Study L-1100 January 15, 1999

Memorandum 99-3

New Probate Code Suggestions: Informal Probate Administration

BACKGROUND

At its December 1998 meeting in San Francisco, the Commission took up, but did not debate or take action on, Memorandum 98-84 and its First and Second Supplements, concerning the suggestion that the Commission undertake a study of informal probate administration. The Commission received additional materials at the meeting, heard presentations by Matthew S. Rae, Jr. and Don E. Green opposed to a Commission study of the subject, and heard rebuttals to their presentations by Robert L. Sullivan, Jr. and Thomas J. Stikker.

Because relatively few Commissioners were present at the time, the Commission decided to defer discussion and decision on this matter until a time when more Commission members will be present. The staff was directed to preserve and digest the presentations made, along with the additional materials received, for consideration by the Commission at a subsequent meeting.

ADDITIONAL MATERIALS

The following additional materials addressed to the subject of informal probate administration were received by the Commission at or following its December 1998 meeting.

PRESENTATIONS MADE AT DECEMBER 1998 MEETING

Matthew S. Rae, Jr.

Matthew S. Rae, Jr., spoke in opposition to a Commission study of informal probate administration. Mr. Rae noted his service as a dissenting member of State

Bar committees that (1) drafted California's independent administration statute and (2) drafted the current informal probate proposal (and his involvement in writing a minority report opposed to it). He also noted his earlier involvement with the State Bar's opposition to the Uniform Probate Code.

Mr. Rae stated that he was speaking as a private practicing attorney. In this capacity he made the following points.

• The State Bar did an exhaustive study of the Uniform Probate Code and concluded that supervised administration is preferable on the whole. There are some aspects of independent administration that are desirable and these are now part of California law.

• It is the opinion of the great majority of California practitioners that it would be a mistake to remove the protection of the probate court from persons who do not have the resources to develop sophisticated and protective estate plans. Practitioners who represent smaller estates have seen numerous instances of serious problems that were corrected or avoided by the probate court.

• Probate litigation has exploded in recent years, particularly in Southern California. This is almost entirely driven by the living trust, which is not subject to court supervision. We have not experienced this problem in probate, where the presence of the court deters overreaching.

• Informal probate lacks the protection of a bond, which can serve as an important remedy for probate problems otherwise.

• California courts, particularly large metropolitan courts, have developed an effective, fully staffed, knowledgeable system of court supervision that is available not only for probate but also for trust litigation and other estate related matters. This is a valuable resource that could not be sustained if large numbers of probates were voluntarily removed from the system. Probate disputes would be tossed into the general court hopper, and the specialized court expertise would be lost.

• When probate practitioners demanded that the State Bar discontinue work on the concept of informal probate administration, the State Bar halted. The Law Revision Commission ought not to start up the process again.

Mr. Rae concluded that although he is a member of the California Commission on Uniform State laws, he does not want to see the Uniform Probate Code adopted in California. However, if confronted with the choice between the Uniform Probate Code and the current proposal for informal probate

administration, he would prefer the Uniform Probate Code, which is a vastly superior product.

Don E. Green

Don E. Green also spoke in opposition to a Commission study of informal probate administration. Mr. Green noted that for the past ten years he has been a probate staff attorney for the Sacramento County Superior Court. Prior to that time he was in practice with a major Sacramento law firm as an estate planning specialist for large, sophisticated estates. Beginning at the end of December he will be a probate commissioner for Contra Costa County.

Mr. Green, speaking as an individual, made the following points.

• The current California probate system is quite good, in part as a result of the Law Revision Commission's work to improve it during the '80s. In fact, a Kiplinger's magazine survey indicates that probate is generally quick, cheap, and easy. See Exhibit pp. 3-6.

In California the typical cost of probate does not exceed 3% of the value of the estate and the typical delay involved does not exceed six months. The cost of probate is quite small when compared with the cost of preparing trust documents to pass the estate free of probate. In the Legislature, the author of a bill to abolish the probate attorney fee schedule in favor of reasonable fees dropped the bill when he realized what a good value the estate was getting in a probate proceeding the bill author was personally familiar with.

• Attorneys seek to encourage use of revocable trusts because they make more money off their hourly rates than they do drafting a will and probating an estate. The trust industry vilifies probate because it is profitable to do so — there is no constituency speaking out for the benefits and advantages of the probate system, correcting the misinformation being circulated about it.

• People hate probate because it is associated with death, and comes at a time when they are emotionally distressed. The hatred is not rationally based, and would apply to any type of death-related procedure. Moreover, the probate system is being scapegoated, and it is an easy target for those who wish to push inter vivos trusts, fostering anger among the elderly.

• Bereavement is a difficult time during which some beneficiaries may take advantage of others. That is why the protective presence of the probate court is necessary.

• Persons who establish trusts, not subject to court supervision, tend to be in control of their affairs. Those who do not, and who rely on the court supervision of probate, tend to be in messier family situations where court supervision is needed.

• The scheme offered for informal probate administration, calling for initial registration with the court, will mislead people into thinking their interests are being looked out for, and they will not monitor what's going on carefully enough.

• An opt-in informal probate system such as that proposed here is not desirable because it will be selected in many cases by those wishing to avoid creditors or taxes, there will tremendous pressure on beneficiaries not to force the estate into probate, and in the long run an optional system will not provide sufficient business to maintain the system.

• Although we are told there are no problems under the Uniform Probate Code, this is misleading. Those who are victimized by the system are not being counted — these are people who are not sophisticated, who do not have attorneys, and who do not receive the protection they would under the current probate system. There is no way to get reliable statistics from Uniform Probate Code states short of auditing cases, going behind the paper record, and finding out what actually happened.

• A study of informal probate administration will be a very complex, technical, and difficult project, and will consume a lot of Law Revision Commission time. There are wildly variant and strongly held opinions about this subject. The proponents on the State Bar project were subjected to abuse from both sides. It will be a shooting gallery if the Commission proceeds with this project.

• Likely opposition to informal probate will come from the California Judges Association, newspaper publishers (due to loss of in rem publication), probate referees (they have political clout in the Legislature), a number of attorney organizations around the state (some of which we have already heard from), Superior Court probate attorneys, government agencies such as Franchise Tax Board (revenue loss), and former members of the California Law Revision Commission (who are likely to testify against it in the Legislature).

• Likely support would come from the American Association of Retired Persons (although lately their presence in the Legislature has diminished) and from HALT (an anti-lawyer-conspiracy group).

Mr. Green concluded by asking, Who the law is for? The probate system currently serves unsophisticated people; the wealthy and sophisticated people can do their own planning. Informal probate would merely give the wealthy another planning tool or option. It will not hinder the trust industry at all, which will continue to thrive on misinformation. The premise of informal probate is that people should protect themselves and not get so emotional at a death in the family. But the measure of civilization in a society is the degree to which the rights of the weak are protected; it's no accomplishment to protect the rights of the strong.

Robert L. Sullivan, Jr.

Robert L. Sullivan, Jr. noted that he has previously spoken to the Commission at length about the merits of a Commission study of informal probate administration. Limiting himself to a few matters in rebuttal to the presentations opposed to a Commission study of informal probate administration, he made the following points.

• It is not the case that when probate practitioners demanded that the State Bar discontinue work on the concept of informal probate administration, the State Bar halted. The State Bar represents all lawyers — it is a lawyers organization. When the informal probate proposal was circulated for comment among probate lawyers it attracted strongly divergent opinions. The State Bar concluded that because of the division within its membership, the State Bar would not be the appropriate entity to carry this study forward. The letter the Commission has received from the current Chair of the State Bar Section, Susan House, (see Second Supplement to Memorandum 98-84) accurately reflects the status of this proposal before the State Bar.

• Under the informal probate proposal, being in or out of court supervision is optional. It does not eliminate the probate system — each family has the choice whether to use the probate system, depending on its own circumstances.

Thomas J. Stikker

Thomas J. Stikker, also in rebuttal to the presentations opposed to a Commission study of informal probate administration, noted that he is a former member of the State Bar's executive committee on estate planning, trust, and probate law. Along with Mr. Rae, Mr. Sullivan, and many others, Mr. Stikker

spent many long hours drafting the proposed legislation. Mr. Stikker made the following points.

• The work product that has been provided to the Commission will give it a substantial leg up on this project, as far as how to integrate the concepts of the proposed legislation into California law. It is not nearly as daunting a task as Mr. Green makes it out, to come up with a meaningful and workable proposal to submit to the Legislature.

• The proponents of informal probate do not mean to suggest that the matter would not be controversial. But there is controversy on both sides of the issue, with strongly-held and polarized opinions being expressed. The proposal has not been repudiated the state bar, as some of the proponents have suggested. There are just as many people who have expressed strong support for the proposal as there are who are strongly opposed. The reason the Law Revision Commission exists is to step back and consider what's right for the people of the State of California.

• California is behind most other states have adopted a much more liberal system of probate. Lawyers in other states who have been polled cannot understand why California has such an anachronistic probate system that forces everyone into a system of supervised court administration at tremendous cost, and that has driven the California public to seek out other alternatives that are expensive and not very workable. The public does not want probate the way it is run in California today; it is the motivating factor of probate avoidance that drives Californians to the trust mills, with the resultant explosion of trust litigation observed by Mr. Rae. The state Legislature needs to recognize that and come up with a better solution. The informal probate administration proposal represents a better solution.

COMMISSION ACTION

The issue presented for Commission decision is whether to proceed with a study of informal probate administration. In addition to the materials presented in this memorandum, materials previously submitted on this matter include Memorandum 98-56, as well as Memorandum 98-84 and its First and Second Supplements.

If the Commission decides to proceed, its existing probate authorization from the Legislature would be sufficient — the Commission's calendar of topics

includes a study of "Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code." The staff has sufficient expertise in this area that it would be in a position to proceed with the study, without the need for an expert consultant on the topic.

The staff in Memorandum 98-56 listed this project as one we believe is meritorious but about which we have reservations. "This is a significant study, but would be subject to vested interest politics." The Commission needs to decide whether it is interested and wants to devote its resources to this project.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Harlean M. Carroll
Los Angeles Superior
111 North Hill Street Room 258
Los Angeles, California 90012
December 09, 1998

Judge Arthur K. Marshall, Chair
California Law Revision Commission
300 S. Grand Ave. FL 28
Los Angeles, CA 90071- 3109

RE: Proposed Uniform Probate Code Statute

Dear Judge Marshall:

Pursuant to our telephone conversation yesterday, as you know I am a Probate Attorney for the Los Angeles Superior Court; however, I am writing this letter in my individual capacity. I do not believe that the passage of the Uniform Probate Code is in the best interest of the people of the State of California, for all of the reasons stated by members of the Los Angeles County Bar, Trusts and Estates Section, a few years ago when Mr. Sullivan gave his presentation, and for many other reasons based on my observations in certain specific cases. One such case involved the presentation, in an ancillary proceeding in California, of a will admitted in another state in an informal proceeding under the Uniform Probate Code of that state. There was a lack of basic notice in the other state's proceeding, which required our court to hear the whole proceeding, including the will contest which was filed after notice was required in California.

However, because I have not seen or read the proposed statute, I cannot comment on it at this time. I would like to be put on the Commission's mailing list for meetings, and, if possible, receive copies of the proposed statutes. If there is a charge, please let me know.

Very truly yours,

Harlean M. Carroll

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December 14, 1998

Our File No. 9911.81-35

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Nathaniel Sterling
Executive Secretary
California Law Revision Commission
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Re: Memorandum 98-84

I write to support the proposal for informal probate. I am one of those probate practitioners who sees the inside of a courtroom as well as trying to assist clients in avoiding the cost and delay of the experience. In my opinion, informal probate is practiced routinely by family members in control of assets of a decedent or conservatee or trust beneficiary. Usually the fiduciary seeks to do an honest job and performs prudently. Occasionally, the rules are bent. It is rare that the involvement of a lawyer protects anyone, except the lawyer and his or her stream of income.

I am supporting informal probate because it works well in Texas and numerous places throughout the world. I am supporting informal probate even though AARP does, and I would assume AARP's support is based on economic advantage to AARP. The opposition of lawyers flies in the face of lawyers falling all over themselves to sell inter vivos trusts as a probate avoidance device. If informal probate is so prone to abuse, how is the living trust any less prone to abuse? The fact that lawyers, judges and commissioners approve informal probate simply supports my view that informal probate is for the benefit of the public. If you are taking polls, try to find a satisfied probate proceeding beneficiary who would not prefer to escape the ministrations of lawyers, judges and commissioners.

The basic problems that need to be addressed are (1) how to protect creditors — and here I say let them protect themselves; and (2) how to clear title for the estate beneficiaries — and here I say make it as quick and cheap as possible.

I urge the Law Revision Commission to study and adopt a meaningful informal probate procedure.

Very truly yours,

Luther J. Avery

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Who's Afraid of Probate Court?

Almost everybody, it seems. But as our state-by-state survey reveals, probate's reputation as a costly, time-consuming, estate-eating monster is a mite overblown.

By Ronaleen R. Roha

It's time to lay one specter to rest: Probate is not a fate worse than death. In most places—and in most cases—the legal mechanism for passing property to heirs goes fairly quickly, often with little court intervention and with reasonable costs.

That's good news for everyone except those who use fear of probate hell to hawk revocable living trusts as a ticket to bypass the nightmare. One such operation in California, Alliance for Mature Americans, recently agreed to pay $1.1 million to settle a lawsuit brought by the state. The group, which admitted no wrongdoing, allegedly sold living trusts to more than 10,000 senior citizens, many of whom didn't need them.

To shine some light into the dark corner where probate normally resides, *Kiplinger's* asked lawyers around the country how the system really works in a typical case—one in which the heirs are the surviving spouse and children and everyone cooperates. You'll find the key results in the table on page 103 and the boxes on page 104. In almost every case, the answers came from the chairperson of the state bar association committee that specializes in probate.

Even though probate is governed by state law, details can vary by county. We note some such variations, but to know how the law works where you live, check with a lawyer who specializes in estate planning.

COURT FEES

Don't worry that court costs will bankrupt your estate. In half of the states, the basic initial charge for taking an estate to court is a flat fee, ranging from $40 in Kentucky to about $185 in Sacramento, Cal. Fees in California vary by county, as they do in Florida, Illinois, Louisiana, Maryland, Oregon and West Virginia. For Hawaii, New Hampshire, New

Mexico and Oklahoma, the table lists the higher of two possible flat fees. In Nebraska, a $22 flat fee applies to certain proceedings.

In the rest of the states, filing fees depend on the size of the estate. The bill is usually based only on the "probate estate," which comprises assets you own in your own name. That differs from the "gross estate," which also includes property you own jointly with the right of survivorship, proceeds from life insurance, and balances in IRAs and other retirement plans that go to a named beneficiary and bypass probate. For these states, we asked for estimated filing fees for two simple estates:

- Case 1: a probate (and gross) estate of $350,000
- Case 2: a probate estate of $600,000 (gross estate of $800,000)

Filing fees in both cases cluster around $250 to $600.

LAWYER'S FEES—HOURLY AND TOTAL

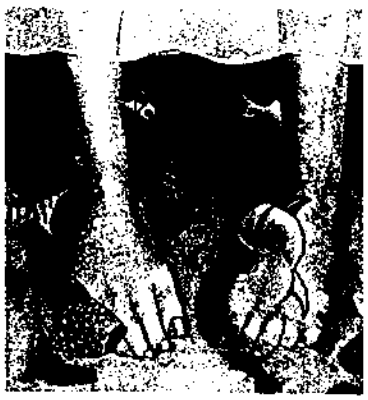
State laws often say lawyers are entitled to a "reasonable fee" that takes into account such factors as the time spent and the complexity of the issues. But, according to our survey, lawyers in almost every state take on probate work for an hourly fee.

The hourly rates and total charges listed in the table represent our respondents' best estimate of what is common in their states. Many were reluctant to make any guesses (indicated by "NA" in the table) because so many factors play a role, including the extent of the lawyer's experience, the prestige of the firm, the complexity of the work and whether the law firm is located in an urban or in a rural area.

In California and Wyoming, hourly fees are not common. In California, a fee schedule is built into the law, and average fees equal 3% of the estate's gross value, says Don Green, chair of the estate-planning, trust and probate-law section of the state bar.

The more a lawyer does, the higher your bill will be, of course. In one case, David Otterman, an estate-planning lawyer in Barre, Vt., even took the trash out of the house that was part of the estate. His fee: a startling $7,000 for a $70,000 estate. In another case, his fee for probating an $850,000 estate was $7,500.

In some cases, the cost of settling an estate will be higher than the fees shown because more than probate is involved. Linda Hirschson, an estate-planning lawyer in New York City, recently worked on a $2.5-million estate. Her fee was about $25,000, with about two-thirds for work on probate-related issues, including preparation of the federal and state estate-tax returns, and the rest for financial planning for survivors.



Most states allow a surviving spouse to claim personal property without going through probate at all.

IS COURT SUPERVISION TYPICAL?

In just over half the states (those with a "no" in this column), informal procedures are the norm. This is especially true in states that have adopted the streamlined procedures of the Uniform Probate Code. Basically, after your executor or personal representative starts the proceedings, he or she may not have to appear in court again until the final papers are filed to show that debts have been paid and assets distributed—and maybe not even then.

Where formal procedures are the norm (indicated by a "yes"), the executor generally has to seek court approval at key steps along the way, such as when selling real estate.

SIMPLER RULES FOR SMALL ESTATES. Almost every state simplifies matters for small estates, usually defined as those consisting only of personal property and no real estate.

In Washington State, an unlimited amount of assets may pass through its small-estate procedure. But, generally, small-estate limits range from $3,000 in Alabama to $50,000 or more in Alaska, Arkansas, Florida, Illinois, Iowa, Kansas, Louisiana, Nevada, Ohio, Oregon, Texas and West Virginia.

Thirty-five states permit surviving spouses and sometimes other heirs to take possession of limited amounts of personal property—such as clothing, furniture and sometimes motor vehicles—simply by completing a declaration of the right to inherit.

CAN YOUR FAMILY RECEIVE FUNDS DURING PROBATE?

It is highly unlikely that your family will be left high and dry while your estate is in probate. In every state

Will state death taxes clip your estate?

ONE PURPOSE of probate is to ensure that state death taxes are taken care of. These take three forms:

- **A pick-up tax.** Every state has this tax, which applies only to estates that owe a federal estate tax. It adds nothing to the tax bill but funnels to the state money that would otherwise go to the feds.
- **An inheritance tax.** Sixteen states (Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Dakota and Tennessee) impose this tax on heirs now, but Connecticut will phase it out by 2005 and Louisiana by July 1, 2004. Tax rates are generally lowest for close relatives, highest for those not related at all. Montana's rates start at 2% and rise to 32%, the highest in the country. In Connecticut, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nebraska, New Hampshire, New Jersey, North Carolina and South Dakota, transfers to a spouse are not taxed at all.
- **An estate tax.** Only three states have a death tax that applies to the estate itself (rather than the heirs) roughly the way the federal estate tax does: New York (the tax is being phased out by February 1, 2000, and until then transfers to a spouse are exempt); Ohio (a bill is pending to phase out the tax); and Oklahoma (transfers to a spouse are exempt).

Sizing up probate, state by state

Check the results of our survey for the state where you live, and perhaps where your parents live as well, for a quick idea of the cost—in time and money—for probating a typical estate. See the accompanying story for an explanation of the categories and footnotes.

	COURT FEES: BASED ON ESTATE CASE 1/CASE 2*	LAWYERS' HOURLY FEE	TOTAL CHARGE FOR PROBATE	IS COURT SUPERVISION TYPICAL?	FAMILY'S ACCESS TO FUNDS	LENGTH OF PROBATE IF NO FED. ESTATE TAX RETURN IS DUE
Alabama	$ 72	$100–$200	$ 250–$500	Yes	Discretionary#	7 mos.
Alaska	100	125–160	1,500–2,000	Not	$1,500/mo. for 1 yr.#	7 mos.
Arizona	80	150–215	2,000 and up	Not	$37,000#	10 mos.
Arkansas	101	100–150	1,200–7,500	Yes	$2,500#	8-12 mos.
California	185	NA	About 3% of value	Yes	Discretionary	9 mos.
Colorado	91	100–200	2,000–3,500	Not	Up to $12,000/yr.#	6-12 mos.
Connecticut	$1,112/$1,270	150–200	750–10,000	Yes	Discretionary#	6 mos.
Delaware	4,375/7,500	150–250	NA	Yes	$2,000#	1 yr.
District of Columbia	575/1,275	150–300	NA	No	$10,000	9-12 mos.
Florida	200/200	100–300	2,500 and up	Yes	$6,000#	6-12 mos.
Georgia	80	90–250	500–1,500	No	Discretionary	9 mos.
Hawaii	55	150	3,000	Yes†	Discretionary	6-8 mos.
Idaho	100	80–150	1,500–2,000	Not	$500/mo.#	6 mos.
Illinois	180/180	75–350	NA	No	$10,000; $5,000 to each minor child#	8 mos.
Indiana	120	200	NA	Varies	$15,000 to spouse; $15,000 to minor children	1-1½ yrs.
Iowa	350/600	NA	NA	Yes	Discretionary#	1 yr.
Kansas	99	150	5,000–10,000	Yes	Up to $25,000#	1 yr.
Kentucky	40	80	800–1,000	Yes	$8,500	6-8 mos.
Louisiana	500/500	125–150	2,000–3,000	Yes	Discretionary	3-6 mos.
Maine	400/500	50–200	NA	Not	Discretionary	6-9 mos.
Maryland	500/750	NA	NA	No, after 1/1/98	$5,000 to spouse; $2,500 to each minor child#	6-9 mos.
Massachusetts	90	150 or more	NA	Yes	Discretionary	9-12 mos.
Michigan	100	90–250	NA	Not	Discretionary	5-6 mos.
Minnesota	165	125–300	2,000 and up	Not	Up to $1,500/mo. for 18 mos.#	6 mos.
Mississippi	82	75–150	750–5,000	Yes	Support for one year#	6 mos.
Missouri	305/365	NA	NA	Varies	Discretionary#	7-8 mos.
Montana	85	NA	NA	Not	Up to $18,000#	6 mos.
Nebraska	440/660	100–200	NA	Not	Discretionary#	1 yr.
Nevada	140	175–225	3,000	Yes	Discretionary#	9-12 mos.
New Hampshire	120	100–200	NA	Yes	Discretionary#	9-12 mos.
New Jersey	50	150–250	1,000	Not	Discretionary#	3 mos.
New Mexico	82	100–200	1,000–2,000	Not	$40,000#	4-6 mos.
New York	500/1,000	NA	NA	No	Up to about $50,000	2 yrs.
North Carolina	1,400/2,400	100–300	NA	Yes	$10,000 to spouse; $2,000 to each minor child	6-9 mos.
North Dakota	80	100–150	1,200–2,000	Not	Discretionary#	9-12 mos.
Ohio	250/275	125–175	NA	Yes	$25,000#	9-12 mos.
Oklahoma	103	100–150	2,000	Yes	Discretionary#	4-6 mos.
Oregon	302/302	120–160	NA	Yes	Discretionary#	6-7 mos.
Pennsylvania	250/550	125–300	3%–4% of value	Not	$3,500#	9-15 mos.
Rhode Island	1,500/1,500	175	1,000–5,000	No	Discretionary	8 mos.
South Carolina	470/845	90–175	2,000	Not	$5,000 of household and personal effects	9-12 mos.
South Dakota	150/150	90–275	NA	Not	Discretionary#	4-8 mos.
Tennessee	150/150	95–200	200–500	Yes	Discretionary#	1 yr.
Texas	113	NA	NA	No	Support for one year#	4-6 mos.
Utah	120	125	900	Not	Up to $6,000#	5 mos.
Vermont	250/250	90–150	NA	Yes	Discretionary	4-5 mos.
Virginia	2,000/1,500	75–125	2,000–3,000	Yes	$22,000#	1 yr.
Washington	110	150–300	2,000–10,000	No	$30,000#	4-6 mos.
West Virginia	175/175	50–150	750 or less	No	None#	6 mos.
Wisconsin	350/800	100–200	NA	Not	Discretionary#	6-12 mos.
Wyoming	175/300	NA	750 + 2% of value over $20,000	Yes	$30,000 homestead allowance#	8 mos.

*Single amount indicates a flat fee not based on estate size. NA Information not available. †Uniform Probate Code state. #Transfer-on-death securities registration allowed.

except West Virginia, a surviving spouse and minor children have access to some funds. As you can see in the table, some states are decidedly more generous than others. Unless specified in the table, amounts shown are for cash or for cash and the value of property, such as a car or a homestead allowance. Some states may give your family access to even more during probate.

Where "discretionary" is indicated, determining factors include the financial condition of the estate, nonprobate assets that pass to the family and previous standard of living.

Our sources around the country say this issue is usually moot, anyway, because families commonly have other sources of funds, such as assets owned by the surviving spouse or property that passes automatically to him or her because it was jointly owned. Even if investments are not jointly owned, they may be passed directly to a named beneficiary without going through probate if your state allows transfer-on-death registration of securities (indicated by a "#" footnote in this column).

HOW LONG WILL IT TAKE?

The process will probably not take as long as you think, but it won't move as quickly as you would like. The numbers in the table are estimates of how long it takes to settle an estate when the spouse and children inherit everything and everyone cooperates. If you start tinkering with the mix—adding squabbling heirs or disorganized records or, heaven forbid, a handwritten will—the probate process can stretch out.

But most people should be optimistic. The vast majority of probate administrations are six-to-nine-month paper-pushing affairs, not vicious court battles. To ensure that this will happen with your estate, organize your records and spend some time and money preparing a solid plan designed to avoid probate pitfalls.

In most cases, probate takes longer if your estate is large enough to warrant a federal estate-tax return. That extra paperwork—and the need to hold on to cash to pay the tax bill—slows things down, often taking between one and two years in Connecticut, Florida, Maryland, Massachusetts and Wyoming, and even longer in Georgia, Illinois, New York, North Carolina and Pennsylvania, among others. In reality, though, your heirs might not notice much. "The estate may remain open until the IRS issues a closing letter, but for all practical purposes, the administration is over long before that," says Fletcher Catron, an estate-planning lawyer in Santa Fe, N.M.

Also, note that fewer estates will be hit by the federal estate tax, thanks to changes okayed by Congress earlier this year. Starting in 1998, the first $625,000 of taxable lifetime gifts and estate assets will escape the tax. That's up from $600,000 this year, and the tax-free amount will gradually increase to $1 million in 2006. For family businesses and farms, the amount that escapes taxes jumps to $1.3 million in 1998.

States where you must file a list of assets

Although an inventory of assets (often only assets that go through probate) must be filed with the court, lawyers say that it is rare for outsiders to bother to take a look.

- California
- Connecticut
- District of Columbia
- Florida
- Hawaii
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maryland
- Massachusetts
- Minnesota
- Missouri
- Nebraska
- Nevada
- New Hampshire
- New York
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- Vermont
- Virginia
- Washington (until Jan. 1, 1998)
- West Virginia
- Wyoming

Should you consider a living trust?

Lawyers in these states commonly advise using living trusts to avoid probate. In any state, though, a lawyer should evaluate your needs before recommending a trust.

- Arizona
- Arkansas
- California
- Delaware
- Florida
- Hawaii
- Illinois
- Indiana (varies)
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Nebraska
- Nevada
- New Hampshire
- Ohio
- Oklahoma
- Oregon (varies)
- Rhode Island
- South Dakota
- Utah
- Vermont
- Virginia
- Wisconsin (varies)
- Wyoming

MUST YOU FILE A LIST OF ASSETS?

Proponents of revocable living trusts often tout the privacy of these trusts—which have no court filing requirement—over probate, which is a public process. But in 20 states, a list of assets may not need to be filed with the probate court. Even in jurisdictions that demand that an inventory be filed—listed in the box above—lawyers report that people unconnected with a case very rarely bother to look at the records.

ARE LIVING TRUSTS RECOMMENDED?

We hit a nerve when we asked whether revocable living trusts are frequently recommended as a way to avoid probate. Some respondents worried that we would fall prey to the knee-jerk premise that living trusts are always preferable to probate. In fact, they are not, and our survey found that in more than half of the states, lawyers do not commonly recommend living trusts to avoid probate. In addition to the states listed in the box above, our respondent in Texas reports that such trusts are commonly used there to avoid the rigors and costs of guardianship.

While property in a living trust passes to the beneficiaries of the trust without probate, bear in mind:

- ▶ Anything not transferred to the trust before death must go through probate.
- ▶ If complex issues exist, such as the need to sell property to distribute assets to children, then the trustee of a living trust must go through the same appraisal and sale process as an executor under a will. And that will take the same amount of time.
- ▶ A living trust does not automatically save estate taxes or reduce the time or cost involved in having a federal estate-tax return prepared. •

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