FITZWATER
LAW

6400 SE Lake Road, Suite 440 | Portland, OR 97222
503.786.8191

Litigation Group
Wesley D. Fitzwater

What cases are litigated in Probate Court?

WHAT IS PROBATE COURT?

Each county in Oregon has a probate court department. In most counties, the probate department is part of the circuit court. In five Oregon counties, probate matters are heard by the county court. The probate court has the same full powers as any court of general jurisdiction.

WHAT TYPES OF CASES GO TO PROBATE COURT?

The probate court makes decisions for all of the following types of cases:

1. Appointment of personal representatives (sometimes called 'executors')
2. Probate and contest of Wills
3. Questions of heirship
4. Guardianships
5. Conservatorships
6. Supervision and disciplining of personal representatives, guardians, and conservators.

Some of Oregon´s probate courts, such as Multnomah County, also hear and decide cases involving trusts, trustees, and trust administration. Otherwise, cases involving trust administration are heard and decided in the general trial department of the circuit courts.

WHAT TYPES OF CASES REQUIRE AN ACTUAL APPEARANCE IN PROBATE COURT?

Typically, probate court operates by notice of a proposed action to interested parties in a probate matter and then allows the parties an opportunity to object to the proposed action. In the vast majority of cases, there are no objections filed to proposed actions of the parties. In these cases, everything is accomplished by filing paperwork with the court, and no actual appearances by the parties in court are required.

Court appearances may be required in the following situations:

- objections filed to proposed actions;
- an emergency exists; or
- the probate court has questions or concerns about the status of a matter.

FITZWATER LAW

6400 SE Lake Road, Suite 440 | Portland, OR 97222
503.786.8191

Litigation Group
Wesley D. Fitzwater

WHAT TYPES OF CASES REQUIRE AN ACTUAL APPEARANCE IN PROBATE COURT? (*continued*)

Every case has its own unique set of circumstances that may or may not lead to a full trial. Most cases settle before ever going to trial. Contested guardianships and conservatorships are the most common cases to go to trial in probate court, for a number of reasons.

First, the people and the issues at stake are often highly emotional. Family members may not agree on who should serve as guardian or conservator. Communication barriers and/or conflicting goals may prevent reaching a workable agreement, resulting in the need for trial.

Second, the outcome of these cases affects fundamental rights of the proposed protected person. Our society places a high value on every person´s right to make decisions about how and where to live and how to manage and spend money. When a person becomes incapable of making these decisions, there may be a danger to health or personal safety, or the person´s assets may be at risk. But sometimes only slight evidence exists to show the incapacity, and a trial is needed to make this decision. Other cases may have a clear showing of incapacity, but the person objects to it very strongly and needs to have his or her day in court.

Other types of cases that often go to trial in probate court include Will contests and creditor claims in probate cases. Litigation can also occur when a party refuses to cooperate or perform his or her required duties, such as filing tax returns or accounting for the disposition of assets.

WHAT ABOUT MEDIATION?

Cases with conflicts between family members over the appointment of a fiduciary are often appropriate for mediation. Some counties require mediation in contested cases. Many experienced elder law attorneys are available for mediation services, and each local court maintains an active list of such attorneys. Parties who desire mediation assistance should contact their local court to obtain a referral to an experienced mediator.

HOW LONG DOES IT TAKE TO GO TO TRIAL?

If someone files an objection to a petition, some courts assign a trial date that is only a few weeks in the future. This often means that a trial will occur within six to eight weeks of the original filing date of the petition. Other courts may set a date that is six or more months in the future.

Often parties will agree to postpone the actual trial to try to work out a solution on their own.

WHAT HAPPENS IF MY CASE GOES TO TRIAL?

A judge decides the outcome of almost all trials held in probate court. A jury trial will only occur where the

FITZWATER
LAW

6400 SE Lake Road, Suite 440 | Portland, OR 97222
503.786.8191

Litigation Group
Wesley D. Fitzwater

WHAT HAPPENS IF MY CASE GOES TO TRIAL? (*continued*)

issue could be described as 'intentional interference with a prospective inheritance.'

Once a court date is set, the petitioner must give 14 days´ notice to everyone required by Oregon law to receive notice. If the case is a contested guardianship, the court visitor must attend the trial. For contested guardianships or conservatorships, many courts require the respondent (the proposed protected person) to attend, particularly if capacity is at issue. Sometimes, in these cases, the respondent´s attorney can appear on his or her behalf. This is especially true if all parties agree to the court´s finding of incapacity and the only question is who shall be appointed.

WHAT EXPENSES ARE INVOLVED IF WE GO TO TRIAL?

Beyond the initial expenses associated with any case filed in probate court, going to trial requires a substantial amount of time for attorney preparation and attendance at the trial.

Contested guardianship and conservatorship cases often have increased supporting costs as well, including psychological testing, medical evaluations, and/or functional assessments. All parties to these cases typically anticipate their attorney fees and costs to be paid from the assets of the protected person, because the process occurred for that person´s benefit. However, a losing party should expect objections if he or she requests payment of fees from the protected person´s assets. If objections are filed, the court will hold an additional hearing to decide the outcome.