



## PROBATE SUMMARY

### WHAT IS PROBATE

"Probate" is a term which refers to when a State court operates in an active, protective capacity for an individual who is unable to manage his or her own affairs, either due to lack of ability or capacity, or due to death.

When an individual is incompetent or has deceased, then the State of California, acting through a court "sitting in Probate," takes over the financial affairs of the individual.

The protective function of the courts goes by different names in various states. In many states, the court is simply called a "Probate Court." However, in some states they go by different names. In New York, for example, the probate court is known as the "Surrogate's Court." In California, it is the Probate Division of the Superior Court.

### CONTRAST WITH A TRIAL COURT

Normally, a court conducts trials in which it (or the jury) acts in a decision-making capacity between competing parties. However, when "sitting in Probate," a State court is actively taking control over and administering the affairs of someone who is unable to do so.

To do this work, the court appoints a fiduciary who, like all licensed lawyers, becomes an officer of the court and is required to account and report their actions to the court. The court also will independently review the account and report of a fiduciary for accuracy and completeness.

Where an individual has not formally named individuals to manage his or her affairs upon their incapacity or death, a probate court proceeding will be needed to appoint a someone else -- a fiduciary -- to do so. The appointment of a fiduciary authorizes the fiduciary to "stand in the shoes" and exercise those rights of the incompetent or deceased individual.

The fiduciary can be nominated by the person whose affairs they are managing. If there is no nomination, the statute gives priority or preference to a spouse or children. Usually, the appointed fiduciary is a family member.

## WHERE DOES A PROBATE PROCEEDING TAKE PLACE

The appropriate place, or venue, for a probate proceeding is either the county of residence of the incompetent or deceased individual, or the principal place of administration in the case of a trust.

Because the authority of a state court is limited to the geo-political boundaries of that state, there may be different probate proceedings in different states when a deceased or incompetent individual owns property in more than one state.

## IS PROBATE NECESSARY

If there is a dispute involving an incompetent individual or a decedent's estate, that dispute can only be raised in a probate court proceeding.

Absent litigation, the involvement of the probate court is not necessary if individuals have taken steps for the management of their affairs upon their incapacity, death, or both. For example, when an agent is appointed in a valid "Power of Attorney," or if one's estate has been placed in a trust, then the probate proceeding may not be necessary.

Contrary to popular misconception, having a will does not avoid probate. All wills must be accepted by, and administered under the oversight of, a probate court.

In California, a probate proceeding is not necessary where a person dies with less than \$100,000 of assets in their individual name. In these situations, the heirs can claim and collect the assets of the deceased individual by a simple declaration.

## TYPES OF FIDUCIARY APPOINTMENTS & PROCEEDINGS

### *Administering a Decedent's Estate*

When a person dies with over \$100,000 or more of assets in their individual name, the primary function of the probate court proceeding is to administer the deceased person's fiscal estate.

In many ways, this probate proceeding is for the protection of creditors of the estate, as it includes various mechanisms for notice to creditors, and for payment of outstanding debts and taxes. After the court has been assured that all legitimate debts have been paid, title to the remainder of the decedent's estate is transferred to the decedent's heirs.

Where a person dies without a will, the property will pass down their bloodlines to their heirs.

When a person dies with a will, the court must first accept the document as the person's will, a process called "proving a will." After which, the decedent's property will be administered in accordance with, and distributed to the heirs identified in, the will.

### ***Protecting the Individual or their Estate***

Where a person is substantially unable to manage their personal or financial affairs, or is susceptible to undue influence, the court will appoint a fiduciary who is responsible for the incompetent person's personal, health and/or financial decision-making.

Conservator for Adults. Where the incompetent person is an adult (over the age of 18), a conservator is appointed. It is, however, the policy of the probate court to keep the conservatorship as limited as possible so as to retain and foster independence.

Where the person is unable to clothe, bath, clean, cook or make medical decisions for themselves, a "conservator of the person" is appointed to make decisions about the personal affairs of the person, including decisions about food, clothing, residence, and medical care.

Conservator of an Estate. A "conservator of the estate" is appointed and responsible for handling the financial affairs of the incompetent individual. The conservator has the power to collect the conservatee's assets, pay bills, and make investments. However, the conservator must seek court supervision for major transactions, such as the purchase or sale of real property, borrowing money and gifting of assets.

It is most common that once a conservator is required, a conservator will be appointed over the person and estate.

### ***Criteria for Declaring Incompetence***

- ✓ For a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter
- ✓ For a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence
- ✓ For a developmentally disabled adult
- ✓ The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

Guardianship for Minors. Where the person is a minor (under the age of 18), there is a conclusive presumption of incompetence, and a guardian may be appointed. Like with conservatorships, there may be guardianships of the person, or estate, or person and estate.

With minors, it is most common for there to be guardianships of the estate. Small gifts, of course, do not require a guardianship. However, where the minor is the recipient of (usually via inheritance) assets valued at over \$20,000, the court will require the appointment of a guardian for managing the assets of the minor.

A guardianship of the person is most common when neither parent is available or is caring for the minor, and a third party (often a relative) is seeking parental authority for medical decision-making and school placement.

### ***Trust Administration***

Normally, most trusts are administered entirely privately and outside of the probate court. However, probate court approval is required for certain trust modifications, and some trusts expressly require court oversight of accountings or distributions.

## **ESTATE PLANNING INSTRUMENTS**

There are four basic types: wills, trusts, powers of attorney, and advance health care directives.

### ***Wills***

A will governs the administration and disposition of assets upon the death of a person. Because a will can be changed at any time and only operates upon death, a will is only a will once a person dies -- and after it has been accepted by the probate court. Wills must be in writing and witnessed by third parties. Typically the will nominates a fiduciary, called an "executor."

### ***Trusts***

A trust is a legally recognized relationship between the settlor/trustor (who establishes the trust), the trustee (the fiduciary who administers the trust), and the beneficiary (who receives the benefit of the trust assets). A trust also can be thought of as a separate legal entity, like a corporation, which manages and distributes assets for the benefit of its beneficiaries. If the trust holds real property, it must be in writing.

## ***Power of Attorney***

With a power of attorney, one person (called the "principal") gives another person (a fiduciary called an "agent") the right to manage the property of and for the benefit of the principal. The agent has only those rights and authority granted by the principal, and the authority can be immediately effective or effective only upon incapacity of the principal. Most financial abuse occurs with agents operating under a Power of Attorney document.

## ***Advance Health Care Directive***

Also called a "living will" in some states, an *Advance Health Care Directive* (AHCD) is basically a power of attorney for health care decision-making: a principal names another person as their health care agent for purposes of medical decision-making in the event they are unable to understand, appreciate or communicate their medical choices. A "pull the plug" instruction is often made in an AHCD. Health care agents cannot be compensated for their services.

## **CHOOSING A FIDUCIARY**

When the probate court appoints a fiduciary (i.e. a person to whom property or power is entrusted for the benefit of another), it will first try to ascertain the preferences of the person's affairs over which it is exerting control. If the person is alive, they court may consider the stated preference of the incompetent individual. The court also will consider preferences stated in estate planning instruments.

When appointing a fiduciary to administer the will of a deceased individual, the court will give "great deference" to a written nomination in a will. And when a conservator or guardian is required (for a living but incompetent individual), the court must choose the fiduciary based upon the "best interests" of the person or their estate, and it may disregard the stated or written preference of the individual.

If there is no reliable evidence of the individual's preference, the court will appointed a fiduciary based upon a order of preference spelled out in the law. The statutory order of preference is for the individual's family, with spouses first, then children, then parents.

All good estate planning instruments will name agents, alternate agents, as well a nominate conservators -- and the identification and naming of a reliable fiduciary is the most important consideration of all.

## TRANSFERS OUTSIDE OF PROBATE

In addition to trusts, there are other means of transferring property upon death outside of probate.

Real property and accounts owned with another as joint tenants passes to the surviving co-owner without going through probate.

Other types of benefits, such as a life insurance policy, retirement accounts or annuities, are paid by contract directly to a named beneficiary, thereby bypassing probate. In addition to joint accounts, a bank account can be set up as a pay-on-death (POD) account or as an "in trust for" (ITF or "Totten Trust") account with ownership passing to named beneficiary without probate.