

WILLS AND PROBATE

A BRIEF SUMMARY OF PROBATE PROCEDURE

If an individual dies with or without a Will, their estate WILL be subject to a probate process, unless there is a pre-death transfer method for avoiding probate in place prior to their death.

The reason heirs end up in probate is because they want assets which are presently titled in the name of a deceased person and the deceased person can no longer sign the necessary transfer documents and other transfer methods (as discussed within this website) are not in place. With no method of titling the assets in their name, they end up in court asking a judge to transfer the assets from the deceased person to them. There are two types of probate proceedings in California.

SUMMARY PROBATE

Transfers assets by affidavit, with little or no court involvement. This procedure applies to estates of less than \$100,000.00. (Fair market value of that property, not the equity value!) Attorney's fees are arranged with the attorney and not court approved.

If the estate does not meet the above requirements, the court method of probate will apply and the assets will be transferred by court order after a probate procedure lasting seven months or longer. The length of time will be extended if real property or a business must be sold in order to pay debts and/or to distribute shares to heirs.

PROBATE PROCEDURE

Probate procedure begins with the filing of a petition by an interested party requesting that the court invoke its jurisdiction over the estate and that it appoint the petitioning person as the estate's personal representative.

This personal representative is either nominated in the Will, a family member, an heir or other interested person, such as a creditor. Once appointed by the court, this estate representative is in charge of the estate until complete distribution of the estate and release by the court. Unless a costly bond requirement is waived in a Will, or otherwise, the estate will have to pay for its issuance before the management of assets begins. A bond is an insurance policy issued for the dollar value of the estate that guarantees that the representative does not steal the estate assets. If he or she does, the policy replaces the estate taken to the extent of the policy limits.

After the hearing appointing the representative, a four-month mandatory creditor claim period begins to run, during that time any creditors must file their claims for debt repayment.

Additionally, during this period all non-cash assets are appraised by a court appointed appraiser and the estate pays for this appraisal. Securities are not cash assets. They must be appraised.

Following the four month creditor period, a full and complete accounting of all assets on hand, assets received and debts paid during the probate, is filed with the court and a final hearing is set to review the accounting before the judge.

At this hearing, to review the accounting and its approval, the court issues an 'order of distribution' that directs transfer of each asset to the appropriate heir(s). The fees charged for probate are composed of:

- the filing fee charged by the court
- the non-cash appraiser's fee
- the newspaper notice of death publishing fee
- bond fee
- fees for the attorney and estate representative(s)

The attorney and the representative each get the same fee as set by state statute. The fee is figured by the fair market value of the estate assets, not by the asset value less any mortgages or money owed thereon. Again, this statutory probate fee is based on the fair market value, NOT EQUITY net value of each asset. Thus mortgages or outstanding loans are not subtracted.

Each attorney and the representative will get:

- 4% of the first \$100,000.00 (or \$4,000.00) plus 3% of the next \$100,000.00, or portion thereof (or \$3,000.00)
- plus 2% of the next \$800,000.00, or portion thereof (or \$16,000.00)
- plus 1% of the next \$9,000,000.00 and One-half of one percent of the next \$15,000,000.00.

Thus, if the probate assets fair market value totals \$300,000.00. The probate fee will be \$4,000.00 for the first \$100,000, an additional \$3,000.00 for the next \$100,000.00 and an additional \$2,000.00 for the last \$100,000.00. Thus, the attorney will receive \$9,000.00 and the estate representative will likewise receive the same \$9,000.00 fee.

The statutory fees now total \$18,000.00.

To the above statutory fees you must add the court filing fee, the notice of publication fee, the appraisal fee and a bond fee. Our \$300,000.00 probate just cost your estate approximately \$20,000.00 to transfer it to your heirs because the mandatory probate process is applicable to assets which are transferred by Will or intestate with no estate planning in place at death.

These probate costs are larger than a Living trust would have cost to transfer these assets to your heirs and the length of time will certainly be greater.

The above sets forth why Wills are usually avoided and revocable “living” trusts are the preferred method chosen by most people to transfer a person’s assets to their heirs after their death.

For more information on Wills and Probate, please contact me to go over your particular situation and needs.

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