



## TIPS OF THE TRADE: REAL PROPERTY, REAL PROBLEMS: A PRACTITIONER'S GUIDE TO DEALING WITH REAL ESTATE IN A PROBATE

By Paul Horn, Esq., CPA\*

### I. SYNOPSIS

You are meeting with a potential client regarding a probate administration. When you gather information about the decedent's assets, you learn that the estate contains real property. Before you accept the engagement, there are critical issues to consider. Is the estate solvent? Is there a risk of foreclosure on estate property? If not, is there another reason to sell property immediately? When petitioning for probate, should you request full authority or will limited authority suffice? How do you ensure the accuracy of an appraisal? Should repairs or renovations be made and, if so, is it likely your client can be reimbursed? Does your client intend to purchase the real property out of probate? These are just some of the issues that arise when dealing with real property in probate, and they should be considered at the outset when determining if you are willing to take on a case.

This article explores these issues and the practical considerations – such as the length of time it will take to close the probate and whether there will be cash available to pay your attorney fees at the end of the administration – that a practitioner should consider when presented with estate matters involving the disposition of real property.

### II. IS THE ESTATE SOLVENT?

Before accepting a probate engagement, you should ascertain the assets of the estate to be administered and determine whether they are sufficient to cover the costs of the probate proceeding, such as court filing fees, newspaper publication, bond, and attorney fees. Often, most of the estate's value lies in the residence of the decedent. If the debt on the house exceeds its current value (*i.e.*, the house is "upside down"), and there are not enough other liquid assets to cover the difference when considering probate costs, initiating a probate may not make financial sense. Indeed, if the value of the decedent's real and personal property in California does not exceed \$166,250, as adjusted by the consumer price index, your client may be able to use the small estate process

and avoid going through probate altogether.<sup>1</sup> If you do file a probate in such a circumstance, you may be questioned by the probate judge as to why you are filing the case. For example, let us say adult children come to you after the death of their mother and tell you that the estate holds only their late mother's residence, which is upside down, and that neither the estate nor the children have the funds to pay the mortgage balance. In practice, a local realtor might be attempting to do a short sale on this house to obtain a commission and may be encouraging the children to open a probate so that the house may be sold. However, since the probate does not create a net benefit to the estate, the probate judge may not be pleased.

Even if there is equity in the house, you must determine whether your client is willing to sell the property or if the heirs or beneficiaries will object to the property being sold. After all, if the house is not going to be sold, and there is no available cash in the estate to pay your attorney fees, then how will you get paid? Just as in the short sale scenario, you will have to come to an alternate arrangement for payment of your fees, get the consent of all concerned to the arrangement, and obtain the approval of the court. In Orange County, for example, Local Rule 608.06 provides that the court will allow and approve attorney fees only to the extent that the estate has cash on hand to pay them.<sup>2</sup> So, even if the estate holds real property with \$1,000,000 in equity, if there is no cash on hand from which to pay attorney fees, the court may not order the representative to pay your attorney fees. A possible solution to this situation might be for the personal representative to agree to advance funds to the estate for the payment of the fees. Such an arrangement should be formalized, consented to, and signed by all the beneficiaries as well as the representative, and fully disclosed to, and approved by, the court.

### III. IS THERE A RISK OF FORECLOSURE?

Now, consider the situation where a probate client comes in, and you determine that the estate has plenty of assets with which to pay the costs of administration. You decide to take the case, but before you file the petition for probate, you learn that the client has received a trustee's notice of default, indicating that a lender intends to initiate foreclosure proceedings against a property of the estate. Your client wishes to sell the property and pay off the debt, but your client has not yet been appointed administrator, by the time your client is appointed, the house will have been lost to foreclosure. What should you do?

One option is to try to get the lender to postpone the foreclosure proceedings. If you are fortunate enough to get the lender to agree to a postponement, you should confirm this



postponement with the trustee sale company that is handling the foreclosure sale.

A second option is to have the beneficiaries pay the outstanding mortgage arrearage to get the property out of foreclosure. The beneficiaries can agree to borrow money from one of the various lenders who specialize in lending to probate estates.

A third option, and one that you should consider once a notice of trustee sale has been recorded against the property, is to request that the probate court enjoin the foreclosure sale. An injunction, which is a writ or order requiring a person to refrain from a particular act,<sup>3</sup> is available when a claimant can show that, among other things, the commission of an act would produce waste or great or irreparable injury to a party, or where pecuniary compensation would not afford adequate relief to the claimant.<sup>4</sup> If an estate property is foreclosed upon, the house will be lost to foreclosure. However, if the foreclosure sale is enjoined until the client can be appointed personal representative, the lender will be paid in full once the estate sells the house. The underlying argument for such an injunction is that the probate court has the discretion to enjoin the sale based on equitable principles, where there is no harm to the lender and no harm to the estate if the injunction is granted.

So, how do you obtain an injunction? First, you should file a petition for probate, requesting that your client be appointed personal representative of the estate.<sup>5</sup> This will result in the court issuing a case number for the probate proceeding. The clerk will also issue a hearing date, at which time your client may be appointed personal representative of the estate. The hearing date should be no more than thirty days after the petition is filed,<sup>6</sup> but typically the date might be set five-to-six weeks out, or longer, depending on the court. Notices and publication requirements must be complied with to avoid a continuance.<sup>7</sup>

In the meantime, you should file (concurrently) 1) a petition for appointment of a special administrator<sup>8</sup> and 2) an *ex parte* application for a temporary restraining order to stop the foreclosure.<sup>9</sup>

The *ex parte* application must address both the need for a temporary restraining order (“TRO”) and the need for a preliminary injunction. A TRO provides an immediate but temporary stop to an action in an emergency situation, pending a hearing on a preliminary injunction.<sup>10</sup> A preliminary injunction, on the other hand, is designed to maintain the status quo until a court can resolve a particular issue; it may

last for a longer period, and it requires a noticed hearing.<sup>11</sup> If the court grants the TRO, the court is required to set a date for the hearing on why a preliminary injunction should not be granted.<sup>12</sup>

In the author’s experience, the probate court will routinely approve the preliminary injunction and enjoin the lender from foreclosing. It is a “win-win” situation for all parties involved.

After a TRO is granted, the lender is often much more willing to work with the estate’s attorney to stipulate to a postponement of the foreclosure until the house can be sold.

#### IV. IS THERE ANOTHER REASON TO SELL IMMEDIATELY?

Appointment of a personal representative takes time. A petition must be filed, a hearing must be held, the hearing might be continued if there are probate notes that cannot be cleared promptly, and even once the petition is granted, it can take weeks for the letters and order of appointment to be returned. In some cases, there is a need to sell a property quickly to avoid harm to the estate. This may be because escrow has been opened but a seller dies before the sale closes, and a representative needs to be appointed immediately. It might also occur when a client has filed a petition to be appointed representative and then learns, upon inspection of an estate property, that the property is in danger due hazardous conditions, such as faulty wiring.

In such a case, you may ask the court to appoint your client special administrator of the estate so that the property can be sold immediately, instead of waiting a few months until formal appointment of the personal representative and return of the order and letters of administration from the court.<sup>13</sup> You will file the petition for probate and an *ex parte* declaration requesting that “Letters of Special Administration” be issued. In your petition and declaration, you will need to convince the court that the circumstances require the immediate appointment of a personal representative with the power to take possession of the estate’s real property to preserve it from damage, waste, or injury.<sup>14</sup> You should also seek the power to sell the property and indicate in the petition that the proceeds of the sale will be placed in a blocked account.<sup>15</sup> Because the court has not yet determined whether your client is to be appointed and whether bond should be required, this provides protection for the assets of the estate.

You should also attach an explanation of the powers requested (*e.g.*, the power to sell the property under Probate Code Section 8544), a complete property description including



the assessor's parcel number, a specified price if a buyer has already been found or a price range if there is not yet a buyer, and the name and address of the bank where the proceeds will be deposited. The powers requested (with the property information) and the blocked account information should also be attached to the order you present to the court for signature.

In addition to the powers requested and the blocked account information, you should consider attaching an appraisal of the property. Although the court has not yet appointed a probate referee in your case, you can engage a probate referee in the county to perform an appraisal and attach that appraisal to your petition.

If your client has already found a buyer for the property, you should consider attaching a probate purchase agreement. Since your client has not yet been appointed representative, it would be prudent to include in the probate purchase agreement a clause providing that the agreement is contingent upon the client being appointed special administrator.

Finally, if obtainable, you should attach consents, signed by the beneficiaries or heirs (who must be provided with notice of the petition and *ex parte* papers).

## V. SHOULD YOU REQUEST FULL OR LIMITED AUTHORITY?

Now, let us assume that you have a new probate engagement that does not involve a need for a TRO or Letters of Special Administration, so that you can proceed in the usual manner by filing a petition for probate. The California petition for probate form provides a space for you to indicate whether you are requesting full or limited authority under the Independent Administration of Estates Act ("IAEA").<sup>16</sup> Which should you choose? This decision is particularly important if the estate contains real estate that will be sold during the probate administration.

If the personal representative is granted full authority, the real estate sale will proceed much in the way a sale would occur outside a probate administration.<sup>17</sup> Three additional documents will be required in order to close escrow: 1) the order for probate; 2) Letters of Administration; and 3) a Notice of Proposed Action.<sup>18</sup> The notice must list the date the sale is intended to close, as well as the purchase price and other terms of sale.<sup>19</sup> Notice must be given to the devisees<sup>20</sup> and heirs<sup>21</sup> of the estate, as well as anyone who has requested special notice.<sup>22</sup> The Notice of Proposed Action must contain a form for objection to the proposed action in substantially the form set out in the Judicial Council form for the notice.<sup>23</sup> If fifteen

days pass and no objections are made, the sale may close.<sup>24</sup> So, although a few additional steps are required, a probate sale made with full authority is not so different than one made in a non-probate context.

If the personal representative is granted only limited authority, however, the process is considerably longer and more expensive. Instead of sending a Notice of Proposed Action, the personal representative must publish a notice of sale in a newspaper at least three times.<sup>25</sup> The cost of this publication can exceed \$1,000.00. Representatives often require a deposit of ten percent of the purchase price and usually sell estate properties "as is." The purchase price must be at least ninety percent of the value of an appraisal performed within one year of the sale.<sup>26</sup> Once a buyer is found, the personal representative must then file a petition for an order confirming the sale. This petition requires an additional filing fee of typically several hundred dollars, and the hearing on the petition must be noticed. The hearing date may be months away. When the hearing date arrives, the listing agent, seller's agent, buyer, and the personal representative's attorney must all attend the hearing, at which anyone else may step in and overbid the proposed buyer.<sup>27</sup> This may present practical and psychological deterrents to a potential buyer who, for example, may wish to sell the buyer's current home in order to purchase a new home, but is not willing to then wait for months to see if the probate sale will actually close. Even if the probate sale is approved, it may take weeks to get the order and close the sale. All of these factors may result in fewer interested buyers and lower sales prices.

It is true that, in certain instances, court confirmation can attract a higher bid on the sale of real property. However, in these circumstances, this is often because the accepted offer was below market value, thus inviting overbidders. All things being equal, if the listing agents appropriately expose the property to the market, the sale price obtained in an administration conducted with full authority should reflect the market value, making the costs involved with court confirmation unnecessary.

## VI. OBTAINING AN ACCURATE APPRAISAL

As discussed above, having full authority under the IAEA usually makes probate sales of real estate close more quickly and with less expense than those conducted without full authority. However, the attorney should be aware that, even in an administration with full authority, the personal representative must file an inventory and appraisal within four months of the date of appointment.<sup>28</sup> The probate referee appointed by the court to appraise the estate's assets will appraise the real property in the estate<sup>29</sup> and submit the



appraisal to be filed by the personal representative as part of the inventory and appraisal. When appraising the real estate, the probate referee will generally drive by the property and obtain comparable sales, and these will form the basis of the appraisal. Probate referees do not generally go inside the real properties that they are appraising.

A problem can thus arise when there are conditions that are not visible from the exterior of the property, that may reduce its value. Examples include structural damage, mold, extreme disrepair or substantial deferred maintenance. These things may negatively impact the value of the house, resulting in a sales price that is substantially lower than the appraised value determined by the probate referee. This will not stop the sale; the representative has full authority to sell the property, and the court does not have to approve the sale in advance. When the personal representative files a final account and petition for final distribution, however, the judge hearing the matter may question the loss upon sale.

The practitioner may avoid this problem by providing information to the probate referee in advance of the appraisal, such as photos of any damage and/or a report from a contractor regarding the costs that will be involved in repairing such damage. Another option is to invite the probate referee into the house to view the damage in person.

## VII. REPRESENTATIVE REIMBURSEMENT FOR RENOVATION AND REPAIR

Sometimes a personal representative wishes to make repairs and/or renovate an estate property so that a higher price may be obtained when the property is sold. However, in some cases, there may not be sufficient cash in the estate to fund these activities. If a personal representative uses personal funds for repairs and renovation work of an estate property, will the representative be reimbursed? The answer is ...maybe.

Section 9650(b) of the Probate Code provides that representatives shall “take all steps necessary for the management, protection, and preservation” of the estate.<sup>30</sup> Section 11420(a) of the Probate Code sets forth the order in which debts of the estate should be paid.<sup>31</sup> Those debts include “necessary” expenses of administration, which are at the top of the list, and “general” debts, which are at the bottom.<sup>32</sup> Repairing electrical wiring that, if left as is, might result in a fire would almost certainly be considered a necessary repair. But what about costs for repairs and remodeling that are not “necessary” but that the real estate agent thinks are likely to bring a better sales price? Are these “general” expenses for which a representative may still be reimbursed?

Whether a court will find that the repairs made by a representative are necessary will depend on the facts involved in the case. Representatives should be aware that reimbursement for these types of expenses may not receive top priority. Moreover, if the court finds that the repairs and/or remodeling were not necessary and did not benefit the estate, reimbursement might be disallowed. For this reason, it is helpful to advise representatives that their job is to *preserve* the estate, to be thoughtful about any improvements made to estate property, to document any such expenses carefully, and to accept the possibility that the court may not allow reimbursement for them.

## VIII. PURCHASE OF THE PROPERTY BY THE REPRESENTATIVE

You may encounter a child who is the personal representative of their deceased parent’s estate who wishes to purchase the late parent’s home. Section 9880 of the Probate Code provides that a personal representative may not purchase estate property, unless an exception applies.<sup>33</sup> The Probate Code provides exceptions, however, where, for example a representative petitions the court, files written consents by each heir and devisee, the sale is shown to be advantageous to the estate, and a noticed hearing is held.<sup>34</sup>

In many administrations, it will be advisable for estate properties to be listed on the open market, so that the highest sales prices may be obtained. It is often difficult to show that a purchase by a personal representative would be preferable to exposing the property to the open market. In some cases, however, the property in question may be one that holds sentimental value for the family members, who do not wish for it to be sold to a third party. If the family member in question is the representative, because of the prohibitions of Section 9880 and 9881, in addition to obtaining and filing written consents from each heir and devisee, the representative will need to petition the court and explain why the sale is advantageous to the estate.<sup>35</sup>

## IX. CONCLUSION

Understanding the issues discussed in this article, which commonly arise when handling real estate probate cases, as well as the pitfalls involved, will help the practitioner better assess potential probate cases and assist personal representatives in their administration.

\* Paul Horn Law Group, P.C., Cerritos, California



- 1 See Prob. Code, section 13100 *et seq.*; Prob. Code, section 890.
- 2 Super. Ct. Orange County, Local Rules, rule 608.06.
- 3 Code Civ. Proc., section 525.
- 4 Code Civ. Proc., section 526, subdivision (a).
- 5 Prob. Code, section 8000 *et seq.*
- 6 Prob. Code, section 8003.
- 7 See generally Prob. Code, sections 8100, 8110-13, 8120-25.
- 8 See generally Prob. Code, sections 8540 *et seq.*
- 9 See Code Civ. Proc., section 527.
- 10 Code Civ. Proc., section 527, subd. (d).
- 11 *Ibid.*
- 12 *Ibid.*
- 13 See Prob. Code, sections 8540 *et seq.*
- 14 Prob. Code, section 8544, subd. (a)(1).
- 15 Prob. Code, section 8544, subd. (b)(3).
- 16 See Prob. Code, sections 10400 *et seq.*
- 17 Prob. Code, section 10503.
- 18 Prob. Code, sections 10510-11, 10580-92.
- 19 Prob. Code, section 10585, subd. (a)(3).
- 20 Prob. Code, section 10581, subd. (a).
- 21 Prob. Code, section 10581, subd. (b).
- 22 Prob. Code, section 10581, subd. (c).
- 23 Prob. Code, section 10585, subd. (c)(3).
- 24 Prob. Code, sections 10586, 10590, subd. (a)(1).
- 25 Prob. Code, section 10300, subd. (a); Gov. Code, section 6063a.
- 26 Prob. Code, section 10309, subd. (b).
- 27 See Prob. Code, section 10311.
- 28 Prob. Code, section 8800, subd. (b).
- 29 Compare Prob. Code, sections 8901 and 8902, subd. (b).
- 30 Prob. Code, section 9650, subd. (b).
- 31 Prob. Code, section 11420, subd. (a).
- 32 Prob. Code, section 11420, subd. (a)(1), (7).
- 33 Prob. Code, section 9880.
- 34 Prob. Code, sections 9881, 9883.
- 35 Prob. Code, section 9881, subd. (c).