



Episode 19: Crash Course in Probate

Let's be honest -- REALTORS face an ever-changing industry. With emerging tech, growing trends, and a booming market, it's vital to keep up. Join me, Gilbert Gonzalez, CEO for the San Antonio Board of Realtors, as I get real with experts on what REALTORS need to know about this industry. It's time to get real.

GG (00:23):

With us today is Charlie Weisinger, Attorney and Counselor at Law with the Weisinger Law Firm. So, thank you for joining us, Charlie.

CW (00:29):

Thanks for having me, Gilbert. It's a pleasure to be here.

GG (00:33):

You know, probate and real estate have gone hand in hand, and they are extremely intertwined. And I just wanted to kind of give the opportunity for our members to hear an overview about the whole process and what's going on and what to expect when taking on a transaction like this. So, I wanted to ask real basic question, is what is probate? Well, how would you tell people when people come in as clients and ask you, what, why do I need to do this?

CW (01:00):

So, probate is simply just the process of the court, helping divide up and get the, get a person's assets to the rightful beneficiaries. In, in the case of a will, you're probating a will, so you're, you're taking the will to the court and having the judge admit that will to probate to say it's valid. And then that allows the executor to then distribute those assets to the, ultimately to the beneficiaries. In the case where there's not a will, then it's called an intestate probate, which is the process of the court, determining who the rightful heirs or future owners of the property are.

GG (01:40):

Now, would you say that there are major steps in the process for both of them or are they completely separate when it's with a will and without a will?

CW (01:50):

The two processes are, are similar in nature, but they're, they're different. And so just to kind of walk you through the, the basic probating of a will. If a person has a will, is passed away with a will then the, the person who is named as executor in that will, will take that will to an attorney who will review it and determine if they believe it's valid or not. That will, will then get filed along with an application with the court. The court will post the notice down the courthouse for 10 days, which is that period of time

where somebody could contest that will. After that 10 day period we have a hearing. At the hearing is when the judge officially appoints the person as executor. And from that point, then they have to do some tasks, which, you know, they've got to let all the beneficiaries know they've been appointed.

CW (02:41):

They've got to let creditors know where, where to come make claims. And ultimately, they, they pay off the debts and distribute the property to the beneficiaries. That's your very simplified probate of a will scenario. If there's not a will in place then the next, then in addition to some of those steps, that initial application filing, you also have to file an application to determine heirs. And so, you have to have the court tell, the court has to appoint the, the appointed attorney ad litem, and who's kind of an investigator to investigate the family history and figure out, okay, who did this person have children, did this person have, were they married? How many marriages, who are the rightful heirs of this property? And sometimes that's frustrating for clients because they say, well, it was my father. I'm the only child. There were no other children. Why doesn't the court just believe me?

CW (03:40):

And the reason is because the court can't just believe you because people lie to the court all the time. So, and so the judge, you know, the probate process in that, in that ad litem and investigator role is kind of to is, is there to help us determine with certainty who the heirs are. And so, what the, what changes there is a lot of extra time. You know, and so it, where, where you can go through probating a will and you can get to, you can get to the court hearing in about three to four weeks, sometimes the intestate process is going to take a lot longer. Kind of the quickest we see people get into court is about 60 to 90 days, somewhere in there. And it can take, and then, and then depending on who the heirs are and how everybody gets along, we may be dealing with this probate two years from now, you know, instead of, instead of having a will in place, that can go a lot quicker. And so, so that's, you know, there, there are alternatives to that probate process when there's not a will. But if you've got certain, you know, if you've got bank accounts and other things that don't have beneficiaries named, that can be a problem that we're going to have to address in a probate.

GG (04:56):

You know, there's a lot there. So I want to take us back to the beginning and ask a couple of questions on that. You mentioned the executor and the ad litem. Those are two very important roles in the process. And how does a realtor fit into those roles? Like where would they be? If could they be the executor? Do they work for the executor? Do they work for the court?

CW (05:19):

Most of the time the realtor works for the executor. And so the, somebody has, you know, the way, the way I've seen it work most often is let's say mom dies and I've got to sell my mom's house. And so the first thing, the first thing, the person that wants to sell mom's house does is they call up their, their realtor and say, Hey, I need to sell mom's house. And so the realtor has to ask a couple questions right away, and they've got to say, okay, well, is mom still alive? No mom passed away. Okay. Well, are you the executor of mom's estate or has, has probate happened? And, and a lot of times that person will say, yeah, I'm the executor I was named in the will. And so the realtor's job then is, okay, have you probated that will? Do you have what's called letters testamentary from the court that give you the authority to sell this property? Because what I've seen happen unfortunately, is somebody tell, and this is why, why, you know, I teach a two-hour class on, on probate or estate planning for realtors, because I've seen this happen previously, where a realtor takes the person's word for it says, yep, I'm

CW (06:32):

the executor, gets ready to sell the property, gets to the title company after they've already got a contract in place. And the title company comes back and says there's no probate has happened. Your, your seller doesn't have the authority to sell this property until they go through probate. And so, so sometimes it's the realtor's job, obviously, never to give legal advice, but it, but it may be the job of the realtor to say, before I can list it, I need to see letters from the court. I need to see something that says you have actually probated this. And where I tell a lot of realtors, if you've got a client who doesn't understand, or who is being a little bit pushy is you can always make the title company the bad guy. And say, you know, say, let me send the will over to the title company, you know, and ask them questions. And the title company will come back with a list of before you sell it, you have to do these steps and that's. And so, the realtor kind of can step in and be that advisor that gets, that connects the, that connects the, the seller or the executor with the attorney to get the process going, and then can come back in and sell the property once the authority is there.

GG (07:46):

You mentioned 60 to 90 days with the will a couple of years without the will. Should a realtor expect that if you're going down this path, that it's going to take a lot longer than a normal transaction.

CW (07:59):

That depends on the situation. So in some circumstances, probate can happen in most circumstances when there's a will in place, probate can happen very quickly. So, you know, in that same scenario, and so I used to get a lot of times, okay, I'm in the middle of the transaction. I had a client a few years ago in this scenario, dad was trying to sell his house. They were set to close on Wednesday. Unfortunately, he passed away on Tuesday. So, he passed away one day before the transaction was to close. So Wednesday comes, can dad, you know, can, can daughter step in and handle that transaction for him? Well, and the answer's no, not at that point. So, so she has to, we have, in this case, he had a will. So, we have to probate his will, and then we can, we can continue with the transaction, which is what we did in that scenario.

CW (08:51):

We, you know, on Wednesday, instead of going to the title company close, we went to the courthouse with the will and filed it for probate. About two weeks, went by, we had a hearing. At that hearing, she was, the client was appointed officially as the executor. And then, that was on a Monday. And by Wednesday, that week we were able to complete the transaction. And so that doesn't always happen that fast, but it can, it can happen pretty quickly. So, if you've got a scenario where you've already got a buyer in place, or you want to go ahead and list it, and you know, there's a will you're pro, if the attorney gives you the go ahead to say, yeah, this is going to be a pretty simple transaction. You can go ahead and list it and move on. But if there's any, any snags in it, if there's a contest in the probate anything like that, then yes, you're going to be waiting, waiting a long time.

CW (09:43):

If it's one of those other situations where it's an intestate administration, where the person died without a will, then you're going to want to wait until your client has letters of administration in hand before you list that property for sale. Because otherwise you, you might have you might have some offers come through that. You can't on transactions that you can't close, and then you're losing buyers. And you're doing a whole lot of you know, your job as a, as a realtor is to market and sell property. And the last thing you want to do is spend all of your time marketing a property that can't be sold, you know, for, for a while and lose out on that, on those transactions. So, so it's good to, and, and frankly, you know, I've seen this more than once where the person who came to the realtor and got ready to sell the house, by the time we get through the intestate process, we find out that's not the person would be authority and

that, and so then another person steps in to sell the property and the realtor who did all that marketing work up front gets nothing.

CW (10:48):

And so, you want to be, you want to be safe, you know, know that the work you're doing is, is going to be rewarded.

GG (10:56):

The way you're going to find no, that is if this person has letters testamentary, which means the ,correct, which means the court has given them the authority to move through it.

CW (11:09):

Correct. And so you'll have in a probate of a will scenario, you'll have letters testamentary, and an order admitting a will to probate. And an intestate situation where there wasn't a will, you'll have letters of administration and, and then order appointing an administrator. So those are the, the two documents you'll have on either side.

GG (11:33):

Is it safe to say that a realtor should always assume it needs the court's permission to sell clients property?

CW (11:39):

I, I, I wouldn't go so far as to say that a realtor should assume that that it always is going to need a court's permission. I would, I, I do think that it's important for the realtor to have an understanding of what happened after a person passed away. And I would, if ,if it were me, I would always defer to the title company and say, okay, I've got a seller who's trying to sell this property, can you, you know, can you take a look at this and tell me if we're going to have any, any problems. Because the title company will run a title, search forum upfront and say, yep, we're going to need either, we're either, we need the will probated, or, or we're going to need one of the alternatives, like an affidavit of heirship done or something, something along those lines. I would, I would always, you know, my, I joke all the time that my two-hour CE class can be reduced into one, one question or one statement, ask the title company. Because that's, that's where a lot of it comes down to is what is, what is the title company going to require to close the transaction once they flow? You know, once, once you get the go ahead from them, you're pretty safe because they're, they're not in the, they're in the business of closing good transactions.

GG (13:00):

So, it sounds like you're a valuable asset for all realtors to keep in mind is a good title company relationship that can help you with that. Definitely. So I know in the past, I've had people come up and say, well, but Gilbert, I have a power of attorney, which allows me to sell the property. How would you answer that consumer who comes and says, I have the power of attorney to sell the property in, in this instance?

CW (13:25):

So, a couple of things with that, again, you could, you could go with the statement of ask the title company because, because of that, that a lot of times it comes down to that. Now, a couple of things, if the person has passed away, the powers of attorney have no, no value. Once, once a person has passed, the power of attorney expires. Powers of attorney do not work after somebody has passed away. Even when while they are living powers of attorney can be troublesome. It has to be a durable power of

attorney, meaning that, and by durable, that means that it can, it can it's still valid beyond the incapacity. So, if you've ever closed a transaction with a power of attorney, title companies, again, they like to, once they do the wellness check on alive and well call before the, the signing of the, for the closing.

CW (14:24):

And so we see this a lot in the military. Somebody is traveling, they're overseas and spouses here is going to sign for themselves and their spouse with the power of attorney. The title company has to get on the phone or that that closing agent has to get on the phone with the principal, the person who's traveling and say, I'm here, your spouse is using power of attorney to close this transaction. I just wanted to make sure you were still on board with that. You're okay. All those things. And that, that's how it is if they say, yep, cool. That's how title companies traditionally closed things with a power of attorney. They like specific powers of attorney, that's a power of attorney just for this transaction. In the scenario where you've got somebody who is, who has a disability, or who's disabled, but did a durable power of attorney before their disability,

CW (15:21):

well, then that alive and well-check doesn't work because they maybe they don't have the capacity to understand what's going on anymore. So, in those cases, the title company is going to want to confirm and verify that they're still living. And they're going to want something to confirm and verify that the person had capacity at the time that they signed that power of attorney. And so, I'll give you an example. A few years ago, I worked with a, with a couple and husband have had capacity at that point, but he had just received a diagnosis of early onset dementia. But, but he still, at that point knew what was going on. He just knew that down the road, he wasn't going to know. So, we signed the power of attorney in my office. I met with him, I understood, I questioned him.

CW (16:13):

I knew that he knew what was going on. Fast forward three years, he has now completely lost capacity. He has no idea what's going on anymore, and they need to move him into a memory care unit. They need to sell their house. And so, his wife puts the house on the market, gets ready to sell this property and gets the title. And title wants to have husband sign. Well, husband can't sign. He doesn't know what's going on. So, she provides the power of attorney, and the title company says, well, we need some proof that he knew what was going on when he signed the document. And so, they come back to me, the lawyer who did the documents three years before, and I write a letter certifying that, yes, I met with we'll call him Mr. Smith. I met with Mr. Smith, Mr. Smith knew completely what he was doing.

CW (17:06):

I'll certify the, this is a good power of attorney and that allowed the transaction to be closed. Had I not been there to certify that, or had it not been done in a lawyer's office, then the title company may have not allowed us to use that power of attorney and might've forced them going through guardianship or some other process. So, so power of attorney can be great. It's one of those, it's one of those scenarios where I tell people, you know, you know, while you can get online forms in these scenarios, I don't ever recommend using an online form for a power of attorney, because you want to know that the, you want it to have the backing of the attorney that did it to call him, you know, in that, in that scenario to call three years later.

GG (17:53):

One of the other things that I find always creates a hiccup for transactions as well, that are here about is heirs and how they play into the deal. Especially if you didn't even know there was some, but let's just

say that an heir doesn't want to be on the same page as everyone, and doesn't feel that it needs to be sold or the property, you know, they want, they want to keep it is, is it, is it possible that an heir can completely hold up a transaction that way?

CW (18:21):

Yes. Heirs can hold up transactions and do regularly. So if there's a, you know, let's because, cause basically what you understand in that scenario is, so let me, let me, let me clarify one thing, if you haven't, if you are an executor of a will then, then most of the time you have the authority to sell without the joinder of the heirs, you don't have to, nobody else has to agree because you have independent authority as executor to sell that property. In a, in an intestate situation, even as an administrator of the estate, you have to get the joinder or the agreement of the heirs to that transaction because basically they own, they, the ultimate heirs are the owners of the, of the property. And so even if I own 90% of the share or 90% of the people, the ownership is in agreement with selling that 10%, that one 10th person whose interest is undivided at that point.

CW (19:24):

And because it's you know, I, you know, for the most part, let's, you know, let's take the house. It's really hard to sell 10% of a house. You know, you've got a farm, you can sell 10% of a farm, pretty, you know, you know, you can take a sliver off of it, but you know, a smaller property like the house now we've got, so this one, 10% owner says, I, I don't agree to that price. I want more I don't, I think we can get more for I, I don't want to sell it at all. And so in those scenarios, the other heirs are going to have to go to court to get an order forcing the sale or, or, you know, or the administrator or the state can say, we have to sell it because we've got to use this to pay debts and that sort of thing. And so we're going to have, in those cases, you're going to have to go to court before you can sell it. So yeah, that can, that can very much extend the timeline of the transaction and can derail the deal at the last minute sometimes if one of those heirs decides not to agree to the transaction.

GG (20:30):

So, we've talked a lot about the probate process and all of the hiccups that come along with it. My last question to you is, is there a way to avoid all of that and help streamline transferring the asset from one person to the other? And obviously it sounds like avoiding probate is sounds malicious, but there are strategic ways to avoid having to go through all that and speed it up.

CW (20:55):

Definitely. No, I devote most of my practice as an estate planning and probate attorney to the planning side of things and saying, okay, how can we make this, this process simple so that when, when somebody passes away, we can deal, you know, spend our time as a family grieving and moving, you know, and moving through that instead of fighting over what to do next, fighting either with each other or, or with the courts and stuff there. And so a couple of, a couple of ways to do that. One of the simplest ways, if it's only real estate and we're dealing with, and you've got only one or two heirs that get along really well or beneficiaries, you get along really well, you can use the, since 2017 in Texas, what's called the Texas transfer on death deed. And those, those deeds have been really helpful for just taking what, in that process, you record the deed while you're living.

CW (21:52):

And so in this case, I could say, Hey, Gilbert, I'm going to give this property to you. I'm giving you a deed to this property, but you don't get ownership of it until I die. When I die, then you file an affidavit with the court showing that I'm, that or with the county clerk, showing that I've passed away. And that property automatically transfers to you. It's not subject to creditor's claims at that point. It's not subject

to probate and it's just done. That's, that's one, one way that we've, that we've used a lot in the last couple of years for fairly small, straightforward, simple estates. Another, another thing that we use a lot is called the living revocable trust and a trust is just simply a benefit relationship between a beneficiary and the trustee. The trustee manages it, beneficiary benefits from in most cases, if you've got a husband and wife that they serve together as trustees and beneficiaries. The benefit there is when one of the spouses passes away, instead of having to probate the deceased spouse's estate, everything remains in the trust.

CW ([23:00](#)):

And so in this trust, you can put your bank accounts, your home other, you know, other types of assets. And again, when, when you pass away, the trust handles what happens with those assets rather than going through the probate process. And so you're able, and we could, we could spend a lot of time going through exactly how trusts work, but just in general, trusts are a great tool to avoid the probate process because we get, we get things, we get things out of the probate estate. And so, so it's just really, it's a matter of, no, it takes sitting down and looking at, okay, what assets do I have that are potential probate assets and what assets are non-probate. And then at the end of the day, how do I get these assets to the beneficiaries that I want to receive them in the most streamlined process? And you can say sometimes, sometimes probating a will is the most streamlined process. Sometimes using a trust is an easier way. And sometimes using one of these transfer on death deeds or other tools

GG ([24:09](#)):

I think we have a lot of great information. The main takeaways in my mind are definitely having a great working relationship with a title company who can help you through this process, as well as someone like yourself, Charlie, who is a very experienced in wills and estates who can help walk people through this. So I appreciate you breaking down some of the more complicated parts in a very short amount of time. And we look forward to having you in the future for future classes.

CW ([24:35](#)):

Sounds good. Well, I appreciate you letting me, let me come on. I've always, always enjoyed talking about this topic.

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