Probate

Making Sense of the Process

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Whitestone Publications

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INTRODUCTION

Every day, I answer calls from people like you, people who have questions, people who are uncertain about what direction they should go, people who are walking the tightrope of grief and moving on.

I don't have the solution to grief or even the answer to every issue you may be facing, but I do know something about Probate, having practiced in this and related areas of the law for over twenty-one years. If you will allow me, I will walk with you through some of the common issues and problems that arise. You may see your situation in some of the hypothetical scenarios I will discuss.

Probate can be understood and with minimal discomfort (hopefully) navigated. This book is designed to help with that process.

Unfortunately, the topic of Probate implies the loss of someone, perhaps someone very dear to you. I can still remember learning my father had died. I was barely three. I was sitting on my bed, a twin to my sister's, part of our French Provencal bedroom set. The creamy white furniture trimmed with a thin line of gold was a little girl's dream.

That day of darkness is burned in my memory. I sat on my bed across from my sister on her bed. Like little birds, we had our faces pointed up to my mother who stood at the foot of our beds. She had something important to tell us. "Listen girls." I was too small to understand everything she was saying, but something of the colors of my world were washed away with her words: "Daddy's not ever coming home. He went to heaven."

I am not sure what either my sister or I would have said or asked in response to this horrific proclamation. The loss of my father has impacted my life each day since. Nothing can replace a missing family member. No amount of money or property can replace the sound of their voice, the twinkle in their eye, the smell of their clothes, the feel of their touch. To borrow from the realm of nursery rhymes, "All the king's horses and all the king's men couldn't put Humpty-Dumpty back together again." Life would go on for me and my sister. But life would never be the same.

My mother somehow trudged through the legal system in the state she was in, known by the dubious title, "orphan's court." She was left to push the paper. It is loss, the loss of a family member unexpectedly, the loss of a son or daughter to a tragedy, the loss of a parent to old age, the loss of a dear friend or spouse to cancer that hurls the grief-stricken person or family into the realm of Probate. In such times, people rarely feel like visiting an attorney and rehashing the details of a deceased person's estate. I understand that.

It is my hope that through reading this book in its totality–or only those parts you find relevant–you will find a path laid out before you. Knowing what lies ahead can make things more bearable.

In this book, I will consider the following topics:

- **What is Probate?**
- **Why is Probate necessary?**
- **What happens in a Probate proceeding?**
- **What does Probate cost?**
- **How long does Probate take?**

- **What happens after the Probate ends?**
- **How can Probate be avoided?**

The book is designed to be read in any order. Each chapter can stand alone. Choose the chapter with the subject matter that most concerns you. Then move on to one or more of the other chapters to clear up misconceptions or learn more about the process of Probate.

1

PROBATE ISN'T A PLACE

After fifty years of marriage, Jacob's wife, Deanna–the love of his life and mother of his children–died after a three-year battle with cancer. And Jacob died less than a month later leaving his two adult children weary and worn out. Beverly and Leo were barely holding onto their jobs and their sanity after losing both parents so quickly. Leo was worried that they would lose the house to the holders of the reverse mortgage if they didn't do something soon. They both took off the day after they buried their father and met with the realtor. If the family home had to be sold to pay the reverse mortgage holder, they didn't want to delay.

The realtor, Eddy, was a friend of Beverly and Leo from the neighborhood. She broke the news to them: "In order to sell the house, you will have to go through Probate since your parents' names are still on title."

Beverly cried on the way home. Leo cursed under his breath. "I just don't see why we have to go to Probate. Mom and dad had a will. Shouldn't that be enough? This nightmare just seems to never end.

Beverly let her brother's words roll off of her. She felt so defeated, so lost, so sad. *What would they do now?* When Leo dropped her off at her house, she barely managed to sigh, "I guess we'll figure this out."

"How? Leo fumed. "What do we know about going to Probate? We're screwed."

"I don't know." Beverly responded. "Let's give it a couple days. I'll do some research online."

"Whatever. I gotta get back to work. I'll talk to you over the weekend."

As she entered the house, even the wagging tail of her Labrador, Butch, didn't chase away the gloom that hung over her.

The next day at work, one of her friends asked about the memorial service. She broke down and started to cry, telling her friend about the discussion with the realtor.

"Hey, I had to hire a probate attorney. Don't worry. It won't be as bad as you think. Actually, it was relatively painless and over before I knew it. The attorney did most of the heavy lifting."

This is what I hope my clients are saying to their friends and family when the issue of Probate comes up. With the right advice and assistance of a competent attorney–one who is familiar with the rules and procedures of Probate Court–going through a probate should be a relatively stress-free experience.

In this chapter, we will look at the following topics:

- **Probate is a Procedure**
- **Probate Court is a place**
- **Problems are solved in probate court**

Probate is a procedure

Probate is not a place. Probate is a procedure, a sequence of actions that must be followed. In the strictest sense, Probate is the process of *proving* a will is valid. A will is proved to be valid by showing–through various procedures and actions–that the will meets all the legal requirements of the State of California.

Once that is shown, the instructions for distribution of the assets and handling of the estate can be followed, and property owned by the decedent (the person who died) can be transferred to those named in the will.

Once an order of the court is made, banks, financial institutions and those wishing to purchase the property know they can rely on the title.

Probate is like a hole or a bucket into which you are going to put all of the assets and property belonging to the decedent. Once they are all in, accounted for, valued and retitled, they can be taken out of the *hole* and given to the beneficiaries.

The term *Probate* can often be confusing because it is sometimes used to speak of the procedure used for an estate in which the person who died (the decedent) left no will. A person who dies without a will is said to have died *intestate*. When a person dies intestate, his or her estate is distributed according to the applicable laws of the State of California. These laws are called the laws of intestacy or the laws of intestate succession.

In the State of California, if you die without a will and leave property, the property will be distributed to your relatives. If you are married, all community property will pass to your spouse. If you die without a spouse or children, your property will pass to your parents. If neither of your parents is alive, the property will pass to your siblings or the children and grandchildren of siblings who die before you.

If you are married and leave separate property, that property will go to your spouse too, unless you have children. If you have children and a spouse, and you die leaving separate property, that property will pass one-third to your spouse, and one-third to your children, assuming you have two or more children.

The point is that if you die without a will, your estate will need to be probated and the laws of intestacy will be applied to determine who receives your property. The correct name for that procedure is an *estate administration,* although many refer to it as *a probate.*

Both the procedure to transfer property via intestate succession, and succession based on a valid will, occur in Probate Court. The essence of a Probate is the taking of property titled in the name of a dead person (the decedent) and retitling it into the names of living people, either those named in a valid will (beneficiaries) or those whom the law recognizes as one's legal heirs (heirs at law).

Because only living people can transfer title, sign deeds or execute documents, property must be titled in the name(s) of the living. When title to property is in the name of a dead person and there are no beneficiary designations and no survivorship rights, the property will have to go through a probate procedure if the value of the assets exceeds the statutory limit or if the property is of a certain type (e.g., real property). This is a lot to digest, but hopefully I have not lost you.

Probate Court is a place

Each county in the State of California has at least one courthouse designated to have jurisdiction to hear probate and probate-related matters. Some of the larger or more populated counties may have more than one courthouse designated to hear probate cases. When determining which courthouse will be your filing courthouse, consult the Court website in your County for more specifics regarding the venue-the appropriate courthouse in which to file your matter.

A variety of matters are within the jurisdiction of the Probate Court in California. These include guardianships, which can be established over the person and/or estate of a minor; conservatorships, which can be established over the person and/or estate of a person found to lack certain competencies; limited conservatorships, which can be established over adults with developmental disabilities; court supervised trust administration and trust litigation. Because of the limitations of time, attention and space, those issues will not be addressed in any

detail in this book, but will only be discussed in passing when appropriate for clarity and consistency.

Problems are solved in probate court

I get calls every week about problems that arise after a person dies. Often the last parent passing away causes the children to fall into old patterns of behavior from childhood. The following is just a short list of some of the problems that can arise when someone dies:

Bullying by one beneficiary of another

Unpaid debts of the decedent

Property of the decedent falling into disrepair

Deadbeat beneficiary occupying the property

Disputes over personal property, personal effects, photographs

Probate can bring an end to bullying, it can level the playing field, it can empower the weaker parties, and it can help resolve issues such as people refusing to leave the real property, keeping it from being sold or distributed.

The following are just some of the benefits of Probate:

- **Court is overseeing the process and resolving disputes**
- **Notices are given and creditors have a limitations on time to respond**
- **Court procedures and time lines keep things moving**
- **Courts require a bond be posted in most cases to protect beneficiaries**
- **Judges and Probate Attorneys review the documents filed for issues, completeness and compliance with applicable statutes and rules**
- **The Court issues an order at the end of the probate procedure-clear title to assets**

- **Probate has a definite end**
- **Probate fees and costs are usually predictable**

Probate is a little like liver and onions. Some people eat it and find it pleasing, easy to digest and good for their health. Others might not like the taste, but they know it is good for them, so they eat it. For those who don't like it, liver and onions can be made more tolerable by an excellent chef. My step-father would make liver and onions that tasted like steak. He would cook the liver just right and then smother it in wonderful gravy. It was not bad at all.

So too with Probate. Some will have an easy time. Others will need some *gravy* to make things better. A competent and efficient attorney can be that *gravy*.

In this chapter we learned that Probate isn't a place–though Probate Court is a place. We also learned that a variety of problems can be resolved in probate court.

2

WHO HAS TO GO?

Sylvia and her husband, Ruben, had been living in the same house for many years, but when he died, they had been sleeping in separate rooms for many years. Before they "separated," they had two children together. They shared the household expenses. The house had been Ruben's before they got married. He had received it in his divorce settlement with his first wife. In recent years, Ruben had gravitated back to his ex-wife and their two daughters. He spent weekends at his ex-wife's house.

You might ask, "Why would Sylvia put up with this?" The reason is not original or unusual. Sylvia was an immigrant. She wasn't educated in her first language and had never learned English. Ruben had been Sylvia's boss when she married him. She was fifteen years his junior. When her husband died unexpectedly in his late fifties, Sylvia took steps to transfer title to the house into her name. She sought the assistance of a document preparer (a non-attorney), and forms were filed with the court in which it was alleged that the property was community property even though it was titled in her deceased husband's name alone "as a married man as his sole and separate property."

At the first hearing, the judge in Probate Court recommended that Sylvia hire an attorney because her step-daughters were alleging that the property was *not* community property, but rather it was Ruben's separate property. If it was community property, it would be distributed one hundred percent (100%) to Sylvia upon his death. If it was separate property, it would be distributed one third to her and two thirds to his children. As it turned out, Sylvia had to initiate a Probate. The

incorrect initial filing cost her added expense. Going to an attorney in the first place would have probably saved her several thousand dollars. In Sylvia's world, that was a huge amount of money which she didn't have.

During the course of the Probate, we were able to settle the claims of the children, so Sylvia was able to keep the house, but it took time, and it did cost more money. In Sylvia's case, Probate was always going to be necessary if the children were unwilling to voluntarily relinquish their interest in the property to her. Consulting with a knowledgeable attorney at the outset could have saved her fees and delay.

As an attorney practicing in the areas of probate, trust administration, and estate planning, I get many calls a year from potential clients who have trouble understanding why they have to go to Probate. Sometimes they will say, "But my parents had a trust." or "But I have a will." Unfortunately, whether or not someone has to go through a Probate is more than knowing if they had a will or a trust.

In this chapter, we will consider the following:

- **Who is required to go through Probate?**
- **Is there another choice besides Probate?**

Who is required to go through Probate?

Assets Valued at $150,000.00+

In California if a person dies owning real property or other assets valued at over $150,000.00, without a will or other estate planning documents, that person's heirs at law are going to have to file a Probate. If a person owns no real estate and only cash accounts totaling less than $150,000.00, it may be possible to distribute their estate without a Probate. It will depend on the assets and the institution holding them.

If a person dies owning improved real property in southern California, that person's estate will probably need to be probated in California. The only exceptions to this would be if the property was properly funded into a living (inter vivos) trust, the property were titled in Joint Tenancy with one ore more living people or if the real property (or fractional share of the property) were of a very low value.

In California today, one of the most common reasons for having a living trust, sometimes called an *inter vivos* trust, which is simply a trust created during a person's life time, is to avoid Probate. Probate can be expensive, and it takes time (usually at least 11-15 months) to complete.

"But I have a will."

This is often the statement of potential clients calling my office to seek advice regarding a loved one's estate when I tell them that the estate will need to go through Probate. This is the confusion. Having a Last Will and Testament will not keep your estate out of Probate. Only real estate properly funded into a living trust or held in joint tenancy will keep you out of Probate court.

A Last Will and Testament is very helpful and can simplify issues in the Probate of a person's estate. In a Last Will and Testament, a person can designate the Executor or Executrix for the estate. This person will be appointed by the court to handle the estate, communicate with the attorney for the estate, sign all the papers prepared by the attorney and make sure that all the assets are protected until they can be distributed to those named as beneficiaries in the Last Will and Testament. A Last Will and Testament can also be used to create a trust for beneficiaries who are minors or whom the Testator (the person making the Last Will and Testament) wishes to receive their portion of the estate at a certain age over eighteen. For example, many people set distribution to occur at age 21 or

25, or even 35 or later. A Last Will and Testament can also be used to nominate a guardian of the person and estate for minor children. A guardian would take over the care of a minor child in the case of the death of one or both parents. In the end, it is better to have a Last Will and Testament, even if it will result in a Probate, than to leave no estate plan at all.

A Last Will and Testament needs to be admitted to Probate in order to pass title from a dead person to a living person(s). Real property can include residential, commercial, industrial and even raw land. The value of the real property can be relevant to determining the type of procedure required to transfer title. Sometimes it is possible to transfer title with a procedure other than Probate. The appraisal of the property has to be done by a Probate Referee, a professional appraiser approved by the court to appraise property for the Probate Court.

The value of the property must be determined as of the date of death of the decedent, the person who died. If the person died thirty (30) years ago, the value that is relevant is the value then, not the value today. If the property involved has very low value or the decedent owned only had a fractional share with little value, it may be possible to do a non-probate transfer. However, first the value must be established by a Probate Referee.

"But the decedent had a trust."

Another question I hear frequently in a consultation regarding a trust administration is "Why do I have to file a petition in the Probate Court when we have a trust?" The problem with trusts is they are very narrow in their scope and specific in how they operate. Only those assets which are specifically funded into a trust are subject to the terms of the trust. In other words, if I want my house to be distributed pursuant to the terms of my trust, my house must have the trust on its title.

The same is true of bank accounts. In order to have a bank account be distributed pursuant to the terms of my trust, the bank account must be vested (named) in the name of my trust. It is also possible to make the trust a beneficiary of an account or a life insurance policy depending on the specifics of the situation, but the trust will only distribute assets which bear its name. A person must be very careful after having a trust drafted, to make sure that all of the assets they want to be distributed by the trust have been titled in the name of the trust. This error–failure to fund assets into a living trust prior to the Settlor's (person making trust) death–is the most common error with living trusts.

Therefore, even when a person dies leaving a living trust, it can still be necessary to go to Probate Court because one or more of the assets was not properly funded into the trust. For example, a husband and wife do a trust and then subsequently refinance their house and take it out of the name of the trust and put it into their own names as some banks and finance companies require. The house is never put back into the trust and both spouses die. If the property is listed on the trust schedule of assets and there is a clear trail that the property was once in the trust and was simply not returned to the trust after the refinance, the court will often order that the real property be titled in the name of the trust. It does not require a Probate, but it does require a noticed petition to the court, at least one hearing and some other related paperwork.

In another example, husband and wife sell their house and buy another one which they never put into the name of the trust. Under this scenario, it may be necessary to probate the real property because it was never in the name of the trust and there is no evidence to present to the court to indicate the intention of the Settlors (those creating the trust) that it be a trust asset. This situation is very

unfortunate given the intention to avoid Probate evidenced by the creation of the trust.

"But the decedent had nothing to probate"

Sometimes it is necessary to go to probate court to get the power to act on behalf of a dead person. If a person died leaving no assets, it is sometimes still necessary to file a Probate simply to allow a living person to have authority to speak or act on behalf of the decedent. This might happen where there are creditors of the decedent or where the decedent was a party to a lawsuit or had claims for which a lawsuit needs to be filed. This is not a common occurrence, but it can come up in the handling of a person's estate. Estates are like people, each one is an individual. Each estate presents the family of a person who has died with different challenges and issues.

Is there another choice besides Probate?

In California, there are alternatives to Probate. One is the Revocable Living Trust, sometimes called an *inter vivos* trust. This is a trust created by the owner of assets during that person(s) lifetime. It can designed to pay out the assets on the death of the Settlor (creator of the trust) or at some other time in the future. As discussed above, the effectiveness of a Revocable Living Trust is dependent on the assets being properly funded into the trust. If you have a trust, you may want to consult with an estate planning attorney to make sure that all of your assets are properly funded into the trust or otherwise titled in the manner in which you would like.

Joint Tenancy Property

Another alternative to Probate in the case of a bank account or a piece of real property is to hold the property in joint tenancy. With joint tenancy accounts or

title on real property, the title goes to the survivor (the last one to die). If two people are named on the title and one dies, title can be passed to the survivor as to a one hundred percent (100%) interest with the recording of a document. If both owners die, a Probate will still be necessary of the estate of the second person to die.

Spousal Property Petition (Transfers between Spouses)

If the property is titled in the name of a married couple as tenants in common, it may be possible to transfer the property by means of a Spousal Property Petition. This petition can be used to transfer title between spouses when one spouse has passed away, but both spouses names appear on title. It is helpful if there is a will leaving all property to the spouse, but it may also be successful if no one objects to the characterization of the property as community property. Under the laws of intestacy (when someone dies without a will), all community property passes one hundred percent (100%) to the surviving spouse.

The Spousal Property Petition can also be used if the property title itself reflects that it is community property, e.g. "Bob Jones and Susan Jones, husband and wife as community property." More recently, properties are being titled in community property with right of survivorship, e.g. "Bob Jones and Susan Jones, husband and wife as community property with right of survivorship." Where this title is used, it may be possible to transfer title by simply recording an affidavit, similar to properties held in joint tenancy.

The Spousal Property Petition can also be used where the real property is titled in the name of the deceased spouse alone but everyone agrees it should pass to the surviving spouse. In that situation, certain allegations can be made about the property and the parties such that the court will grant an order transferring the property to the surviving spouse. This is usually not successful if any children of

the deceased spouse object to the transfer or the characterization of the property as community property. The issues as to the characterization of the property, i.e. community or separate, can be resolved by the court in the probate matter.

For real property in California, two additional non-probate procedures exist. They are dependent on the value of the real property which must be established by an appraisal done by a California Probate Referee. The appraisal must be done on a form called an *Inventory and Appraisal*. That form, once completed by the Probate Referee, must be attached to the petition and filed with the court. The *Inventory and Appraisal* is the proof required by the court that your matter qualifies for the type of Petition you are filing:

- **Affidavit re Real Property of Small Value ($50,000.00 or less)**
- **Petition to Determine Succession to Real Property (Estates under $150,000.00)**

Both of the above required Judicial Council forms which are available from the California Courts website at http://www.courts.ca.gov.

Pay-on-death beneficiaries

With non-real estate assets such as bank accounts, it is possible to name a pay-on-death beneficiary to receive the accounts once you pass away. If no beneficiary is named and the total of all estate assets is less than $150,000.00, a bank account may be transferred using a non-probate procedure. Usually, the financial institutions will require that you wait a period of time (up to forty days) to receive those assets. Once the wait period has passed, the person entitled to the assets must sign a declaration under penalty of perjury alleging certain facts such as the date of death, the persons entitled to the assets, etc. With assets such as annuities, life insurance, retirement accounts and investment accounts, beneficiaries can be named as well.

If you have to go to Probate, it will be because no other alternative was available or used. As an estate planning attorney, I recommend that you evaluate the assets that you own, how you intend them to be distributed in the event of your death and what needs to be done to make sure that your intentions are carried out. Verbal agreements and things written on scraps of paper and stuffed into your desk are rarely effective to transfer your assets to loved ones. Moreover, the lack of an estate plan makes it more difficult for your loved ones and family members to do what you may have wanted. In some cases, they may be totally unable to carry out your wishes, especially if the people you would have wanted to leave your estate to are non-relatives.

Be as deliberate about your estate plan as you are about accumulating your estate. You wouldn't drive down the road and toss money out of your window. Nor should you leave your estate in such a condition that requires considerable sums be paid out to attorneys and others to transfer the assets to the intended beneficiaries. The best way to avoid such unintentional expense is to make an estate plan.

3

IS IT GONNA HURT?

(The Probate Process Begins)

Before the doctor comes in to give her a shot, six-year-old Sally worriedly asks her mother, "Is it gonna hurt?" The response of her mother is calculated. If she tells her the truth–that it might be a little painful at first, but it will pass very quickly–Sally may worry more and tense up when the shot comes, adding to her discomfort. But if she fails to tell Sally the truth, she loses credibility something that is very hard for a mother to earn and easily lost in moments of subtle compromise. So she answers, "Yes. It will hurt a little, but I am here with you. Try not to worry. I had to have shots myself as a little girl."

So too it is with me as an attorney as I explain this process to you. I don't want you to worry unnecessarily about the Probate process–but I also don't want to lose whatever fragile credibility I might have with you by not being honest about all that is involved in the Probate process, both financially and procedurally.

In this chapter, I will summarize the first part of the process of Probate for you. If you are reading this chapter, it is important to remember that a Probate is not always required when someone dies, but is only required in certain situations. The following is a short, non-exhaustive list of the circumstances that will demand that a Probate be commenced:

- **Real property owned in the State of California not properly funded into a trust**
- **Personal property owned by a decedent who lived in California with no beneficiary and no co-owner which cumulatively exceeds one hundred and fifty thousand dollars ($150,000.00)**

In this chapter, I will address the following milestones in the first part of the Probate Process, briefly explaining each one, the monetary costs involved, and the amount of time it should or usually takes to complete:

- **Pre-Filing matters**
- **Filing of Petition to Initiate Probate**
- **Appointment**
- **Marshaling of Assets**
- **Inventory and Appraisal of Assets**

I will attempt to bring real numbers and real time frames to this often murky and confusing area of the law. All estimates of money and time given in this chapter are intended only as estimates, not promises or guarantees for myself or any other probate attorney. I am basing these estimates on over twenty years of experience handling probates and the current court system and flow of cases in the Los Angeles and Orange County courts. It should be understood that each county's courts, and even each court within a county, may handle the probate calendar and cases differently. Most counties will have only one or two courts which handle probate cases, and this can sometimes mean these are busy calendars with many cases on the docket on any given day. This is especially true in Los Angeles and Orange Counties, which have large populations. The fees charged by the court often change in January of each new year. They can change at any time, so checking the court website for your county will help you to avoid unnecessary delay or the inconvenience of having insufficient funds.

Before Filing the Petition

Before filing the Petition in a probate matter, certain documents and pieces of information are essential. The person filing must have the most recent original will of the person who died. If the person died without a will (intestate), then no will needs to be presented to the court. It is important to have a copy of the death certificate for the person who died. The death certificate can be obtained by a family member from the county recorder's office of the county in which the person died.

In addition to documents, the person who files the Petition for Probate–usually a family member, e.g. spouse, sibling, child or grandchild–needs to have an estimate of the value of the real property belonging to the estate, an estimate of the income from the real property (if it is income generating property), an estimate of the value of the personal property and an estimate of the income generated by the personal property. Income on personal property is often in the form of interest or dividends paid. Other information required is the name and mailing address for anyone mentioned in the will. If there is no will, the names and addresses of all the heirs at law are required. The heirs at law are typically the closest relatives; however, this is a subject that should be discussed with an attorney to determine who should be listed in the Petition for Probate.

That being said, notice is not something to be taken lightly. If notice is not properly given, the matter will be delayed. The other pieces of information needed for the Petition for Probate are self-evident, e.g. the name of the petitioner, name of the person to be appointed executor or administrator, the place of residence of the decedent, the place of death, allegations regarding the bond (discussed in more detail later in this chapter) and other relevant information all clear from the face of the Petition.

How do I begin?

The first step in the probate process is the filing of the Petition for Probate. The Petition for Probate, a Judicial Council form available from the Court and standard for the entire State of California, needs to be completed correctly and all the necessary attachments need to be with the Petition when it is filed. Sometimes a court will have a cover sheet which needs to be filed with the Petition for Probate indicating certain information about why the court chose is the correct court. More information about such forms can be found on the county website for the county in which the Petition is being filed.

At the time the Petition is filed, a hearing date is assigned by the court for the hearing on the Petition. Typically this date is set thirty (30) to sixty (60) days out. Sufficient time is required to allow for the publication of the notice. Every Petition for Probate needs to be published in a newspaper with a circulation that meets the court requirements. Typically, one can contact the legal newspapers such as Metropolitan News or The Daily Journal and arrange to have the notice published in the correct newspaper. Proof of the publication has to be prepared by the newspaper, so going to the local paper in town may seem easiest, but if newspaper staff members don't know the court requirements, it can be a nightmare.

In one of my cases in which the client started the probate process before hiring me. She had contacted a local newspaper who said they knew about Probate publication. Not only did they know nothing about the court requirements for such publications, but also they didn't know they needed to file an affidavit. So the matter was delayed, and then the newspaper published the incorrect information, and a further delay resulted. The delay was very frustrating for the client who was waiting to transfer assets to herself and her siblings.

Even using an experienced legal publication, I still have to follow up with the newspaper to make sure it has received the petition and has begun publication, so my hearing is not delay. Usally the newspaper will also do the Notice of Administration which is the notice of the hearing on the Petition for Probate. This means the paper will prepare the notice of the hearing date on the petition and mail it out to everyone listed in the Petition for Probate. It also takes care of filing the notice with the court.

How do I know if I was appointed?

Probate Court is unlike most other areas of court because in Probate Court, the attorneys and parties are notified ahead of time of the problems that exist with their case, the issues that the court is going to raise, and what, if any, information is missing from the Petition for Probate. This is very helpful if the information is available enough time in advance of the hearing date to correct the errors or address the Court's concerns. Corrections or additional information can be submitted to the court in the form of a supplemental pleading. Often this will allow the matter to be cleared or "RFA" (recommended for approval) by the Probate Attorney reviewing the case for the judge.

With appointment by the court, the Personal Representative of the Estate (Executor if there is a will or Administrator if no will) has the authority to act in the decedent's shoes. Proof of this authority is generally provided by the Letters Testamentary (with a will) or Letters of Administration (no will). Often a financial institution will ask to see the "Letters." The institutions usually require a certified copy of the Letters, which is obtained from the court. Since dead people cannot sign documents, the Personal Representative acts on behalf of the dead person (decedent), signing documents, closing accounts, transferring assets, etc. All assets

that were in the name of the decedent are transferred into the name of the Estate of the decedent. They are not distributed out to the beneficiaries or heirs until the order to do so is issued by the court. The Personal Representative of the Estate has the authority to handle assets on behalf of the estate.

Do we have full powers or limited powers?

When appointed as Personal Representative of an estate (Executor or Administrator), the Petition will generally request powers under the Independent Administration of Estates Act (IAEA). In requesting powers, the Personal Representative can request either full power or limited powers. The most significant different between the two is that with full powers, the Personal Representative can sell or encumber estate real property without court order and subject only to a notice-giving procedure. With limited powers, the Personal Representative must petition the court separately to sell or encumber real property. The matter must be set for hearing, and the sale is subject to over-bidders at the time of the hearing. This can be very disconcerting for buyers and the Real Estate agents involved if they are not experienced. That is why if there is real property to be sold, full powers often will be requested.

What about a bond?

While full powers are often requested, they are sometimes not granted because of the Personal Representative's failure to qualify for a sufficient bond. The bond is an insurance policy on the estate assets. The bond company will have to pay out to the beneficiaries if the Personal Representative runs off with the assets or otherwise mishandles and loses some or all of the assets. If the bond company has to pay out on the bond it will, of course, sue the Personal Representative.

If the Personal Representative cannot qualify for a bond for the combined value

of the real property and the personal property, then full powers will not be granted. To have full powers, the Personal Representative will usually have to be bonded unless the court has approved a waiver of the bond. In the case of a Will, if the Will provides for a bond waiver and the named Executor is serving, the court will usually grant the waiver. Where there is no will, the court may consider a waiver of bond if all the heirs at law sign waivers. The court is hesitant to grant a waiver of bond and usually will not do so if there has been a delay in filing the probate (several years) or if the Personal Representative (Administrator/Executor) lives outside of California.

As a matter of practice, I usually try to find out if a client will qualify for a bond prior to the hearing. If the client(s) will not qualify for a bond with full powers, a bond equal to the value of all the estate assets, then I try to get them qualified for limited powers which still requires a bond equal to the liquid assets (cash, bonds, stocks, vehicles, etc.).

The benefit of *Full Powers* is that the Personal Representative can sell the real property or borrow against any estate real property without prior court order. Without *Full Powers*, it is necessary to petition the court prior to a sale, set a hearing and have the court order the sale at the terms agreed upon. When the court is involved in the sale of the real property, it requires that the sales price be a certain percentage of the appraised value, it also reviews the terms of the sale, the notices given, and additional attorney time is required in the preparation of the Petition for Order Confirming sale and the appearance at the hearing. For many Realtors, the *Full Powers* are preferred because when a sale is heard in court, it is possible for there to be over-bidders–those who are willing to pay more than the agreed upon sales price. When this happens, the Realtor can lose part of his or her commission, and the original buyers can be left with nothing when they are overbid by other buyers at

the time of the hearing. The disadvantage of *Full Powers* is that the cost of the bond is higher since it must include the value of all real and personal property.

When looking for property recently, I didn't even both looking at the two properties that were subject to court confirmation. I knew it would increase both the delay and the uncertainty of the transaction going through. It is important if you plan to sell real property during Probate to carefully consider the options regarding the bond and the powers.

Collecting the Decedent's Property

Once the Personal Representative has been appointed, the bond (if any) posted, and the Letters Testamentary (or of Administration) issued, then the Personal Representative needs to begin the process of marshaling the decedent's assets. Another word for marshalling is *gathering*. In marshaling the assets, the Personal Representative needs to not only determine what assets the decedent owned at the time of his or her death, but he or she also needs to take possession of those assets. For example, in the case of bank accounts, the Personal Representative needs to contact the bank or financial institution and let them know that the decedent has passed away and the Personal Representative will be acting on the decedent's behalf in closing the accounts and moving the assets into an Estate account until the Court orders the distribution pursuant to a will or the laws of intestacy.

Finding out what the decedent owned is going to vary greatly depending on the decedent. I am sure the assets that I own are different from the assets owned by you or by one of my neighbors. As someone once said, "One man's junk is another man's treasure." One place to start in determining the assets is the home of the decedent. The personal records, tax returns, mail and other documents found in the place where the decedent last resided can often be a gold mine of information regarding

what they owned. Tax returns can provide account numbers and institutions where the decedent held accounts. They can also reveal pensions, annuities and other retirement accounts. Whatever assets are discovered, those that are subject to Probate need to be marshaled and inventoried so they can be appraised by the court-appointed referee.

The following is a short list of the types of things that a Personal Representative should look for in terms of assets owned by the decedent:

- ☐ Real Property
- ☐ Personal Property
- ☐ Cash, travelers' checks
- ☐ uncashed checks/money orders payable to the decedent
- ☐ Bank accounts
- ☐ Brokerage accounts
- ☐ Securities (stocks, bonds)
- ☐ Life insurance policies
- ☐ Annuities
- ☐ Retirement accounts
- ☐ Furniture
- ☐ Jewelry
- ☐ Art
- ☐ Antiques
- ☐ Gold, silver, precious stones
- ☐ Collectibles (baseball cards, sports memorabilia, dolls, coins, stamps)

- ☐ Vehicles (cars, trucks, recreational vehicles, boats, trailers, all-terrain vehicles)
- ☐ Mobile Homes
- ☐ Businesses (Sole Proprietorships, Partnerships, Limited Partnerships, Corporations, Limited Liability Companies)
- ☐ Livestock and breeding animals
- ☐ Distributions from estates and trusts
- ☐ Patents, Trademarks, Copyrights and other royalty interests
- ☐ Judgments and ongoing litigation
- ☐ Deeds of Trust/Promissory notes

It is helpful if the Personal Representative was in a close relationship with the decedent (e.g., a spouse, a child, a close friend or relative). Under those circumstances, the Personal Representative will often know something about the assets.

In marshalling the assets, the Personal Representative may find that certain assets were co-owned with another individual or individuals. With such assets, it is important to find out how the account or asset was vested (who is on title along with the decedent). Sometimes title is in Joint Tenancy; other times title is tenants in common. Depending on how title is held, an asset may still need to be marshaled by the Personal Representative for the Probate Estate.

When assets of the estate are received or discovered by the Personal Representative, he or she must deposit them in an Estate Account. This is an account opened at a federally insured bank in the name of the Personal Representative, in his or her representative capacity (Executor/Administrator) for the benefit of the estate of the decedent. This is an account opened with a tax identification number that is

assigned to the estate by the Internal Revenue Service (IRS). Separate tax returns will need to be filed for the estate to report income and losses of the estate while it is open according to the requirements of the IRS. The Personal Representative should be very careful not to co-mingle his or her own personal assets with the estate assets.

Appraisal of Assets

Once the assets are marshalled, they need to be appraised. An appraisal of the assets is done once the Personal Representative completes an *Inventory and Appraisal*, which is a Judicial Council form required by the court. The *Inventory and Appraisal* has two attachments. The first attachment includes a list of assets appraised by the Personal Representative. The assets to be listed on this attachment are limited. They include things such money and other cash items, checks, refund checks, and cash-type accounts (checking, savings or money market) in banks and other financial institutions. The second attachment lists the assets to be appraised by the Probate Referee appointed by the court. All other assets, other than those listed as includable on Attachment 1, are appraised by the court-appointed Probate Referee. The Probate Referee is entitled to a fee which is a percentage of the value of the assets appraised plus some out-of-pocket costs. This fee is due when the appraisal is completed.

The *Inventory and Appraisal* values are used in determining the statutory fees to be paid to the attorney for the estate and the Personal Representative. The statutory fee will be discuss in more detail elsewhere.

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IS IT GONNA' HURT? (Part 2)

(The Probate Process Continues)

Because I grew up in the seventies, and we had six in our family, all family travel took place in our Buick station wagon. As kids, we had little appreciation for the journey and were obsessed with the destination. "Are we there yet?" was the constant, nagging question. This got so bad at times that severe punishment was promised to anyone who dared to ask the question again before we arrived at our destination. As the attorney handling the probate process for clients, I sometimes feel like my parents must have felt when we repeatedly asked, "Are we there yet?"

I try to outline for clients what is going to happen, but they often forget or simply weren't listening when I told them. They want to know if we are close to finishing after they are first appointed. I have to explain to them that appointment is just the starting line. We have many hurdles to jump over and hoops to jump through before we will be in a position to close the probate.

In this chapter, we will continue with our discussion of the probate process and will consider some of these hurdles and hoops. The following topics will be covered in this chapter:

- Notices
- Appraisal of Assets
- Resolution of Disputes
- Petition to Close the Estate
- Final Issues

Notices

Once the Personal Representative has been appointed, he or she must give certain notices required by California law. First of all, notice must be given to the Department of Health Services. If the decedent has a pre-deceased spouse, notice of the death of that spouse must be given as well. This notice will cause the State of California to research if any reimbursements are due from the estate of the decedent to the State of California because of benefits paid to the decedent or a predeceased spouse by the State during his or her lifetime. If benefits were paid out, this notice will result in a creditor's claim being filed in the Probate, a subject which is addressed later in this chapter. If there were no benefits paid, the California Department of Health Services will send a letter to that effect.

Notice also must be sent to the California Franchise Tax Board. They will let the Personal Representative know if any taxes are due from the decedent and/or if the decedent had failed to file any returns. If nothing is due to the Franchise Tax Board, they send a letter to that effect to the personal representative. That letter will be submitted later with the final petition, so the court is aware that no outstanding tax issues exist.

All known creditors of the decedent must also be given notice. In order to make sure that he or she is aware of all the creditors of the decedent, the Personal Representative should arrange to receive the decedent's mail. If any bills come to the decedent with balances due, those creditors need to receive a Notice of Administration to Creditors, a California Judicial Council form which requires certain information regarding the estate, the personal representative and contact information be given to the creditor. That way, the creditor can file a claim within the statutory time frame. The Creditor notice period is four (4) months from the issuance of the Letters by the Court. If a Creditor does not make a claim during that

time period, the creditor will be barred from making a claim at a later time assuming proper notice was given.

If a creditor of the estate makes a claim, the creditor must file the original Creditor's Claim with the court where the Probate of the decedent's estate is filed. The creditor must also mail a copy of the claim to the Personal Representative of the estate. Once the Creditor's Claim is received by the Personal Representative, he or she has a certain time within which to allow the claim or reject the claim. In order to allow or reject the claim, the Personal Representative must complete a California Judicial Council form. The same form can be used whether the claim is being allowed or rejected. The Personal Representative must complete the Allowance/Rejection form and file the original with the court and mail the copy to the creditor. If there are sufficient funds in the estate account at the time of allowance, a check can be sent with the allowance form. If the estate has no liquid assets at the time of the allowance, I will typically prepare a cover letter to let the creditor know that payment will occur upon sale of real estate or whatever other assets the estate has. If the claim is being rejected, the original is filed and a copy is sent to the creditor. The creditor has a certain time within which to file a lawsuit on the claim or he/she/it loses the right to do so. The personal representative will not be able to close the estate until that time frame has expired. Sometimes, if the claim is small and the estate assets are sufficient, it is easier and faster to simply pay the claim even if it is not a just claim. All just claims of the decedent for which a creditor's claim is received should be paid. Of course, this is an issue which should be discussed with the attorney for the estate.

A few additional notice requirements exist that only apply to certain estates. The best way to find out if you need to give any additional notice is to contact an attorney who is experienced in handling probate estates in California.

Once all notice and claim periods have expired, if there are no disputes, the final petition to close the estate can be prepared and filed. However, disputes often arise prior to the filing of a probate, or during the time the estate is being administered and assets are being marshalled.

Appraisal of Assets

In the course of the probate administration, after the assets have been marshalled, the assets must be appraised. Certain assets can be appraised by the personal representative; however, most of the assets must be appraised by the court-appointed appraiser, also known as the Probate Referee. This person is appointed to the case by the court, and he or she will establish the value for the asset(s) of the estate as of the date of death of the decedent.

In order to have an accurate appraisal, the assets must be described in some detail. The description of the assets including type of account, location, legal description, make, model, vin number and other information must be listed on the Inventory and Appraisal form, a California Judicial Council form available from the court website. This form is required for all counties in the State of California. Assets are listed on attachments to the form and described in sufficient detail for the Probate Referee to determine their value.

Once the Probate Referee has returned the inventory and appraisal–along with his or her bill–the original Inventory and Appraisal must be filed with the court. The values listed in the inventory and appraisal are the values for purposes of establishing a basis for determining capital gain as well as the values used for setting the statutory fee for the attorney handling the Probate and the statutory fee for the personal representative.

Resolve Disputes

Disputes which occur during a Probate typically fall into one of three categories:

- Challenge to testamentary documents
- Ownership disputes
- Creditors' claims

Challenges to testamentary documents or *Will Challenges* are not infrequent in probate matters, but because of the amount of detail and discussion required are beyond the scope of this book. Suffice it to say, if you have challenge to a will you are trying to probate or want to challenge a will someone else is probating, you need to contact an attorney who has experience handling such matters to discuss the merits of your position.

Another common dispute that occurs in the process of probating a decedent's estate is the issue of who owns certain property. Often an ownership dispute can be rooted in the character of the property itself–community or separate. Often, as the result of bad advice from a realtor or loan officer, married people will title property or accounts in the name of one spouse as their "sole and separate property." This *separate property* labeling does not necessarily prevent a spouse from later making a claim–often justifiably–that certain property is really community property or that the community has a substantial issue in the property. That being the case, disputes will occur frequently as to the characterization of property as separate or community, and as a result of a characterization, the property will be distributed according to the laws of intestacy which are different for separate property and community property.

Finally, a fair number of creditors will choose to sue to enforce their rights under a creditor's claim. As we discussed above, if the creditor's claim is rejected by the personal representative, the creditor will have to file a lawsuit to enforce the

claim. Sometimes this happens. When it does, the personal representative becomes a party to a civil lawsuit (outside of the probate court), and then that lawsuit has to be resolved before the probate estate can be closed out. Once the lawsuit is settled or judgment is entered, the probate process can continue and if everything else is in order, the final petition can be prepared and filed to close out the estate.

Petition to Close Estate

I have never been much of a fan of horror movies, so when things get gruesome or extremely *horrific* during a movie, I might keep my eyes shut and nudge my husband and ask, "Is it over yet?" Some probates can be analogous to a horror movie with every type of dispute and hard-to-deal-with beneficiaries, but at some point, *it is over*. Filing the Final Petition in a probate estate is a time for great celebration–if everything was done correctly and no loose ends were left untied–or for further frustration, if all the ducks are not lined up neatly.

After practicing in this area for such a long time, I have learned to start before the end to determine if anything was left undone. I have my staff begin drafting the final petition at least a month or two before I want to file it, to make sure that everything that needs to be done has been done.

The following is a checklist of things that have to be done before we can close out the estate:

- ☐ Notice to California Department of Health Services
- ☐ Notice to California Franchise Tax Board
- ☐ Notice to all known creditors of decedent
- ☐ All statutory time periods have expired

- ☐ All assets of the decedent which are to be probated have been inventoried and appraised
- ☐ All decedent's and estate tax returns filed and any taxes due have been paid
- ☐ Statutory fees–for both the attorney and the Personal Representative of the estate–have been calculated and all gains and losses taken into account
- ☐ All extraordinary fees have been determined and a detailed explanation of the fees and declaration of the attorney regarding these fees prepared
- ☐ An Accounting of all Estate assets has been prepared in the format required by the California courts or all beneficiaries or heirs at law have signed a waiver of account.
- ☐ All reimbursements of costs advanced have been paid to anyone having advanced costs of administration such as filing fees, bond fees, publication fees, etc.
- ☐ Determination and description of the assets on Hand for distribution is prepared
- ☐ A list of the people entitled to distribution along with their respective shares and contact information is prepared

Once the Petition is drafted and all the required allegations made, it is easy to double check that everything that should have been completed has, in fact, been done. With this accomplished, it is easy to finalize the Final Petition and Accounting. Once the Final Petition is complete and signed by the attorney and the Personal Representative, it is submitted to the court for filing along with another filing fee. Once it is filed, the court will set a hearing date, and Notice of Hearing and a copy of the Final Petition and Accounting is sent to all those entitled to notice.

Notice must be given at least fifteen days before the date of the hearing.

Prior to the hearing on the Final Petition and Accounting, the probate attorney working for the court will review the petition to make sure all the allegations are present and correct and to review the accounting. Sometimes, if there are deficiencies, the probate attorney will notify the attorney for the estate so those matters can be cleared up before the hearing. If there are no issues, the court may indicate that the matter has been *recommended for approval*, which means that it will be approved by the court at the hearing unless someone makes an objection.

Once the court approves a Final Petition and Accounting, an Order must be submitted for the court to sign. It will include much of the information that was alleged in the Final Petition. It will include a description of the property to be distributed and the names and respective shares of those entitled to receive a distribution. This is the light at the end of the tunnel for most clients. It means the money is going to be coming soon if there is any to be distributed.

Final Issues

Before the Probate process is complete, the assets must be distributed as ordered by the court. If there is money in an estate account, the fees are paid to the attorney and the personal representative and then the balance is divided as provided in the Order. If there is real property, the Order must be recording in the county in which the real estate is located. If there are items of personal property, the Personal Representative must give those to the persons entitled to receive them. Each person who receives cash and/or personal property needs to sign a receipt indicating what they received. The receipts must be filed with the court before the court will close the Probate.

Finally, once the receipts are all filed and all tax returns are filed and distributions made, the estate can be officially closed. This is done by filing with the court a California Judicial Council form called an Ex Parte Petition for Discharge and Order. It is signed by the Personal Representative and serves as a means of closing the Probate estate and releasing the Personal Representative from further responsibility. If there is a bond, the bond will be exonerated after this Ex Parte Petition for Discharge and Order is signed by the judge.

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WHAT'S THIS GONNA SET US BACK?

Mr. and Mrs. Myer walk into an estate planning attorney's office. The secretary greets them and has them fill out a Client Information Form. After they complete the form, the secretary escorts the couple into the office of the attorney, D.J. Jones. Mr. Myer remembers the advice that his accountant gave him and asks attorney Jones, "How much do you charge for giving legal advice?"

"Two hundred and fifty dollars to answer three questions." Attorney Jones answered.

Shocked and a little nervous about going forward with the meeting, Mr. Myer asked, "Isn't that a little on the high side?"

To which attorney Jones responded, "Yes. What is your third question?"

All joking aside, legal fees can be very expensive. With Probate, the fees are largely set by the California Code. Therefore, an attorney can speak with some certainty as to the fees which will be incurred at least with regard to the work covered by the statutory fee. This means that while the fees may be high and may be unavoidable, they are knowable. The known is much easier to deal with and plan for than the unknown.

In this chapter, which will address the fees and costs associated with the average probate estate, we will cover the following:

- ☐ Statutory fees of the attorney for the estate and the personal representative(s)
- ☐ Court costs and other expenses of administration

Statutory fees for Attorney and Personal Representative

The fees in a Probate proceeding are determined by the California Legislature. The California Probate Code provides the following fee structure for the personal representative for the estate:
10800. (a) Subject to the provisions of this part, for ordinary services the personal representative shall receive compensation based on the value of the estate accounted for by the personal representative, as follows:

(1) Four percent on the first one hundred thousand dollars ($100,000).

(2) Three percent on the next one hundred thousand dollars ($100,000).

(3) Two percent on the next eight hundred thousand dollars ($800,000).

(4) One percent on the next nine million dollars ($9,000,000).

(5) One-half of one percent on the next fifteen million dollars ($15,000,000).

(6) For all amounts above twenty-five million dollars ($25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal value of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

The California Probate Code provides the following fee structure for the attorney for the estate:

10810. (a) Subject to the provisions of this part, for ordinary services the attorney for the personal representative shall receive compensation based on the value of the estate accounted for by the personal representative, as follows:

(1) Four percent on the first one hundred thousand dollars ($100,000).

(2) Three percent on the next one hundred thousand dollars ($100,000).

(3) Two percent on the next eight hundred thousand dollars ($800,000).

(4) One percent on the next nine million dollars ($9,000,000).

(5) One-half of 1 percent on the next fifteen million dollars ($15,000,000).

(6) For all amounts above twenty-five million dollars ($25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property.

In order to better understand how this statutory fee structure works, consider the following scenarios, all of which are invented and do not represent any particular client. It is important to remember that the values are established by the court-

appointed Probate Referee. The value that they assign to the assets will usually be the one adopted by the court. When considering the value of an asset, no deduction is made for any loan or encumbrance secured by the asset. For example, a house valued at $600,000.00 with a mortgage of $550,000.00 is counted as $600,000.00 of value for purposes of calculating the statutory fees.

Scenario 1:

Under this scenario, the estate includes the following assets as appraised by the Court-Appointed Probate Referee:

House in Whittier, California	$600,000.00
Cash in accounts	$ 50,000.00
Car	$ 4,000.00
Total value of estate:	**$654,000.00**

The statutory fee calculation under **Scenario 1** would be as follows:

$100,000.00	x	.04 (4%) =	$4,000.00
$100,000.00	x	.03 (3%) =	$3,000.00
$454,000.00	x	.02 (2%) =	$9,080.00
Total		=	**$16,080.00**

The statutory fee for the attorney would be $16,080 and the statutory fee for the personal representative would also be $16,080.00 for a total statutory fee of $32,160.00. In addition to the statutory fees, the attorney for the estate may be entitled to Extraordinary compensation for certain work that is not covered under the statutory fee. Most commonly this work involves issues related to real property or those related to taxes.

To make sure that we understand how the statutory fee works, here is another Scenario.

Scenario 2

Under this scenario, the estate includes the following assets as appraised by the Court-Appointed Probate Referee:

House in Whittier, California	$275,000.00
Vacant land in Victorville, California	$ 10,000.00
Cash in accounts	$ 45,000.00
Total value of estate:	**$330,000.00**

The statutory fee calculation under **Scenario 1** would be as follows:

$100,000.00	x	.04 (4%) =	$4,000.00
$100,000.00	x	.03 (3%) =	$3,000.00
$130,000.00	x	.02 (2%) =	$2,600.00
Total		=	**$9,600.00**

The statutory fee for the attorney would be $9,600 and the statutory fee for the personal representative would also be $9,600.00 for a total statutory fee of $19,200.00. Again the attorney could be entitled to extraordinary compensation as well.

Extraordinary Fees

The fees for the standard probate procedures are covered under the statutory fee as discussed above. However, in many estates, there is work required of the attorney and representative that is not within the scope of the statutory fee. The following are a couple of the areas in which extraordinary fees may be requested:

- ☐ Sale of Real Estate
- ☐ Tax issues/tax returns
- ☐ Operation and/or closure of a business
- ☐ Litigation within the probate proceeding

When extraordinary fees are being requested, the attorney and representative must itemize the fees being requested by providing a description of the work done, the amount of time spent on each task, and an hourly rate at which the person is requesting payment. This must be totaled and requested as part of the Final Petition along with the request for the Statutory Fees. The request for Extraordinary fees is subject to the court's approval, so there is no guarantee that what is pled will be paid. The court has discretion to reduce the amount of the fees if it feels there is insufficient support provided for the request or if the fees are considered unreasonable.

Costs and other expenses of administration

In addition to the Statutory Fees and the Extraordinary Fees, the estate must pay certain costs as a part of the administration. The standard fees include the following:

- ☐ Filing Fees
- ☐ Attorney Service
- ☐ Publication
- ☐ Bond
- ☐ Appraisal
- ☐ Other Expenses

Filing Fee

A filing fee is required to be paid when filing the Petition for Probate with the court. At the time of the filing, the filing fee must be paid unless a fee waiver has been obtained. If a fee waiver has been obtained, the filing fee for the initial filing may be waived, but once assets come into the estate, the filing fee will have to be paid. Delaying it can sometimes cause more problems. The filing fee is set by the government, and it is usually posted along with the other court fees on the court web site. It is a good practice to check that before filing anything.

Attorney Service

An attorney service is a company or individual who takes documents to the court for filing and who serves documents that need to be served, usually by personal service. During the court of a Probate, it may be necessary to use an attorney service to get documents filed, to obtain copy of court documents or to handle personal service if it is required. Most attorneys will use attorney services as part of their usual practice. These costs are usually passed on to the estate. How an attorney will handle the payment of such costs is a subject that should be covered in his or her fee contract or retainer agreement.

Publication

Every Probate Petition must be published in a newspaper prior to the appointment of a personal representative. The rules regarding publication and where it must be done are very specialized. A legal newspaper should be used. The most commonly used legal newspapers in the Southern California area are Metropolitan New and the Daily Journal. Do not assume that other newspapers will understand this process. I took over a Probate from someone who had tried to handle it without an attorney and the newspaper claimed to know about probate publications, but after three attempts and multiple continuances, it finally got resolved. I recommend that if you are filing a Probate, you go with one of the larger legal publishers. It will make things go a lot smoother.

Bond

I had an extensive discussion of the Bond in Chapter Three. Please refer back to that for further detailed information about when and why a bond is required. With regard to the amount of the bond, that will be determined by the court. The cost of the bond is based on the amount of the bond. It is a percentage. It is impossible to

know what the bond premium will be unless you know the amount of the bond. If a bond is required, you may want to contact the bond company ahead of time to get an estimate of the cost.

Appraisal

During the course of every Probate, an Inventory and Appraisal must be submitted to the court listing the assets of the estate. Certain types of assets can be valued by the personal representative, but most of the assets will require appraisal by a court-appointed Probate Referee. The cost of this appraisal is set by statute and is based on the value of the assets subject to the appraisal. The cost of the appraisal usually is due within thirty (30) days of receipt of the appraisal by the personal representative. A more extensive discussion of the Inventory and Appraisal and valuing of assets in the estate is found in Chapter Two.

Other Expenses

Whenever I see a category like "other expenses" I start to worry. In a Probate, the "other expense" category will include things such as the costs of sale with a real property sale, e.g. realtor's commission, escrow costs, and other closing costs. Another possible "other expense" is taxes, e.g. income tax, property tax, and federal estate tax. When consulting with an attorney, it is always good to ask a question regarding potential other expenses that might arise. Most attorneys don't have crystal balls to see the future, but if an attorney has experience doing Probates, he or she will know the types of costs that might occur in your matter.

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WHEN WILL IT EVER END?

One of the most common complaints about Probate is that it takes forever. Of course, it is longer than the baseball season and longer than a semester of college, and if there are complex issues, it can be drawn out. I try to close my Probates as soon as allowable under the court rules and once all issues have been resolved. How fast a Probate closes is to a large degree the client and his or her responsiveness to me. Another key factor has to do with whether there are unusual or complex issues in the Probate. Those can cause additional and sometimes unpredictable delays.

In this chapter, I am going to take some time to discuss the most common factors or causes of delay in a Probate. Some are entirely unpredictable and unavoidable. Others are avoidable. I will address the following:

- ☐ Client responsiveness delays
- ☐ Attorney caseload delays
- ☐ Asset issues
- ☐ Beneficiary issues
- ☐ Court delays

Client Responsiveness Delays

In my office, when we send documents out, we set a date to follow up with clients. This system helps things to move along and keep files from "falling through the cracks," so to speak. I know that in some offices, no such follow-up procedure is used, and because of heavy caseloads, the attorneys and their staff often wait until the client calls to ask the status. And in pulling the file, it is not uncommon for the

staff to find that a letter with documents was sent out thirty, sixty or ninety days before. This type of case management leads to long delays and contributes to some of the negative stories that people often hear about Probates.

Another problem that exists is that clients often have their own lives which consume their attention. New jobs, new babies, new spouses, new responsibilities in the light of someone passing all result in clients not being as responsive as is ideally required to keep things on track in a probate matter. I have had clients report to me over the years that they don't open their mail from the office because of the dread they feel when they see one of my letterhead envelopes in the mail. Sometimes these actions and feelings can lead to delays that really are avoidable. It seems obvious, but if you want your case to move forward, the best thing you can do is pay attention to it–pay attention to correspondence and calls from the attorney. Follow up with the attorney at least once every month.

Another reason to be responsive and communicate regularly with your attorney has to do with human behavior. If you as the client don't show you care about the case–if you don't call to check, respond to calls and correspondence, provide information and documents request–all other things being equal, many attorneys will simple not make your case a priority. As the saying goes, "the squeaky wheel gets the oil."

Attorney Caseload Delays

Sometimes attorneys market themselves as doing particular kinds of work and are seeking to do volume. This can be a viable business plan, and it can make the attorney successful, but it is not always the best thing for an individual client. When volume is a lawyer's goal, the attorney is less concerned about any one individual case–especially those that are worth less, generate lower statutory fees, or have

limited or no extraordinary fees. Sometimes in high volume offices, delay is a result of the attorney's large caseload. When an attorney has a large number of open cases, he or she has to focus on what attorneys call "putting out the fire." What this refers to is that certain cases are problem cases involving issues that have to be addressed immediately. They have clients or beneficiaries who are difficult to deal with people, who might be calling and harassing the attorney and staff. They may have opposing attorneys who are filing items with the court and causing extra work for the attorney. These types of cases will consume the time and attention of the attorney and his or her staff. Thus, the other cases get little or no attention until the "fire" is put out and before another one starts.

Another problem that sometimes occurs with attorney caseloads is that the attorney primarily practices another type or types of law. Probate is an area he or she would like to do more of but doesn't do on a regular basis. This can cause delays. If the attorney doesn't handle a lot of probate cases or hasn't done them very frequently, he or she will not be a familiar with the forms, the rules, changes in procedures and the general flow of the case. In addition, the lawyer may put off working on the probate file because it is out of the general flow of what the lawyer does on a regular basis. This will cause delays in moving the case forward.

Some attorneys will hire out their probate work to others like probate paralegals and document preparers. It is important to know who is doing and supervising the work done on your file. I don't know why you would pay the same fee to have a paralegal handle your probate matter when you could have an attorney who is experienced in the field do it.

When choosing an attorney, it is important to have some understanding of the type of cases that the lawyer regularly handle. An attorney will not necessarily be

the best reporter of that information. I would look at the website of the business. I would ask the staff when you initially call what areas the attorney practices in–before you state the type of matter you are calling about. The first couple of areas of practice that are stated to you are likely to be the ones the attorney does regularly. The attorney may be competent to practice in other areas, but the office is geared for the areas that consume most of that business's time. Just because someone was a good divorce attorney or criminal attorney doesn't mean he or she will be a good probate attorney. These areas of law are very different from each other and in larger courts, the judges who handle these cases are different as well.

Asset Issues

Asset issues can come in different forms. It would be impossible to list all of the possible asset issues that could come up in the course of a probate proceeding, but I will address several which to some extent are representative of the types of things that can come up when liquidating and transferring assets during a probate proceeding.

With the increase in privacy laws came a great increase in the difficulty of getting information about assets of decedents. The personal representative has to contact the various financial institutions at which the decedent held assets. Sometimes this can be a very tedious and time-consuming process. An attorney can help with this part of the administration by sending letters to the various institutions requesting the forms and paperwork that are needed to close and/or transfer accounts. Oftentimes when my office sends such a request, a packet of paperwork with a letter of instruction will come asking for all sorts of documentation–including the death certificate, stocks, account numbers, personal information of the decedent and so on. It can seem overwhelming, but with some patience, it can be worked

through step-by-step. Usually, the institutions are responsive when they have all the documents properly signed and in their possession.

Another type of issue that can arise is the situation in which a decedent owned or had an ownership interest in a business. If the decedent had a interest in any business the personal representative will have to work on valuing and liquidating that interest if that is possible. Sometimes with business, the value was in the person who owned it, and by the time the personal representative gets in and looks at things, the business can be looted by employees or competitors who steal the book of business. If the decedent owned a business, it could have been in the form of any one of the following business entities: Sole Proprietorship, General Partnership, Limited Partnership, Limited Liability Company (LLC), or Corporation.

Each different type of business entity has its own issues. With a partnership, LLC or corporation, the transfer of ownership should be spelled out in the operating agreement. Hopefully, there is one. Sometimes there will be a buy-sell agreement that will specify the terms of a buy-out. In the case of a business, it is very important for the personal representative to get involved right away in determining the type of business entity, reviewing the documents and consulting with an experienced attorney.

Beneficiary Issues

As with other areas of life, in Probate people will be people. That is to say that sometimes the biggest issues in a probate estate are the beneficiaries themselves. The following is a short list of adjectives that describe some of the beneficiaries of estates I've handled or litigated against:

Certifiable

Paranoid

Brooding

Resentful

Big shot

Black sheep

Do-gooder

Over achiever

Under achiever

Broken-hearted

Mentally Disabled

Physically Disabled

Alcoholic/drug addict

Recovering alcoholic/drug addict

Each person must be met where he or she is. Communication is important between the representative of the estate and the beneficiaries regardless of their status. The beneficiary's situation can make the representative's job more challenging. I only mention this because it can be a source of delay in the Probate since people have issues that can cause them to put roadblocks in the path of a smooth administration.

Court Delays

As you might expect, in the probate process, legal issues can arise. Three common ones are:

- ☐ Beneficiaries who are minors
- ☐ Ancillary Probates (assets outside of California)
- ☐ Court calendar

Beneficiaries Who are Minors

When assets are left to minors, an additional procedure, a guardianship proceeding, must be commenced before the probate estate can be closed. Any assets intended for minors must be distributed into guardianship estates rather than into their names directly. The guardianship is a separate legal entity. It requires that a petition be filed, an investigation be completed by the court and a hearing be held to appoint the guardian. This can take several months, even if no one opposes it. This will most certainly cause a delay in the closing of a probate estate.

Ancillary Probates (assets outside of California)

When the decedent owned real property or other assets outside of California in addition to owning assets within California, an ancillary Probate or other action will have to be filed in the other state to transfer the assets as provided in the decedent's will or via the laws of intestacy. The California court has no authority over assets held in other states. The state in which the assets are located must be brought in to make those transfers. These actions are referred to as *ancillary Probates*. They must be completed before the probate estate in California can be closed out. This can cause delay in closing the probate estate.

Court calendar

In Southern California where I practice, the courts are very busy. They handle many probate and probate-related cases every day of the week. With that in mind, I can give you a rough estimate of how the cases are running in the local Los Angeles County Probate court by way of example. These numbers are not intended as an estimate but are used to illustrate. At different times of the year the calendar load is different. Moreover, in the ongoing budgetary crisis, court resources are often being shifted, so what the court will look like when you file (or when your attorney files)

could be very different from these numbers. Nonetheless, to help you understand the time of a probate matter, I offer the following:

INITIAL HEARING

It is approximately 45-60 days between the filing of a Petition for Probate and the first hearing for appointment. This could be longer depending on the attorney's other cases. If issues are found by the probate attorneys or examiners that are not resolved before or at the first hearing, the original hearing date will be continued 40-60 days to allow time to resolve the outstanding issues. Once the court makes an order for appointment of the personal representative, additional time is required to get the letters issued, the bond submitted and the order signed. If certified copies are required, that could take additional time.

CREDITOR'S PERIOD

Once the Letters are issued, a four-month creditor's notice period must expire before the final petition to close the estate can be filed, assuming all other work has been completed in transferring, liquidating and selling assets. If additional creditors are located later, the time period may need to be extended. Once all assets have been marshalled and appraised, all required notices given and the creditor's period has expired, the final petition to close the estate can be filed. If an accounting is required, that could take some additional time depending on the assets of the estate. Usually the final hearing is held between 45-60 days after the filing of the final petition. If there are no issues, the court will make the order at the hearing, and the written order will be signed within two to three weeks of its receipt by the court. The swiftness of the process depends on different

factors. These include: the court calendar; the attorney workload and calendar; the time of year; requirement and complexity of accounting; responsiveness of the personal representative; and the assets themselves and how long they take to transfer/sell/liquidate.

Distribution of Assets

Once the court has made the order, the assets can be distributed in accordance with the court order. Usually the beneficiaries or heirs will be required to sign a receipt acknowledging their receipt of the assets pursuant to the court order. It can take some time to get these receipts back. They need to be filed with the court and final fiduciary tax returns need to be prepared if required. Once the final returns are submitted, all expenses of administration are paid, and the Ex Parte Petition for Discharge is filed with the court, the matter will be officially and finally closed. This usually will be no sooner than nine months from the filing of the Petition for Probate. It can be much longer. I have had Probates that lasted more than four years. The norm, however, if there is one, is considerably shorter than that.

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HOW COULD WE AVOID PROBATE?

John and Cheryl, a married couple with no children, came to my office to do a will. I asked if they owned real property and they said they did. I started to talk about the benefits of having a trust, but they stopped me before I got very far, saying, "We don't care. We'll be dead. Just give us two wills."

Sometimes people will choose to save the small difference in cost between a will and a trust because they don't have children and are leaving their entire estate to charity or to non-relatives. This is one situation where a Probate couldn't be avoided. In my experience, such situations are the exception, not the rule.

The unavoidable probate situations aside, sometimes it is very easy and inexpensive to avoid Probate. In this chapter we will look at some of the ways to avoid Probate including:

- ☐ Estate Plan with a Living Trust
- ☐ Assets not requiring Probate
- ☐ Beneficiary Designations
- ☐ Joint Tenancy assets

As with most things in life, no guarantees can be made that your relatives will do the right thing, which is to create the appropriate estate plan in order to avoid Probate. As it is often said, "You can't help what your relatives or friends do." They may leave you with no choice but to probate certain assets. However, you can be proactive. You can recommend to your loved ones that they get an estate plan. And you can get one for yourself.

Estate Plan with a Living (*inter vivos*) Trust

As discussed in earlier chapters, one way to avoid Probate is to have all your assets properly funded into a living trust, sometimes called an *inter vivos* trust. It is a trust that is created by an individual or married couple to hold and distribute their assets.

A properly funded trust will be useful to the creators of the trust (Settlors/Trustors) in the event of incapacity as well as upon his/their deaths. A trust can also provide for distribution of assets to minor children, a situation that might otherwise require a court petition to appoint a guardian.

Assets not Requiring Probate

If you own no assets requiring Probate at the time of your death, your estate will not have to be probated. This would be true if, for instance, you owned no real estate and your cash or other personal property was valued at less than $150,000.00. If that were the case, you would avoid a Probate. However, even if you are sure that at the time of your death your assets will not include real estate and the value will be less than $150,000.00, it is important to have a will. The will should specify the person you wish to be your executor–the person who will handle your estate after you pass–and the people to whom you wish your assets to be distributed after your death.

Beneficiary Designation

Another way to avoid Probate as to certain types of bank accounts is to name a beneficiary to those accounts. This designation will allow the financial institution to transfer the assets directly to the person(s) you designate in the percentages that you designate. A beneficiary designation is usually the least expensive option, but also the least flexible option. It only speaks at death, and in California, such accounts are not available to the beneficiary for forty (40) days after the date of death of the owner.

With such accounts, it is also difficult to get contribution for payment of debts that exist after death, such as funeral expenses or medical bills.

Joint Tenancy Assets

Finally, Probate can be avoided if assets are titled in joint tenancy. With joint tenancy accounts or titling on other assets, when a person dies, his or her interest is transferred by operation of law to the remaining joint tenant(s). Usually, all that is required is a death certificate to remove the dead person's name from the account. Like the beneficiary designation, it does little to help in the event of incapacity, and if there are debts of the decedent to pay, getting money back from the joint tenant on an account can be difficult and sometimes impossible. It is a less expensive option, but it lacks some of the benefits of the living trust. It is also an uncertain option because until a joint tenant dies, it is not clear how the property will pass. If a joint tenant dies first, leaving the property entirely to the surviving joint tenant, there is no way to ensure that heirs of the first to die will receive anything. Most likely they will receive nothing. It is something like shooting craps.

Be deliberate

Whatever you decide to do, be deliberate. If you do nothing, the law will decide to whom your property will pass. There is an extensive body of law, the law of intestacy, that states clearly which of your relatives will receive your property. For example, if you are married without children, all of your property will go to your spouse. If you are not married and don't have children, your property will go to your parents. If your parents predecease you, then to your siblings. If you are unmarried and have children, your property will go to your children in equal shares. If any of your children is a minor at the time of your death, a guardianship will have to be set up for him or her to hold the money or property until the child reaches the age of

eighteen (18). Whatever your situation is, the law determines which relatives should receive your property.

As I learned when I was three, death comes to young and old alike. You may not expect to die. You may think that you have plenty of time to prepare your estate plan because you are young. Don't count on it. Better to create an estate plan and not use it for fifty years than to need one and not have created it.

It is not only death that an estate plan address, but also incapacity. If you are incapacitated by an accident, a stroke or some other event or illness, who will step into your shoes? If you have a spouse, he or she will probably be able to do it with little trouble, but if you don't, it can be very expensive for your family members to petition the court to appoint a conservator for you.

As you consider your own estate plan, here are a few things to review:

☐ Understand what you own

☐ Understand how each asset is titled

☐ Don't assume you understand things–ask questions

☐ Find an attorney to be your family lawyer–the person you can ask questions

☐ Avoid self-help; Google is not a substitute for real legal and/or tax advice

☐ Avoid the temptation to be cheap

☐ Avoid non-lawyers (e.g. financial planners, CPAs)

You have probably worked hard for your assets. You probably love your family or your friends and want to give them something if you are no longer around. If you really love them, don't leave them with a mess. Make an estate plan. Be deliberate.

Probate

Making Sense of the Process

What exactly is Probate? You might be surprised to know that even some lawyers don't understand it very well. Probate law isn't the most glamorous area of law, unless the estate that is being probated belongs to some celebrity. But most folks aren't celebrities. People who need Probate usually just want to make it through the process.

Losing a loved one can be difficult enough without having to worry about facing a confusing legal process. As an attorney with extensive experience in Probates, Trusts, Estate Planning and related matters for more than 20 years, Mary Mullin can help you understand the basics of Probate. Read this book and discover the most common misconceptions that people have about Probate. More importantly, learn how you can proceed through the process with confidence and peace of mind.

If you need a better understanding of Probate – or want to learn how you might be able to avoid it – this book is a must-read. Probate can be navigated successfully with the right expertise!

Attorney Mary Mullin has been practicing and teaching in the legal profession for more than 20 years. She has run her own business since 1993 and has extensive experience in Probate, Trusts, Estate Planning, Family Law, Business Law, Collections, Business Entities and Formation, Real Estate Law, Landlord-Tenant Law, and Bankruptcy Law.

Mary Mullin