent's property. The Court of Appeals affirmed the judgment without commenting on the use of the show cause procedure. See also *Texas Mexican R'y Co. v. Locke*, 63 Tex. 623, 1885 W.L. 7097 (Tex.). (Although filing a petition may have been better approach, show cause was sufficient for purposes of this case).

C. Show Cause Procedure

After unsuccessful informal request, the usual procedure is to file a Motion for Show Cause Order, present it to the Judge ex parte and obtain an Order to Show Cause, which directs the party to appear and show cause, if any, why the requested order should not be made. Citation must be served on the defendant or his/her attorney, and the hearing date set at least ten (10) days after the date of service, excluding the date of service. Texas Estates Code §§51.051(c); 51.055 (formerly Texas Probate Code §§33(f)(1); 34). At the hearing, evidence is presented, and an Order on the Order to Show Cause will be signed either granting or denying the requested action. See *Appendices A - C*.

Texas Estates Code §402.001 (formerly Texas Probate Code §145(h)) limitation on judicial supervision of an independent executor should not prevent an Independent Executor from obtaining a show cause order. Such section prohibits a court from interfering in an independent executor's administration of an estate, but does not prohibit an independent executor from accessing the courts. An independent executor is entitled to the same judicial relief available to other parties. As stated in *Efter v. Tuck*, 91 S.W.2d 875 (Tex.Civ.App. – Dallas 1936, writ dismissed):

An Independent Executor is not a law unto himself. His "independent consist largely in his right in the administration of such estate to do without an order of the County Court every act which he could do with such an order, were he acting under the control of such court . . . His management of the estate is an "Administration" of the same in contemplation of the law, and for some purposes the estate remains all the while under the jurisdiction of the County Court probating the Will under which he is action.

See also *In re Estate of Bean*, 206 S.W.3d 749, 757078 (Tex.App.-Texarkana 2006, pet. denied) ("While court jurisdiction over independently administered estates is limited, it is not eliminated.").

See Appendix G for Show Cause and Removal of Personal Representatives.

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King, Steve M., Judge, Tarrant County Probate Court Number One, Fort Worth, Texas, *The Ad Litem Manual for Guardianship & Heirship Proceedings in Texas Probate Courts*, July 2017.

NO. 1234-P

IN RE: ESTATE OF
JOHN SMITH,
DECEASED

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IN THE PROBATE COURT
OF
DALLAS COUNTY, TEXAS

MOTION FOR ISSUANCE OF SHOW CAUSE ORDER TO JANE SMITH

_____, Independent Executor of the Estate of John Smith, Deceased (“Movant”), files this Motion for Issuance of Show Cause Order to Jane Smith (“Jane Smith”) and, in support thereof, would respectfully show the Court as follows:

1. John Smith (“Decedent”) died on October 1, 2003, survived by his fourth wife, Jane Smith, and his two natural children and two step-children. The Last Will and Testament of John Smith (the “Will”), was admitted to probate in this cause, and Movant was appointed Independent Executor of the Estate of John Smith (the “Estate”).

2. Disputes have arisen among the beneficiaries of the Estate regarding the ownership and/or character of certain property as being the Decedent’s separate property of the community property of Decedent and Jane Smith.

3. All records relating to Decedent’s separate property and the community property of Decedent and Jane Smith jointly controlled during their marriage, Decedent’s personal memorabilia and separate property as well as the community personal property of Decedent and Jane Smith (the “Items”), are in the possession, custody and/or control of Jane Smith or her agents. As the Independent Executor, Movant is entitled to possession of these Items. Despite having the legal right to possession of the Items, Movant has made many attempts to work out a fair and mutually agreeable arrangement to give the Estate and all the beneficiaries equal and unrestricted access to the Items, but all such attempts have been either rejected or ignored by Jane Smith. Jane Smith has refused, and continues to refuse, to deliver the Items to Movant.

4. Jane Smith resides at _____ . Movant requests the Court to order Jane Smith to appear at a time and place to be set by the Court and Show Cause why she should not deliver, or cause to be delivered, to Movant all of the Items described above; and to account for the Items that are no longer in her possession, custody and/or control.

5. Due to the actions of Jane Smith, it has been necessary for Movant to incur attorney's fees and expenses. Movant requests that the Court order Jane Smith to pay Movants' reasonable and necessary attorney's fees and costs incurred to obtain the records described herein.

WHEREFORE, PREMISES CONSIDERED, the Independent Executor of the Estate of John Smith, Deceased, requests the Court to order Jane Smith to appear at a time and place set by the Court and show cause why she should not deliver, or cause to be delivered, to Movant all Items described above, to account for the Items that are no longer in her possession, custody and/or control, and for any other further relief, at law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

Attorneys for Independent Executor

NO. 1234-P

IN RE: ESTATE OF
JOHN SMITH,
DECEASED

§ IN THE PROBATE COURT
§
§ OF
§
§ DALLAS COUNTY, TEXAS

ORDER TO JANE SMITH TO SHOW CAUSE

ON THIS day came on to be considered the Motion for Issuance of Show Cause Order to Jane Smith filed by the Independent Executor of the Estate of John Smith, Deceased (“Movant”), and the Court, after considering said Motion, is of the opinion that the Motion should be GRANTED.

IT IS, THEREFORE, ORDERED that Jane Smith appear before this Court at _____ o’clock, _____ a.m. on the ____ day of _____, 2004, and Show Cause why she should not deliver, or cause to be delivered, to Movant all records relating to John Smith’s separate property and the community property of John Smith and Jane Smith jointly controlled during their marriage, John Smith’s personal memorabilia and separate personal property, as well as the community personal property of John Smith and Jane Smith that are in the possession, custody and/or control of Jane Smith or her agents, and to account for such items that are no longer in her possession, custody and/or control.

IT IS, FURTHER, ORDERED, that the Clerk of this Court issue Notice to be personally served on Jane Smith at _____, Dallas Texas, together with a copy of the Motion for Issuance of Show Cause Order to Jane Smith and a copy of this Order, by any Sheriff or Constable of the State of Texas or by any other person who is not a party and is not less than eighteen (18) years of age, directing and requiring that Jane Smith appear in the Courtroom of the Probate Court of Dallas County, Texas at ____ o’clock, at ____m, on the _____ day of _____, 2004, to Show Cause why she should not deliver, or cause to be delivered, to Movant all records relating to John Smith’s separate property and the community property of

John Smith and Jane Smith jointly controlled during their marriage, John Smith's personal memorabilia and separate personal property, as well as the community personal property of John Smith and Jane Smith that are in the possession, custody and/or control of Jane Smith or her agents, and to account for such items that are no longer in her possession, custody and/or control.

Signed this ___ day of _____, 2004.

JUDGE PRESIDING

NO. 1234-P

IN RE: ESTATE OF
JOHN SMITH
DECEASED

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IN THE PROBATE COURT
OF
DALLAS COUNTY, TEXAS

ORDER ON ORDER TO SHOW CAUSE

On the ___ day of _____, 2004 at a regular term of court pursuant to Order to Jane Smith to Show Cause and to appear before the court on _____, 2004, Jane Smith appeared in person and by and through her attorney of record, and _____, Independent Executor of the Estate of John Smith, Deceased, appeared in person and by and through her attorney of record, and the Court proceeded to call the matter on the Court's docket, and the parties announced in open court that an agreement had been reached in regard to certain matters addressed in the Order to Jane Smith to Show Cause; and the Court having sworn Jane Smith and _____ as witnesses inquired of each of them whether the agreement that had been reached was in fact their agreement and based upon such agreement the court makes the following orders.

IT IS ORDERED that Jane Smith make available, on or before _____, 2004, the premises known as _____, Dallas, Texas for inventorying and appraising the personal property located in such premises as well as the premises at a storage facility in Dallas for inventorying and appraising such property located in such storage unit and to deliver the property in such storage unit to _____, Independent Executor of the Estate of John Smith, Deceased; and

IT IS FURTHER, ORDERED that Jane Smith deliver a _____ automobile and _____ owned by the Estate of John Smith, Deceased to _____, Independent Executor of the Estate immediately; and

Cause No. 1234-P

IT IS FURTHER, ORDERED that this matter be continued on the court's docket until further orders of the Court.

SIGNED this ____ day of _____, 2004.

JUDGE PRESIDING

Appendix S: Motion to Show Authority

No. _____

Guardianship of

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Probate Court

Number One of

An Incapacitated Person

Tarrant County, Texas

Motion to Show Authority

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Attorney Ad Litem for _____ (“Movant”), files this Verified Motion to Show Authority, and in support thereof, under oath, does swear or affirm as follows:

1. Movant is the court-appointed Attorney Ad Litem for _____, Proposed Ward herein.
2. _____ (“Respondent”) has entered an appearance on behalf of Proposed Ward as privately-retained counsel and filed a contest to the application of _____ seeking appointment as Guardian of the Person and Estate of Proposed Ward. Movant has answered the contest, and denies the allegations made in such contest.
3. Movant believes that such contest is being prosecuted without authority in that Proposed Ward lacks the capacity sufficient to retain counsel.
4. In accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006, Movant requests that Respondent be caused to appear and show his authority to act on behalf of Proposed Ward.

WHEREFORE, Movant prays that a hearing be scheduled on this Motion and that Respondent be cited to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure, and that upon hearing hereof, Respondent not be permitted to further appear on behalf of Proposed Ward herein, that any pleadings filed on behalf of Proposed Ward by Respondent be stricken, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: _____

[Attorney Information,
Address Block and Signature]
Attorney Ad Litem for
Proposed Ward

STATE OF TEXAS §
COUNTY OF TARRANT §

Before me, the undersigned notary, on this day personally appeared _____, the affiant and Movant herein, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

“My name is _____. I am capable of making this verification. I read the Motion to Show Authority. The facts stated in it are within my personal knowledge and are true and correct.”

Name of affiant

SWORN TO AND SUBSCRIBED before me by Affiant on _____.

Notary

Insert Certificate of Conference

Insert Certificate of Service

SHOW CAUSE CITATION

No. 2014-GD12345-1

**THE STATE OF TEXAS)
)
COUNTY OF TARRANT)**

**IN THE PROBATE COURT
NUMBER ONE OF
TARRANT COUNTY, TEXAS**

To Any Sheriff or Any Constable Within the State of Texas, GREETING:

YOU ARE HEREBY COMMANDED to summon **H. Lee Lamar, Attorney**
who may be served at **1434 Tallahatchee Bridge St.,
Fort Worth, Texas 76102**

regarding the guardianship of **Billie Jo McAlister, an Incapacitated Person**

if to be found in your County, to be and appear before the Probate Court Number ONE of Tarrant County, at 100 West Weatherford, in the City of Fort Worth, Texas on the **21st day of June A. D. 1999 at 4:00 O'clock p.m.**

and show his authority to represent Billie Jo McAlister in the above-styled and numbered proceeding.

Herein fail not, and make due return of this Writ. By Order of the Honorable Probate Court.

Witness, MARY LOUISE GARCIA, Clerk, and seal of said Court, at my office in Fort Worth, Texas on this **20th day of May A. D. 2014**

**MARY LOUISE GARCIA, Clerk of the
Probate Courts of Tarrant County
100 West Weatherford Street
Fort Worth, Texas 76196-0401**

Dosey Doates, Deputy

No. _____

Guardianship of

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Probate Court

Number One of

An Incapacitated Person

Tarrant County, Texas

Order [Granting/Denying] Motion to Show Authority

On this date, the Court, considered the Motion filed herein by _____, Attorney Ad Litem for the Proposed Ward in this matter, requiring _____ to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006;

Option A and it appearing to the Court that Respondent has failed to show such authority;

It is, therefore, ORDERED that the pleadings filed by Respondent on behalf of Proposed Ward be STRICKEN and that Respondent is hereby refused permission to appear on half of and represent Proposed Ward in this matter.

Option B and it appearing to the Court that Respondent has adequately demonstrated such authority,

It is, therefore, ORDERED that Respondent be permitted to appear on half of and represent Proposed Ward in this matter and that _____, Attorney Ad Litem herein, be, and he is hereby DISCHARGED from further responsibility in this matter.

SIGNED _____

JUDGE PRESIDING

SHOW CAUSE AND REMOVAL OF PERSONAL REPRESENTATIVES

A. Show Cause - Make Me!

1. NOTIFICATION – ASKING NICE THE FIRST TIME - When a PR (personal representative, whether executor, administrator or guardian) has transgressed, the court may either send a polite reminder, send increasingly firm requests or simply start off with the show cause citation and not worry about attorneys taking any slack they know they will get anyway. It's largely a matter of personal choice on the part of the judge.
2. CITATION – THE GLOVES COME OFF – A Show Cause proceeding is a process whose logical end could be the removal of the PR and the imposition of a judgment against the PR (and his or her surety) for money damages and possibly even contempt sanctions, including jail time. Because of the important due process and other constitutional safeguards, the strictest compliance with procedural rules and laws must be followed.

- a. Contents of the Citation: At this point the citation constitutes the pleadings of the court. It must give the PR enough information to find out how to fix the problem if they intend to. The citation must state: 1) the style and cause number of the estate proceeding in question 2) a specified time and place to appear and explain to the court why they should not be removed from office for 3) the specific failing sought to be remedied.
- b. Whom do you Serve? Probate Code §§34 and 634 state that, after an attorney has appeared for a party, service by certified mail on the attorney is authorized. When it comes to Show Cause proceedings the PR should be personally served. Because the PR has a property interest at stake (the office of executor, administrator or guardian) and a possible liberty interest (in the event of contempt proceedings), due process and other constitutional considerations come into play. Without personal service, the whole process becomes moot and you must start over with new service of citation. Wetsel v. Estate of Perry, 842 S.W.2d 374 (Tex. App.-Waco 1992, no writ)

The only time it is safe to serve the attorney on behalf of the PR in show cause matters is where that attorney has previously been designated as a resident agent for service on a non-resident PR.

The court can only take proper action if it has obtained personal control of the PR by personal service and return of the citation. Subsequent contempt proceedings can only be enforced upon a personally-served PR. Personal liability cannot be established and recovery against the PR's bond **cannot** be accomplished through service of citation upon the attorney. Probate Code §33(a) gives the probate judge discretion to provide for a more comprehensive type of service than may be specified in the Code. The extra trouble of personal service on all PRs is more than justified.

The attorney should be mailed a copy of the show cause citation as a courtesy. The surety (bonding company) should also be mailed a courtesy copy.

3. THE HEARING!

- a. What does the Judge do? It depends on the case as to what is necessary to be done. If it has gotten to this point, you probably have a pretty good idea what needs to be done to keep the estate moving forward. Remember, this is a good opportunity to craft an equitable result if it is deserved. Some examples might be:
 - i. Independent Administration – Failure to file an inventory within 90 days: remove the executor and revoke any letters issued. If there is anything left to be done on the estate administration, the executor will have to come back in and deal with the court to get new letters testamentary issued. If a named successor is willing to serve, appoint the named successor. If it appears that there is nothing more to be done, revoke the letters and let it go.
 - ii. Dependent Administration (also Administration with Will Annexed): remove the Administrator, revoke any letters issued and notify the bonding company. Typically, unless there are minor heirs, the court may not choose to appoint a successor at that time. However, if it appears there is any property in the estate it might be prudent to appoint an attorney ad litem to at least investigate if there is anyone who might be harmed by the failure to appoint a successor administrator. If there is estate property from which attorney's fees might be paid, it is often easier to find an attorney to serve as successor administrator to take over the estate and clean it up.
 - iii. Guardianship -- whether of the Person or Estate or both – the court usually cannot simply do nothing – the well-being of the ward may be at stake. It is usually necessary to remove the guardian, cancel any letters, notify the sureties or the bonding company and appoint a successor guardian to protect the ward's interests.

- b. What marching orders are issued? It often depends on how much information you have at that time:
 - i. Clean up the mess - The successor may need to investigate, then attempt to fix whatever is broken and see what can be salvaged.
 - ii. Go after the removed PR and seek to obtain a judgment against the former PR and surety.
 - iii. Collect the damages, plus the costs of effecting compliance, from the bonding company, up to the amount of the bond.

B. REMOVAL

- 1. BASIS FOR REMOVAL Removal of the PR can occur in some instances without prior notice! TPC §§222 and 761. The numerous statutory grounds for removing or disciplining the PR are found in the Probate Code. In addition, the judge is not limited to specific grounds for removal itemized in the Probate Code, but may validly remove a PR for reasons unique to a particular fact situation. Haynes v. Clanton, 257 S.W.2d 789 (Tex. Civ. App. 1953, writ dismissed by agrmt).

Example: A guardian is appointed based on an asserted priority for appointment because of an alleged common-law relationship with the proposed ward. The proposed ward's heirs at law can challenge the priority in appointment by show cause (after appointment), a Motion in Limine as to standing and heirship proceedings (after the ward's death).

- 2. REMOVAL PROCEDURE

- a. Personal Notice There is no particular process for removal specified by the code, but the PR must, at the very least (due process), be provided with personal notice of the specific charges being made, along with an opportunity to respond. The personal notice is accomplished through the personal service of the Show Cause citation on the PR.
- b. Court Filings as Evidence - The hearing should be held at the time specified in the citation. The court may take notice of the pleadings in its own file, particularly if the show cause is based on the failure to file a particular pleading.
- c. Testimony - Hearing testimony may or may not be necessary, depending on the grounds for removal. If an ad litem has been appointed, the court will probably want to hear the results of any investigation. If the PR does not appear at the hearing, a default judgment of removal may be entered. If the PR does appear to contest the proceeding, the court should be prepared to hear whatever defense may be offered.

- 3. ORDER OF REMOVAL §§222(c), 761(c)

- After hearing the evidence, if the court determines that removal is justified, the court should
- a. make findings in the order specifying the cause for removal;
 - b. order the PR removed,
 - c. order all letters cancelled and returned to the clerk,
 - d. order the removed PR to account within a specified time
 - e. adjudge the costs of the removal process and the failure to fulfill the duties against both the PR and the surety. Tex. Prob. Code Ann. §§245, 668.
 - f. order all assets remaining in the estate to be delivered to a successor PR or to those persons entitled to receive the same.

- 4. SPECIAL CONSIDERATIONS IN GUARDIANSHIPS

- a. Personal Danger for the Ward? In a guardianship, where the personal safety, health or welfare of the ward may be concerned, in addition to the possible issue of damage to assets, drastic action may well be necessary. Where the guardian fails to qualify within the twenty days allotted, removal and termination of the order of appointment may be necessary. A new guardian should be appointed who can qualify and undertake the necessary action to protect the personal interests of the ward and collect the ward's assets.
- b. Simultaneous Increase in Bond Where a guardian has qualified, but has failed to file an inventory or accounting, the show cause process should be joined with a demand for an increase in the bond at the same time. This way, it can be determined what the assets of the estate are and if the guardian fails to produce the required information, removal can take place and a successor can be appointed to protect the ward and the estate assets.

- c. Appoint an Attorney Ad Litem - Again In each instance, an attorney ad litem should be appointed under §646 to represent and protect the ward's interests. It will also enable the ad litem to collect estate assets if necessary and to prosecute any actions against the prior guardians if necessary.

FORM 3-5 APPLICATION TO COMPEL DELIVERY OF WILL

Comment:

This form is specifically designed for use for compelling delivery of a Will. However, the form may be altered to serve to compel delivery of other documents that belong to the estate.

NO. _____

ESTATE OF	§	IN THE PROBATE COURT
	§	
[DECEDENT]	§	NUMBER
	§	
DECEASED	§	[COUNTY] COUNTY, TEXAS

Application to Compel Delivery of Will

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, [APPLICANT], Applicant, and files this Application to Compel Delivery of Will, and in support thereof shows:

1. Applicant is the [STATE INTEREST OF THE APPLICANT, SUCH AS “the person named as Executor in Decedent’s Last Will and Testament”]. Applicant’s address is [ADDRESS].
2. Decedent died on [DATE OF DEATH]. This Court has jurisdiction and venue over Decedent’s estate because Decedent was a resident of this county at the time of death.
3. Applicant believes that [PERSON HOLDING WILL] is in possession of the original of Decedent’s Last Will and Testament. Applicant has made demand on [PERSON HOLDING WILL] to deliver said Will to the clerk of this Court pursuant to §252.201 of the Estates Code, but [PERSON HOLDING WILL] has failed to make delivery. A true and correct copy of the demand letter is attached hereto as Exhibit A and is incorporated by reference herein. No response has been received by Applicant to the letter.
4. Applicant requests this court to conduct a show cause hearing and to then compel [PERSON HOLDING WILL] to deliver the Will to the clerk of this Court. If [PERSON HOLDING WILL] refuses to do so, Applicant requests that said person be arrested and jailed until he/she complies with this court’s order.
5. Applicant further requests that [PERSON HOLDING WILL] be ordered to reimburse Applicant for all reasonable and necessary attorney’s fees and expenses incurred herein.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that a show cause order be issued and personally served on [PERSON HOLDING WILL]; that this court thereafter conduct a show cause hearing at the earliest possible date, that after hearing the court order [PERSON HOLDING WILL] to deliver the Will to the clerk of this court; that [PERSON HOLDING WILL] be ordered to pay all of Applicant’s reasonable and necessary attorney’s fees and expenses incurred in this proceeding; and that Applicant receive such other and further relief to which he/she may be entitled.

[ATTACH ATTORNEY SIGNATURE BLOCK]

Affidavit of [APPLICANT]

STATE OF TEXAS	§
	§
COUNTY OF [COUNTY]	§

Before me, the undersigned authority, personally appeared [APPLICANT], who being sworn by me deposed and said:

“My name is [APPLICANT]. I am over the age of eighteen years and am competent to make this affidavit.

“I am the Applicant in the above and foregoing pleading. I have read the Application to Compel Delivery of Will. Every statement contained therein is within my personal knowledge and is true and correct.”

Further, Affiant sayeth not.

[APPLICANT]

SUBSCRIBED AND SWORN TO BEFORE ME on the ____ day of _____, 20__.

Notary Public, State of Texas

NO. ____

ESTATE OF

§

IN THE PROBATE COURT

[DECEDENT],

§

NUMBER ____ FOR

DECEASED

§

[COUNTY] COUNTY, TEXAS

§

Order Compelling Delivery of Will

On the ____ day of _____, 20__, came on to be heard the Application to Compel Delivery of Will filed herein by [APPLICANT]. Notice of this show cause hearing was personally served on [PERSON HOLDING WILL], and said person appeared in person and through his/her attorney of record. Applicant also appeared in person and through his/her attorney of record. After reviewing the pleadings, and after hearing the evidence and the arguments of counsel, the Court finds that said Application is well-taken and should be granted.

IT IS ORDERED that [PERSON HOLDING WILL] shall deliver to the clerk of this Court, within 5 business days from the date below the original of Decedent’s Last Will and Testament.

IT IS FURTHER ORDERED that [PERSON HOLDING WILL] shall pay the sum of \$_____ to [APPLICANT] as payment of court costs and reasonable and necessary attorney’s fees incurred in this proceeding.

IT IS FURTHER ORDERED that, if [PERSON HOLDING WILL] fails to deliver the Will in compliance with this Order, he/she shall be arrested and jailed until such delivery is made.

Signed this ____ day of _____, 20__.

JUDGE PRESIDING