

A hand holding a set of keys over another hand, with a pen and documents in the background.

A Guide to Probate and Trusts for Real Estate Professionals

HOW TO HELP CLIENTS AND MAKE MONEY DOING IT

THE
WERNER LAW
FIRM

Introduction

The concept of probate, for most real estate professionals, is not one we think of with a warm fuzzy feeling in our hearts. Probate can be confusing. It can be a long process. And it can seem absolutely daunting to those unfamiliar with it.

But it doesn't have to be.

My goal in writing this is to educate you to be able to help clients. Such that if a potential client contacts you to sell their deceased loved one's home, that you will confidently be able to take on that client and help guide them through the process.

The information you need to know to be able to effectively help clients is not out of reach, and it is not overly difficult. You do not need to go to law school to understand this stuff.

In this guide I walk you through what to expect when you come across probate or trust situations. What your clients can expect. And more importantly, while probate is sometimes unavoidable, I want you to be able to recognize situations in which quicker, more cost-effective probate alternatives are available to clients and to you to get the job done.

You can help these clients. No one starts off their career knowing all of this stuff, and you are not alone in this. If you ever have any questions about a client's situation and need some guidance, please feel free to contact our office for a free consultation at 1-800-752-9937 or email me directly at troywerner@wernerlawca.com.

We are happy to help.

The Werner Law Firm

A handwritten signature in black ink, appearing to read 'Troy Werner', written in a cursive style.

Troy Werner, Esq.

THE BASICS

In potential probate situations, title is key. If a potential client contacts you to sell their deceased loved one's home, the first major question to ask is who is on title to the home.

If the deceased is on title to the home alone, then we run into the main issue that this book addresses: the only person who has legal authority to sign to sell the property is dead.

So...what do we do? Who signs the listing agreement? Who is technically the client? And ultimately, who has authority to sell the property?

This is a major reason why probate court exists. Probate is the process through which an individual (usually a loved one) can get legal authority to deal with the assets and debts that are in the deceased loved one's name. In many situations, a probate case is not necessary. The only time a probate case is generally opened in California is when there is a specific asset we need to address that we can't deal with any better way.

The goal for most people in setting up a living trust and doing estate planning is to avoid probate entirely. When people fail to set up a living trust or estate plan, we can sometimes be left with little choice but to file a probate case. That said, it is not the end of the world. Probate, at its heart, is just a court process. It is usually fairly routine, predictable, and easy to manage if you know what to expect.

In the following sections, we'll be addressing the specific situations that you may come across, information about what to expect in these situations, and most importantly, the best process to help your client sell the property.



COMMON SCENARIOS AT A GLANCE

Here are the most common scenarios you may come across, and the sections in which we address those scenarios:

- If title is in the name of the deceased and a spouse who is still alive, read the section on Co-Ownership with Spouse.
- If title is in the name of the deceased and another individual who is still alive, read the section on Co-ownership with other Individual(s).
- If the deceased recorded a transfer on death deed (this is a special, relatively new form in California) in which they designated a beneficiary to inherit the property when they passed away, read the section on Transfer on Death Deeds.
- If title is in the name of a trust, read the section on Living Trusts.
- If title is in the name of the deceased alone, read the section on Probate and Probate Alternatives.
- If title is in the name of multiple individuals who are now all deceased, read the section on Probate and Probate Alternatives.

CO-OWNERSHIP WITH SPOUSE

If there is a surviving spouse listed on the real property with the deceased, the second question to ask is how they own the property together.

If the deceased is listed on the property with a surviving spouse as community property with rights of survivorship, then that makes for an easy situation. It will be important to make sure that "with rights of survivorship" is specifically listed on title. If so, the surviving spouse automatically inherits the property from the deceased, and no probate procedure is necessary. A form called an Affidavit Community Property with Right of Survivorship will need to be signed by the surviving spouse and recorded with the county (along with an original certified death certificate), but this is an easy form that either a law firm can prepare or that escrow commonly prepares as a part of the transaction.

If they own the property together as "joint tenants," then a similar form titled an Affidavit Death of Joint Tenant will need to be recorded with an original certified death certificate.

If they do not own it as joint tenants, and "with rights of survivorship" is not listed anywhere, then we will have to go through an additional procedure to get title fully into the surviving spouse's name alone, and as such you should read the Probate or Probate Alternatives Section which addresses Spousal property petitions.

If the surviving spouse isn't on the title at all, and it was held in the name of the deceased spouse alone for whatever reason, then you should read the Probate or Probate Alternatives Section.

CO-OWNERSHIP WITH OTHER INDIVIDUAL(S)

If there is a co-owner listed on the real property with the deceased, it is important to determine how they own the property together.

If the deceased is listed on the property as joint tenants with an individual that is still alive, that makes for an easy situation. That person automatically inherits the property from the deceased, and no probate procedure is necessary to make that happen. A form called an Affidavit Death of Joint Tenant will need to be signed by the surviving individual and recorded with the county (along with an original certified death certificate), but this is an easy form that either a law firm can prepare or that escrow commonly prepares as a part of the transaction.

If the deceased is listed on the property with another individual or individuals, and no specification is given regarding how they own the property together, then they will likely be considered tenants in common under California law. This just means that the individuals own the property together, and they do not automatically inherit the property from the other(s) when one of them passes. This is fairly common. In these situations, if one of them passes away, that person's ownership interest in the property needs to be dealt with as a probate situation, and as such you should read the Probate or Probate Alternatives section.

TRANSFER ON DEATH DEEDS

On January 1, 2016, California joined a number of other states in allowing the inheritance of property through a Transfer on Death Deed (TOD). Essentially, this is a document that individuals can sign and record against their property to specify who they wish to inherit the property once they pass. This would be a separately recorded document.

For a variety of reasons, a living trust is still the preferred method of avoiding probate in California, but we will occasionally see these deeds.

If the deceased has recorded a transfer on death deed, and the beneficiary is alive, then the process is straightforward. That beneficiary automatically inherits the property from the deceased, and no probate procedure is necessary to make that happen. A form called an Affidavit Death of Transferor (TOD Deed) will need to be signed by the beneficiary and recorded with the county (along with an original certified death certificate), but this is an easy form that either a law firm can prepare or that escrow can prepare as a part of the transaction. If the beneficiary passed away before the deceased, then the transfer on death deed has no effect. If multiple transfer on death deeds were recorded, the last one will control, as a transfer on death deed revokes any previously recorded transfer on death deeds.



LIVING TRUSTS – HOW THEY WORK WITH REAL ESTATE

A living trust is the gold standard through which families avoid probate in California. If your client mentions that the deceased set up a living trust, then that is probably a good sign.

Note that there can be a huge difference between a properly prepared living trust done through an attorney, and some downloadable do it yourself form done by the deceased.

While this book focuses on how living trusts work in real estate transactions, general information on living trusts and estate planning as a whole can be read in our separate free book: *Living Trust and Estate Planning Basics*. Like every other situation addressed in this book, the first thing to do is check to see who is on title to the property. When a living trust is prepared properly, the deceased should have also recorded a deed transferring the property from their name as an individual into the name of the trust. Usually, title on the deed will say something like, "Troy Alexander Werner, Trustee of the Werner Family Trust Dated 1/1/2001."

While this can seem complicated to people who haven't had a lot of experience with living trusts, the concept is fairly straightforward. While I am alive, I am the trustee of my trust. I transfer my real property into my trust. If I want to sell it, I can. I simply sign the listing agreement and everything as the Trustee of the trust. Everything is very similar to a transaction in which I am the sole owner as an individual. The property is still essentially treated as my property.

Then, once I pass away, my trust states two main things: 1) who I want to have inherit my property, and 2) who I want to have in charge of handling everything. That person, listed as the "successor trustee" in the trust, would be the seller. They can sign a listing agreement as the trustee of the trust and can sell the property without going through probate court. The transaction is usually fairly straightforward. The net proceeds from any sale will be issued to the trust, with the client listed as trustee. The client will need to have a bank account opened for the trust in which to deposit the funds, and will need a Tax ID number to facilitate the transaction. The Tax ID number can be applied for through the IRS website.

It will be important to look at the trust document itself to see who is listed as the successor trustee. Sometimes, it may list two people to act as co-trustees, who will have to sign everything together. Sometimes the individuals listed as successor trustees have passed away, or decline to act, at which point any alternate successor trustee would be able to step up and handle things.

In order to sign on behalf of the trust before the sale, a form called Affidavit Death of Trustee will need to be signed by the successor Trustee and recorded with the county along with a certified death certificate. While this is a form that can be prepared by escrow, we do recommend that successor trustees hire or at least consult with an attorney regarding trust administration before taking any action.

Administering a trust as a Successor Trustee can be straightforward in certain situations, and complicated in others. The Successor Trustee is taking on a role where they hold very specific, fiduciary and legal responsibilities to handle matters for the benefit of the beneficiaries. Even the best intentions can get successor trustees in trouble if they do not handle things properly.

LIVING TRUSTS – SPECIFIC ISSUES

NAMING A NEW SUCCESSOR TRUSTEE

If the trust doesn't name a successor trustee who is alive and who can handle the transaction, or if it names someone who is not responsive, we may need to file a petition with the court to appoint your client as the successor trustee instead. Such proceedings are generally routine in nature, and usually take a couple of months to get a court date to get them appointed as the trustee. Be aware though, these matters can get complicated and drag out if another individual objects to our petition (for instance, if the other individual thinks that they should be appointed as successor trustee instead). The court would then have to schedule a trial to determine who should be appointed as the trustee.

TITLE ISSUES – PROPERTY NOT IN TRUST

Probate and probate procedures are sometimes even required where a trust was created. It is important when creating a trust to set it up and properly "fund" it by putting the trust on title to the property. Many people fail to do this.

If real property is not transferred into the name of the trust, then the successor trustee will not be able to control it. They will not be able to sell it as it is likely still in the deceased individual's name. The property may have never been put into the trust. Or, the deceased might have put it into the trust when they initially set up their trust, but then took it out of the trust at some point when they refinanced the property and forgot to transfer it back in.

In certain situations when property is not placed into the trust, we can file a Heggstad Petition (or California Probate Code 850 Petition), in which we petition the court to recognize that the deceased clearly intended to put the property into the trust, and to sign a court order recognizing the trust as the owner of the property. The general way to prove this is if the property address is listed specifically in the trust. Usually this is done in the back of the trust in a section called "Schedule of Trust Assets" or "Schedule A."

Such a procedure is generally much easier, quicker, and more cost-effective than going through probate, usually only taking a couple of months to resolve.

OTHER TITLE ISSUES

Sometimes we come across title issues where the deceased had a poorly drafted trust or had multiple deeds filed, and a title company needs clarification or more information before the transaction can move forward. Sometimes these concerns can be resolved through our analysis of the trust and correspondence with the title company. In other situations though, we may need to petition the court for clarification and instruction on certain provisions of the trust.

IF THE CLIENT SAYS THEY HAVE A WILL OR POWER OF ATTORNEY

Most people are familiar with the concept of a Will – it names who you wish to inherit your property when you pass away. A Living Trust can appear to be very similar. The important distinction is the process through which beneficiaries actually inherit the property. A will is adequate simply in identifying who you wish to inherit from you. With regard to most real property though, the beneficiaries generally would still need to go through probate in order to actually sell or inherit the property. The property title is likely held alone in the name of the deceased, and the court would need to appoint someone to be able to sign on their behalf.

Similarly, family members sometimes get confused regarding the usefulness of a power of attorney. The deceased may have had a power of attorney naming a family member as their agent to deal with financial matters. It is important to note that such power of attorneys cease to be effective upon the death of the deceased. The family member will not be able to use the power of attorney to sell the property.



PROBATE AND PROBATE ALTERNATIVES

WHAT IS PROBATE?

Probate is the court process through which an individual (usually a loved one) can get legal authority to deal with the assets and debts that are in the deceased loved one's name. It is important to note that the court in a probate case will only deal with assets that were left in the deceased loved one's name alone. If the deceased had other properties that were held as joint tenants with someone else, or that were in a living trust, then those properties would not be part of the probate case.

When a client realizes that they have to go through a probate procedure to get authority to deal with property, we normally recommend that they hire a probate attorney to guide them through the process. While some areas of the law are somewhat more manageable with do it yourself resources, probate court is generally much more difficult to navigate. The worst thing about it is a mistake in probate cases can typically cause a two to three-month delay in selling property and resolving the estate. Repeated mistakes can unnecessarily draw out a probate case much longer.

A FIRST LOOK – DOES THE CLIENT QUALIFY FOR A PROBATE ALTERNATIVE?

If a client finds themselves in a situation where probate might be necessary, my goal in writing this is to educate you so that you are better equipped to recognize their options moving forward. The unique and interesting thing about probate matters is that there can be two or even three different ways to accomplish the same thing. Understand that you almost always have the option to file a normal probate case to deal with an issue. It will get the job done, but it may not be the best way.

That is why I am writing this. While probate is sometimes unavoidable, there may be a more efficient, cost-effective, and quicker way for you to get the job done. These alternatives might end up saving your client thousands or even tens of thousands of dollars. It might also help speed up the sale of the property to the benefit of all involved.

If the deceased had a living trust set up at one time or another, I specifically mention a procedure to avoid probate in the living trust section earlier in this book.

Beyond that, if your client is a surviving spouse, or if the real property is worth \$150,000 or less, then we might be able to qualify for a probate alternative. I have summarized these alternatives for you in the sections that follow.

SMALL ESTATE PROBATE TRANSFER OF REAL PROPERTY

When there is real property involved, but the estate is worth \$150,000 or less, we can generally avoid probate by filing a petition with the court. This is called a Petition to Determine Succession to Real Property. Note that for purposes of the \$150,000, the court looks simply at the fair market value of the property, it does not matter if there is a mortgage or if there is little to no equity.

For instance, if the fair market value of a property is \$200,000, it will not qualify for this procedure, even if \$170,000 is owed against the property and there is only \$30,000 in equity. It does not matter.

While a petition like this still requires a court hearing, it generally allows us to resolve the process and get the property transferred to the heirs much more quickly and cost effectively than a standard probate case. The court appoints a professional called a probate referee to do an appraisal of the property to determine its value for purposes of these procedures. These are not standard appraisals that would be done in connection with a sale; the probate referee normally does not do a walkthrough of the property, but generally relies on comps and other available information. The complete process to complete these petitions usually takes two to three months, and it requires the cooperation of all of the heirs. When completed, the court transfers title into the names of all of the heirs, after which they would all be able to cooperate to sign and sell the property.

For estates with real property worth \$50,000 or less, a similar affidavit procedure can suffice which is generally simpler and does not require a court hearing.



SPOUSAL PROPERTY PETITION

When spouses own real property together, they will own it generally either as joint tenants, as community property with rights of survivorship, or as tenants in common. If it is either of the first two, the surviving spouse can file a form with the county recorder's office in order to transfer title into their name alone.

However, if a spouse passes away and a home is held as tenants in common, simply as "community property," or it does not specify, then technically the surviving spouse only owns one half of the property, and they will be unable to sell or refinance the property without first putting the home entirely in their own name.

Beyond this, we regularly come across situations in which the real property was just in the deceased spouse's name alone, and the surviving spouse isn't on title at all! This might have been done in order to qualify for a loan when originally purchasing the property, or refinancing down the road.

As California is a Community Property state, real property acquired during the marriage is generally considered community property. If the deceased spouse did not name someone else as a beneficiary through a will or a trust, then their assets will be inherited naturally by the spouse under California law. If the deceased spouse had a will or trust naming the surviving spouse as the beneficiary, then it makes things much more straightforward.

That said, California recognized that it would be tedious to have to go through a full blown probate case simply to transfer such property into a spouse's name, so a procedure was established (a spousal property petition) through which a spouse could petition the Court to transfer such property into their name. Such a petition is much quicker and easier than probate. Unlike the other probate alternatives, this petition does not require an appraisal.

In these situations, it usually takes a couple of months to get a court date, and if everything goes well, the property is transferred into the surviving spouse's name and they will be able to sell the property.

Ultimately, remember that if it looks like a spouse is the only one entitled to inherit the property, then a spousal property petition is usually your best option to consider. If the deceased had no will, and the home was inherited by the deceased or was owned by the deceased before they got married, then the home might be considered the separate property of the deceased and, therefore, it might not be inherited completely by the surviving spouse. Instead, children or other relatives of the deceased might have a claim, and a spousal property petition might not be feasible. However, if there is a will naming the surviving spouse as a beneficiary, then it is usually smooth sailing.

THE GENERAL PROCESS – STANDARD PROBATE CASE

Sometimes a standard probate case is unavoidable, but do not despair! It is simply a process to navigate, and it can be easy to handle if the client has a competent probate attorney and you know what to expect.

The case starts with a Petition for Probate that we file with the court. We get assigned a court date when we file our paperwork, which is usually scheduled between 2-3 months down the road depending on the court's calendar. If all goes well, the client is appointed by the court at that court date, and will have formal, court paperwork a few weeks after that giving the client authority to proceed with the listing and sale of the property.

You may have heard that probate cases can take over a year to resolve, and this is true. Most cases take anywhere between 9 months and a year to complete. But that addresses the case as a whole: from opening the case to when beneficiaries receive their inheritance. Being able to sell the real property is a different matter, and clients can get authority to sell much earlier.

IF SOMEONE OBJECTS AT THE COURT DATE

When we file the petition for probate, we are asking the court to appoint the client as the personal representative (sometimes referred to as administrator or executor) of the estate of the deceased. After filing the petition, we are required to give notice of the court date to the other family members, heirs, or beneficiaries of the deceased.

These other individuals will have an opportunity to object at the court date. They can ask the court to appoint themselves as the personal representative instead. If the deceased had a will nominating your client as the executor, then the client will have priority, and hopefully the issue will be easily resolved. If there was no will, then a spouse has priority, followed by children. If there is a dispute between heirs as to who should be appointed, the court may schedule a trial to determine who to appoint. This can delay things considerably, for months at a time.

Most cases are straightforward, family members are in agreement, no one objects, and the client gets appointed. That being said, if there is a possibility that someone might object, we try to resolve that disagreement beforehand where possible to avoid these delays.



SELLING REAL ESTATE IN A PROBATE CASE - INTRODUCTION

Once the client has been appointed as the personal representative of the estate, they will get court orders granting them authority to handle matters on behalf of the estate. This includes being able to sign a listing agreement and move forward with the sale of the property.

In some situations, the court will grant the client "Full" authority to handle these matters. With such orders, the client will have much more freedom and discretion to sell the property without involving the court. Alternatively, the court may grant the client "Limited" authority to handle matters. In these situations, a special court date will have to be held in order to approve the sale before it can move forward.

We will walk through how to handle a real estate transaction from the probate court perspective in both situations, when a client has full authority and when a client has limited authority.

FULL AUTHORITY VS. LIMITED AUTHORITY – THE FACTORS AT ISSUE IN THE PROBATE CASE

The issue of full authority or limited authority will greatly affect how the real estate transaction is handled. That said, it is helpful to understand why some clients will get limited authority vs. full authority, and the factors that go into that result.

The major factor on whether a client will be able to get full authority is whether a bond is required by the court, and whether the client qualifies for bond. This can be a complicated issue. Essentially, if the court is putting an individual in control of \$500,000 worth of assets, and the individual is supposed to ultimately divide the proceeds among other family members, the court wants to make sure that the other family members are protected.

The court wants to make sure that the individual doesn't sell the property, take the money, and leave the state with the proceeds. In these situations, the bond acts like insurance. If the individual misappropriates the funds, then the bond is there to pay the inheritance of the other family members. The bond company will then go after the individual to recover the funds.

If the deceased had a will, the will may provide that the client should not be required to get a bond, which can be very helpful to avoid the issue of getting a bond entirely. Alternatively, if all heirs agree to sign a formal court document to waive the bond requirement, then the issue of bond might potentially be avoided. That said, the court still has discretion to order bond, and generally will still do so if the client lives out of state.

For purposes of bond, we look at equity in property. If the estate has property worth \$500,000, but there is a mortgage of \$300,000, then court might require the client to get bond in the amount of \$200,000 if they want full authority to deal with the estate. This transaction is similar to how bail bonds work. If the client had \$200,000 sitting around, they could deposit that money with the court, and they would get that money back once they complete their role and finish the probate case. That money would sit with the court as security.

Most people do not have that type of money. Instead, they use bond companies. Instead of coming up with \$200,000 themselves, the client pays a bond company an annual premium, usually anywhere between a few hundred and a few thousand dollars depending on the amount of the bond. The bond company, in turn, takes care of the \$200,000 bond. That said, the bond company will look at the client's credit, their income, and their assets to determine if the client qualifies for the bond, and how much of a premium to charge the client.

If the client has no assets or income, then the bond company likely will not provide bond. That is because if the client ran off with the money, and the bond company had to cover the inheritance of other beneficiaries, then the client would have nothing for the bond company to go after and they would be stuck losing money. The more secure the bond company feels in assets that they can go after, the more likely the client will qualify for the bond and the lower the premium should be.

Sometimes, the client will need a co-signer to qualify for the bond to get full authority. Sometimes the client may only qualify for a \$100,000 bond instead of a \$200,000 bond. Sometimes, the premium the client would have to pay the bond company for the bond is just too much.

In these situations, where the client does not qualify for bond or if it's just not practical, we can ask the court to grant the client limited authority to deal with the estate. This gives the client the ability to get court approval, usually with a significantly smaller bond (\$20,000, for instance), and they will be able to move forward with the sale of the property.

MOVING FORWARD WITH THE SALE

Once the client is appointed with either full or limited authority, the client can move forward with the listing agreement. Depending on the county the case is being heard in, note that the court may set a cap on commissions that can be earned as a part of the sale.

The court requires that we arrange for a professional called a probate referee to do an appraisal of the property. These are not standard appraisals that are traditionally done in connection with a sale; the probate referee normally

does not do a walkthrough of the property, but generally relies on comps and other available information. The probate referee has 60 days after we make a request to complete the appraisal. The court primarily relies on this appraisal to make sure that the property is not sold at far less than market value.

When we get the appraisal back from the probate referee, it does not include a detailed report, comps, or any real information on how the value was reached. It simply lists the appraised value.

Note that if there is a concern about the interior or the condition of the property such that the appraisal, based on comps, might be too high, we can provide such information for the probate referee to consider when we request the appraisal in the first place.



PROCEDURE WHEN CLIENT HAS FULL AUTHORITY

If the client has full authority to sell the property, then the court will not generally require a court hearing to approve the sale. That said, there are still procedures to follow to make for a smooth transaction. As attorneys, we will typically handle the court paperwork for the probate case in relation to the sale. That said, it is important to know about the process and what to expect.

When the purchase agreement and escrow instructions are prepared, a document titled Notice of Proposed Action will need to be prepared in the probate case. This document will include the legal description of the property, common description of the property, purchase price, buyer's information, commissions to be paid, and appraisal value. The notice of proposed action must be served on the other individuals that are part of the probate case at least 15 days prior to the close of escrow.

If the sell price is less than 90% of the appraised value that was given by the probate referee, then we will need to justify the lower sale price to the court. This can usually be accomplished by a declaration from you as a real estate professional with your license number, years of experience, and facts to support your professional opinion as to why the proposed sale price is likely the best offer that will be made. This declaration will be served along with the Notice of Proposed Action.

It is important to note that individuals will have an opportunity to file an objection in response to the notice of proposed action, essentially wherein they can state their disagreement with the terms of the sale, and their position that the sale should not be allowed to move forward as proposed.

If any objections are filed within the time frame, then we will have to go through additional procedures to get a court hearing to confirm the sale of the property. These are the same procedures that must be followed if the client only had limited authority, and which are described in the next section.

If there are no objections filed in the allotted time, we will provide escrow with a copy of the court orders which show that the client has authority to sell the property and confirmation that we have received no objections. This will allow the sale to be completed. Any net proceeds of the sale will be distributed to the estate of the deceased, with the client listed as the administrator. The client will need a bank account set up for the estate, and will have a Tax ID number for the estate to facilitate the transaction and deposit the funds into that account.

PROCEDURE WHEN CLIENT HAS LIMITED AUTHORITY

If the client has limited authority to sell the property, then the court will require a specific court hearing to approve the sale. This process is generally referred to as a Petition to Confirm Sale. It is important to note that the court hearing will also be an opportunity for other buyers or investors to bid and make offers on the property. Given this, the terms of the sale and the parties involved can potentially change considerably. That said, it is fairly common for these hearings to proceed without any new bidders.

As attorneys, we will typically handle the heavy lifting in these situations. However, it is important to know about the process, what to expect, and your involvement as a real estate professional.

Once a buyer has made an acceptable offer, we must get a copy of the purchase agreement and prepare a Notice of Sale. The notice of the sale is required to be published in a newspaper designated to handle legal publications. This publication essentially notifies other potential buyers and investors of the sale. Once the publication has run in the paper for a set period of time and the publication requirement has been satisfied, we then file a document titled Report of Sale and a Petition for Order Confirming Sale of Real Property with the court. These documents notify the court and individuals involved in the case of the proposed sale, and a court date is assigned for the sale.

Notice of the court date with a copy of the petition will also be prepared, including information on the buyer, the buyer's agent, and the seller's agent. As attorneys, we will attend the court hearing. We also recommend that the buyer and the buyer's representative attend the hearing in case other potential buyers make a higher bid than the proposed sale price. If the buyer wishes to increase their offer at that point, they must have proof of funds (a bank statement or pre-approval for a loan) and a check to cover the new deposit amount. After the court date, we will submit an order for the court to sign to formally confirm the sale. Once the court signs it, we provide that to escrow and the transaction can be completed.

As is the case with a transaction with full authority, any net proceeds of the sale will be distributed to the estate of the deceased, with the client listed as the administrator. One difference for the client with limited authority is that the net proceeds usually must be deposited into a blocked bank account set up for the estate by the client, and as such, these funds cannot be wired by escrow. The client will need a bank account opened for the estate, and will have a Tax ID number for the estate to facilitate the transaction and deposit the funds into that account. Escrow instructions should specifically provide that the funds must be issued by check by escrow to the estate, with the client named as the personal representative of the estate. In most cases, the client must then personally deposit the funds in person at the bank with a copy of the court order.

WHAT THE CLIENT SHOULD EXPECT AFTER THE SALE OF THE PROPERTY

While the real estate transaction is done at this point, it is still useful to know what clients can expect from the rest of the probate process. Up until this point in the probate case, the client has been appointed as the personal representative to handle matters on behalf of the estate, and they have made efforts to deal with any assets and debts. They were able to sell the real property and deposit the net proceeds into a bank account owned by the estate. The money, though, has not yet been distributed to the heirs. As attorneys, we will have taken care of legal notices to creditors and other entities as required by law. Once these outstanding matters are taken care of, we will be able to file a petition for final accounting and distribution to the heirs. We get a court date for this petition, usually a couple of months after we file it, for the court to essentially review what the client has done, approve distribution to the heirs, and allow the client to close the case.

The client will be entitled to administrator fees as compensation for their spending the time to act on behalf of the estate, and we as attorneys will be entitled to an equal amount of attorney's fees. The administrator fees and attorney's fees are set by the court and are based on the gross value of the estate, they are:

4% of the first \$100,000 of the estate;

3% of the second \$100,000 of the estate;

2% of the next \$800,000 of the estate;

1% of the next \$9 Million of the estate.

That means that if an estate is worth \$400,000, the client would receive \$11,000 in administrator fees and the attorney's fees would be the same. The court's filing fees, costs to do legal publications, and other costs usually will cost the estate another \$2,500 approximately.

SPECIAL SITUATIONS – PENDING FORECLOSURES, EMERGENCIES, AND TENANTS

There are some situations that you will come across where a mortgage has not been getting paid. That the deceased family member passed away six months ago and the family is just now starting to deal with these issues. When there is substantial equity in the property, it would be an extreme waste to allow the property to be foreclosed on. We want to be able to protect the home from foreclosure, and thereby protect the family's inheritance from the home by being able to sell the property at fair market value.

Until the client gets formally appointed by the court though, no one will have authority to sell the property before the foreclosure. In most situations, the mortgage company will not even speak to the client, as the loan is in the name of the deceased and the client has no legal authority yet.

The most common way families deal with these situations is simply to continue to pay the mortgage. While the mortgage company may indicate that they cannot give information about the loan, or communicate about it with the client, we rarely see situations where the mortgage company refuses a payment. Most people simply keep sending in the monthly mortgage payments until they are sold. If a client is doing that to the benefit of their family, they will normally be reimbursed at the end of the case through the proceeds of the sale.

That said, many clients do not have the funds to be able to make these mortgage payments, especially if the amount in arrears has built up over many months.

There is another option. If a foreclosure sale date has been set, we can petition the court to stay the foreclosure.

Oftentimes we will do this on an “ex parte,” or emergency basis, where we file the legal paperwork and get a court date in a much shorter time frame to stop a pending foreclosure. The court does not like to see properties foreclosed on simply because someone passed away. In such petitions, we advise the court of the situation, and the court has authority to stay the foreclosure to give the client time to sell the property. While such petitions are successful in many cases, the court usually wants to see that the property will diligently be sold for the benefit of the family, and that there will be no undue delay. The court cannot prevent a foreclosure indefinitely. Additionally, if the client wasted time and lived in the property for years before starting this process, the court may be less inclined to stay the foreclosure since the client already has had ample time to address the issue.

Beyond the power to stay a foreclosure, the court also has the power to appoint the client as the personal representative with “special” temporary powers. These “special” powers refer generally to the client getting authority to act on behalf of the estate before their normal court date. Special powers are usually very specific in nature: the court might simply grant the client authority to sell a property, or to access a certain account. If there is an emergency need to get the client legal authority to address a specific issue, we can file an emergency petition to ask the court to grant the client these powers.

If there are tenants in the property, those tenants are dealt with in a fashion similar to traditional landlord/tenant situations. If a prospective buyer wishes to purchase the property with the tenants still in possession of the property, then that is fine. That said, usually the only buyers we see that might agree to such a term are investors.

If the goal is to retake possession of the property and have it move in ready for the buyer, then hopefully an amicable agreement can be worked out for the tenant to vacate if the property before the sale. If legal action is necessary, the primary difference in probate is that the client will simply have to be appointed as the personal representative before they have legal authority to start the eviction process. The eviction process itself is no different.

CONCLUSION

If you ever have any questions about a client’s situation and need some guidance, please feel free to contact our office for a free consultation at 1-800-752-9937 or email me directly at troywerner@wernerlawca.com. We are happy to help.

FOR MORE INFORMATION ABOUT PROBATE OR ESTATE PLANNING, SCHEDULE A
FREE CONSULTATION WITH THE WERNER LAW FIRM TODAY.

ABOUT THE AUTHOR



Troy Werner has been an indispensable asset to The Werner Law Firm since joining in 2009, providing exceptional legal service to its clients. An Ivy League graduate, he has won numerous awards during his tenure as an attorney, including being recognized with an award as one of the top 40 individuals under 40 in the community. His goal is to help give clients peace of mind in dealing with their individual legal situations. In collaboration with his father/founder of the firm, L. Rob Werner, and backed by the firm's dedicated and experienced team of attorneys and legal professionals, he plans to continue the firm's tradition of excellence well into the future.

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