Guide to Probate in California

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WHAT IS PROBATE?

Probate is the process through which the state of California oversees the administration of a person's estate after his or her death. The California probate process is designed to oversee the proper organization and distribution of one's assets, and ensure those assets are distributed to the appropriate beneficiaries and/or legal heirs.

WHICH COURT?

A person's assets must be administered with the oversight of the *probate court located in the county where the decedent lived* if:

1. The person died without a Will or Trust.
2. The person died with a Will, but no Trust.

WHEN IS PROBATE REQUIRED IN CALIFORNIA?

Probate (i.e. going through Court) is required when the value of the estate is greater than $166,250 and those assets are ***not held*** in a Trust. If a person dies with less than $166,250 worth of assets, those assets can typically be transferred to heirs or beneficiaries using a Small Estate Affidavit, which is not subject to the court's oversight and does not require an attorney.

DO I NEED A LAWYER FOR THE PROBATE PROCESS?

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You are not required to hire an attorney for the probate process. However, it is a good idea in almost all situations, because even in the simplest of situations (such as 1 heir), hiring an attorney will save you the headache of trying to learn not only the probate code & its procedures, but also the relevant county's local rules and the interplay of county rules with state law.

If the estate has more than one beneficiary or is complex (heir living in house, foreclosure, familial disputes, creditors, etc.) hiring a *good* Probate attorney can be invaluable in not only protecting the Administrator of the Estate, but also ensuring that assets are distributed in a timely manner.

WHAT DOES THE ATTORNEY FOR THE ADMINISTRATOR DO?

First, let's define **Administrator**. The Administrator of an Estate is essentially the person in charge of the estate. This person is called an **Executor** *when there is a Will* that names them as such. A *Will in California* is very different than a *Trust in California*, so be sure not to confuse the two.

The Estate Administrator in California manages all assets during the Probate Process, and distributes them to the appropriate heirs and beneficiaries at the end of the Probate. Being the Administrator (or Executor) of an Estate in California is a substantial job, with myriad responsibilities and duties to the Court, as well as the estate's beneficiaries. Thus, it can be very helpful for the Administrator to have an attorney who can guide them through each step.

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Every Administrator of an Estate in California is entitled to an attorney. The Estate pays for the attorney's fees. The attorney's job is to ensure the Administrator(or Executor) meets all of his or her legal deadlines, obligations, and fiduciary duties. A stellar attorney will **avoid costly mistakes and delays** (California Courts are more than happy to reset your hearing to months later should you make a mistake.)

The attorney for the Administrator can also serve as a buffer between the Administrator and the estate beneficiaries, communicating on the Administrator's behalf and minimizing potential antagonism. Additionally, the attorney for the Administrator can appear on behalf of the Administrator for all court hearings, draft all legal documents for the Administrator, serve all required documents to heirs and beneficiaries, and keep the probate moving toward closing (i.e. distribution of assets). An attorney can ensure Estate Administrators are not sued, or removed, by beneficiaries due to mistakes or delays during the probate process.

HOW LONG DOES A PROBATE TYPICALLY TAKE?

Probates typically take between 6 months to 1 year, but the timeline depends on a number of factors, including: the county court's schedule (some counties are inundated with cases and understaffed, others are not); the attorney's ability to communicate and take actions; and if there is any litigation (Will contest, etc) that prolongs the process. In the smoothest

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of probates, the timeline is demarcated by the following events:

1. Petition for Probate Filed. Court hearing date set approximately 6-8 weeks out.

2. The Petition comes before the Court on the hearing date, and the Judge grants the Petition, effectively allowing the Administrator to start taking control of the estate assets.

3. A 4-month creditor claim period must be waited out.

3. A Petition for Final Distribution is filed, with a hearing date approximately 8 weeks out.

5. The Court hears the Petition on the hearing date, grants the Petition, and the Administrator distributes the funds and other assets of the estate.

WHAT ASSETS ARE COUNTED WHEN DETERMINING THE VALUE OF THE ESTATE?

Probate is required for assets that do not already have a designated beneficiary, such as a life insurance policy, or jointly held bank account. Homes are the most common type of asset that pushes the value of the estate above $166,000.

IS THE VALUE OF A HOME DETERMINED BY THE HOME'S VALUE OR THE HOME'S EQUITY?

In determining the size of the "probate estate" the value of the home is determined by the home's current appraised value. In

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other words, the approximate amount you would get for the property were you to sell it today. Equity, loans owed on the home, or other factors that relate to how much of the home one personally owns are not relevant. Assets' appraised values are what determine if an estate must go through the probate process, and the statutory fees for the Personal Representative (Administrator/Executor) and his/her Attorney.

WHAT ASSETS ARE NOT SUBJECT TO PROBATE?

Assets with a designated beneficiary such as Life Insurance Policies, Transfer on Death Accounts, jointly owned properties, and IRAs with beneficiaries are examples of assets that are not part of the probate process. These assets are also not counted toward the value of the probate estate.

IF THERE IS A TRUST, WILL THE ESTATE STILL NEED TO GO THROUGH PROBATE?

Any assets not titled in the name of the trust may still be subject to probate. This depends on a few factors, including the nature of the Trust and the existence of a Pour Over Will. In some situations, an attorney can petition the court with what's known as a "Heggsted Petition" to place an asset into the Trust. For these types of assets, its best to consult an attorney who specializes in Trust and Estate Law.

WHAT ISSUES CAN DELAY PROBATE?

Numerous issues can delay the finalization of a Probate Estate. Backups in the court can push out hearing dates,

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mistakes made by administrators or executors, and litigation are the primary culprits for delay.

HOW DO I AVOID PROBATE?

Probate can be avoided by placing assets in a Trust. Creating a will does not avoid probate. With the simplest of estates, persons with **only one** beneficiary will also consider Payable on Death accounts for financial assets and Transfer on death deeds for real property. However, these two options can lead to unforeseen complications in some instances, and an attorney should be consulted.

ADMINISTERING THE PROBATE ESTATE

WHO IS IN CHARGE OF MANAGING THE ASSETS IN THE DECEDENT'S ESTATE?

In a probate proceeding, an executor (if there is a will) or an administrator (if there is no will) is appointed by the court. In legalese, this person is called the "personal representative" of the estate. As personal representative, this person is responsible for collecting assets, paying debts and expenses from the estate, and distributing the estate to beneficiaries. The court provides oversight to ensure that the representative is appropriately handling the estate. If the personal representative has an attorney, the attorney is responsible for helping him/her to meet all deadlines and requirements of the Court.

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WHAT IF THERE IS MORE THAN ONE WILL?

Generally the most recent will cancels out any previous wills. However, I have had cases where this was not true due to other circumstances. Speak with an attorney if you are concerned about the validity of a will.

WHAT IF NO WILL EXISTS?

If no will exists, and there is no evidence to support intention to make a will - or that a will was destroyed - inheritance is dictated by intestate succession. This means that the assets of the person who has died are distributed according to California's order of inheritance laws. Laid out by California Probate Code, these laws spell out the exact order by which family members inherit assets when no will or trust exists. The court will appoint an Administrator to oversee the probate process and ensure the appropriate heirs receive what they are entitled to by law.

DOES THE EXECUTOR OF A WILL AUTOMATICALLY BECOME THE PERSONAL REPRESENTATIVE?

No. A petition for probate must be put before the court in order to determine the validity of the will and appoint a Personal Representative. If an executor is named by the will, they are the most likely candidate to be appointed as Personal Representative, assuming they are willing to act. Thus, a named executor must be approved by the court before taking on the role of executor in an official capacity.

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NAVIGATING THE COURT PROCESS OF A PROBATE

HOW DOES THE PROBATE PROCESS BEGIN?

The case will begin at the Probate Court when the custodian of the Will (person who has the decedent's Will at the time of the decedent's death) takes the original Will to the Probate Court Clerk's office and sends a copy of the Will to the executor (person named in the Will to distribute the estate). The custodian of the Will MUST do this within 30 days of the decedent's death. If the custodian fails to do this, they may be sued for damages caused. If the custodian is not aware of the death, or the Will cannot be found, consult an attorney to determine liability and the next steps.

WHAT NEEDS TO BE FILED FOR THE CASE TO BEGIN?

The Petition for Probate must be filed in court in order to start the case. The petition must be filed in the county where the decedent lived. For example, a person who resided in Walnut Creek would have his/her probate proceeding in the Contra Costa County probate court, located in Martinez. If the decedent lived outside of California but owned property located in California, the petition must be filed in the county where the decedent owned property.

WHO SETS THE COURT HEARING AND WHO NEEDS TO BE NOTIFIED OF THE HEARING?

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The Probate Clerk will set a date for a hearing after the petition is filed. The petitioner (person who filed the Petition for Probate) must give notice of the hearing to anyone who may have the right to get some part of the estate. The petitioner must also give notice to surviving family members, including those not named in the Will (if one exists). Any person interested in the case can file a Request for Special Notice, which means they are entitled receive a copy of paperwork filed by the personal representative. If the Petitioner has an attorney, the attorney is responsible for noticing all parties.

HOW DOES THE PETITIONER FULFILL THE NOTICE REQUIREMENTS OF A PROBATE?

The petitioner must notify certain required parties of hearing dates and of paperwork that is filed for the case. The notice must include copies of any relevant documents as well as a Notice form. Note that the petitioner cannot be the one to mail the notice. Notice can only be mailed by an adult who is **not** party to the case. The petitioner must also arrange for notice to be published in a circulating newspaper on three different dates. Any Notices not served properly can cause significant delays to the probate case.

WHO REVIEWS THE PETITION AND OTHER DOCUMENTS?

In general, the court probate examiner will review the case petition and other relevant documents prior to the hearing to ensure everything was filed correctly. The probate examiner will let you or your attorney know if the documents need to

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be edited. When necessary, the Court's research attorney and/or Judge will also review paperwork.

WHAT HAPPENS AT THE HEARING FOR PETITION FOR PROBATE?

At the first hearing for a Probate, the judge will typically determine who to appoint as the personal representative of the estate (also called the "administrator" or "executor"). If there is disagreement about who should act as personal representative, the judge may continue the hearing to a different date to allow parties to work out their differences.

WHAT ARE THE DUTIES OF THE PERSONAL REPRESENTATIVE AFTER THEY ARE APPOINTED?

Once appointed, the personal representative is responsible for marshalling the assets of the estate. This essentially means locating all real property, financial assets, and personal property of significant value and determining how title is held and if those assets should be included in the probate. A life insurance policy, for example, would most likely not be included in a probate because such policies are distributed directly to the named beneficiary. Other beneficiary accounts, like Transfer on Death bank accounts would likewise not be subject to probate.

Once all assets have been located and assessed for relevance, the Personal Representative (or his/her attorney) must file an Inventory and Appraisal with the Probate court. This form lists the assets and their respective values. The personal

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representative may need to contact a probate referee (if one is not assigned to the case) to assess the value of nonmonetary assets, such as real property.

Another important duty of the personal representative is to provide formal notice to any creditors of the estate, and ensure that debts to creditors are paid. The Franchise Tax Board and the Department of Healthcare Services must also be notified of the decedent's passing and the Probate proceeding.

The personal representative may also be required to provide a detailed accounting to the court and report to the court on how the estate was handled. If the estate earned any money, such as interest or profit from a sale, the personal representative may also be required to submit a final tax return on the decedent's behalf. For some estates, an estate tax return may also be required.

WHAT ARE THE PERSONAL REPRESENTATIVE'S FEES?

Personal representatives (estate administrators and executors) receive a statutory fee that ranges between 2-4% depending on the size of the probate estate. The personal Representative can also receive extraordinary fees at an hourly rate.

WHAT ARE ATTORNEY'S FEES?

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Attorneys get a statutory fee that typically ranges between 2-4% of the estate's value. The specific amount depends on size of the probate estate, but is equal to the fee received by the Personal Representative. The statutory fee covers all attorney work necessary to complete the probate, but does not include time spent on litigation or other extraordinary services including attorney assistance with the sale of real property. In a Probate, all fees must be approved by the Court.

CAN THE PERSONAL REPRESENTATIVE OF THE ESTATE BE HELD RESPONSIBLE FOR HIS/HER ACTIONS?

YES. The personal representative can be held legally liable for their actions in regard to the estate. This is one of the primary reasons that administrators seek the assistance of an attorney for estates.

CAN YOU SELL REAL PROPERTY (HOUSES, BUILDINGS) DURING A PROBATE?

Yes, the personal representative (Administrator/Executor) can sell property before the probate is closed. Once an Administrator has been appointed and the Court has issued an Order for Probate with accompanying "Letters," that person has the authority to sell real property. However, there is a special procedure that must be followed when selling a house, land, or commercial building in the course of a probate. One such procedure is the "Notice of Proposed Action" which is required in some cases once a bid has been accepted. When

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beneficiaries are willing to waive certain actions required by the court, the sale of real property can be much quicker in a probate.

WHAT HAPPENS IF A WILL IS CONTESTED OR THERE ARE OBJECTIONS TO THE PROBATE?

There are a number of ways that heirs and beneficiaries (or potential beneficiaries) can object to a probate that has been filed with Court. The most obvious objection (although not the most common) would be a Will contest. This can occur when a Will has been filed with the Court that a beneficiary or heir believes is invalid for whatever reason. If the Personal Representative has an experienced Probate attorney who knows how to handle contested probates, that attorney can guide them toward resolving the matter. In rare situations, the matter will go to trial. However, generally issues can be successfully resolved or mediated with experienced counsel.

Another possible "objection" to a probate is an objection to who will act as Administrator. This can be dealt with by filing a "competing" Petition for Probate. Again, with a good attorney these types of matters can often be resolved.

There are a host of potential problems that can crop up throughout the probate process and eventually delay the es estate's distribution. These include objections to anything related to the sale of related property, objections to the Estate Accounting, objections to the Petition for Final Distribution, among others. The key here is having good legal advice along the way so as not to unnecessarily cause problems, and then having someone in your corner who can assist you with resolving problems that do arise.

HOW DO YOU CLOSE A PROBATE AND DISTRIBUTE THE ASSETS OF AN ESTATE?

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When an estate is ready to close that generally means that all estate work has been completed and the Creditor Claim Period of 4 months has expired. Any litigation has generally been resolved and the primary step left is to distribute funds and/or property to beneficiaries.

If the estate is ready to close, the Administrator (or attorney on their behalf) files a Petition for Final Distribution. Unless beneficiaries have waived an Estate Accounting, an Accounting of all estate assets is required by the court. The Accounting includes assets on hand at the date of death and all transactions thereafter. The accounting is used to calculate Administrator and Attorney statutory fees as well as provide full transparency to the court and beneficiaries. The accounting further illustrates that the Administrator has handled all estate funds and assets appropriately. In general, this means the Administrator has not paid any money to himself or herself inappropriately, used the estate bank account for his or her own expenses, or made any distributions to beneficiaries.

When the Petition for Final Distribution is filed with the Court, the Court will set a hearing date. Current probate hearing dates are set approximately 4-8 weeks out in Contra Costa, Alameda County and San Francisco Counties but can vary by Court and time of year. If everything goes smoothly and there are no technical issues raised by the Court or objections, the Court will sign an "Order for Probate" authorizing the Administrator to pay all costs of Administration and distribute the assets of the estate. The Administrator has some duties beyond the final distribution, but generally they are minimal (final taxes, etc.) and their duties have ended.

WHAT COUNTIES DO WE SPECIALIZE IN?

Talbot Law Group specializes in Probates in San Mateo County, Santa Clara County, Contra Costa County, Alameda County, Marin County, Orange County, and San Francisco

County. It's important that Administrators and Executors seek counsel who have experience specifically in the county the probate will occur.

HOW DO WE CONTACT YOU?

Call our main number at 925-322-1795 or email consults@talbotlawpc.com with a brief summary of your matter. Our Client Intake Specialist will be able to assist you in determining if we are the best firm to handle your matter, and if not provide other recommendations.