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Estate Planning & Elder Law

Probate

Probate in California is the court-supervised process to resolve the legal and financial matters of a decedent's estate. It is available if a person leaves a will and dies "testate" or if a person has no will or other estate planning documents and dies "intestate." The process takes from six months to two years, sometimes longer if the estate is complex or there are problems in administration. It is somewhat costly, though other forms of administration, for instance, trust administration, also have their costs. At best, probate is orderly and transparent, and it offers the heirs and creditors of the decedent and finality.

In some cases, probate is not necessary. The most common circumstances in which probate is not needed is when the decedent titled his or her property into a living trust that provides for the effective administration of the estate; where the decedent owned property in joint tenancy; where all the decedent's property is community property; where the decedent passed on property through beneficiary designation, as is often the case with life insurance, annuities, and retirement accounts; and in various situations involving "small estates" of up to \$150,000 in personal property or \$50,000 in real property, assessed at the time of death.

Where probate is necessary to administer some or all of a decedent's estate, the process involves the following stages and basic steps (this list is not exhaustive and not all steps are needed in every probate):

Stage I: Appointment of Personal Representative

1. File original will (if any) with the court
2. Petition for appointment of personal representative
3. Publish and mail notice of administration
4. Court hearing for appointment of personal representative
5. Issuance of bond, unless bond is waived
6. Issuance by the court of "Letters" of administration

Stage II: Notice to Creditors; Identify, Collect, Appraise, Protect, and Manage Assets; Pay Debts and Taxes

1. Identify creditors and send them proper notice of the administration
2. Prepare and/or work with probate referee to prepare and file Inventory & Appraisal of decedent's estate
3. Collect assets
4. Accept and pay creditors or reject creditor's claims

5. Distribute specific gifts as authorized by will and law
6. Liquidate assets as needed for distribution (may involve sales of stocks, vehicles and other tangible personal property, and real property)
7. File state, federal income, inheritance taxes and related forms

Stage III:

1. Prepare accounting (unless waived) and file with court the accounting and the representative's report on how the estate was handled and petition for final distribution
2. Mail notice of petition
3. Court hearing for petition
4. Obtain court approval of the accounting and distribution plan
5. Make final distributions, obtaining receipts from recipients
6. File any required receipts with the court
7. Obtain a court order discharging personal representative and his or her bond

Probate Avoidance

The probate process takes time, particularly if real property is to be sold or if the estate is complex, the will is contested, or problems arise during administration. The probate process is also public; anyone who wishes to do so can review probate filings either at the courthouse or, in many counties, online. Fees for the personal representative and the probate attorney are set by statute as a percentage of the gross value of the probate estate, as follows:

- Four percent on the first one hundred thousand dollars (\$100,000)
- Three percent on the next one hundred thousand dollars (\$100,000)
- Two percent on the next eight hundred thousand dollars (\$800,000)
- One percent on the next nine million dollars (\$9,000,000)

Because of the time it takes to complete the project, the lack of privacy, and the cost, many people choose to pass their assets particularly by trust, so as to avoid probate. For information about passing assets by trust rather than through probate, see Estate Planning.

Advantages to Probate

While probate takes time, is public, and authorizes statutory fees, it is not without its merits. Other forms of administration, for instance, trust administration, also have their costs, including the cost of creating and maintaining the trust, and

many of the same steps are required in trust administration as in probate. If real property needs to be sold from the trust before the assets can be distributed, trust administration will also take time. Probate provides a more effective means to cut off creditors claims than does trust administration. Because it is court supervised, probate has built in assurances that beneficiaries' interests are protected and that they are kept informed of the administrative process. At best, it is orderly, transparent, and offers the heirs and creditors of the decedent the best protections and ultimate finality. If you need help with a probate administration, or to discuss your estate planning options and needs, please give us a call.

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