

The Probate Trap

1. What is Probate?

Probate is a judicial process by which estate assets that are owned by a deceased individual are administered and transferred to the rightful beneficiaries by law. If the decedent had a last will and testament the estate is transferred through the will. If there is no will, then the assets are distributed through state probate law. In California, if a decedent has over \$150,000 in gross estate assets sitting outside of a Trust a general probate will need to be opened.

2. Where do you file a Probate?

The estate must be probated in the state and county of the domicile of the decedent. The domicile is the permanent legal residence of the decedent. If there is real property or tangible personal property in another state then an ancillary probate will need to be opened in that jurisdiction as well. Ancillary probates will usually be opened if there is for example a vacation home in another state or if there is a boat, airplane or cars registered in another state.

3. How long does Probate Take?

This depends, but specifically in California it tends to take an average of 18 months to probate an estate. This is frustrating for the families of the decedent because assets are typically frozen until such time as the Judge signs necessary court orders that allow distribution and transfer to beneficiaries. Every probate requires court documents submitted, confirmation of administrator or executor, creditors that need to be paid and other procedural requirements that have to be strictly adhered to. In addition, most of these estates will have real property that needs to be sold and/or financial assets that need to be consolidated.

4. How much does it cost to complete a Probate?

Every state has their own fee structure; however, California has one of the more complicated fee structures based on the value of the estate. Per California Probate Code the administrator and the attorney of record can both separately charge as follows:

- 4% of the first \$100,000 of the gross value of the probate estate
- 3% of the next \$100,000
- 2% of the next \$100,000
- 1% of the next \$100,000
- .5% of the next \$100,000

An attorney can also charge extraordinary fees for things such as negotiating with creditors or estate litigation such as will contest. An attorney's extraordinary fees will be their hourly rate stipulated in the retainer agreement you signed in the beginning of representation.

5. How can you avoid Probate?

There are certain assets like 401(k)s and IRAs in which you can name transfer on death or pay on death beneficiaries. These assets if designated properly will be distributed to the beneficiaries directly outside of probate. Real property, if left in the decedent's individual name, will have to go through probate. However, if the real property was titled in a Trust prior to the decedent's death, then the property will avoid probate. It is important to note that real property designated to a beneficiary in a last will and testament will have to go through some form of probate.

6. Can spouses avoid Probate?

California is a community property state and one would assume that assets would simply transfer to the surviving spouse, but that is not the case. First, it is important to note that if assets are titled as husband and wife as joint tenants or rights of survivorship it will avoid probate.

However, if assets are in one spouse's name alone at the death of that spouse, that asset will have to be probated. Luckily, spouses have what's called a Spousal Property Petition that allows for transfer of estate assets usually with one hearing or more if necessary.

7. What are the general steps in a Probate?

First you will want to locate and start gathering all estate documents. Then meet with a probate attorney and file the appropriate probate petition and ancillary documents required to open a probate case. The goal then is to get someone named as the administrator or executor of the

estate. Once someone is named, then you will have to inventory and appraise the estate for the court. After this, final bills, taxes and all other creditor issues need to be settled. It is important to note that when the administrator or executor has authority to act for the court, they can start marshalling, consolidating and selling estate assets as per court order. Finally, you will submit an accounting to the court as to what was marshalled and spent throughout the probate. This is where administrator or executor fees, attorney fees and finally beneficiary distributions will be requested.

8. Is it a requirement to hire an Attorney to Probate a will?

While it is not a requirement to hire an Attorney to Probate a will, it is highly suggested. The process is very daunting with many technical requirements for most people to handle on their own. A qualified Probate Attorney will have the experience and knowledge to be able to expedite the process and save the estate unnecessary delays and expenses.

9. Do children have an automatic right to inheritance?

Children defined by the probate code are those related biologically or legally adopted. Step children are generally not considered children under the probate code. In California specifically, under certain circumstances children do have what is called an omitted child's defense if they are left out of estate documents that were drafted prior to when they were born or adopted. However, disinheriting language will trump this defense. Therefore, a child does not have an automatic right to an inheritance. A decedent can choose to disinherit a child in their trust and/or will documents.

10. How are assets distributed in Probate Court if there is no will indicating who the beneficiaries are?

If there is no will indicating who the beneficiaries are then assets get distributed as according to intestate succession. The California Probate Code provides as follows: If there are children but no spouse, then the children receive 100%. If there is a spouse but no children, parents or siblings, the spouse receives 100%. If there are parents but no spouse, children or siblings, then

parents 100%. Siblings but no spouse, children or parents, then the siblings 100%. If there is a spouse and child, then spouse inherits all of the community property and 1/2 or 1/3rd of your separate property. Children inherit 1/2 or 2/3rds of your separate property. If there is a spouse and parent, then spouse inherits all of the community and 1/2 of the separate property. Parents inherit 1/2 of the separate property. If there is a spouse and sibling but no parents, then spouse inherits all of the community property and 1/2 of the separate property. Siblings inherit 1/2 of the separate property.

11. Who can challenge a Last Will and Testament?

Any interested party can challenge a last will and testament. This would be anyone who would have inherited if the challenged last will and testament did not exist. Challengers will be anyone named in a prior will or distributees. Distributees may include spouses, siblings, children and potentially grandchildren.

12. Do Trusts ever need to be Probated?

Technically, if funded correctly Trusts do not need to be Probated; however, they are pulled into Probate Court for various litigation reasons. Some of the most common reasons are wrongful acquisition or misappropriation of trust assets, petition to compel to return trust assets to the trust, breach of fiduciary duty, elder abuse, conversion, removal of trustee, compelling a forensic accounting and to invalidate trust documents.

13. How do you sell real property in Probate?

First, it is important to work with a reputable probate realtor when selling real property in a Probate. Additionally, how real property is sold in a Probate depends on whether an administrator or executor has full authority to act for the estate under what is called the Independent Administration of Estates Act. If the administrator or executor has full authority under this Act, they can sell real property by providing judicial notification to the beneficiaries of the sale, and proceeding with the sale under court orders. If they, on the other hand, have limited authority to act for the estate a court will need to confirm a sale of real property. The new buyer

plus other interested buyers bid for the property in court auction style under specific terms provided by the Probate Code. Whoever has the confirmed highest bid will usually be accepted by the Judge presiding over the proceedings.

14. In what order do debts need to be paid in a Probate?

If an estate is insolvent then the administrator or executor need to pay debts in a certain order as provided by the Probate Code. The order is as follows except that debts owed to the United States or a state that has preference under the laws of the United States shall be given the preference required by law: expenses of administration, obligations secured by a mortgage, deed of trust or lien, funeral expenses, last illness expenses, family allowance, wage claims and other general debts.

15. What taxes might be due at the decedent's death and need to be reported in Probate?

The decedent's last income tax will need to be filed at the Franchise Tax Board and IRS and reported to the Probate court. There could also be property taxes due and other taxes such as personal property taxes due if it accrued prior to the decedent's death. California does not have a state inheritance tax; however, we do have to adhere to the federal estate tax. The current exemption amount for 2018 is \$11,200,000 for a single person and \$22,400,000 for a married couple. This means a single person can pass away in 2018 and not have to pay taxes on the transfer of \$11,200,000 to their beneficiaries times two for a married couple.

16. Who has to be noticed of a Probate?

All parties who have an interest in the Probate assets are required to be noticed by mail or process server. This gives them warning that a Probate is being initiated. Interested parties are those individuals named in wills as beneficiaries and if there is no will the administrator or executor will have to conduct a due diligence search for those individuals as according to intestate succession as discussed in number 10 above.

17. Are there any other notice requirements during a Probate?

A notice to any known creditors is required during a probate to notify them of their right to place a claim in the Probate. This will usually be by mail. For any unknown creditors a notice publication is required in a local newspaper. Notice to creditors typically after beneficiaries are noticed. Creditors will then submit claims for debts owed and the administrator or executor will use estate funds to pay the claim.

18. Who can serve as the Administrator or Executor of the estate in Probate?

Anyone that is named as an Executor in a will can act as the Executor in a Probate in the order named in the will. The court will need to conform the validity of the will prior to appointing the Executor. If the court is appointed an Administrator because there is no will then the following can act: spouse, domestic partner, child, grandchild, other issue, parents, brothers and sisters, issues of brothers or sisters, grandparents, issue of grandparents, children of predeceased spouse or domestic partner, other issue of a predeceased spouse or a domestic partner, other next of kin, parents of a predeceased spouse or domestic partner, issue of parents of a predeceased spouse or domestic partner, conservator or guardian of the estate acting in that capacity at the time of death who has filed a first account and is not acting as conservator or guardian for any other person, public administrator, creditors and any other persons.

19. Does Probate Court handle matters other than matters associated with the decedent's estate?

Guardianship of estate or person of a minor child as well as Conservatorship of estate or person of an adult are handled in Probate Court. The guardian or conservator of an estate is appointed by the judge to oversee monies or properties belonging to the individual, while a guardian or conservator of the person is appointed to approve the proper care of the individual. The probate court also has jurisdiction over the appointment of guardians or conservators for persons with cognitive disabilities, including placement of these individuals. In addition, the court is empowered to commit a person suffering from severe mental illness to an appropriate hospital.

20. How do you Appeal a Probate decision?

Any person aggrieved by an order, denial, or decree of the probate court may appeal to the Superior Court. In general, appeals must be taken within 30 days of the date of the order, denial, or decree, but some matters may have a longer appeal period.