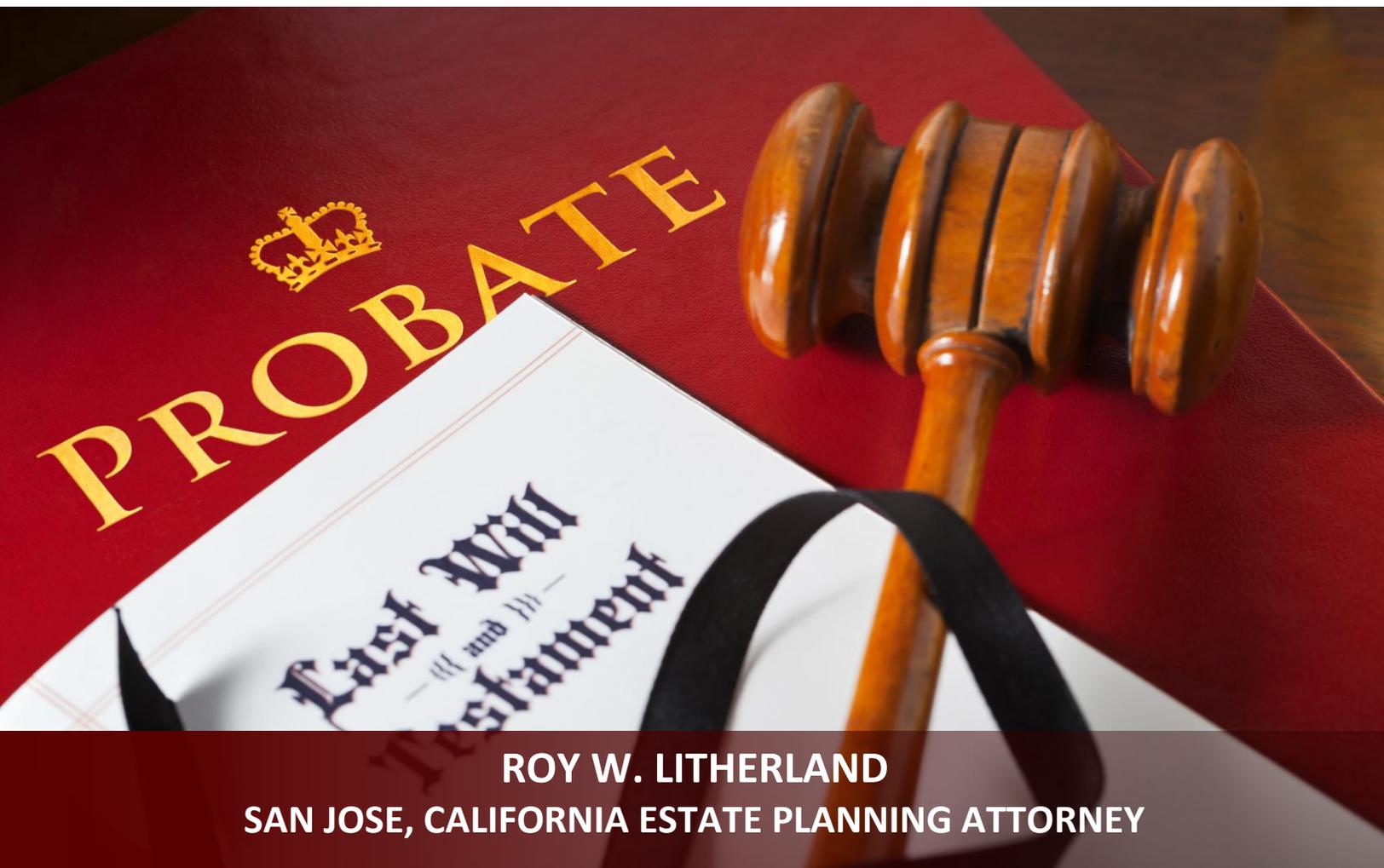


WHAT ARE THE DRAWBACKS OF PROBATE IN CALIFORNIA?

“It opens the door to will challenges, and probate records are available to anyone who wants to know how you planned your estate.”



ROY W. LITHERLAND

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Probate is the legal process of estate administration. When you use a last will to direct the distribution of your personal property, the will must be admitted to probate. The estate must be probated before the heirs receive their inheritances.



People sometimes think that property is immediately transferred to the heirs if a last will has been executed. In fact, this is not the case.

When you create a last will, you name an executor or personal representative. This is the person who will administer the estate. The executor must admit the will to probate before inheritances are distributed.

The probate court must examine the will to determine its validity. If there were any challenges to the validity of the will, they could be presented during the probate process.

Final debts must be paid during probate, including tax responsibilities. After all debts have been paid, the executor prepares the assets for distribution to the heirs.

Probate does provide protections, but there are some drawbacks that go along with the process. We will look at some of them in this paper.

Estate Challenges

Probate provides a window of opportunity for anyone who wants to challenge the estate. While there are legitimate challenges, there can also be disgruntled individuals who are not happy with the decisions of the deceased.

This can slow things down as the challenge plays itself out.

Time Consumption

Probate is inherently time-consuming. A relatively simple and straightforward case could be resolved in under a year. However, there are more complicated cases that could take longer.



As stated previously, the heirs to the estate do not receive their inheritances until after the estate has been probated and closed by the court.



Waiting a number of months for an inheritance can be a mere inconvenience to those who don't really need the money. On the other hand, there could be family members who were relying on the decedent for support. The delay could result in financial hardships for these individuals.

Loss of Privacy



Estate matters can be quite sensitive, so confidentiality is very important to many people. When probate enters the picture privacy is lost, because probate records are available to the general public.

Expenses



The process of probate is not free by any means. The executor of the estate is entitled to payment for his or her time and trouble. There will be a filing fee with the court, and the executor will typically bring in a probate lawyer to assist.



Since there are final debts that must be paid, an accountant is often required. There may also be appraisal and liquidation fees. All of this can add up to consume a noticeable portion of the estate.

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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.

Avoiding Probate

When you consider the drawbacks that go along with the probate process, you may wonder if it is possible to facilitate asset transfers outside of probate. The answer is yes, there are a number of different ways that you can avoid probate.

A very popular probate avoidance tool is the revocable living trust. When you create a revocable living trust, you maintain direct control of the assets while you are still alive. You can serve as the trustee and the beneficiary initially.

As the trustee you control the actions of the trust, and you can take monetary distributions from the trust as you see fit. Since the trust is revocable, you can rescind the trust at any time, and it would no longer exist. The assets would once again be your direct personal property.

You name a successor trustee and a successor beneficiary when you create the trust agreement. After you die, the successor trustee can distribute assets to the successor beneficiary or beneficiaries in a direct manner, outside of the probate process.

This is one way to facilitate probate avoidance, but there are others. The optimal course of action will vary depending on the circumstances.

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, where he graduated cum laude. 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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Summary

Probate is the legal process of estate administration. When you use a last will to direct the distribution of your personal property, the will must be admitted to probate. The estate must be probated before the heirs receive their inheritances.

This process can be expensive and time-consuming. It opens the door to will challenges, and probate records are available to anyone who wants to know how you planned your estate.

There are various ways that you can avoid probate. To explore your options, schedule a consultation with a licensed estate planning attorney.

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