



Q LEGAL: Understanding Probate
by Christopher Heritage

In the previous article, *An Introduction to Estate Planning*, we reviewed the need for all of us, regardless of age, health or wealth, to complete our estate planning. However, in order to fully understand the concept of estate planning, and the pitfalls of lack of or poor estate planning, we must have a basic understanding of California's probate process, which you can find in California's Probate Code. There is no way to make this exciting, so grab a cup of strong coffee and I will try to make this as brief and painless as possible.

Will, or no Will (intestacy), you must go through some form of the probate process. The advantage of drafting a valid Will is that you, not the state, get to select how your property is distributed.

But, what is probate? Probate is the court-supervised process that makes sure that your Will (if you have one) is valid, all of your debts are paid, and finally that all of your assets are distributed according to your instructions. Each state has its own probate process. In California, a probate proceeding is started when a petition is filed with the court, usually by the person named in your Will to be your executor or personal representative. After notice is given, and a hearing is held, the Will is admitted to probate with the executor appointed.

If you are married, or are a registered domestic partner, have a will and have left all your assets to the surviving spouse/partner, the surviving partner can file a spousal and domestic partner property petition with the court to have the assets transferred into his or her name. This is a simpler and faster version of probate.

If your assets value less than \$100,000, and there is no real property (home, land) involved, then beneficiaries can usually transfer those assets without involving the probate court through a simplified statutory procedure. However, any California estate with a total value more than \$100,000, and/or any California estate that includes real property being distributed through a Will, must go through the probate court process before beneficiaries can remove your name from the asset's title and replace it with their own. This process can take months, and oftentimes years, and cost anywhere from 4% to 8% of the total value of the estate. Additionally, these costs must be paid before any assets are distributed. After payment of last debts and probate costs, there may be little if anything left in the estate to pass to the beneficiaries. Finally, if you own property in

different states, you must open a probate proceeding in each state to distribute that property.

Probate also requires that you have a personal representative, or executor throughout the probate proceedings. Usually, this is the surviving partner, close friend, or family member. However, it may also be a bank or private fiduciary (more of this in later articles). That person or entity will be spending significant time, energy and money on moving your estate through the cumbersome probate process. Finally, probate is a public process and is a matter of public record. Your beneficiaries may be exposed to unknown heirs, fraudulent creditors, and sleazy solicitors, any of whom can delay the probate process.

Under California Probate Code, if you die without a valid Will, or die *intestate*, your property will go to your closest living blood relatives. If you are single, without children, the property will go to your surviving parent(s). If you are registered as domestic partners, all of your community property will go to the surviving registered domestic partner, and your separate property will be distributed to your domestic partner and closest blood relative(s). Perhaps this works for you, but for most of us it does not. Oftentimes, our chosen family is different from our biological family. For those of us in relationships not registered with the state, there are no protections for the surviving partner who is not a beneficiary in the Will.

California's Probate Code also outlines the court procedure for conservatorships. A Conservator is a court-appointed individual or organization that is authorized to take care of people who are unable to take care of themselves. This care could include where the conservatee lives, the medical treatment he or she receives, and how his or her finances are used.

Probate sounds arduous, right? Should you try to avoid it? Absolutely. Are there ways to avoid it? Many, and we will explore some of them in articles to follow.

BYTAG

This article is part of an ongoing series of articles pertaining to legal issues in the LGBT community. Previous articles can be viewed at www.heritagelegal.net. This information is intended for general information purposes only, and is not intended to provide legal advice. Christopher Heritage is an attorney in Palm Springs, CA, who focuses on LGBT estate planning, domestic partnerships, probate and trust administration, and debtor/creditor issues. He welcomes questions and comments, and can be contacted at 760.406.4717, or by email: chris@heritagelegal.net