

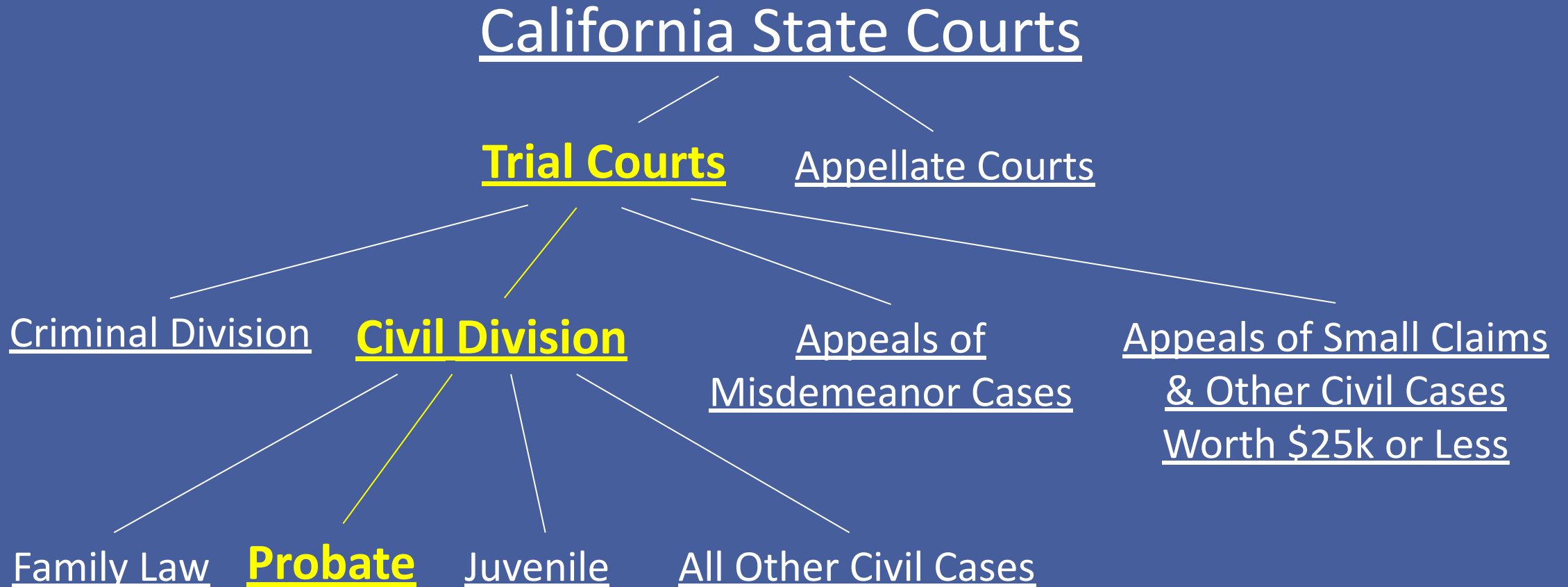
An Overview of California Probate

Presented by

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For 349th Judge Advocates Office

Where Probate fits into the State Court System



The Probate Division hears cases concerning:

- The appointment of personal representatives including guardianships for children and conservatorships for incapacitated adults;
- Review and accounting of guardians and conservators;
- Petitions regarding Trust Administration;
- Disputes about Wills, Trusts, and Powers of Attorney;
- The distribution and handling of estates of people who have died; and
- Other matters that may arise under the Probate Code.

The Appointment of Personal Representatives

- **California Terminology**
 - **Guardianships for Minors**
 - Ward is the protected person
 - Guardian is the surrogate
 - **Conservatorships for Adults**
 - Conservatee is the protected person
 - Conservator is the surrogate

The Appointment of Personal Representatives

- Guardianship or Conservatorship of the **Estate**
 - Financial Affairs of the Protected Person
 - Substitution of surrogate decision maker in place of protected person when dealing with Social Security or Financial Institutions

The Appointment of Personal Representatives

- Guardianship or Conservatorship of the **Person**
 - Medical Decisions, Living Arrangements, and other Personal Matters
 - Substitution of surrogate decision maker in place of protected person
 - Right to Personal Information about Protected Person

The Appointment of Personal Representatives

- **Guardianship of the Estate**

- For Minors often arises when person under 18 years of age receives a personal injury award or bequest
- Guardian may be responsible parent or professional fiduciary
- Many banks have departments that manage large trusts for injured minors

The Appointment of Personal Representatives

- **Guardianship of the Person**
 - Common case when biological parents are unfit, incarcerated or deceased
 - Includes undocumented child immigrant cases
 - Frequently the child's grandparent(s), aunt or uncle are petitioners
 - Parental nomination considered, but not binding on court
 - Judge decides based on fitness of proposed guardian & circumstances
 - Most cases Pro Per

The Appointment of Personal Representatives

- **Conservatorship of the Estate**

- For **Young Adults** may arise when personal injury award received by severely injured persons who are unable to manage their own financial affairs
- Child turns 18 for whom Guardianship was in place
- For **Older Adults** arises when person can no longer manage own finances due to cognitive disease processes such as Alzheimer's or other Major Neurocognitive Disorders
- Unable to resist fraud or undue influence is key criteria

The Appointment of Personal Representatives

- **Conservatorship of the Person**
 - Laternman-Petris-Short
 - Involuntary commitment to a mental health institution
 - Probate Conservatorship
 - Allows for surrogate decision making for issues of health and welfare of the conservatee

The Appointment of Personal Representatives

- **Conservatorship of the Person**
 - Young Adult example include
 - Developmental Disability
 - Traumatic Brain Injury
 - Older adults
 - Declining Cognitive Function

The Appointment of Personal Representatives

- **Conservatorship of the Person**

- **Full or Limited Conservatorship**

- 7 areas of personal care and voting rights at issue

- Contract, Residence, Medical, Confidential Records, Education, Social/Sexual, Marriage

- Medical Declaration required to show deficits in mental function

- Diagnosis should not be considered to avoid stigmatization

Review and Accounting of Guardians and Conservators

- History of abuse prompted legislation increasing accountability and court supervision over estates of wards and conservatees
- No less Frequent than Biennial Review of Accounting of Estate
- Identifies any changes in property since last accounting
- Categorizes and Justifies necessity of expenses
- Fiduciary catalogs hours and activities for which payment requested - Requires court approval

Petitions Regarding Trust Administration

- Common Petitions

- Probate Code §17200

- To determine the validity, existence, or terms of a trust
 - To determine beneficiaries of a trust
 - To compel trustee to provide terms of a trust or accounting
 - Removal of Trustee
 - To approve or direct the modification or termination a trust
 - To amend or conform the trust to qualify the decedent for certain tax treatment

- *Probate Code § 850 (incl. Heggstad Petitions)*

- Determine whether a trust is the owner of property when not re-titled into the trust during the settlor's lifetime

Petitions Regarding Trust Administration

- Common Types of Trusts ruled upon by the Court
 - Revocable Estate Planning Trust that became irrevocable upon the death of the Settlor
 - Single Person's Simple Revocable Trust
 - Married Couple's Simple Revocable Trust
 - Married Couple's A-B Disclaimer Trust for Estate Tax Purposes
 - Married Couple's A-B Mandatory Allocation Trust
 - Special Needs Trust
 - Preserves qualification for public benefits
 - Pays for care not provided by public benefits
 - Charitable Trusts
 - Testamentary Trusts

Disputes about Wills, Trusts, and Powers of Attorney

- Capacity (Testamentary or Contract)
- Undue Influence
- Vague or Ambiguous Language
- Revocation
- Appointment of Personal Representative

Disputes about Wills, Trusts, and Powers of Attorney

- Payment of Costs
- Declaration of Constructive Trust
- Breach of Fiduciary Duty by Trustee
- Conflict of Interest and Self Dealing
- Family Law Crossover Issues

The Distribution and Handling of Estates of People Who Have Died

- Non-Probate Transfers
- Passage of Property to Surviving Spouse without Administration
- Simplified Transfer Procedure for Small Estates
- Probate Administration

The Distribution and Handling of Estates of People Who Have Died

- **Non-Probate Transfers**

- Beneficiary Designations
- Joint Tenancy Accounts
- Community Property with Right of Survivorship
- Living Trusts
- Totten Trust accounts
- Transfer on Death Deeds
- Life Estates
- Gifts in view of impending death

The Distribution and Handling of Estates of People Who Have Died

- **Non-Probate Transfers**

- Do not require Wills Act Formalities
- Not Counted in Gross Estate for Probate Attorney and Executor Fees
- May still be counted for Gift and Estate Tax purposes

The Distribution and Handling of Estates of People Who Have Died

- **Non-Probate Transfers**
 - **Real Property Transfers**
 - **Joint Tenancy**
 - File Affidavit of Death of Joint Tenant, Death Certificate & PCOR
 - Stepped Up Basis on Deceased Joint Tenant's ½ Interest
 - **Community Property held as Joint Tenant**
 - Spousal or Domestic Partner Property Order Preferable
 - Stepped Up Basis on Entire Value of Property
 - **Living Trust**
 - New Deed from Trustee to Beneficiary

The Distribution and Handling of Estates of People Who Have Died

- Passage of Property to Surviving Spouse w/o Administration
 - One spouse dies intestate or devises property to surviving spouse
 - 40 Day Waiting Period
 - No property value limitations
 - Surviving Spouse has full power to sell, convey, or otherwise deal with or dispose of community property
 - Same rights as if owned as surviving spouse's separate property

The Distribution and Handling of Estates of People Who Have Died

- Passage of Property to Surviving Spouse w/o Administration
 - Surviving spouse may record affidavit of facts that establish the right to make such disposition
 - Other persons named in Will of deceased spouse may block spouse's right to deal with property by recording notice of interest
 - Surviving spouse may petition court for order requesting that:
 - Administration is not necessary as to property passing to surviving spouse
 - Confirms surviving spouse's ownership of community property

The Distribution and Handling of Estates of People Who Have Died

- Passage of Property to Surviving Spouse w/o Administration
 - Surviving Spouse liable for debts chargeable against property
 - No liability for property administered through probate
 - Surviving spouse is liable for failure to turn over property to persons who have superior testate claim
 - Surviving spouse may collect by affidavit wages owed to decedent not in excess of \$15,000
 - Limit subject to CPI increases
 - No limit for surviving spouses of firefighters or peace officers

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedures for Small Estate
 - Estates under \$150,000 (adjusted for inflation)
 - Real Property under \$50,000
- Probate Administration
 - Estates over \$150,000 (adjusted for inflation)

The Distribution and Handling of Estates of People Who Have Died

- Property **NOT** Included in Value of Decedent's Estate
 - Joint Tenancy Property
 - Real Estate outside California
 - Spousal Property under §13500
 - Property held in Revocable Trust
 - Property subject to Beneficiary Designation

The Distribution and Handling of Estates of People Who Have Died

- Property **NOT** Included in Value of Decedent's Estate (cont.)
 - Motor Vehicles, Boats, Manufactured or Mobile Homes
 - Amounts due for Service in Armed Forces
 - Compensation owed to Decedent not in excess of \$15,000
 - Life Estates

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - The gross estate may not exceed \$150,000
 - Gross Value of Real and Personal Property
 - Not including Exempt Assets
 - Not considering liabilities
 - 40 day waiting period
 - No proceeding being conducted in CA for Decedent's Estate

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates (cont.)
 - Personal Property transferred by Affidavit
 - Real Property transferred by Order to Determine Succession
 - Real Property under \$50,000 by Affidavit
 - Requires action by the Successor(s) of the decedent with most superior rights determined by Will or Intestacy
 - All Successors must agree

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Personal Property may be transferred using Affidavit Procedure
 - Affidavit completed by Successor(s)
 - Notarized
 - Declared under Penalty of Perjury
 - Inventory of Decedent's assets same as Probate Administration

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Personal Property may be transferred using Affidavit Procedure (cont.)
 - Certified copy of Death Certificate
 - Presented to holder of Decedent's personal property
 - Holder's failure to release: Attorney's fees awarded if court action required
 - 3 Times Damages to rightful owner for fraudulent transfers
 - Recipient liable for Decedent's debts

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Real Property may be transferred by Court Order determining Succession
 - Petition filed by successor(s)
 - Inventory and Appraisal completed by Probate Referee of Property
 - Petition includes Names and Addresses of Heirs
 - Copy of Will attached if any

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Real Property may be transferred by Court Order determining Succession (cont.)
 - Notice of Hearing to Heirs and all required persons
 - Order filed in county of domicile and recorded in county where property situated
 - Personal liability to Successor for decedent's unsecured debts
 - Attorney's fees not subject to court approval

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Affidavit Procedure for Real Property of Small Value
 - Real Property not in excess of \$50,000 gross value
 - Value established by Inventory and Appraisal by Probate Referee
 - 6 month waiting period from time of death
 - All debts including funeral expenses paid or successor personally liable

The Distribution and Handling of Estates of People Who Have Died

- Simplified Transfer Procedure for Small Estates
 - Affidavit Procedure for Real Property of Small Value (cont.)
 - Affidavit filed by Successor with most superior right
 - Notarized
 - Certified copy of Death Certificate
 - Copy of Affidavit mailed to all persons entitled to notice
 - Certified copy of filed affidavit issued and recorded in county where real property located
 - Three Times Damages for fraudulent affidavit

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Venue for CA domiciliary is the County in which the decedent was domiciled
 - For non CA domiciliary, venue is the county where decedent owned property or died

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Opening of administration by filing petition and lodging will with the court
 - Holographic and Formal wills requirements
 - Intestacy
 - 120 days to contest a will once admitted to probate

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Hearing to determine Appointment of Personal Representative
 - Notice to heirs, creditors, devisees and named executors
 - Publication three times in newspaper where decedent resided
 - Named Executors have priority in appointment
 - Ineligible if minor or there are grounds for removal
 - Bond required for value of the estate unless waived by decedent
 - Letters of Administration Issued

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Inventory and Appraisal
 - Inventory and Appraisal by Personal Representative of Cash and Liquid Accounts
 - Appraisal by Probate Referee of All Other Property
 - Filed with Court within 4 months of Letters being issued
 - Change of Ownership Statement
 - Preliminary Change of Ownership Report (PCOR)

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration

- Creditor Claims

- Notice required to be given within 4 months of letters or 30 days of learning of creditor
 - Includes all liabilities of Decedent including last illness expenses and taxes
 - Creditor claims must be filed within 4 months of letters or 60 days from notice of admin
 - Personal Representative shall allow or deny the claim

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration

- Estate Management

- Preservation of Estate Assets
 - Management of Business
 - Dispose of Personal Property not specifically bequeathed if cost to maintain exceeds value
 - Commence or Defend actions for benefit of the estate
 - Sale of Real Property may require court supervision and confirmation

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Compensation of Personal Representative and Attorney
 - Based on Gross Value of the estate
 - 4% of first \$100,000
 - 3% on next \$100,000
 - 2% on next \$800,000
 - 1% on next \$9,000,000
 - .5% on next \$15,000,000
 - Extraordinary fees based on hours of work performed

The Distribution and Handling of Estates of People Who Have Died

- Probate Administration
 - Final Petition for Distribution
 - Provide evidence that Notices were given as required
 - Court order for Final Distribution
 - Distribution of Assets occurs
 - Final Accounting
 - Release of Personal Representative

Other matters that may arise under the Probate code

- Disposition of Decedent's Remains
- Ancillary Administration – In state administration of estate for nondomiciliary decedent
- Transfer of Guardianship or Conservatorship to Another Jurisdiction
- Creation of Special Needs Trust