

# CAN PROBATE IN CALIFORNIA BE AVOIDED?

*Probate Provides Certain Protections, But  
It Also Comes with a Number of Drawbacks*



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*Probate comes with some inherent drawbacks. If you want to arrange for future asset transfers outside of probate to avoid these pitfalls, you do have options. One of these options would be the creation of a revocable living trust. These trusts facilitate asset transfers outside of the probate process.*



Estate planning involves a great deal of decision making. To be ideally prepared, you should understand all of the pros and cons of the various different asset transfer vehicles that are available to you.

The last will is the most commonly used estate planning device. When you use a last will to express your final wishes, you should include the nomination of an executor. This is the person who will administer the estate after you die.

The executor of the estate must admit the last will to probate. Probate is the legal process of estate administration. The property that comprises the estate is not distributed to the heirs until the estate has been probated.

Probate provides certain protections, but it also comes with a number of drawbacks.

### **Public Access**

If you are like most people, you conduct your financial affairs in private. For various reasons you do not want everyone in town to know exactly how you manage your monetary resources.

When your estate is being administered during the probate process, records are kept by the court. These probate records are publicly available. If someone wanted to know what went on during probate, they could access the probate records.

This can even include the press. You sometimes see news stories based on information that was obtained by accessing probate records.

Simply put, privacy is lost during probate.

### **Probate Expenses**

There are considerable expenses that can be incurred during the probate process. There is a filing fee that the court will charge. The executor is entitled to payment. The executor will often retain a



probate lawyer. A tax accountant may be necessary as well because final taxes are paid during probate.

There can be property liquidation expenses, and incidental costs will invariably arise as the business of the estate is being conducted.

When you are deciding on a vehicle of asset transfer, you should be aware of the expenses that are typically incurred during the probate process. A last will may seem like the most cost-effective option, but you do have to factor in probate expenses.

### ***Delayed Inheritances***

Probate can be a time-consuming process. The court allows a particular amount of time for creditors to come forward seeking satisfaction. There is a certain caseload, and the executor must handle numerous different administrative tasks.

It is not just a matter of shuffling paper. If the estate contains different types of property, the executor must prepare these assets for distribution. This can involve liquidation, and as we all know property does not necessarily sell at a fair price overnight.

The delay is not a hand-to-mouth concern for many families, though you probably don't want to wait forever if you are in line for an inheritance, regardless of your financial status. However, there are those who need immediate liquidity.

Probate can take a number of months in relatively uncomplicated cases. More complex cases can take considerably longer.

The time factor is another one of the drawbacks of probate.

### ***Probate Avoidance***

Probate comes with some inherent drawbacks. If you want to arrange for future asset transfers outside of probate to avoid these pitfalls, you do have options.

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Medicaid (Medi-Cal in California) is a government funded program that provide financial assistance for seniors that need help paying for healthcare services such as a nursing home. People must meet certain criteria in order to receive Medicaid. In some cases, trying to meet eligibility for Medicaid can leave a person with nothing, often having to deplete their net worth, or give assets away in order to qualify for Medicaid. But with a little Medicaid Planning, you can use this government benefit and still retain your estate.

One of these options would be the creation of a revocable living trust. These trusts facilitate asset transfers outside of the probate process.

Here's how it works. You, as the person creating the trust, are called the grantor. You name a trustee to administer the trust after you pass away. This can be a person that you know, or it can be a professional fiduciary entity such as a bank or a trust company.

In the trust agreement you also name a beneficiary or beneficiaries. After you die, the trustee tributes monetary resources to the beneficiaries according to your wishes. These distributions are not subject to the probate process, so they are made in a timely manner.

Revocable living trusts are very popular among people who would like to avoid probate. However, this is not the only option for those who are interested in probate avoidance.

### ***Conclusion***

Probate is a legal process. When you direct the transfer of personal property through the terms of a last will, the estate must be probated before the heirs receive their inheritances.

Probate comes with some inherent drawbacks. It is a public proceeding, it is time-consuming, and it can be quite expensive.

It is possible to arrange for the transfer of your monetary assets outside of the process of probate. You have a number of different options. The best way to explore them would be to discuss everything in detail with a licensed estate planning attorney.

Whether you ultimately decide to avoid probate or not, you should certainly make a completely informed decision.

## ABOUT THE AUTHOR

### ROY W. LITHERLAND



Roy Litherland has been providing legal services in Santa Clara and Santa Cruz Counties continuously since 1975.

Roy has an undergraduate degree in accounting from Indiana State University, and a Juris Doctor degree from Indiana University. In law school he was a recipient of the Dean Faust Award and received awards and honors in income taxation and estate and gift taxation.

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