

Guide to Probate in California



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WHAT IS PROBATE?

Probate is the process through which the state of California oversees the administration of a person's estate after his or her death. The California probate process is designed to oversee the proper organization and distribution of one's assets, and ensure those assets are distributed to the appropriate beneficiaries and/or legal heirs.

WHICH COURT?

A person's assets must be administered with the oversight of the *probate court located in the county where the decedent lived* if:

1. The person died without a Will or Trust.
2. The person died with a Will, but no Trust.

WHEN IS PROBATE REQUIRED IN CALIFORNIA?

Probate (i.e. going through Court) is required when the value of the estate is greater than \$166,250 and those assets are *not held* in a Trust. If a person dies with less than \$166,250 worth of assets, those assets can typically be transferred to heirs or beneficiaries using a Small Estate Affidavit, which is not subject to the court's oversight and does not require an attorney.



DO I NEED A LAWYER FOR THE PROBATE PROCESS?

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You are not required to hire an attorney for the probate process. However, it is a good idea in almost all situations, because even in the simplest of situations (such as 1 heir), hiring an attorney will save you the headache of trying to learn not only the probate code & its procedures, but also the relevant county's local rules and the interplay of county rules with state law.

If the estate has more than one beneficiary or is complex (heir living in house, foreclosure, familial disputes, creditors, etc.) hiring a *good* Probate attorney can be invaluable in not only protecting the Administrator of the Estate, but also ensuring that assets are distributed in a timely manner.

WHAT DOES THE ATTORNEY FOR THE ADMINISTRATOR DO?

First, let's define **Administrator**. The Administrator of an Estate is essentially the person in charge of the estate. This person is called an **Executor** *when there is a Will* that names them as such. A *Will in California* is very different than a *Trust in California*, so be sure not to confuse the two.

The Estate Administrator in California manages all assets during the Probate Process, and distributes them to the appropriate heirs and beneficiaries at the end of the Probate. Being the Administrator (or Executor) of an Estate in California is a substantial job, with myriad responsibilities and duties to the Court, as well as the estate's beneficiaries. Thus, it can be very helpful for the Administrator to have an attorney who can guide them through each step.

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Every Administrator of an Estate in California is entitled to an attorney. The Estate pays for the attorney's fees. The attorney's job is to ensure the Administrator(or Executor) meets all of his or her legal deadlines, obligations, and fiduciary duties. A stellar attorney will **avoid costly mistakes and delays** (California Courts are more than happy to reset your hearing to months later should you make a mistake.)

The attorney for the Administrator can also serve as a buffer between the Administrator and the estate beneficiaries, communicating on the Administrator's behalf and minimizing potential antagonism. Additionally, the attorney for the Administrator can appear on behalf of the Administrator for all court hearings, draft all legal documents for the Administrator, serve all required documents to heirs and beneficiaries, and keep the probate moving toward closing (i.e. distribution of assets). An attorney can ensure Estate Administrators are not sued, or removed, by beneficiaries due to mistakes or delays during the probate process.

HOW LONG DOES A PROBATE TYPICALLY TAKE?

Probates typically take between 6 months to 1 year, but the timeline depends on several factors, including: the county court's schedule (some counties are inundated with cases and understaffed, others are not); the attorney's ability to communicate and take actions; and, if there is any litigation (Will contest, etc.) that prolongs the process. In the

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smoothest of probates, the timeline is demarcated by the following events:

1. Petition for Probate Filed. Court hearing date set approximately 6-8 weeks out.
2. Hearing Date: The Petition comes before the Court on the hearing date & the Judge grants the Petition, effectively allowing the Administrator to start taking control of the estate.
3. Letters of Administration issued. A 4-month creditor claim period begins.
4. A Petition for Final Distribution is filed, with a hearing date approximately 8 weeks out.
5. Hearing Date for Petition for Final Distribution: The Court hears the Petition on the hearing date, grants the Petition, and the Administrator distributes the funds and other assets of the estate.

As you can see, the above timeline is 7-8 months, assuming no delays and successful completion of each step in the Probate process.

WHAT ASSETS ARE COUNTED WHEN DETERMINING THE VALUE OF THE ESTATE?

Probate is required for assets that are titled in the name of the decedent (person who died), and do not already have a designated beneficiary. Homes are the most common type of asset that push the value of an estate above the \$166,000 mark. If a home is held in a Trust, it would not be subject to Probate.

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IS THE VALUE OF A HOME DETERMINED BY THE HOME'S VALUE OR THE HOME'S EQUITY?

In determining the size of the “probate estate” and whether an asset must go through the probate court, the value of property is determined by the property’s **appraised or sale value**. In other words, the approximate amount you would get for the property if it was sold. Lines of credit, loans owed on the home, or other factors that relate to how much equity the decedent had in the property are not relevant for probate purposes. In short, assets’ sale values are *generally* what determine if an estate must go through the probate process.

WHAT ASSETS ARE NOT SUBJECT TO PROBATE?

Assets with a designated beneficiary such as Life Insurance Policies, Transfer on Death Accounts, jointly owned properties, and IRAs with beneficiaries are examples of assets that are not part of the probate process. These assets are also not counted toward the value of the probate estate.

IF THERE IS A TRUST, WILL THE ESTATE STILL NEED TO GO THROUGH PROBATE?

In general, if the decedent had a trust, his or her assets will not have to go through probate. However, any assets not titled in the name of the trust *may* still be subject to probate. This depends on a few factors, including the nature of the Trust, and the existence of a Pour Over Will. In some situations, an attorney can petition the court with what’s known as a “Heggsted Petition,” to place an asset into the

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Trust post death. For these types of assets, its best to consult with an attorney who specializes in Trust and Estate Law.

WHAT ISSUES CAN DELAY PROBATE?

Numerous issues can delay the finalization of a Probate Estate. Backups in the courts can push out hearing dates, mistakes made by administrators or executors can lead to continued hearings, and litigation between parties, are all examples of issues that can delay the probate process.

HOW DO I AVOID PROBATE?

Probate can be avoided by placing assets in a Trust. Creating a Will does not avoid probate in California. With the simplest of estates, persons with **only one** beneficiary will also consider Payable on Death accounts for financial assets and Transfer on death deeds for real property. However, these two options can lead to unforeseen complications in some instances, and an attorney should be consulted.

ADMINISTERING THE PROBATE ESTATE**WHO IS IN CHARGE OF MANAGING THE ASSETS IN THE DECEDENT'S ESTATE?**

In a probate proceeding, the Executor (if there is a will) or the Administrator (if there is no will) is appointed by the court. In legalese, this person is called the "personal representative" of the estate. As personal representative, this person is responsible for collecting assets, paying debts and expenses

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from the estate, and distributing the estate to its beneficiaries. The court provides oversight to ensure that the representative is appropriately handling the estate. When a personal representative has an attorney, the attorney is responsible for helping him/her to meet all deadlines and requirements of the Court.

WHAT IF THERE IS MORE THAN ONE WILL?

Generally, the most recent Will obviates any prior Wills. However, disputes can occur regarding the validity of one or more Wills. Speak with an attorney if you are concerned about the validity of a California Will. Will contests can generally be resolved within the context of the Probate.

WHAT IF NO WILL EXISTS?

If no Will exists, and there is no evidence to support intention to make a will - or that a will was destroyed - inheritance is dictated by intestate succession. This means that the assets of the person who died are distributed according to California's inheritance laws. The California Probate Code spells out the exact order by which family members (heirs) inherit assets when no will or trust exists. The California Probate Code also dictates who has priority to be Administrator of the Estate. However, those persons with priority to be Administrator can nominate other individuals to act as Administrator if they do not wish to do so.

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At the first Court hearing, the court will appoint an Administrator to oversee the probate process and ensure the appropriate heirs receive what they are entitled to by law.

DOES THE EXECUTOR OF A WILL AUTOMATICALLY BECOME THE PERSONAL REPRESENTATIVE?

No. A petition for probate must be put before the court in order to determine the validity of the will and appoint a Personal Representative. If an executor is named by a will, that person is the most likely candidate to be appointed as Personal Representative, assuming they are willing to act. Thus, a named executor must be approved by the court before taking on the role in an official, or legal capacity.

NAVIGATING THE COURT PROCESS OF A PROBATE

HOW DOES THE PROBATE PROCESS BEGIN?

The case will begin at the Probate Court when the custodian of the Will (person who has the decedent's Will at the time of the decedent's death) takes the original Will to the Probate Court Clerk's office and sends a copy of the Will to the executor (person named in the Will to distribute the estate). The custodian of the Will (or their attorney) must do this within 30 days of the decedent's death. If the custodian fails to do this, they may be sued for damages caused. If the custodian is not aware of the death, or the Will cannot be found, consult an attorney to determine liability and the next steps.

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**WHAT NEEDS TO BE FILED FOR THE CASE TO BEGIN?**

The Petition for Probate must be filed with the probate court in order to start the case. The petition must be filed in the county where the decedent lived. For example, a person who resided in Walnut Creek would have his/her probate proceeding in the Contra Costa County Probate Court, located in Martinez. If the decedent resided in Alameda County, the correct court would be in Berkeley, and so forth.

WHO SETS THE COURT HEARING AND WHO NEEDS TO BE NOTIFIED OF THE HEARING?

The Probate Clerk will set a date for the first hearing after the Petition for Probate is filed. The petitioner (person who filed the Petition for Probate) must give notice of the hearing to all beneficiaries of the estate. The petitioner must also give notice to surviving heirs, including those not named in the Will (if one exists). If the Petitioner has an attorney, the attorney is responsible for noticing all parties and ensuring all paperwork is correctly filed with the Court.

HOW DOES THE PETITIONER FULFILL THE NOTICE REQUIREMENTS OF A PROBATE?

The petitioner must notify certain required parties of hearing dates and of paperwork that is filed for the case. The notice must include copies of any relevant documents as well as a Notice form. Notice can only be mailed by an adult who is **not** party to the case. The petitioner must also arrange for notice of the estate's administration to be published in a circulating newspaper on three different dates. Any Notices not served or

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filed properly and within a certain timeframe can cause significant delays to the probate case.

WHO REVIEWS THE PETITION AND OTHER DOCUMENTS?

In general, the court probate examiner will review the case petition and other relevant documents prior to the hearing to ensure everything was filed correctly. The probate examiner will let you or your attorney know if the documents need to be edited. When necessary, the Court's research attorney and/or Judge will also review paperwork.

WHAT HAPPENS AT THE HEARING FOR PETITION FOR PROBATE?

At the first hearing for a Probate, the judge will typically determine who to appoint as the personal representative of the estate (also called the "administrator" or "executor"). If there is disagreement about who should act as personal representative, the judge may continue the hearing to a different date to allow parties to work out their differences.

WHAT ARE THE DUTIES OF THE PERSONAL REPRESENTATIVE AFTER THEY ARE APPOINTED?

Once appointed, the personal representative is responsible for marshalling the assets of the estate. This essentially means locating all real property, financial assets, and personal property, and determining how title is held and if those assets should be included in the probate, sold, etc.

Once all assets have been located, the Personal Representative (or his/her attorney) must file an Inventory

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and Appraisal with the Probate court. This form lists the assets and their respective values. Certain assets, such as real property, stocks, and vehicles, must be appraised by the Probate Referee. When the Petition for Probate is granted and a Court Order for Probate is issued, the Court appoints a Probate Referee.

Another important duty of the personal representative is to provide formal notice to any creditors of the estate, and ensure that debts to creditors are paid in the manner specified by California law. The Franchise Tax Board and the Department of Healthcare Services must also be notified of the decedent's passing and the Probate proceeding. Other duties include, but are not limited to: Pulling an EIN from the IRS, filing taxes on behalf of estate, and submitting the appropriate forms to the Assessor's office for real property.

Once the estate is ready to be finalized and distributed, the personal representative may also be required to provide a detailed accounting to the court. Depending upon the County where the Probate is located, additional documentation also needs to be filed with the Court in order to close the Probate. In San Francisco County, for example, bank statements from all estate bank accounts must be filed.

WHAT ARE THE PERSONAL REPRESENTATIVE'S FEES?

Personal representatives (administrators and executors) receive a statutory fee that ranges between 2-4% of the value

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of the probate estate. The personal Representative can also receive extraordinary fees for work that is considered above and beyond the “normal” scope, at an hourly rate. The hourly rate depends upon the county and its local rules.

WHAT ARE THE ADMINISTRATOR’S ATTORNEY’S FEES?

The attorney for the Administrator is entitled to the same statutory fee the Administrator receives (2-4% of the estate’s value). The calculation of statutory fees is as follows: 4% of the first \$100,000, 3% of the next \$100,000, 2% up to a million, 1% of the next \$9 million.

The statutory fee covers all attorney work necessary to complete the probate but does not include time spent on litigation or other extraordinary (non-typical) services, including the sale of real property. Those services are billed at the attorney’s hourly rate. Prior to the attorney receiving any fees, however, the fees must be approved by the Court. Both attorney and administrator statutory fees are not paid until the probate is finalized and distribution of the estate to its beneficiaries has been authorized by the Court.

CAN THE PERSONAL REPRESENTATIVE OF THE ESTATE BE HELD RESPONSIBLE FOR HIS/HER ACTIONS?

YES. The personal representative (administrator or executor) can be held legally liable for all of their actions regarding the estate. This is one of the primary reasons that

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administrators seek the assistance of an attorney for probate estates in California.

CAN YOU SELL REAL PROPERTY (HOMES, COMMERCIAL BUILDINGS) DURING A PROBATE?

Yes, the personal representative (Administrator/Executor) can sell real property during the probate proceeding, once the Order for Probate & Letters of Administration have been issued, and the proper authority has been granted by the Court. Property can also be sold once Letters of Special Administration have been issued. *See below for more information on Special Administration.*

The process by which the Administrator sells the property depends upon several factors: whether the Administrator has “full authority” or “limited authority,” and if any beneficiaries object to the sale. A Court hearing is not typically required when an Administrator has full authority, whereas a hearing is required when the Administrator has only limited authority. A hearing can also be necessary if there are objections to the Notice of Proposed Action regarding the sale. *See case study number 2 and 3 for examples in the companion Guide to Probate: Case Studies.*

WHAT HAPPENS IF A WILL IS CONTESTED OR THERE ARE OBJECTIONS TO THE PROBATE?

There are a number of ways that heirs and beneficiaries (or potential beneficiaries) can object to a probate that has been filed with Court. Filing a *Will Contest* is one such way. A Will Contest is generally filed when a decedent’s Will has been

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lodged with the Court that another beneficiary or heir believes is invalid. If the Personal Representative has an experienced Probate attorney who knows how to handle contested probates, that attorney can guide them toward resolving the matter.

Filing a “competing” Petition for Probate is another way to effectively object to a Petition for Probate. In many cases, the competing Petition for Probate seeks to put forward a new Administrator of the Estate. If an Administrator has already been appointed by the Court, a Petition for Removal will often be filed along with the competing Petition for Probate. For an example of a case that involved a competing Petition, a Petition for Removal *and* a Petition for Surcharge, *see case study number 1, in the accompanying Guide to Probate: Case Studies.*

Most objections to a Petition for Probate are resolved through direct settlement discussions and mediation. In some instances, the case will proceed toward trial.

Aside from Objections that are specific to the Administrator or the decedent’s Will, there are a host of other problems that can crop up throughout the probate process. And problems inevitably delay distribution. These issues include objections to the sale of related property or Notice of Proposed Action, objections to the Estate Accounting, objections to the Petition for Final Distribution, and others. The key for Estate Administrators in California is to have an experienced and reliable probate attorney, who can prevent unnecessary issues

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and ensure the Administrator does not breach his or her fiduciary duty to the Estate. A ounce of prevention is truly worth a pound of cure when it comes to estate administration in California.

HOW DO YOU CLOSE A CALIFORNIA PROBATE AND DISTRIBUTE THE ASSETS OF AN ESTATE?

When an estate is ready to close it generally means that all estate work has been completed, the Creditor Claim Period has passed, any litigation has been resolved, and the last step left is to distribute funds and/or property to beneficiaries.

If the estate is ready to close, the Administrator (or attorney on their behalf) files a Petition for Final Distribution. Unless beneficiaries agree to waive the Estate Accounting, an Accounting of all estate assets and transactions is required by the court. The Accounting includes assets on hand at the date of death and all transactions thereafter. In addition to providing full transparency to the court and estate beneficiaries, the accounting is also used to calculate Administrator and Attorney statutory fees. The accounting further illustrates that the Administrator has handled all estate funds and assets appropriately. In general, this means the Administrator has not paid any money to himself/herself inappropriately, used the estate bank account for his or her own expenses, or made any distributions to beneficiaries.

When the Petition for Final Distribution is filed with the Court, the Court sets a hearing date. Hearing dates are set approximately 8-12 weeks out, with exact timing depending

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upon the county and its schedule. If everything goes smoothly and all issues raised by the court are resolved prior to the hearing date, or objections by other parties, the Judge issues an Order authorizing the Administrator to pay all costs of Administration and distribute the assets of the estate. After distributing the estate assets, the Administrator's duties have largely come to an end. All that typically remains is to file taxes for the estate. That's an important last step that shouldn't be taken for granted as the estate tax return can be used by beneficiaries to offset their own personal taxes.

WHAT IS A SPECIAL ADMINISTRATION?

A Special Administration is necessary when there is an urgent need for someone to take control of estate assets. For example, if a home is in foreclosure or significant disrepair, or there are tax issues that must be dealt with. The Petition for Special Administration is submitted to the Court on an "Ex-Parte" basis, meaning that the Judge will review the matter within 5 court days of being submitted. If sufficient evidence is provided to show that a Special Administration is indeed warranted, the Court will issue Letters of Special Administration. These Letters give the Administrator the proper authority to take actions on behalf of the Estate.

WHAT COUNTIES IN CALIFORNIA DO WE SPECIALIZE IN?

Talbot Law Group has extensive experience handling Probate matters throughout the San Francisco Bay Area, including Contra Costa County, Alameda County, San

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Francisco County, San Mateo County, Solano County, Napa County, Sonoma County, Marin County, and Santa Clara County. We also handle probate matters in other counties throughout California, though on a more selective basis.

HOW DO WE CONTACT YOU?

Call our main number at 925-322-1795 or email elizabeth@talbotlawpc.com with a brief summary of your matter. Our Team will be able to assist you in determining if we are the best firm to handle your matter, and if not, provide other recommendations.

