2nd Edition

How to Live – and Die – With

California Probate

Wills, Trusts, and Estate Planning in Layman's Language

Leland Alan Stark, Editor

In association with the
BEVERLY HILLS BAR ASSOCIATION

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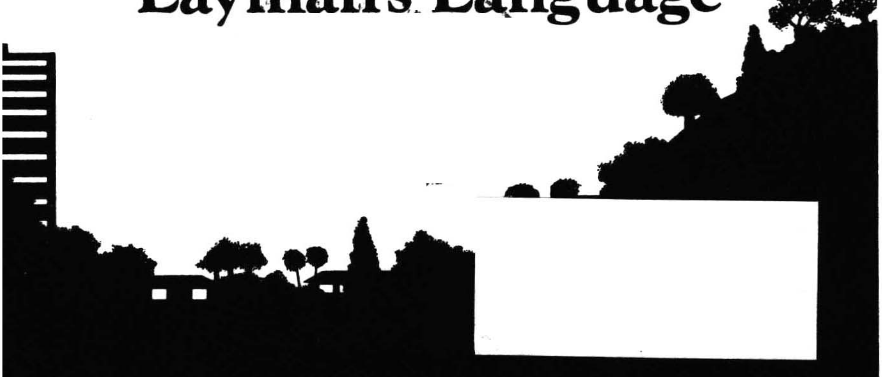

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Library of Congress Cataloging in Publication Data

Stark, Leland Alan.
How to Live—and Die—With California Probate
Includes index.
1. Probate law and practice-California-Popular works. 2. Inheritance and succession—California—Popular works. I. Title. II. Title: Wills, trusts, and probate.
KFC205.Z9S8 1984 346.79405'2 83-22863
ISBN 0-87201-095-3 347.940652

Acknowledgments

The Beverly Hills Bar Association sincerely thanks the Bar Association of San Francisco and the State Bar of Texas for consenting to the preparation of this second edition. Special gratitude is expressed for the very fine work done on the first edition by the nineteen distinguished San Francisco lawyers and Harold I. Boucher, who served as editor. Special thanks is also due to Charles A. Saunders, editor of the original Texas book, for his helpful guidance.

The authors of this second edition were selected for their special expertise and clarity of expression and include members of the Probate, Trust and Estate Planning Section as well as the Taxation Section of the Beverly Hills Bar Association. The authors and the chapters they contributed in this new edition are as follows:

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I owe a special debt of gratitude to Mildred Eleanor Haft who tirelessly read drafts of each chapter and made many valuable suggestions.

I am very grateful to my capable legal assistant, Sharron Callender Craig, for typing the drafts of this book and coordinating its compilation with her usual cheerful competence.

I would also like to thank attorneys Bruce S. Ross, Robert E. Bennett, Richard D. K. Josslin, and Terence S. Nunan; and Phyllis Cardoza, independent legal assistant, for reviewing the manuscript for changes effective in 1984 to the California Probate Code and for other helpful suggestions.

I would also like to acknowledge the extra efforts of Bill Lowe and his assistant, Melissa Lewis, of Gulf Publishing Company for their special expertise and guidance.

Leland Alan Stark, Editor

Preface

Protecting your family while saving them money, taxes, and avoidable costs at death requires careful planning. Yet often the information available is too technical for the lay person to understand. To meet the need for an introduction to estate planning that can be easily understood, the Beverly Hills Bar Association undertook the publication of this book. This fully up-to-date second edition is the work of California lawyers for Californians and those with property in California.

The first edition was prepared in 1970 by the Bar Association of San Francisco and was based on a similar book by the Real Estate, Probate and Trust Law Section of the State Bar of Texas entitled *How to Live—And Die—With Texas Probate*.

You'll be surprised to learn the taxes and costs your family will have to pay if you don't plan. And you'll be delighted to learn how these taxes and costs can be substantially reduced, if not entirely eliminated, through proper planning.

Community property, probate, and new alternatives now available under recent changes in the law are described in detail along with many different ways of handling property on death. Planning opportunities and their advantages and disadvantages are clearly pointed out. You'll also read about the various types of trusts and learn which ones can save you money as well as protect your loved ones. Finally, you'll become aware of the pitfalls in a homemade will and the solutions to some of the problems presented by ownership of a business or farm.

This book is not intended to be a do-it-yourself substitute for carefully made estate plans. Indeed, today it is only the foolhardy who attempt such a substitute. On the contrary, it is intended to alert you to some of the problems your family will face if you do not plan, and the many alternatives available with professional guidance.

General principles have been stated to provide an overall view of the subject. The reader with expertise will observe that certain exceptions to general rules have been omitted. Thus, the importance of personal consultation with the family lawyer proficient in the field of estate planning cannot be stressed enough.

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What Is Probate?

The law of probate—the law of dealing with the transmission of property from a decedent to his beneficiaries—is centuries old, yet little understood. The purpose of probate, the people it protects, and the advantages it offers should be understood by the man in the street, and with this understanding he should be moved to plan his estate to achieve probate's highest purposes, protections, and advantages.

The original meaning of the word *probate* was "to test and to prove." This word has come to mean the procedure for establishing an instrument as the last will and for doing all those things that the probate court has jurisdiction to do in settling estates.

Probate proceedings involve determining whether the deceased left a valid will and whether a will should be admitted to probate. A personal representative for the estate is qualified and appointed. This representative collects the assets, pays valid claims, and may sell property to pay debts and death taxes. The proceedings determine those entitled to receive the property, distribute their property to them, and settle the accounts of the personal representative. The representative is discharged, the sureties are released from their bond, and the estate is closed.

What Is a Personal Representative?

The personal representative of the decedent's estate is the person appointed by the court to act for the estate. This person qualifies by taking an oath and posting a bond if one is required. Individuals, banks, and trust companies may act in this capacity. The personal representative is known as the *executor* if specifically named in the will, as the *administrator with will annexed* if not named in the will and as the *administrator* if the decedent left no valid will. The court will appoint as executor the person named in the will unless some special reason compels a different appointment.

The clerk of the court issues *letters testamentary* to an executor or *letters of administration* to an administrator after appointment by the court, the filing of the oath of office, and the posting of any required bond. These *letters* are a printed form certified by the court clerk that the holder is in charge of the estate and entitled to possession of the assets.

Many small estates are administered by the public administrator, a county official who acts if no executor has been named and no one else who is entitled by law wishes to act as administrator.

In the next chapter we will discuss the steps taken by the personal representative during probate, but now we will identify which assets are probated and which are not.

What Is the Estate?

The *estate* of a person includes everything he owns. In this sense, a person's estate is the aggregate of all his assets, riches, and fortune and includes his rights to receive income from property owned by another.

This is to be distinguished from the *probate estate*, which is only the property administered by the personal representative subject to the terms of any will and control of the court. It does not include property which does not pass into the hands of the personal representative. The *probate estate* exists until the debts have been paid, the property has been distributed and the personal representative has been discharged.

The *probate estate* is not to be confused with the *gross estate*. The *gross estate* is defined for purposes of assessing the estate tax that we will discuss in Chapter 11. A deceased person may have owned, controlled, or enjoyed income from property which is part of his *gross estate* for tax purposes but not part of his *probate estate*.

Common examples of property included in the gross estate that is not part of the probate estate are:

1. Conveyances of property in which the deceased retained the income or certain elements of control for his lifetime.

2. Trusts created by a person who retained the right to revoke, alter, or amend the trust, to control the beneficial enjoyment of the trust property, or to receive the income.

What Is Not Included in the Probate Estate?

The probate estate may not include all of the property owned by a deceased person during his lifetime. This is important to recognize, since a common misconception is that a will determines the disposition of all of a person's property. A will only directs who receives the property of the probate estate. Even a person of modest means usually owns property said to be a part of his estate which may not pass under his will and never becomes part of his probate estate. Such property may include insurance, employee benefits, social security, bonds, property in joint tenancy, and trust property. We will discuss each type separately.

Insurance

Life insurance is payable on a person's death in the manner provided by the policy. It is usually made payable to a named beneficiary, and in the case of the prior or simultaneous death of the beneficiary, it is made payable to a contingent beneficiary. The insured is usually the owner of the entire policy, or the policy is part of the community estate of the insured and his spouse. The proceeds of such policy are generally not payable to the personal representative of the estate of the insured and do not become a part of his probate estate. However, the proceeds will be a part of the probate estate of the insured if they are made payable to the estate by the terms of the policy or if all named beneficiaries die before the proceeds become payable. Moreover, if there are no named and qualified primary or contingent beneficiaries and if the insured owned the policy, the proceeds are payable to the personal representative of the estate. We will return to a discussion of insurance in Chapter 16.

Annuities and Employee Benefits

Annuities, pensions, and employee benefits usually are not included in the probate estate. An annuity may be payable under what is known as an *annuity contract* or under an insurance policy with provisions for direct payment of benefits during the lifetime of the insured and perhaps thereafter. An individual may be the beneficiary of an annuity purchased by him or purchased by another for him. He may be an employee of a corporation which has a pension plan or profit-sharing plan under which he and his family are entitled to payments. In most cases any amounts payble after the death of the beneficiary will be made according to the terms of the annuity contract, insurance policy, or pension plan. These amounts generally do not become part of the probate estate unless the estate is named as the beneficiary.

Social Security

Social Security benefits and pensions payable under federal law generally do not become part of the probate estate. However, any amounts payable prior to the death of a beneficiary are payable to the personal representative of his estate as part of the probate estate.

Bonds

United States savings bonds may be made payable to the deceased, to a co-owner, or to a beneficiary named by the decedent. If the bond is payable to a co-owner or named beneficiary who survives the deceased, the survivor becomes the absolute owner of the bonds. These bonds are not part of the decedent's probate estate, although they may be included, in whole or in part, in the gross estate for tax purposes. The United States Supreme Court has held that bonds purchased by Californians with community funds are not subject to the community property laws of California and that federal and Treasury regulations prevail over state law. An example of the consequences of this will be discussed in Chapter 19. Of course, these bonds will be part of the surviving co-owner's or named beneficiary's probate estate if he still owns them and has not caused them to be reissued to himself as a co-owner or to a named beneficiary.

Property in Joint Tenancy

Property owned by the deceased and another in joint tenancy with right of survivorship is not part of the probate estate of the deceased.

This property is often referred to as joint tenancy property. It passes to the surviving joint tenant upon the death of the deceased joint owner by operation of law and the contract entered into when the joint tenancy was established. Many stocks, bonds, bank accounts, savings and loan accounts, and other properties are owned in joint tenancy. This assumes that a joint tenancy with right of survivorship was created in a valid manner. Of course, the property may be included in the probate estate of the surviving joint tentant.

The California Supreme Court has held that under our community property system a husband and wife can create jointly owned property with community property. Joint tenancy with right of survivorship is commonly used in many states, but under the California property system where the husband and wife each own an undivided one-half interest in their community property, the need for joint tenancy is not the same as in other states. Much litigation, uncertainty and adverse tax consequences have resulted from unintentional or ill-advised conversion of community property into joint tenancy property. Our discussion of joint tenancy continues in Chapter 18.

Trust Property

Property conveyed by an individual, called a grantor, to a trustee to be administered in trust and distributed after the individual's death usually is not part of the probate estate. A person has the right to convey his property to a trustee to be held and administered in trust with the income and principal distributed as provided in the instrument. The grantor may make himself the trustee and may reserve the right to alter, amend, or revoke the trust. He may also make himself a beneficiary of the trust during his lifetime. Property in a revocable trust is not part of the probate estate but is included in the gross estate for tax purposes. How to avoid probate with a revocable living trust is discussed in Chapter 10.

If the deceased was the trustee or beneficiary of a trust created by another person or if he was entitled to receive income from or the use of property for his life, these rights would terminate upon his death. The property in which he had these rights would not be part of his probate estate, except for undistributed income payable to him or possibly other vested rights in the property at the time of his death.