

# The California Probate Process

By Nancy Andreasen

**\*\*This report is for informational purposes only and should not be construed as legal advice\*\***

A California Probate is necessary when a decedent dies testate (with a Will) or intestate (without a Will) with a California estate value in excess of \$150,000. (If the decedent had a formal Trust AND the property/assets are held in the Trust, then Probate will NOT be necessary. This means the property was recorded by the county recorder's office, in the name of the trust—not the individual's name.) If the property was not in the trust and recorded, it goes through probate. Reverse Mortgages--generally the Deed is not placed back in the Trust and recorded, so, unfortunately, it has to go through probate. If the property is being sold, it is generally done during the probate process, once you are appointed the Executor or the Administrator. The Executor has less liability and there are fewer disclosures when sold as a probate sale.

IF the estate will be selling property, the general 'rule of thumb' is to file for Full Authority and a majority of probates are filed Full Authority. There are reasons for filing for Limited Authority--it gives an added layer of protection to the Executor/Administrator of the estate. If the Executor/Administrator does not have funds for the bond, or if there is fighting between the heirs, it will also most likely be filed as Limited Authority. It does take longer to go through the probate process, and the sale will require court approval. Also, with Limited Authority, be prepared to pay additional attorney fees for Extraordinary Fees, which are allowed by the court.

IF you don't already have an attorney, there are several whom I have worked with and have done excellent work for my clients. If you are handling it yourself, known as 'pro per', and find it overwhelming or get 'stuck' there is also an excellent paralegal I can recommend to you.

## **Overview of the Process**

For starters, a formal "Petition for Probate" is filed in Probate Court and a personal representative of the decedent's estate is appointed by the Court to administer the decedent's estate. A personal representative can have various names (Executor, Administrator, etc.), depending upon whether or not the decedent left a Will.

Usually, in a Will, the decedent names an "Executor" to act as the estate's personal representative. If there is no Will or the decedent failed to name an Executor, the court will appoint a personal representative called an "Administrator." The personal representative can be any interested person, including a family member, friend, or even a creditor of the decedent.

As a personal representative (it is a big undertaking) you will be responsible for:

- Cataloging all property of the decedent (including real property and personal property);
- Paying any debts, claims or taxes that are due;
- Collecting rights to any income (royalties, stock dividends, etc.) to which the deceased was entitled;
- Settling financial and property disputes;
- Filing the decedent's final income tax return;
- Filing the estate tax return, if needed;
- Preparing an accounting of estate assets and expenses;
- Litigating creditor's claims; and
- Distributing or transferring the remaining property to heirs.

As a personal representative of an estate, you may be required to post a bond to serve. If the Will waives bond and the named Executor is appointed, no bond is required. However, if a Will does not waive a bond or the Administrator lives out of state, then a bond will be required. The amount of the bond required is based on the value of the estate, minus any mortgages. The “cost” of the bond will depend on the value of the estate and the personal representative’s credit score. Thus, a low credit score--the more a bond will cost. The bond is based on the total estate value and is typically calculated at .05% Example: \$100,000 of coverage will cost \$500. A \$500,000 estate will cost \$2,500.

### **Overview Continued--For those who want to know more . . .**

The Petition for Probate must be served on all beneficiaries named in the Will, if any, and all intestate heirs of the decedent. Intestate heirs are defined in Probate Code Section 6400-6414. Also, be sure to check the court's local rules to see if any special procedures are required in the county you will be filing in.

Once the personal representative is appointed at the first hearing (assuming there are no challenges to the appointment) the Court will issue to the personal representative “Letters Testamentary” if there was a will and "Letters of Administration," if there was no will. The “Letters Testamentary or Administration is the official document that you will show to the banks, title, etc. to show that you have Court authority to act on behalf of the decedent’s estate.

After the appointment, the personal representative will need to serve "Notice to Creditors" (be sure to include a blank "Creditor's Claim" form with the notice) on the California Franchise Tax Board (the FTB is mandatory to ensure the decedent’s California income taxes have been paid) and all known creditors of the decedent. Creditors include credit cards, utilities, landlord, and anyone else the decedent may owe money to. Be sure to be over-inclusive, not under-inclusive. The creditors will typically file a “Creditor’s Claim” with the probate

court and the personal representative will have to decide whether or not to pay the claim. The creditors have 4 months from the date of service of notice to file a claim or “technically” their claim is barred.

The personal representative will be required to file an “Inventory” of all of the estate assets within 4 months of being appointed. There are potentially 2 attachments to the inventory. Attachment No. 1 is for listing cash and cash equivalent accounts and is completed by the personal representative.

Attachment No. 2 (which is the same form as Attachment No. 1) is for listing everything else and must be completed by the Court assigned “Probate Referee.” (Probate Referee is an overpaid Assessor. Only one time have I seen a Probate Referee go into a property.) All assets of the estate must appear on these attachments. If items are missed when the first Inventory is filed then supplements and amendments can be filed.

After the 4-month mandatory creditor, the period has run the personal representative can file a "Final Account and Petition for Final Distribution." It is at this time that the personal representative can request compensation for serving. The compensation is equal to the statutory fees that are awarded to the attorneys. The overall time frame, for uncomplicated probate is typically 9 to 12 months--IF papers have been filed correctly, on time and also it depends on the court's calendar.

The statutory attorneys' and personal representative fees for a Probate are broken into statutory fees and fees for extraordinary services. Statutory fees are calculated on the basis of the value of the estate as follows: 4% of the first \$100,000, 3% of the next \$100,000, 2% of the next \$800,000, 1% of the next \$9,000,000, .005% of the next \$15,000,000, and for all amounts above \$25,000,000 a reasonable fee to be determined by the Court. In addition, the gross value of the estate is considered, not the net value. As such you get no discounts on value for mortgages or other debts. In addition to the statutory fees

set forth above, attorneys and representatives are entitled to additional fees for extraordinary work, such as work involved in real estate transactions and tax work. While such fee requests have to be submitted to the Court for approval the fees can range anywhere from \$390.00 to \$490.00 per hour, depending on the complexity of the work.

I hope you find this helpful. Again, this is an 'overview' of the probate process and not legal advice.

If I can be of any service to you, or if you have any questions, please feel free to contact me directly.

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