

## SALES OF PROPERTY

Sale of any kind of property are allowed only when the Will specifically allows; otherwise, they are only allowed in order to raise cash to pay debts, pay legacies, Family Allowance, expenses of Administration, taxes, or "for the advantage, benefit, and best interests of the estate". If a item of property has been specifically bequeathed to someone, the property cannot be sold without the beneficiary's consent, unless there is no other property available for sale. The court may require a hearing to see if there is any way to avoid the sale.

## REAL PROPERTY

Sales may be public or private: either is OK, but usually a sale is private and done through a broker. But a personal rep should consider doing an auction if the particular piece of property is not drawing much interest.

## FULL IAEA METHOD:

If the personal rep has full IAEA powers, he/she can prepare a Notice of Proposed Action and attach a Proof of Mailing form. If no objection is received within 15 days, the sale goes forward. It is important to work with the realtor and escrow company, title company, and lender. The attorney will have to provide a certified copy of the Letters, Notice of Proposed Action with Proof of Service, and perhaps other documents to escrow. Often a letter from the attorney is required stating that no estate taxes are due.

Most courts prefer that sales proceed using this method, rather than the more formal procedure outlined below (where a court hearing is required). If you didn't get your client full IAEA in the initial petition for probate, you can file a petition after the fact and set it for a hearing. In authorizing full authority, the judge will require your client to post a higher bond equal to the amount you expect to realize from the sale. Make sure you ask your client whether he/she has any credit problems that would prevent them from getting bonded for a higher amount.

## LIMITED IAEA OR NO IAEA:

1. Prepare an Ex Parte Petition for Exclusive Listing. These are usually good for 90 days and authorize the broker/agent to act for the estate.

2. Sales Contract/Deposit Receipt: Once the agent finds a buyer, the Executor signs as for the estate, SUBJECT TO COURT APPROVAL.

3. Notice of Sale: The attorney must publish a Notice of Sale in a local newspaper (three publications over a ten day period) unless the Will authorizes or directs the sale. Once the publication is complete, the newspaper (or the attorney) files an Affidavit of Publication with the Court. In actual practice, the publication can be done at any time once the personal rep

decides a sale is necessary. However, if the sale process takes longer than a year, it may be necessary to re-publish.

4. Inventory & Appraisal: The attorney must get the property reappraised if the original appraisal is dated more than 12 months prior to the court hearing. Since the original appraisals are done as of the date of death, any hearing held more than a year after that date will require reappraisal.

5. Deposit: At one time a 10% deposit was required, but courts generally do not demand this any more.

6. Escrow: Should you open before or after the hearing? That depends on whether you think someone will overbid at the hearing. If this is unlikely, the buyer can open escrow and get a head start on the process. However, if the sale is not consummated, getting the deposit back may take some effort.

7. Financing Problems: The buyer may assume the note that the decedent owed on, but courts are wary of this unless the estate is off the hook completely.

8. Report of Sale: Once the personal rep signs the contract, the attorney has 30 days to file a petition for confirmation of the sale. The petition is entitled "Report of Sale and Petition for Confirmation of Sale of Real Property." The petition is set for hearing by the court, usually in four or five weeks time.

9. Additional Bond: The court may require a higher bond if the initial bond was only for the amount of the personal property. The court will usually take into consideration the costs of sale and escrow payouts in determining the bond amount.

10. Notice of Hearing: At the hearing, anyone can bid on the property if they can come up with the minimum overbid. (Avoid this by calling potential bidders into office.) The first Overbid is calculated as follows (and is included in the Petition):

[Initial price] + \$500.00 + 5% of initial price; OR  
[Initial price] + 10% of 1st \$10,000 + 5% over \$10,000

11. The Petition must list the personal rep's efforts to expose the property to the market. See e.g. Orange County rule 606.07, which lists several things that the attorney must list in the petition to convince the court that the personal rep has used his/her "best efforts" to sell the property:

- a. Several brokers?
- b. Ad in papers?
- c. Multiple listing?
- d. Many prospective buyers?

- e. Sign on Property?
- f. Caravans?
- g. Open houses?

12. At the hearing, anyone can bid on the property, as long as they are willing to offer at least as much as the first overbid. If someone overbids, ask them if they have a check for at least 10%. Some courts provide forms to the buyers to make formal written offers if they become the successful bidders. Once the overbidder has made his offer, the court then sets the amount that each person must offer (for example, \$1,000 increments) over the previous bid if they want to stay in the bidding. Basically, then, the court merely conducts an auction.

13. Order: Once the court approves the sale, either to the original buyer or an overbidder, the attorney prepares the Order Confirming Sale of Real Property and provides a certified copy to the escrow company.

14. Commissions: Brokers/Agents commissions are usually fixed by the court, although the amount charged by realtors is generally known in any particular area. 6% is typical in California for improved real estate, but 10% is usually allowed for vacant land. But check local rules of court. Los Angeles allows only 5% for improved real estate, while Orange County will allow 6%.

Where an overbidder is successful and is represented by a broker, the commission is split between the old and new brokers, but the new broker gets slightly more: the original broker gets 1/2 of the commission on original price, while the new broker gets the balance.

In no event can a commission paid to a broker who produces a successful bidder other than the original bidder exceed one-half the difference between the original offer and the successful overbid. The reason for this is that there must be a net gain to the estate.

If the overbidder has no broker, the original broker gets all of the commission on the original price.

### PERSONAL PROPERTY SALES

The reasons for the sale of personal property are the same as for real property: either the Will must authorize or direct the sale, or the personal rep must give the court reasons for the sale: to pay debts, expenses of administration, etc.

When the personal representative has full or limited IAEA, it is only necessary to mail a Notice of Proposed Action to all interested persons.

If the personal rep has NO IAEA, it will be necessary to prepare a Petition (no court form) asking for confirmation of the sale. Notice of Sale is not required to be published if the Will authorizes or directs the sale. Otherwise, publish the Notice as in the case of real property.

Other types of sales may be allowed, particularly if the personal rep has independent powers:

Garage sales

Auctions (get court order authorizing if no IAEA)

Give the balance to Goodwill or junk it: If the executor has independent powers, do Notice of Proposed Action of intent to abandon/junk the property.

No reappraisal is needed, but you should sell at or near the appraised value to avoid problems. If a hearing is required, the court can sell to the highest bidder.

### SALE OF SECURITIES OR DEPRECIATING PROPERTY

Securities usually means stocks or bonds. These can be sold Ex Parte (even if no IAEA), and no Notice of Sale is required. Use the Judicial Council form and file it with the court. No hearing is held. If the executor has independent powers, just sell the stocks or bonds. It is not necessary to do a Notice, but it might be a good idea anyway (unless the securities are not "listed" on a stock exchange; then you should do a Notice).

Over-the-counter securities can be sold ex parte also, but you should tell the court their most recent bid/offer.

Types of depreciating property:

Cars, boats, Leisure World condos, mobile homes. Orange County Rule 6.04 says that you can sell without notice if a loss or expense will be incurred by keeping the property (insurance, storage charges, etc.). In some cases, an item (such as a cooperative apartment) can be sold as either a security or depreciating property. Use the Judicial Council form.

### LEASES

A lease of property can be entered into by the executor with independent powers merely by mailing a Notice of Proposed Action to the appropriate people. Notice is not necessary, however, if the lease is for less than one year, or if it's for personal property.

Without independent powers, the executor must get court approval, unless the rent does not exceed \$1,500/month and the term is under 1 year, or it's only a month-to-month tenancy. However, the lease must be to the estate's advantage. If court approval is necessary, the executor must file a petition with the court and set for it for a hearing; the petition must show a description of the property, the term of the lease, the rental conditions, and attach a copy of the lease. Publication of a Notice of Intention to Lease is required unless the Will authorizes the executor to lease the property. At the hearing, the court can consider new offers to lease at more favorable terms. But it must be acceptable to the executor. The Court generally won't approve leases over 10 years, and can't if a beneficiary objects (except for oil and gas leases).

The actual lease document must state that it is given by authority of the court, giving the date of the Order. The Order must be recorded, just like a deed.

### PERSONAL REPRESENTATIVE'S LOANS

An executor with independent powers must mail a Notice of Proposed Action to the interested persons outlining the proposed borrowing and the reasons. However, if the executor intends to mortgage real property (give a note secured by a Deed of Trust), he/she must have FULL independent powers to avoid a court hearing. Otherwise, court approval will be necessary.

With NO OR LIMITED IAEA, it is required that the personal rep file a petition with the court, telling the purpose for the loan (necessary to pay legacies, debts, encumbrances, expenses, etc.) and indicating that the loan is to the advantage of the estate instead of selling. The petition must give the terms (how much is to be borrowed, terms of repayment, etc.), and indicate whether any security is to be given for the loan (collateral). The court may require an additional bond to be posted if one was originally required. Again, if a Deed of Trust is to be given on real property, a court hearing is required, unless the executor has full powers.

Following the hearing, the attorney prepares an order authorizing the loan and records a certified copy of order (or sends a certified copy to the loan company, along with a certified copy of the Letters).

### PETITIONS TO COMPEL TRANSFER OF PROPERTY

#### PC 850, et seq. (formerly 9860 - 9868)

Two situations occur often that require what is commonly known as an 850 (formerly 9860) petition:

1. Someone claims that property in the Decedent's name actually belonged to someone else;
2. The estate claims that some other person holds property that belonged to the decedent.

This petition can be used for an uncompleted escrow contract, or contracts to be performed at death. Sometimes people will take property from the decedent immediately after death, which should rightfully belong to the estate. Or the decedent might have agreed to keep some item for another person prior to death. This latter situation occurs when the decedent has agreed to give (or sell) his car to an heir. Prior to the actual (or physical) transfer, the decedent dies.

It is necessary to file a petition with the court, which the clerk sets for hearing *at least* 30 days away. Notice and a copy of the petition must be personally served on all persons named as respondents, the executor, and/or trustee, at least 30 days prior to the hearing (which is why

you should probably ask the clerk to set the hearing 45 - 60 days off). When serving the executor or trustee, you *may* have to ask the clerk to issue a Citation to get personal jurisdiction over him/her (although not all courts require the issuance of a citation; check local rules of court). Other courts do not require a Citation, but merely follow the Probate Code in requiring personal service of the Notice of Hearing form. Los Angeles County local rule 10.24 requires that the caption of the petition reference Pr.C. section 850 and that the hearings be set at least six weeks off. In addition, the Notice of Hearing form must contain a description of the property that is the subject of the petition and a statement that any person interested in the property may file an answer to the petition.

Other interested persons (e.g., other heirs, beneficiaries, or those requesting Special Notice) should be mailed a Notice of Hearing with a copy of the petition at least 15 days before the hearing.

Any interested person can respond and do discovery, etc., just in the case of a civil lawsuit. In addition, if the action affects real property, a Lis Pendens can be recorded to prevent its transfer while the case is pending. The court must grant reasonable continuances so that any interested party can respond or perform discovery.

If a civil action is pending (yes, the petitioning party can also file a civil case in addition to the probate case), the court must abate this action until the civil case is over, or it can refer the matter to the civil court for trial.

If the executor has independent powers and wishes to complete a contract entered into by the decedent, he should mail a Notice of Proposed Action to the interested persons outlining the action to be taken.

### PETITION FOR INSTRUCTIONS (PC 9611)

Any Executor/Administrator can petition the court for instructions when he is confronted with a difficult situation. There are three basic requirements before the court will entertain a petition for instructions:

- a. No other procedure is provided by law;
- b. It's within the probate court's jurisdiction;
- c. It's within the Court's discretion to grant.

Be forewarned: a petition for instructions is NOT an alternative method of getting court approval merely because the attorney or the personal rep doesn't know what else to do. It is necessary to give the court all the facts, quote law if appropriate, and give the court choices (with suggestions, as well).

The following are examples (but not exclusive) as to the types of questions that the court will consider when a petition for instructions is filed:

1. Are the provisions in a Will mandatory or precatory?
2. How should the executor vote corporate stock in a closely held corporation.
3. Is property community or separate?
4. Can heirs in a foreign country inherit (treaty?)?
5. Has ademption (satisfaction) occurred? Is an asset no longer in existence?
6. Does the executor have the authority to hire counsel, or defend or prosecute a difficult lawsuit (use IAEA?)?
7. Should the personal rep allow (or reject) a large and somewhat questionable creditors' claim?

Check local rules: they may give you some clues as to how the court will act in any particular area.

Also, if someone wants the personal rep. to act in a specific way and he won't, any interested person can file a PC 9613 petition and allege that the estate will suffer great or irreparable harm if petition isn't granted. Suppose, for example, that the heirs want the executor to vote stock in a close corporation in a specific way and he won't. The heirs can file a 9613 petition and ask the court to order him to do so.

Additionally, anyone can petition under PC 9614 to suspend the executor's powers if it appears that the personal rep. may take some action that would unreasonably jeopardize the interests of the Petitioner. In the above example, if the executor was about to vote the stock in a manner apparently contra to the wishes of the heirs, this type of petition would be appropriate.

### DETERMINATION OF HEIRSHIP

#### PC 11700 - 11705

A Petition to Determine Heirship, also known as a Petition to Determine Entitlement to Distribution, can be filed to determine what a Will means (interpretation of the Will), or it can be used to determine who gets what. Also, questions involving the estate or the Will can be solved.

In the petition, the attorney should give the judge an analysis of what the problem is, how

the Will can be interpreted, or whatever is pertinent. In most cases it will be necessary to give the judge Points and Authorities on pertinent areas of the law. After filing the petition, the attorney gives notice, and mails copies of the petition to all heirs, beneficiaries, etc. The executor is supposed to take a neutral position (formally), but typically gives the judge a suggestion on how he/she should rule. The Notice of Hearing should inform the heirs that they have the right to file a "Statement of Interest" through counsel. This is a statement setting forth the heir's interest in the estate and the petition. No other pleadings are necessary, including answers/responses.

This type of petition can also be used to establish an equitable parent-child relationship, the validity of a marriage, the share of an heir, etc.

### PETITION TO ESTABLISH FACT OF DEATH

#### PC 200 - 204

This type of petition, which is usually filed ex parte, can be used to obtain a court determination whenever title to property is in question as a result of someone's death. Sometimes there's a mistake on the Deed, or the person's name is spelled incorrectly. It can also be used to terminate a joint tenancy when court approval is desired (rather than using the Affidavit - Death of Joint Tenant procedure).

If there is a pending probate action, the petition can be filed under the existing case number, and no additional filing fee is required. It can also be filed **with** the Petition for Probate.

The petition can be filed by the personal rep or any interested person, but must be filed prior to final distribution. If the petitioner indicates to the court that there is "no known opposition" to the petition, it can be heard ex parte. Otherwise, it must be set on the court's regular calendar, and notice must be given. Once the judge has made his/her ruling, a certified copy of the order must be recorded in order to transfer real property.

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8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF ORANGE

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11 Estate of: ) CASE NO. A 123456  
12 I. M. DECEASED, )  
13 ) PETITION BY EXECUTOR TO ESTABLISH  
14 ) ESTATE'S CLAIM OF OWNERSHIP TO  
Deceased.) ITS TRANSFER TO THE ESTATE.  
I. L. GETRICH, ) [Probate Code § 850]  
15 )  
16 ) Petitioner, )  
17 )  
18 vs. )  
19 )  
TAMMY DECEASED and )  
18 DAVID DECEASED, )  
19 )  
Respondents. )

20 Petitioner, I. L. GETRICH, Executor of the above-named estate,  
21 alleges as follows:

22 1. The decedent died on December 1, 1994. Petitioner is the  
23 surviving spouse of the decedent. Petitioner was appointed  
24 executor of the estate on January 31, 1995, and has acted as such  
25 executor ever since.

26 2. Prior to the time of decedent's death, decedent  
27 transferred a savings account and checking account at Home Savings  
28 of America to her two children, David Deceased and Tammy Deceased,

1 along with approximately 25 U.S. Series EE Savings Bonds. The  
2 total value of the two accounts is approximately \$39,611.93, while  
3 the bonds have a face value of approximately \$12,500.00.

4 3. Petitioner has demanded the return of this money and  
5 bonds to the estate, but as of this date, neither has been  
6 returned.

7 4. Decedent's Will states that Petitioner is "to have all  
8 our savings accounts..."

9 5. Petitioner requests that the court, pursuant to Probate  
10 Code Section 850, determine that title to the property described  
11 herein is vested in Petitioner as administrator of the decedent's  
12 estate. Petitioner further requests that this court exercise its  
13 equitable powers to hold that David Deceased and Tammy Deceased are  
14 constructive trustees and hold said property in trust for the  
15 Estate of I. M. Deceased, deceased.

16 WHEREFORE, Petitioner prays as follows:

17 1. For an order determining that the property described  
18 herein belongs to the Estate of I. M. Deceased;

19 2. That David Deceased and Tammy Deceased be directed to  
20 convey said property to Petitioner as executor, and that David  
21 Deceased and Tammy Deceased hold said property as constructive  
22 trustees for the Estate of I. M. Deceased;

23 3. For issuance of a citation to David Deceased and Tammy  
24 Deceased;

25 4. And for such other relief as the court deems proper.

26 Dated: \_\_\_\_\_

\_\_\_\_\_  
I. L. GETRICH

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Alan D. Davis  
Attorney at Law

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VERIFICATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on \_\_\_\_\_ at Santa Ana, California.

\_\_\_\_\_  
I. L. GETRICH

ORDER

Let a citation issue.

Dated: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

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8 | SUPERIOR COURT OF CALIFORNIA  
9 | COUNTY OF ORANGE

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11 | Estate of: ) CASE NO. A 123456  
12 | I. M. DECEASED, )  
13 | ) PETITION TO DETERMINE ENTITLEMENT  
14 | ) TO DISTRIBUTION.  
14 | \_\_\_\_\_ Deceased.) P.C. SECTION 11700

15 | I. L. Getrich, Executor of the estate of I. M. Deceased,  
16 | alleges as follows:

17 | 1. Decedent died testate on December 1, 1994, a resident of  
18 | Orange County, California.

19 | 2. Letters Testamentary were issued to petitioner on  
20 | January 31, 1995, and petitioner has acted as executor with full  
21 | independent powers ever since.

22 | 3. No order of final distribution has been entered.

23 | 4. Decedent's Will contains an ambiguity in that it attempts  
24 | to distribute property to Arthur Smith, decedent's grandson,  
25 | pursuant to Paragraph Seven as follows:

26 | "To ARTHUR SMITH, my grandson, I leave the  
27 | property located at 5555 South Main Street,  
28 | in the City of Santa Ana."



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9 COUNTY OF ORANGE

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Estate of: ) CASE NO. A 123456  
)  
I. M. DECEASED, ) EX PARTE PETITION TO ESTABLISH  
) FACT OF DEATH  
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)  
Deceased.) [P.C. SECTION 200, et seq.]

Petitioner, I. L. Getrich, alleges as follows:

1. Decedent died testate on December 1, 1994, a resident of Orange County, California. Petitioner is her surviving spouse. A copy of her death certificate is attached hereto as Exhibit A.
2. At the time of her death, decedent owned unimproved real property in Anaheim, California, in her name legally described as:  

Lot 1111, Tract 2222, as per map recorded in Book 3333,  
Page 4444, of Maps, records of Orange County.
3. Prior to her death, the property had been owned by petitioner and decedent as joint tenants. On September 18, 1994, petitioner and decedent deeded said property to decedent and her two children, Harvey Deceased and Goldilocks Deceased as joint tenants.
4. Sometime thereafter, but prior to her death, someone

1 changed the Grant Deed to read: I. L. Getrich and I. M. Deceased,  
2 husband and wife as joint tenants, hereby grant to I. M. Deceased,  
3 as her separate property... The deed has been obviously altered  
4 from the original. A copy of the deed is attached hereto as  
5 Exhibit B.

6 5. Petitioner desires that the court establish the fact of  
7 decedent's death, and that decedent died owning the above-described  
8 real property in joint tenancy with her two children named above.

9 6. Petitioner knows of no opposition to this petition.

10 WHEREFORE, petitioner prays as follows:

- 11 1. For an order establishing decedent's death;
- 12 2. For an order establishing that decedent owned the above-  
13 described real property at her death in joint tenancy with her two  
14 children named herein.
- 15 3. For such other orders as the court deems proper.

16 Dated: \_\_\_\_\_

17 \_\_\_\_\_  
18 I. L. GETRICH

19 I declare under penalty of perjury under the laws of the State  
20 of California that the foregoing is true and correct.

21 Executed on \_\_\_\_\_ at Santa Ana, California.

22 \_\_\_\_\_  
23 I. L. GETRICH

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