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HOW DO I KNOW IF I NEED PROBATE?

What is Probate and What is My Estate?

A. Definition

Probate is the system by which a court oversees the payment of creditors and distribution of the decedent's estate.

B. Advantages

The probate procedure allows the court to make certain that the decedent's debts are paid in the proper priority after proper claims are filed. Also, creditors have a limited time period to make their claims. Distribution to the beneficiaries named in a Will is supervised by the court. Or, if there is not a Will, distribution to the decedent's heirs is supervised by the court in accordance with provisions of the California Probate Code.

C. Disadvantages

Probate generally takes one year or more. There are expenses for court fees, the publication of notices and, sometimes, bond. Court appearances may be required; and, there are fees for the attorney and commissions for the estate representative that run from 4 percent of the first \$100,000; 3 percent of the next \$100,000; 2 percent of the next \$800,000; 1 percent of the next \$9 million; and so on, each, based upon the gross value of your estate (liens, encumbrances and debts are not considered) plus all gains on sales and receipts during probate and less any losses. On an estate of \$200,000 that would be \$7,000 **each**, and on an estate of \$1 million, it would be \$23,000 **each**. In addition, extraordinary fees and commissions are often granted for things such as the sale of the decedent's home, a Will contest, and estate tax work.

D. Will vs. No Will

The difference between having a Will or not having a Will does not determine whether or not an estate goes through probate. The difference is whether the decedent dictated how to distribute his or her assets or whether the court will decide, based upon what the State Legislature believes the decedent would have done if he or she had gotten around to having a Will drawn-up. With a Will, the decedent may have also designated who will handle his or her affairs (i.e. estate representative); how his or her estate will be distributed; and, who will raise his or her minor children (i.e. Guardian).

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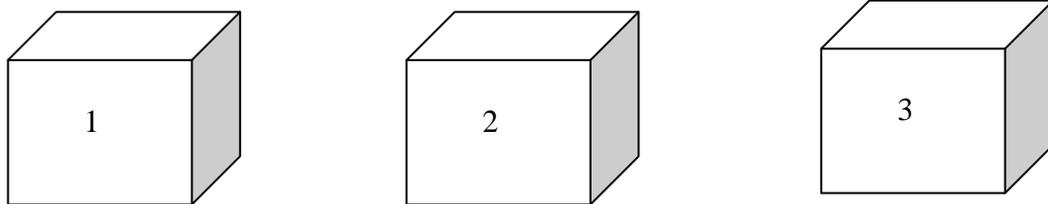
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E. What is My "Estate" An "Estate" defines what assets are subject to being distributed upon death. In general, if married, it consists of the decedent's separate property (assets that he or she had before marriage or received by gift or bequest to him or her) plus one-half of his or her community property (assets acquired with his or her spouse during marriage). If single, it includes all of the decedent's assets.

What a person means by his or her "Estate" can vary. For financial planners it means one thing, for Estate Tax it means something else, and for probate, it has a third definition.

"MY ESTATE" for Purposes of Probate is Illustrated as Follows:

Please try to visualize this. At death, we sit down with a list of the decedent's assets-every item he or she owned an interest in. In front of us are three boxes. Every item the decedent owned has to go in one of the three boxes. We determine which box it goes in by the type of asset and the way the asset is owned/vested. This will include all of the decedent's separate property and one-half of his or her community property.



Box #1 gets all the assets the decedent owned with either a named beneficiary (such as a retirement plan, life insurance, or POD bank account) or joint owner (assets titled as "joint tenancy" or as "community property with right of survivorship"). These assets will pass to the beneficiary or joint owner without probate.

Box #2 gets all the assets the decedent owned in a valid Trust. The title to the property has been changed from the decedent to the Trustee of the Trust. These assets will be administered and distributed as the Trust dictates without probate.

Box #3 gets everything else. Anything that did not qualify to go in Box #1 or Box #2 must be placed in Box #3. **This box represents the probate estate.**

Depending on the decedent's situation, one or more of the boxes may be empty. For example, if he or she never set up a Trust or did not transfer assets to a Trust, there will not be anything in Box #2.

Are Probate Proceedings Required?

If the assets in Box #3 total more than \$150,000, court-supervised and controlled probate proceedings are required. If the decedent has a Will, the Will will direct the court how to distribute these assets at the end of the proceedings. If the decedent does not have a Will, the court will follow the standard distribution amongst the decedent's family members or heirs set by the Probate Code. *The decedent's*

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assets are NOT turned over to the government (common myth) unless no heir of the decedent's can be found.

If the decedent's assets do not exceed \$150,000, there are three "short" forms of non-probate proceedings, as follows:

A. Real Property Valued at \$50,000 or Less:

If the decedent had an interest in real property (such as oil and mineral rights or a Trust Deed) valued at \$50,000 or less, it can be appraised by a court-appointed appraiser and be transferred without a formal probate proceeding. There are no court hearings involved. This process can be initiated after at least six months have passed since the decedent's death. After the six months have passed, this process usually takes less than one month.

B. Personal and Real Property Valued at \$150,000 or Less but More Than \$50,000:

If the decedent had an interest in personal and real property valued at \$150,000 or less but more than \$50,000 and at least 40 days have passed since the death of the decedent, a summary probate proceeding is available that is less involved than a normal "probate." There is a court hearing involved, and this usually takes approximately two months.

C. Personal Property Valued at \$150,000 or Less:

If, at the time of death, the decedent had assets (other than real property) of \$150,000 or less in value, an Affidavit can be prepared to allow the transfer of those assets to the decedent's heirs or beneficiaries of the decedent's Will or Trust. This process may be initiated after 40 days have passed from decedent's date of death. No court hearing is required.

It is our objective, in planning and upon death, to avoid probate where possible. It is not because probate is necessarily an evil thing. Nor does it always take longer than administering a Trust. In fact, sometimes (e.g. where there is some family discord or doubt) it can allow administration to be less worrisome because the court is overseeing the process. However, normally we can save time and expense avoiding probate.

How to Begin Probate Proceedings:

1. To get started, we will need a copy of the Death Certificate, the original Will (if any) and a list of all heirs and persons whose name appears in the Will as well as their address and relationship, if any, to the decedent.
2. If decedent did not have Will, we will need a list of the heirs of decedent, their address and relationship to decedent.
3. Next, we will need a list of assets in the sole name of decedent and a list of creditors of the decedent.

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In Brief, Probate Involves Some of the Following, Depending on the Specific Circumstances:

1. Conference with an attorney or probate paralegal to gather initial information and documents.
2. Prepare a Petition for the court and obtain a court date for the appointment of the estate representative to handle matters. The court date is usually set eight weeks after filing the Petition with the court. Normally your appearance is not required at this hearing.
3. The court issues “Letters Testamentary” (Will) or “Letters of Administration” (no Will) (“Letters”) which can be used by the estate representative as proof to others that they have been appointed to represent the estate.
4. Notice to creditors is given and they have four months from the date the Letters are issued from the court appointing the estate representative to file a claim in order to be paid. We send a notice to all creditors based upon a list we receive from you.
5. During the four-month waiting period, an inventory is prepared listing all assets in the sole name of decedent and decedent’s ½ interest in any community property. It is sent to the court-appointed appraiser who places values on all “non-cash items” and returns it to the attorney for filing with the court. Assets can be sold during the probate proceedings under court guidelines.
6. All assets need to be inventoried and appraised. All “non-cash” assets are appraised by an appraiser appointed by the court.
7. The estate representative takes control over all assets, secures them and insures them.
8. After the four-month waiting period expires, we file an accounting and petition to distribute the estate assets, which is set for hearing approximately eight weeks later. (Again, your appearance is not normally required at this hearing).
9. Taxes, claims and debts are itemized and paid by the order of priority set by the Probate Code. Will contests (actions by disappointed heirs or others) are lawsuits which can slow-up the administration of the estate.
10. Payment of fees, distribution and closing of the probate estate takes place upon filing a Petition with the court and disclosing actions which have taken place to the satisfaction of the court. Distribution cannot take place until the court orders it. Once everything is taken care of, the court is requested to close the estate. The court wants to receive receipts from the beneficiaries so there is proof distribution took place as ordered.

Here is an Estimate of the Timing of the Various Aspects of Probate *(these estimates are based on the assumption that everything runs smoothly and that there are no contested creditor's claims, tax audits, litigation or other disputes involving the estate):*

ASAP Contact an Attorney

1 Week The Petition for probate is filed with the court.

8 Weeks A hearing date is set. The court should approve the Petition, admit the Will (if any) to probate, appoint you as the estate representative and appoint a probate referee. Probate administration then commences.

2 Weeks The court issues "Letters Testamentary" (Will) or "Letters of Administration" (no Will) ("Letters") approximately two weeks after the hearing. You can use the Letters as proof to others that you have been appointed as the estate representative.

1 Week The creditor's claim period commences. Creditor's claims must be presented to you or filed with the court within four months of this date. Various creditors, including Medi-Cal, will be notified. If you have not already done so, please send us a list of the names and addresses of any possible creditors (including funeral bills, medical bills, etc.) so we may mail out the proper notices. The creditors then have four months to file the proper claims against the estate. If we have given them notice and they do not file within the four-month waiting period, they cannot collect at a later date. Therefore, it is best to notify any and all possible creditors. Please review all claims with our office prior to your approval and payment, or rejection, of the claims.

After Letters are Issued:

Schedule a meeting with an accountant to review the preparation of income tax returns for the deceased and the estate. You should also discuss the selection of a fiscal year for the estate for income tax purposes. Also, a federal tax identification number should be obtained by you (similar to a social security number) and should be substituted on all bank accounts or investments. Consult your accountant regarding all tax matters. If you do not have an accountant, we can make a recommendation.

1 Week The Inventory and Appraisal of estate assets is prepared by you and our office and submitted to the court appointed probate referee. Prior to that time, we will request the necessary information from you.

2-4 Weeks After the referee completes the appraisal we will file the Inventory with the court.

Four Months After Letters are Issued, the Creditor's Claim Period Expires:

ASAP You, with your accountant's assistance, file the decedent's final state and federal personal income tax returns and pay any tax due thereon. If the returns indicate the right to a refund, they should

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be filed as soon after the date of death as possible and the amount of the refunds should be shown on the Inventory.

After Creditor Claim Period:

You put together a Probate Accounting in the appropriate form (we can provide an outline) and provide it to our office so that we can prepare a Petition for 1) approval of your actions as the estate representative; 2) allowance of fees; and, 3) distribution of the estate. Also included is a request to hold a reserve of funds for taxes, audits or unexpected expenses.

1 Month Your Accounting and Petition for fees and distribution is filed with the court.

8 Weeks A hearing on the final Accounting and Petition takes place. The court enters its order and you are then directed to pay fees and make distribution of the estate.

1 Week You meet with our office to arrange for distribution of the assets of the estate to the beneficiaries in accordance with the court's order.

1 Week You make final distribution of any assets which you withheld for purposes of paying the balance of any federal estate tax and file the final receipts with the court.

You, with your accountant's assistance, file final fiduciary income tax returns for the estate. This date will vary considerably, depending on your selection of a fiscal year for the estate. You are discharged by the court as the estate representative.

3 Years For up to three years you hold a reserve, especially to cover the expense of communications with the IRS or FTB and audits.

The two most time-consuming matters for you during probate will likely be compiling the necessary information for our use in preparing the Inventory and Appraisal of the assets and the preparation of your final accounting as the estate representative. You should immediately commence preparation of the information necessary to prepare the Inventory and Appraisal of the decedent's assets.

Helpful Accounting Tip:

Your job will be much easier (and thus, so will ours) if you maintain an accounting booklet with information on all income (including the date, the source, the reason and the amount), and information on all disbursements (including the date, who it was paid to, the purpose, and the amount). You should avoid paying for things in cash, but if you must, then be sure to get a signed receipt.

The above is intended only as a **very rough estimate** of the timing of the various aspects of probate. Undoubtedly, various aspects of administration will be completed at times different from those set forth above. Please do not hesitate to contact our office if you have any questions.

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