



Seven Reasons To Have an Estate Plan

How to Avoid Probate

1. Will Alone Does Not Avoid Probate

When a client prepares a will, they assume that this document will allow them to pass all their property and cash assets to their beneficiaries without consequence. That is entirely incorrect. In fact, preparing just a will is a direct invitation to go to Probate Court. In Probate Court, a judge has to decide if the will is valid, if the beneficiaries are still around in order to inherit, and if there is a will contest among the remaining family members, before the inheritance can be made. The Probate Process is our judiciary's attempt to assist individuals who have not taken the time to properly plan, in determining how assets are to be distributed, and to whom. Probate rules are set out in California Probate Code §7000 et. seq.

2. Without Proper Planning, Statutory Distribution Scheme Goes Into Place Which May Not Be Consistent With Your Wishes

The only thing that a properly prepared will succeeds in doing is avoiding the California Statutory Intestate scheme for distribution of assets from going into effect. That provision, detailed in Probate Code §6400 et. seq. is the legislature's attempt to determine a person's natural beneficiaries when those individuals were not identified in a written will or other document. This might mean that persons that you would otherwise not include in your list become a beneficiary of your estate and are entitled to inherit your money and other assets.

3. Probate Is Expensive and Time Consuming

Probate fees are statutory and can be as high as 10% of your gross estate. Yes, this is not a typo. All calculated fees are based on a person's gross estate, and not a net estate. There are many fees that are assessed in the probate process, such as court filing fees, publication fees, service of process fees, probate examiner fees, realtor fees, and of course fees paid to the Executor and the Attorney for completing this process. These statutory fees, set out at Probate Code §10800 et. seq. provides the guidelines for how much an attorney and Executor are entitled to in compensation for completing the probate process. So, for a typical estate worth \$500,000 gross, the cost for the services of the Executor and the Attorney for the Executor would be approximately \$26,000.00. Since a gross estate includes a variety of assets, including real and personal property, cash and savings accounts, insurance policies without named beneficiaries, and much more, most people's gross estate far exceeds the amount in this example, so the probate fees would be much higher. In addition, probate is often a long drawn out process, and even uncomplicated estates often take over two years to completely run its course through the courts.

4. Living Trusts Can Avoid Probate and Excessive Taxes

A Living Trust is considered a legal entity, recognized by the Legislature and the Courts as having the capacity to transfer assets to beneficiaries without the need for the Probate



process. A properly created and fully funded trust, in addition to a pour-over will, does the task of not only avoiding probate, but possibly eliminating or reducing taxes. A Living Trust or Revocable Trust is a contract between you, the settlor, and the successor trustee to distribute funded assets to your intended beneficiaries. A trust can own or have title to all assets in your estate, including real property, personal property, cash, savings and retirement accounts, life insurance policies and more. Using an Estate Planning attorney to properly draft, and then fund a trust with all your assets, effectively avoids the lengthy probate process. In addition, a properly drafted trust, utilizing all available tax exemptions, effectively reduces or eliminates Estate Taxes, which can be as much as 40% of the non-exempt amount.

5. Health Care Wishes Will Not Be Addressed Without Complete and Current Advance Health Care Directives

Everyone remembers the story of Terry Schiavo, the young lady whose persistent vegetative state caused a massive legal and financial battle between her husband and parents over her right to live or die. Over many years, legal posturing and political struggles, her battle finally ended on March 31, 2005. Everyone seems to agree on one thing in this case. If Terry had an Advance Health Care Directive in place, properly drafted and executed, she would have had the “voice” to tell her family what she ultimately wanted to do about her health care. It could have avoided the entire problem.

6. Health Care Issues Might Impact Accounts Being Kept Current Without Durable Powers

Have you ever wondered what would happen to your house and financial obligations if you were not able to pay those payments, write those checks or make calls to handle your finances? What happens if you have a stroke, or are involved in an automobile accident which renders you unable to communicate, temporarily, with family members about what to do with those accounts or your assets? The reality is that your medical care could cease and you could lose your house and property while you were recovering from an illness. Without giving a trusted individual the Limited Power of Attorney granted in a Durable Power of Attorney to manage those financial responsibilities during your incapacity, all could be lost.

7. Without Guardianship Nomination Forms, Minor Children Lose

If you have minor children, you probably have had the thought or even the conversation with family members about what should happen to minor children if something happens to the custodial parent(s). But is the family entirely in agreement? Does everyone know what role each of them plays in your child’s life? Do they know where to get access to funds for their health care, education, maintenance and support should something happen to you? There is a very real possibility that if you and your spouse have not taken the time to write out your wishes adequately, that a family battle could ensue over guardianship of minor children, which might mean that the children have to go to foster care while the battle is being fought in court.

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