

OVERVIEW OF PROBATE ADMINISTRATION

Why do we need probate? What is it? Almost everyone outside of the legal community asks these questions, along with some legal professionals, as well.

Probate is the legal process by which a person's property is transferred to his heirs or beneficiaries upon his/her death. Without probate, the property sits in limbo as far as ownership is concerned. Often, the heirs assume that once dad and mom have died, that they are just naturally entitled to the property, as long as they pay the mortgage and taxes. It's only when they try to sell or mortgage the property (usually near the close of escrow) that they discover that they can't do either because they don't own the property. That's when they seek the advice of a probate attorney, who must then explain the procedures to them.

Probate is initiated by filing a petition with the superior court. Where do you file? Generally in the county where the decedent resided. But occasionally an estate is probated for a non-resident who owned property in California. In that case, probate is begun in any (one) county where the asset is located. Only one probate is necessary, even though there may be assets scattered throughout the state.

Once the petition is filed, along with any Will and Codicils the decedent may have left, the court automatically calendars it for a hearing. The attorney's job, prior to the hearing, is to mail notices to each heir, beneficiary, or other interested person, and publish a formal notice in a local newspaper. If there was a Will, at least one of the witnesses must sign a declaration that he recognizes his signature on a copy of the Will. If all of these details are taken care of prior to the hearing, the judge will normally approve the petition without the necessity of the attorney showing up ("RFA - recommended for approval"). Upon submission of the Order, the judge signs it and the client is appointed as the personal representative (executor or administrator) of the estate.

The attorney's job after the hearing is to see that the right paperwork is sent to the court. In addition to the Order, it is necessary to have "Letters" issued by the court, which represent the personal representative's official badge of office. With these Letters, the personal representative can open an estate bank account, sell assets (subject to probate law, of course), and carry on the affairs of the estate. In order to issue the Letters, the court will also require the filing of the "Duties and Liabilities" form, by which the executor lets the court know that he is aware of what the job of executor entails. Additionally, if the court ordered the executor to post a bond, the attorney must arrange for the issuance of a bond by a company licensed to act as surety in California.

After issuance of the Letters, the personal representative must do several things. He must inventory the estate assets and have them appraised (the court will appoint a probate referee to appraise everything except cash items and bank accounts). He must notify, in writing, any known creditors of the decedent. And he must take charge of the estate assets, preserve them, and, where appropriate, invest them. When necessary, the estate representative will sell assets

in order to raise cash, pay bills, or for some other lawful purpose. Estate sales are an important part of most probates, so the personal representative must be made aware of this from the outset.

It may be necessary to file the decedent's final income tax returns (both state and federal), and in this regard it also may be required that the estate file income tax returns. Because the estate is a separate income-producing entity (in many cases), the executor should obtain a taxpayer's identification number from the Internal Revenue Service, for use on all subsequent tax forms. This number can also be used when opening up an estate bank account, and will generally be provided to escrow during a sale of real property.

When all of the estate business has been taken care of, and all of the creditors claims have been satisfied, the estate is ready to be closed. Four months must have elapsed since the Letters were issued. The executor is required to file a petition with the court asking for permission to distribute the estate assets to the heirs/beneficiaries. At the same time, the executor must file a formal accounting (including income and expenses), and the estate attorney is allowed to request payment for his or her services. Once the court approves the petition, the judge will sign a final decree allowing the assets to be distributed. Each person receiving property (cash or otherwise) will sign a receipt, which is then filed with the court. Once the receipts have been filed, the personal representative can ask the court to be discharged from his or her duties. The judge signs an order to that effect and a copy is supplied to the bonding company in order to release the bond. At that point the probate is over.

COURT STRUCTURE

Probate court is a division of the superior court. A probate court judge is merely one of the judges who sit in that court. They are usually assigned by the presiding judge of the court for a two year stint. Since many probate judges have little or no experience in probate matters (including guardianships and conservatorship), and the volume in this area is enormous, most courts have developed a staff system to assist the judge. (In some court systems, a commissioner, rather than a judge, is assigned to handle probate matters. Commissioners are hired by the court system to hear certain types of legal matters, generally family law, juvenile, and law and motion, in addition to probate. They sit as judge pro tems and can only hear cases when the parties agree to it.)

Typically, courts hire examiners to review each petition or other document that is filed in probate court. Often these examiners are attorneys, but even where they are not, they are always quite knowledgeable about probate matters. Their job is to scrutinize each case and make sure that there are no mistakes, problems, or errors. They write a review of each case before the hearing into "notes", which the judge and attorney can read. If there's a problem (a defect), the attorney will want to know before the hearing. In some counties, these notes are mailed or faxed to the attorneys. In others, a phone call is all it takes to obtain the notes. Some problems are easily corrected, before the hearing, with a supplement to the petition. Others require the attorney to continue the hearing to another date. Continuances can generally be done over the phone the first time around. Subsequent problems, however, usually require a court

appearance so that the attorney can explain to the judge why another continuance is necessary.

When a case has been reviewed and there are no problems, it is "recommended for approval" (RFA) by the examiner. At the time of the hearing, the judge announces to the assembled courtroom that he/she is going to read a list of those matters that have already been pre-approved. If anyone has an objection, he or she is free to voice that opposition. Otherwise, the matter is approved, and the judge signs a court order to that effect. If the matter is to be continued, the judge announces the date of the next hearing, typically four to five weeks in the future, and moves on to the next case. Depending on the court, the probate calendar may contain anywhere from twenty to over one hundred matters in a morning. For that reason, the job of the probate examiner is very important. It would be virtually impossible for the judge to review that many matters and still be able to handle contested matters, trials, settlement conferences, etc.

Most attorneys are too busy to run down to the court and file their own petitions, supplements, etc. Instead, they hire an attorney service that does the job for them. The attorney service can additionally serve a summons or citation in the case of will contest or other problem matter. Regardless of whom the attorney has file the papers, the clerk of the court will stamp the petition or other documents with a "filing stamp" and case number, give you a hearing date by writing the date on your copy of the papers, and returning to you one or more copies for your records. You must also pay a filing fee to the court. This is a one-time fee and does not have to be paid again for the probate unless someone else "appears" in the case. For example, if a Will Contest is filed, the contestant must also pay a filing fee. We call these fees "appearance fees".

Once the hearing on your petition has been held, the judge will (hopefully) approve the petition. The attorney or his staff must then submit the order and any other documents, depending on the petition, for the judge's signature. It is important to search the Internet a few days or so (or even a couple of weeks) before the hearing and see if the case has been recommended for approval in order to avoid making any unnecessary trips to the courthouse. These can waste the attorney's time and money (don't forget those parking fees!).

EX PARTE

In emergencies, an attorney can file a petition for a temporary order without giving the usual fifteen days notice to the heirs/beneficiaries. However, even in such cases, most courts require at least five days notice. In these situations, the attorney can run down to the court, petition in hand, and ask to speak to the probate examiner/attorney or judge and have the emergency order signed. Reasons for these vary, but could include problems that occur to a business that you are probating, emergency need for cash in a bank account, or issuance of Special Letters of Administration for a variety of purposes. It is important to check the court's local rules of practice to see if they have any particular way of doing things. All courts have local rules (probate policy memorandum), but only the major courts (L.A., Orange, San Francisco, San Diego) have comprehensive rules for most situations that can arise. A person practicing

probate law must familiarize himself with these rules for the counties in which he comes into contact. Copies can usually be purchased through the county clerk or the Los Angeles Daily Journal.

CONTINUANCES

If a matter cannot be approved for any particular reason, or the attorney is required to appear in the court and cannot be there, a call can usually be made to continue the case to the next available date - typically four to five weeks off. Courts will try to work with attorneys on this, but the general rule is you get one "free" continuance; that is, no reason is necessary. The next one, however, may require a personal appearance in the court to explain to the judge why you need another.

Many courts are easily accessible by phone, and it is important to have the phone numbers for the courtroom, probate examiner or attorney, and clerk available. However, with modern technology, more and more courts are putting probate notes on the internet. Coupled with the congestion and budget cuts that have hit the courts, many courts have now passed rules disallowing phone calls. Instead of "talking" to the probate examiner, you now e-mail them.

If the attorney is going to be late to court, he must call the courtroom clerk and ask to be placed on "second call" or risk having his matter continued, taken off calendar, or worse: being held in contempt of court. It is important to be courteous and properly dressed in court. And always be on time!

DEFINITIONS

PERSONAL REPRESENTATIVE - can be an executor, administrator, administrator cta, or a special administrator; the person authorized by the court to act on behalf of an estate.

EXECUTOR - a person nominated in a Will to be the personal representative.

ADMINISTRATOR - a person who administers the estate of an intestate decedent (no Will).

ADMINISTRATOR CTA - a person who administers the estate of a decedent who died testate without naming an executor, or whose executor cannot or will not act.

SPECIAL ADMINISTRATOR - a person appointed on a temporary or emergency basis to administer an estate.

ANCILLARY ADMINISTRATION - administration of an estate that is secondary to the main or primary probate action.

INDEPENDENT ADMINISTRATION OF ESTATES ACT - allows the personal representative to take certain actions without prior court approval.

PROBATE EXAMINER - the person who reviews each petition (or other document) filed in a probate case and checks for accuracy, mistakes, problems, etc. Could be either an attorney or paralegal (depending on the court).

PROBATE NOTES - the probate examiner's written notations after he or she has reviewed the documents in each case. Generally these are available at least a week before the hearing so that mistakes can be corrected.

LOCAL RULES - each court's particular policy memorandum regarding an area of law. They cover most aspects of law: criminal, civil, probate, family law, law and motion, etc.

EX PARTE - the filing of a petition without giving notice, or giving very little notice, in order to get a court order in an emergency.

BOND - an insurance policy required by the probate court in certain instances or at the discretion of the judge. Usually waived in a Will.

NOTICE - required to be given to all heirs, beneficiaries, or other interested persons because of the due process requirement of the Constitution.

WILL - A document in writing that disposes of a person's property after death.

LETTERS - A document issued by the court that is the personal representative's official "badge of office."