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## Common Issues in Probate

MCBA  
Common Issues in Probate  
East Valley Bar Association

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### I. Introduction

- **Overview of Probate:**
  - Probate is the court-supervised process of administering a deceased person's estate. *It is not probation. That is a criminal thing.*
  - Includes validating the will, appointing a Personal Representative (PR), inventorying assets, paying debts and taxes, and distributing assets to heirs or beneficiaries.
- **Purpose of this CLE Presentation:**
  - Identify common issues that arise during probate proceedings.
  - Provide practical insights and tips to address these challenges effectively.

### II. Common Probate Issues

#### A. Will Validity

1. **Challenges to the Will:**
  - Lack of testamentary capacity.
  - Undue influence.
  - Improper execution (e.g., lack of witnesses, no notarization in some cases).
  - Examples for discussion:
    1. Last minute changes in an estate plan
    2. Everything to the younger paramour
    3. Everything to the caregiver

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## 2. No Will (Intestate Succession):

- Distribution according to Arizona's intestacy laws (A.R.S. § 14-2101).
  1. If a person dies intestate, his/her estate will be distributed in accordance with ARS 14-2103
    1. Spouse, If married
      1. Depends if the children of the decedent are common to the marriage- otherwise then there is an intestate share for surviving spouse and the rest to the children.
    2. Decedent's descendants by representation
    3. If no descendants, to parents
    4. If no parents, to the descendants of the parents (siblings, for example)
    5. After that, it gets more complicated, with different levels of family members inheriting in different fractional interests.

## B. Personal Representative (PR) Issues

1. In the movies (and in some states) we call this "the Executor."

### 2. Qualifications of the PR:

- Must be at least 18
- There is a priority list of who may serve:
  1. ARS 14-3203
    1. Person named in Will
    2. Spouse who is also inheriting under a will
    3. Another beneficiary under a will
    4. Spouse, even if not inheriting under a will
    5. Other heirs-at-law
    6. The list goes on...

### 3. Disputes Over PR Appointment:

- Competing petitions for appointment.
  1. The Court first looks to priority
  2. Then for "good cause" it can pass over someone with higher priority for someone with less priority
  3. Role of fiduciaries

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1. What is one? – Discussion

- Allegations of conflict of interest or mismanagement.

**C. Inventory and Valuation of Assets**

**1. Locating All Assets:**

- Commonly missed assets include digital assets, safe deposit boxes, and unknown bank accounts.
- Usually have to file or mail within 90 days of being appointed
- Sometimes you do not know what the assets are, and you have to amend the inventory.

**2. Valuation Disputes:**

- Real property appraisals.
- Business valuations.

**D. Creditor Claims**

**1. Identifying and Notifying Creditors:**

- Arizona requires PRs to notify known creditors and publish notice for unknown creditors.
  1. Publication Notice to unknown creditors
    1. Starts a 4 month window for claims
  2. Actual Notice to known creditors

**2. Disputing Creditor Claims:**

- Time limitations for claims
- Validity and priority of claims.

**E. Distribution of Assets**

**1. Disputes Among Heirs/Beneficiaries:**

- Ambiguities in the will.
- Unfair distributions
  1. One kid living in a home, not paying rent, for example
    1. How do we remedy?
    2. How far back do we go to remedy?
      1. Usually to date of death

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## 2. **Non-Probate Assets:**

- Confusion over assets passing outside probate (e.g., joint tenancy, POD/TOD accounts).

## **F. Special Circumstances**

### 1. **Family Business Interests:**

- Challenges in continuing operations.
- Buy-sell agreements or valuation disputes.
- Less common

### 2. **Blended Families:**

- Disputes between current spouse and children from prior marriages.
  1. So. Many. Fights.
    1. Often times they end up fighting over sentimental items
    2. Also financial items, of course

### 3. **Claims of Elder Abuse:**

- Financial exploitation affecting the estate.
  1. If found to have exploited a vulnerable adult, #OutOfTheWill!

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## **III. Practical Tips for Avoiding and Resolving Issues**

### **A. Preventative Estate Planning**

#### 1. **Encourage Comprehensive Planning:**

- Have an estate plan!
- Regularly update wills and trusts.
  1. Don't let 35 years go by because, while still valid, allows an opportunity to create a problem

#### 2. **Address Potential Conflicts Early:**

- Discuss plans with family members in certain situations
- Consider using a neutral third-party fiduciary as PR or Trustee.

### **B. Effective Communication**

#### 1. **Transparency With Heirs/Beneficiaries:**

- Regular updates on the process. (in some cases)

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- Provide clear explanations for decisions. (in some cases)

**2. Managing Expectations:**

- Educate clients about the probate timeline and likely challenges.

**C. Best Practices for Attorneys**

**1. Document Everything:**

- Maintain detailed records of communications, filings, and financial transactions.
- Make sure your client understands their duties and responsibilities

**2. Act Proactively:**

- Identify potential problem areas early in the process.
- Seek court intervention when necessary.

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**IV. Other Considerations**

**A. Simplified Probate Procedures**

**1. Small Estates Affidavit:**

- Available if the total estate value is under \$75,000 for personal property or \$100,000 for real property (A.R.S. § 14-3971).

**2. Informal vs. Formal Probate:**

- Informal: Faster, less court oversight.
- Formal: Required for contested matters or if only a copy of a will exists

**B. Community Property Laws**

**1. Impact on Probate:**

- Distinguishing between community and separate property.
- Rights of surviving spouse.

**V. Conclusion**

**• Key Takeaways:**

- Probate involves a variety of legal and practical challenges.
- Preventative planning, clear communication, and diligent representation can resolve or minimize many issues.

