

**AVOIDING THE TRAPS AND MINIMIZING THE HASSLES OF  
REAL ESTATE PROBATE SALES**

By  
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1. **Buying Real Property In Probate: How Can The Buyer Get A Better Price For The Property: Private Sale Or Auction? And Why?**

In general, a buyer will get a better price through a private sale rather than an auction. The auctioned properties, particularly if the auction is absolute, will command a higher price, particularly in this economy. Auction houses are seeing a great deal of interest by potential buyers. In an auction in Glendale about a year and a half ago, there were 80-90 registered buyers for an absolute auction for a piece of real property. An extreme example is an auction of a plain home in Woodland Hills which drew 110 buyers.

2. **What Is The Difference In Buying Property When The Decedent Has His Or Her Property In A Trust? When Is Probate Needed?**

If the real property is in a trust, no court supervision is generally required unless a beneficiary files a petition objecting to the sale of real property. However, if the trustee feels threatened or exposed by beneficiaries, he or she may file a Notice Of Proposed Action under Probate Code 16500 and 16502.

Thus, the sale of the decedent's home, for example, proceeds in exactly the same manner as if the decedent were selling the home himself or herself. Only, in this instance, the trustee is handling the sale. So, in essence, the sale price you negotiate will be subject to the usual pressures facing sellers: the immediate need for money; the negotiating skills of the seller; the seller (or his or her brokers) knowledge of the relevant market, the condition of the property and the seller's willingness to expend sums to fix up the property before listing it (or negotiating a price reduction or requiring repairs the buyer asks for after a contract of sale is entered into) and the availability of conventional or seller financing for the property.

If the seller is a trustee, all the standard disclosures required by any seller under California law are required, except that the trustee is not charged with the seller's knowledge of hidden defects in the property, i.e., The Real Estate Disclosure Statement required under Civil Code §1102.1 is not required. Civil Code

§1102.2(d). The property is really sold “As Is”. You should make sure that you agent has the trustee fill out the CAR Trust Advisory Letter form.

The property sale is not subject to court confirmation.

The property sale is not subject to overbid.

Is an appraisal needed? Not always. Here are two examples of when the trustee may not get an appraisal.

- a. If the trustee sells the property within six months of the date of death of the trustor, no appraisal is needed as the value of the property for 706 purposes is established by the sale price of the property.
- b. If the value of the property is below the estate tax exclusion amount, the trustee is not required to get an appraisal of the property before selling it. But, in this instance, if the beneficiaries are at war with each other or the trustee, it may be advisable (although not legally required) to get at least a Broker’s Price Opinion or a standard California appraisal such as the type banks commission for a loan.

What happens if a beneficiary files a petition objecting to the sale of the property?

In that case, the Court becomes involved and can order the property sold. I just tried a case early this summer on this issue in Palm Springs. The Court has broad discretion in determining what probate procedures need be followed in this instance. The Court can set the sale price if the parties give the Court a range in prices from which to pick, e.g., one beneficiary wants to sell at \$200,000 and the other wants to sell at \$100,000. Almost always you will need expert testimony from competing appraisers.

3. **What Are The Procedures That Must Be Followed In Buying Property Through Probate?**

**Private Sale:** Independent written bids are first solicited and received by the estate representative for review.

**Public Auction:** Bids are first received in open, competitive bidding by the estate representative.

In either a Private Sale or Public Auction, the highest and otherwise acceptable bid must be returned to the probate court for further open and competitive bidding before the sale may be confirmed, unless you are given authority under the Independent Administration of Estates Act (“IAEA”).

**NOTE:** For very small, value sales, i.e., where the estate has a total value of less than \$10,000, the Personal Representative may take charge of the estate and sell any real or personal property without court authorization. Prob. Code § 7660

### **Independent Administration of Estates Act (IAEA)**

Generally, a personal representative need *not comply* with the requirements for sales requiring Court confirmation where the representative has powers pursuant to the IAEA. Prob. Code § 10503. She may sell:

1. at either public auction or private sale;
2. with or without notice; and
3. for such price, for cash or on credit, and on such terms and conditions as the personal representative determines.

### **There Are Exceptions, However.**

#### **First Exception Requiring Confirmation Under IAEA**

The first exception is obvious: Court Confirmation is required if the property is sold to or exchanged for property of the personal representative or the representative's attorney.

#### **Exception to the Exception.**

If all the following are true, then confirmation is not required even where estate property is transferred to the personal representative in his individual capacity

- a. the personal representative is the estate's sole beneficiary, or all known heirs consent to the transaction
- b. the period for filing creditor's claims has expired
- c. no request for special notice is on file, or all those who have filed requests have consented to the transaction; and
- d. all creditor's claims have been paid, settled, or withdrawn, or all creditors have consented to the transaction

## **Second Exception Requiring Confirmation Under IAEA.**

The second exception is where the representative has obtained only limited authority under the IAEA.

## **Objection to Proposed Action or Restraining Order Issued.**

Court Confirmation is also required where an objection has been made to the proposed action or a restraining order has been issued pursuant to Probate Code § 10588.

## **When Publication of Notice of Sale is Not Required.**

A Representative is not required to publish a Notice of Sale where any one of the following conditions are satisfied:

1. the will grants the representative the authority to sell estate property
2. the estate is subject to the Independent Administration of Estates Act; or
3. the asset appraises for less than \$5,000

## **When Publication of Notice of Sale is Required.**

The Representative is required to publish a Notice of Sale in all other cases, whether the sale is by a private sale or public auction

## **Requirements for Publication of Notice of Sale**

1. The Notice must be published in a newspaper published at least weekly in the county in which all or some of the property lies. Prob. Code § 10300; Gov. Code § 6063a.
2. The Notice must be published at least three times during a ten day period. Prob. Code § 10300; Gov. Code § 6063a.
3. There must be at least five days, not counting publication dates, between the first and last publication date. Prob. Code § 10300; Gov. Code § 6063a.

The Publication of Notice must be completed before the day specified in the notice as the day of the sale, whether by private sale or public auction. Prob. Code § 10300.

## **Contents of Notice of Sale: Probate Code 10304.**

The Notice of Sale must state whether the sale is to be a private sale or a public auction sale:

1. In the case of a private sale, the Notice must state the place at which bids or offers will be received and a day on or after which the sale will be made.
2. In the case of a public auction sale, the Notice must state the time and place of sale.
  - a. A public auction must be held between 9 a.m. and 9 p.m. on the date specified in the Notice and in the county where the real property is located.
  - b. The Personal Representative may postpone a public auction (not to exceed 3 months) by public declaration of postponement at the time and place appointed for the sale if postponement is to the estate's advantage.

Whether it is a private sale or public auction, the Notice must state the street address or other common designation of the real property to be sold. The legal description may be used where the real property does not have a street address or other common designation.

The Notice may state other matters, including terms and conditions of sale.

Many local rules require the Notice of Sale to disclose the existence of any encumbrances. The failure to do so may result in the undisclosed encumbrance being discharged out of the purchase money even if no claim has been filed.

### **Appraisal Required For Any Private Sale.**

The appraisal must be conducted within one year of the Confirmation Hearing and the valuation date must be a date within one year of the Confirmation Hearing. The appraisal must be alleged in the Petition for Confirmation of Sale of Real Property. The accepted bid on the property must be equal to at least 90 percent of the appraised value of the property.

## **An Appraisal Is Not Required For A Public Auction.**

### **The Purchase Agreement.**

The Purchase Agreement should specify:

1. the title to be conveyed is whatever the estate holds;
2. the sale is subject to Court confirmation;
3. the broker's commission will be in an amount determined by the Court and will be paid only from the sale proceeds, and
4. the property is being sold in an "as is" condition

### **Required Disclosures**

Probate sales of residential real properties are exempt from much of the stringent disclosure requirements contained in Civil Code §§ 1102-1102.17.

However, the representative must "disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical conditions of the property and previously received reports of physical inspections." Civ. Code § 1102.1

Additionally, the representative must use the special disclosure for certain properties in earthquake fault areas under the Alquist-Priolo Earthquake Fault Zoning Act; the personal representative must also disclose earthquake fault zones, seismic hazard zones, state fire responsibility areas, very high fire hazard severity zones, special flood hazard areas, and flood hazard zones. These are available as publically attainable material, but the representative's broker will usually commission a company to provide this information in a package.

The personal representative must also disclose if a death occurred on the property within the last three years, i.e., the decedent died in his home.

### **Report of Sale and Petition for Order Confirming Sale of Real Property**

Unless the personal representative is acting pursuant to the IAEA, all real estate sales must be reported to and confirmed by the Court. (Under the IAEA, the sale of the real estate will be disclosed in a Petition for approval of any interim or final accounting.) The representative must file a Report of Sale and Petition for Order Confirming Sale of Real Property within 30 days after the date of sale, e.g., acceptance of the bid by the representative

If the representative does not file the Petition within 30 days after the sale, the purchaser may file the Report and Petition for Confirmation

The sale must be reported and returned to the Court for confirmation on the Report of Sale and Petition for Order Confirming Sale of Real Property Judicial Council Form DE-260/GC-060

### **Sale on Credit**

If the sale will be made on credit then the representative must obtain the purchaser's note(s) and a mortgage or deed of trust, which should be deposited in escrow.

### **Encumbrances**

If the purchaser assumes or takes subject to encumbrances, the Petition and Order Confirming the Sale should list the encumbrances and the balance due on each so that the total purchase price and the amount in excess of the encumbrances can be determined.

### **Confirmation Hearing : Requirements for Court Confirmation of Private Sale.**

#### **Notice of Hearing.**

The personal representative's attorney must mail a copy of Notice of the Hearing at least 15 days prior to the hearing to all following persons:

1. each person requesting special notice;
2. each non-petitioning representative, and
3. the purchasers named in the Petition

The representative's attorney or the unrepresented personal representative must be present at the hearing. Cal. Rule of Ct 7.452

Additionally, all of the following conditions must be satisfied in order for the Court to confirm a private sale of real property:

1. the real property must have been appraised within one year prior to the date of the confirmation hearing;
2. the valuation date used in the appraisal is within one year prior to the date of the confirmation hearing, and

3. the sales price is at least 90 percent of the appraised value

Unless the decedent's will authorizes or directs the sale, the Court must determine at the hearing that the sale is necessary or is to the advantage of the estate and of benefit to the interested persons in making the sale. Prob. Code § 10310(a).

The Court must also examine into the efforts of the personal representative to obtain the highest and best price for the property "reasonably attainable". Prob. Code § 10310(b).

The Court must also continue the sale if it is shown that the personal representative has denied a bona fide prospective buyer or her broker a reasonable opportunity to inspect the property.

The Court may proceed to confirm the sale if good cause is shown for the confirmation of the sale. Cal. Rule of Ct. 7.451

### **Overbids at the Confirmation Hearing**

The Court will ask for any increased bids at the Confirmation Hearing. The Court will confirm the sale to the original buyer and fix any broker's commission if no overbid is made.

If an overbid is made, the Court can accept the offer if all of the following conditions are met:

1. the offer is at least ten percent more on the first \$10,000 of the original bid and five percent more on the remaining amount of the original bid;
2. the increased bid is in writing, and
3. the offer is made by a responsible person and complies with all provisions of law.

If the increased bid is on credit, the personal representative or her attorney must indicate to the Court that the offer is acceptable before the Court may consider it. Prob. Code § 10311(d).

### **Court Discretion to Order New Sale**

The Court has the discretion to decline to accept the increased bid that meets these conditions and may instead order a new sale. Prob. Code §10311(c).

## Order Confirming Sale

Pursuant to Probate Code §10313, the Court will issue an order confirming the sale to the person making the highest offer that satisfies the requirements of Probate Code §§10300-10316 and directing conveyances or assignments or both to be executed, if all the following are found to be true:

1. the sale was authorized or directed by the decedent's will, or good reason existed for the sale;
2. Proof of Notice of Sale was given as required by Probate Code § 10312;
3. the sale was legally made and fairly conducted;
4. the sales price to be confirmed is not disproportionate to the value of the property;
5. where it is a private sale, the sum to be confirmed is at least 90 percent of the appraised value of the property as determined by an appraisal conducted within the past year, and
6. if the sale is confirmed to the original bidder, an overbid meeting the requirements of Probate Code § 10313(a)(6) could not be obtained

If requirements set out above are not satisfied, then the Court must vacate the sale and order a new sale.

If the sale is confirmed, the Court must make an order regarding whether additional bond is required pursuant to Probate Code § 10206, and, if so, whether the proceeds must be deposited in a blocked account. The Court must not file the Order Confirming the Sale until the additional bond is filed. Cal. Rules of Ct. 7.206 [CHECK CITE TO MAKE SURE IT IS CURRENT]

#### 4. **What Are The Dangers In Buying Property In Probate When The Auction Method Is Used?**

The biggest danger in buying properties at probate auction sales is overpaying for the property. Many people believe that if property is being auctioned, it will be sold at fire sale prices. That is particularly true if it is an absolute auction as opposed to an auction where the seller sets a reserve.

If you are the winning bidder, and you change your mind, you will lose your deposit as liquidated damages. The usual contracts require about a deposit of 3% and 10% which are also liquidated damages that is automatically released from the escrow to the seller if the buyer backs out. Auction companies use this as leverage to force the buyer to perform if he or she suffers buyer's remorse, or

more commonly try to renegotiate the sale price after the auction is over and the buyer finds that the property's condition is not what he or she thought it was. In addition, many auction houses will have a back up buyer in place in the event the winning buyer defaults. This keeps the pressure on the winning buyer to perform.

The auction contract is always heavily biased in favor of the Seller. There is no negotiation of terms.

Remember on auctions, the buyer pays the "commission" also known as the buyer's premium. The amount of the commission will depend on the sale price. Most use a sliding scale. In one case, one auction company I know charged a 1% buyer's premium on the sale of a \$26M shopping center.

Time to close can be unusually short, 30-45 days to close. So, you will need to either have your financing up front or be prepared to pay all cash. There is no loan contingency. In fact, there are no contingencies. If you are the winning bidder, you must complete the purchase or forfeit your deposit.

You must inspect the property before the auction, during the marketing period. There is no price adjustment after you win the bid for the property if you "discover" the repairs are greater than you anticipated.

5. **What Are The Dangers In Buying Property In Probate When The Private Sale Method Is Used?**

This depends on whether the property is sold by the administrator with full authority under the IAEA or must be approved by the Court and subject to overbid.

If the property is subject to Court confirmation, the process gets drawn out. It is more time consuming, and you are under contract to buy and cannot back out. When you attend the court hearing, someone may come in and overbid you. You will then be in an auction type proceeding in Probate court, and you need to be careful then to not overpay. If the bidding gets too rich, you have wasted your time and you have tied up your money.

If the IAEA applies, you will be dealing with the special administrator as you would with any seller. So, the usual pitfalls apply as they would in any transaction.