WHAT IS PROBATE? Probate is a legal proceeding that is used to wind up a person's legal and financial affairs after death. In California probate proceedings are conducted in the Superior Court for the county in which the decedent lived, and can take at least eight months and sometimes as long as several years.

WHAT HAPPENS DURING A PROBATE? The person who is nominated in the will as executor files a petition with the Superior Court asking that he or she be appointed as executor. If there is no will, the Probate Code provides a list of persons who have priority to petition to become administrator. The will also is filed with the petition, and notices are sent to the heirs and/or relatives to let them know when the hearing will be held. If there are objections to the petition, or if the validity of the will is contested, the hearing will be used to resolve any problems that have arisen. In some cases this may mean that the validity of the will is not upheld, or that some other person than the original petitioner is chosen to administer the estate. In most cases, however, there is no objection and the petition is granted. The executor then makes an inventory of the estate's assets, locates creditors, pays bills, files tax returns, and manages the estate assets. When all of the duties of the executor are completed, another petition is filed with the court asking that the estate be distributed to the heirs. If this petition is granted, the estate administrated is completed by distributing the assets to the heirs and filing final tax returns.

HOW MUCH DOES PROBATE COST? California Probate Code section 10810 sets the maximum statutory fees that attorneys can charge for a probate. Higher fees can be ordered by a court for more complicated cases. The fees are four percent of the first $100,000 of the estate, three percent of the next $100,000, two percent of the next $800,000, one percent of the next $9,000,000, and one-half percent of the next $15,000,000. For estates larger than $25,000,000, the court will determine the fee for the amount that is greater than $25,000,000. The fees listed below are the California statutory fees used to compensate attorneys and executors in probate cases for various sizes of estates. If both the attorney and the executor receive a fee, the amount paid will be double that shown below. The value of the estate is determined, in general, by the inventory for the estate. (If an accounting of the estate has been waived, the total value of the estate for attorney's fees purposes is the inventory, plus gains on sales, minus losses on sales.) Debts are not included in determining attorney's fees, and if a house is appraised at $1,000,000, for example, and it has a mortgage of $800,000, it is still considered a $1,000,000 asset for the purpose of calculating attorney's fees.

Estate Value	Statutory Fee
$100,000	$4,000
$200,000	$7,000
$300,000	$9,000
$400,000	$11,000
$500,000	$13,000

$600,000	$15,000
$700,000	$17,000
$800,000	$19,000
$900,000	$21,000
$1 million	$23,000
$1.5 million	$28,000
$2 million	$33,000
$3 million	$43,000
$4 million	$53,000
$5 million	$63,000
$6 million	$73,000
$7 million	$83,000
$8 million	$93,000
$9 million	$103,000
$10 million	$113,000
$15 million	$138,000
$20 million	$163,000

The fee charged by the court to file a probate petition is $435, but may be slightly higher in some counties due to surcharges. There will be an additional $435 fee when the petition for final distribution is filed. There are other fees for publication of the probate notice, for the probate referee, and for certification of copies of court documents.

APPRAISAL OF THE ESTATE: Estates are appraised by probate referees, who are appointed by the State Controller to determine the fair market value of the asset. The fair market value includes mortgages and other debts, which can result in an appraisal of the property that is higher than the equity that the deceased owned in the property. Probate referees receive a fee based on .1 percent of the assets that have been appraised.

FEES CAN GO HIGHER: In probates that are complicated by lawsuits or tax problems, the attorney and executor can ask the judge to approve fees that are higher than those set by state law.

ADVANTAGES OF PROBATE: The proceedings are controlled by a judge, who can decide disputes between heirs or between the heirs and the executor. Creditors are required to submit their claims against the estate within a four-month period, provided they have been notified of the probate. The executor is required, in most cases, to prepare an accounting and report of the executor's activities.

DISADVANTAGES OF PROBATE: The cost is usually much higher than would be required for the administration of a living trust for an estate valued at the same amount. It usually takes longer to probate an estate than to administer a trust. Most estates don't need the supervision of the court unless disputes occur.

AVOIDING PROBATE: Many estates do not need to be probated. If there is a surviving spouse and there is no will, or the will gives the estate to the surviving spouse, a spousal property petitionmight be used. For estates valued at less than $150,000, the small estate law may be useful.

Joint Tenancy in California

Joint tenancy is a way of avoiding probate simply by putting the words "joint tenancy" in the title of an asset. But joint tenancy can have drawbacks, as explained on this web page.

What is the right of survivorship? When a joint tenant dies, his or her interest in the asset vests in the surviving joint tenant or joint tenants. In other words, if two people own real estate in joint tenancy, and one of them dies, the surviving joint tenant then owns 100 percent of the property.

Does a will or trust have any control over joint tenancy? If property is owned in joint tenancy, the surviving joint tenant will receive the deceased joint tenant's interest in the property, regardless of what that person's will or trust says about the property. An exception would be if both joint tenants died simultaneously, in which case their wills would control their interest in the asset.

What are the capital gains problems with joint tenancy? Joint tenancy is not recommended for married couples who own assets that can increase in value, such as a residence, because the surviving joint tenant will not receive a "step-up" in cost basis to fair market value at the date of death of the other joint tenant.

Cost basis is used to determine capital gains. For many homeowners, the cost basis is the price they paid for their home, plus any capital improvements that have been made. The cost basis is subtracted from the selling price to determine the capital gains. When a married couple owns an appreciated asset as community property, the surviving spouse will get a step-up in the cost basis to the fair market value at the date of death of the other spouse. (The amount of the step-up, however, is limited to $4.3 million for the surviving spouse and $1.3 million for others.) In other words, if the surviving spouse has to sell the residence, he or she is unlikely to have to pay any capital gains. But if the residence is held in joint tenancy, it is more likely that some capital gains tax may be due because only half of the property receives a new basis. The federal tax reform bill passed in 1997 allows the surviving spouse a capital gains exclusion of $250,000, but for some California residents, even this amount may not be enough to prevent payment of capital gains tax when a residence is sold. On the other hand, owning the property as "community property" will give the surviving spouse a 100 percent step-up in basis. However, this will change in 2010, if the current tax bill remains in effect.

Advantages of joint tenancy:

1. Joint tenancy avoids probate.

2. Title to real property can be cleared after a death by filing an affidavit of death of joint tenant. The surviving joint tenant then owns the property with no further proceedings or paperwork required.

Disadvantages of joint tenancy:

1. The step-up in basis is limited for married couples who own property in joint tenancy.

2. The asset will usually be probated after the death of the surviving joint tenant unless it is put into another joint tenancy or a trust.

3. The tax planning advantages used in a living trust, such as the creation of an exemption trust, are not possible for joint tenancy property. A similar form of ownership is called "community property with right of survivorship," which allows the property to be transferred to the surviving joint tenant without going through probate. This form of ownership allows a 100 percent step-up in basis.

California Probate FAQ

I have a small estate. Does it have to be probated? In California, estates that are valued at more than $150,000 (including only probate assets) generally have to be probated. There are exceptions made if the decedent is survived by a spouse.

What is a probate asset? Assets held only in the name of the decedent are generally probate assets. An asset is not counted as a probate asset if it is owned in joint tenancy (but not if it is owned in tenancy in common) or if there is another means of determining who receives the asset after death of the owner, such as beneficiary designations for life insurance and IRAs. If those designations have been made, the asset avoids probate, otherwise it will be added to the estate and probated. If there is a surviving spouse, a formal probate can usually be avoided with a spousal property petition.

What is an executor? The executor, also called an administrator or personal representative, is the person who is responsible for management of the probate, which includes preparing an inventory, paying bills, filing taxes, and distributing the estate after a court order is obtained. The executor is nominated in the will. If there is no will, or if all of the executors who are nominated have died or are unwilling to serve as executor, state law provides that the decedent's closest relatives have the highest priority to become administrator of the estate. Depending on the circumstances, this person may be called the executor, administrator, personal representative, or administrator with will annexed.

How does a probate case get started? Probate begins with the filing of a petition for probate at the Superior Court in the county where the decedent lived. The petition is usually prepared by the attorney for the person who wants to become the executor or administrator. The petition for probate provides details about the person who died, details about the executor, and information about the heirs. The petition also includes information about the size of the estate and whether bond will be required.

Who decides whether the petition will be approved? The decision is made by the judge who hears the case, but the preliminary work is done in most counties by a court staff member who is called the probate examiner. The probate examiner reviews the file, makes sure that state laws are complied with, and makes a recommendation to the judge that the petition be approved or denied. If the petitioner disagrees with the recommendation, a hearing will be held to give the petitioner a chance to present his or her case.

What are the executor's duties? Administration of the estate includes managing the assets to prevent losses, paying bills for the estate, filing tax returns, preparing an inventory of the assets, locating heirs, and dozens of other duties. The goal is to wrap up all of the loose ends of the decedent's financial affairs and distribute the estate to the beneficiaries without further legal problems.

How long does an average probate take? If the probate has no unusual problems, it can be concluded in eight to twelve months. That includes a four-month creditor's claims period, and the time it takes after a petition is filed before it is actually heard. Due to crowded court calendars, hearings are often held several weeks after the petition is filed. There may be other problems with creditors, taxes, or will contests that will delay the probate for longer periods.

How can someone see the will of a person who has died? If the estate is in probate, you can go to the Superior Court in the county in which the decedent lived, and ask to see the file. The file will include the will and all other documents that have been filed in the case.

Who will receive a notice that the probate is being started? State law requires that notices be sent to all of the heirs of the decedent, beneficiaries who are mentioned in the will, and proposed executors. The notice will state the date and time of the hearing and the courthouse where the case will be heard.

I went to one of those hearings and I didn't hear any testimony. What was happening? In most counties, if the case has been approved by the probate examiner's office, and no one has indicated that they intend to contest that decision, the hearing is minimal: The judge calls the names of the cases on the "approved list." If no one stands up to object when the case is called, the order will be signed without having to hear testimony. If you want to raise an objection to any petition, be sure to call the probate examiner's office, or the attorney for the opposing side, to make your objection known before the hearing.

How much does probate cost? The table below shows the fees for attorneys and executors, as provided by the California Probate Code.

Estate Value	Statutory Fee
$100,000	$4,000
$200,000	$7,000
$300,000	$9,000
$400,000	$11,000
$500,000	$13,000
$600,000	$15,000
$700,000	$17,000
$800,000	$19,000
$900,000	$21,000
$1 million	$23,000
$1.5 million	$28,000
$2 million	$33,000
$3 million	$43,000
$4 million	$53,000
$5 million	$63,000
$6 million	$73,000
$7 million	$83,000
$8 million	$93,000
$9 million	$103,000
$10 million	$113,000
$15 million	$138,000
$20 million	$163,000

Avoiding Probate in California

Avoiding probate is easy if you plan ahead. The benefits are lower costs for your estate administration and less frustration for your family. Among the methods of avoiding probate are the following:

LIVING TRUSTS:

Assets owned through a living trust do not need to be probated.

JOINT TENANCY:

If an asset is owned by two or more people as joint tenants, it will usually not be probated. These assets can be identified by the words “joint tenants,” or “in joint tenancy,” “JT TEN,” or similar wording. When a joint tenant dies, the other joint tenant takes 100 percent ownership of the asset. This occurs regardless of the provisions of the will or trust of the deceased joint tenant. In other words if a house is held in joint tenancy by persons A and B, and A dies, it doesn’t matter what A’s will said about the house because the joint tenancy has a higher priority and the house will be owned 100 percent by B. If this is what A and B intended, then joint tenancy might be beneficial to them. Otherwise, they should use some other form of ownership, such as tenancy in common. Joint tenancy is not recommended for assets that can increase in value, such as a residence, because the surviving joint tenant will not receive a “stepped up cost basis” to fair market value at the date of death of the other joint tenant. Cost basis is used to determine capital gains. For many homeowners, the cost basis is the price they paid for their home, plus any capital improvements that have been made. The cost basis is subtracted from the selling price to determine the capital gains. When a married couple owns an appreciated asset as community property, the surviving spouse will get a step-up in the cost basis to the fair market value at the date of death of the other spouse. In other words, if the surviving spouse has to sell the residence, he or she is unlikely to have to pay any capital gains. But if the residence is held in joint tenancy, it is more likely that some capital gains tax may be due. Federal law allows the surviving spouse a capital gains exclusion of $250,000, but for some California residents, even this amount may not be enough to prevent payment of capital gains tax when a residence is sold.

SMALL ESTATES:

The California Probate Code provides that probate estates of less than $150,000 do not need to be probated. In some cases, the total estate may be considerably larger than $150,000, but the small estate law can still be used. The reason is that many assets are not defined as probate assets, such as life insurance (unless it was payable to the estate), IRAs, 401Ks, assets held by a living trust, and joint tenancy assets. The $150,000 amount is calculated by totaling all of the probate assets owned by the decedent.

SPOUSAL PROPERTY PETITIONS:

If the decedent is survived by a spouse, the spouse can file a spousal property petition with the court. The purpose of this petition is to change the titles of the assets to the surviving spouse’s ownership. The petition is a simplified probate, and takes much less time than a full probate. Legal fees are usually much lower for this type of petition than a full probate. Spousal property petitions can be used when the decedent did not have a will and the couple owned community property, or when there was a will and the spouse is the main beneficiary. A spousal property petition is not used when all of the decedent's assets were in a trust.

Spousal Property Petitions

What is a spousal property petition? After the death of a spouse, a spousal property petition can be used to transfer assets from the deceased spouse to the surviving spouse or domestic partner. It is a simplified probate, and takes much less time than a full probate. Legal fees are usually much lower for a spousal property petition than a full probate.

When can a spousal property petition be used? Whenever someone has died and that person leaves a surviving spouse or domestic partner. If there is a will, and the only beneficiary is the surviving spouse or domestic partner, both community property and separate property can be transferred by a spousal property petition. If the will has other beneficiaries, however, a probate may be needed for the assets being transferred to those beneficiaries.

However, if there is no will, the estate will be transferred in accordance with intestate succession. Community property can be transferred to the surviving spouse or domestic partner through the spousal property petition. But if the decedent owned separate property, and there is no will that gives the separate property to the spouse, a full probate might be required for the separate property assets.

Does a spousal property petition have to be used in all cases in which there is community property? No. In some cases the surviving spouse may want to probate the estate because litigation against the estate or a will contest is likely, or because of potential problems with creditors.

How does the process work? The surviving spouse files a spousal property petition with the Superior Court in the county in which the decedent resided. The petition is usually filed with the help of an attorney, although that is not required. The petition states the facts of the case (name of the decedent, date of death, etc.) and also lists the community property owned by the decedent. Some of the decedent's assets will not be on the petition, however, because they were owned in ajoint tenancy.

The petition asks (1) that the court state that the decedent's half of the community property passed to the surviving spouse by operation of law and (2) that the court confirm that the surviving spouse's half of the community property belongs to the surviving spouse.

A court hearing is set for the petition, and notice of the hearing is sent to everyone who is mentioned in the will (if there is one) and all of the heirs of the decedent.

If there is no objection to the spousal property petition, the court will sign an order that transfers all of the community property to the surviving spouse's sole ownership. There is usually no testimony required and spousal property petitions are often on the court's "pre-approved" list, meaning that unless someone asks that the case be heard, there will be no hearing and the court will sign the order.

The spousal property order is then recorded with the County Recorder in each county in which the real property is located to put the surviving spouse's ownership of the property on the public record. Copies of the order are also given to financial institutions and brokerages to clear up any ownership questions concerning other assets.

What happens if the surviving spouse does not file a spousal property petition? Title to assets owned by the couple will be clouded because a deceased person will be listed as an owner of the assets. Real estate, for example, cannot be sold or refinanced until the title is cleared.

Federal Estate Tax

The federal estate tax is a tax on assets transferred at death and on transfers made during a person's lifetime. However, for most U.S. citizens the federal estate tax is not a problem because the current exemption from the tax is $5.34 million. In other words, if someone dies, and their net worth is less than $5.34 million, it is unlikely there will be any estate tax owed. This web page explains the estate tax and how it may affect your estate.

THE FEDERAL ESTATE TAX is a tax on any transfer of assets from a deceased person's estate to his or her heirs, except for transfers to spouses.

ALL OF THE ASSETS owned by the deceased person are subject to the estate tax, including property in joint tenancy, living trusts, IRAs, and life insurance (if the insurance was owned or controlled by the decedent).

EACH ESTATE HAS AN EXCLUSION from the tax of 5.34 million per person for deaths occurring in 2014. That amount is indexed to inflation.

TAX RATE: Assets that are subject to the estate tax (in other words, an estate greater than $5.34 million for a single person and $10.68 million for a married couple) are taxed at 40 percent.

THE MARITAL DEDUCTION: Assets that are transferred from one spouse to the other spouse at death are not taxed. This is called the "marital deduction," and there is no limit on how much can be transferred to the surviving spouse.

PORTABILITY: If a surviving spouse does not use his or her exclusion amount by funding an exemption trust or making bequests to anyone other than his or her spouse, the surviving spouse can use the unused exclusion amount of the first spouse to die. Portability doubles the amount available to the surviving spouse in many cases, and up to $10 million of assets can be excluded from the estate tax. (Portability is not indexed to inflation.)

Here are the requirements for portability:

1. The decedent and the survivor must have been married.

2. Death must have occurred after Dec. 31, 2010.

3. An election to use portability must be made on the estate tax return of the decedent.

4. Portability applies only to the surviving spouse, not to other family members.

5. Portability applies for both estate and gift tax purposes.

6. Portability does not apply to the generation skipping tax.

THE FEDERAL GIFT TAX is intended to limit the amount that can be transferred to persons other than a spouse without incurring a tax. Annual gifts of up to $14,000 can be made to an individual without incurring a gift tax. If the gift is made by a married couple from their jointly owned assets, it can be as much as $28,000 per year without being taxed. There is a lifetime gift exemption of $5.34 million per donor, but the gifts made during lifetime will be deducted from the donor's exclusion amount.

WHAT IS A DISCLAIMER? A disclaimer is a refusal to inherit all or part of an asset or of an entire estate. The reason for doing this is that the person who is entitled to receive a bequest either doesn't need or doesn't want the bequest. In most cases the bequest would only make a sizable estate larger and increase the amount of federal estate taxes that will eventually be collected from that estate. The disclaimer operates as though the disclaimant died before the decedent, and the decedent's estate plan specifies a contingent beneficiary, who is often the disclaimant's children. If that is the case, the effect is that the bequest goes to the disclaimant's children, and is never taxed in the disclaimant's estate. In some cases, the amount that is disclaimed will go to a disclaimer trust.

DOES CALIFORNIA HAVE AN ESTATE TAX OR INHERITANCE TAX? There is no state tax on inheritances or gifts for California residents. California had an inheritance tax until 1981, when it was voted out in a statewide election.

Dying Without a Will in California

If a California resident dies without a will or trust, they die "intestate" and the laws of intestate succession are used to determine who will inherit the estate. Determining the heirs involves answering a series of questions about the person who died. The following discussion applies only to California residents and the intestate succession law of other states may be different.

The first question is whether the decedent (the person who died) was married.

A. If the decedent was not married, the estate is distributed as follows:

1. To the decedent's children, who take in equal shares if they are in the same generation.

2. If there are no children or other issue (issue is the legal term for children, grandchildren, great-grandchildren, etc.) living, the estate goes to the decedent's parents.

3. If there are no parents living, the estate is distributed to the "issue of the parents." If the decedent had brothers or sisters, they will inherit the estate. If there are deceased brothers and sisters, and they had issue, the issue will inherit the share of the estate that the deceased brother or sister would have inherited.

4. If there are no brothers or sisters, the decedent's grandparents will inherit the estate.

5. If there are no living grandparents, then the "issue of the grandparents" will inherit the estate. This could include the decedent's aunts and uncles, or if there aren't any aunts and uncles, the decedent's cousins. Generally, the oldest generation that has surviving issue will inherit, but if there are deceased issue in that generation, their issue will inherit their share.

6. If there are no cousins, Probate Code section 6402 provides that the estate will be distributed to "next of kin in equal degree," generally meaning more distant cousins.

B. If the decedent was married, the first question is whether the decedent owned community property, separate property, or a combination of the two. Community property is generally defined as the assets acquired during marriage from earnings or salary. Separate property is generally defined as assets brought into the marriage when the decedent got married, inheritances to the decedent, or gifts to the decedent. However, California case law provides many exceptions to these definitions, and assets can change from community to separate property, or from separate to community, by combining assets, by improving separate property with community property, or by written agreement of the spouses, for example.

1. The decedent's community property goes to the surviving spouse, who may have to file a spousal property petition to establish ownership.

2. The decedent's separate property is distributed as follows:

a. The surviving spouse receives all of the separate property if the decedent is not survived by issue, parents, brothers, sisters, or children of a deceased brother or sister.

b. The surviving spouse receives one-half of the separate property if the decedent had only one child, or issue of a deceased child.

c. The surviving spouse receives one-half of the separate property if the decedent left no issue, but left parent(s) or their issue.

d. The surviving spouse receives only one-third of the separate property if the decedent left more than one child.

e. The surviving spouse receives only one-third of the separate property if the decedent left one child and the issue of one or more deceased children.

f. The surviving spouse receives only one-third of the separate property if the decedent left the issue of two or more deceased children.

However, all of the above considerations are irrelevant if the decedent had a will or living trust.

How an asset is titled may also change who will own it after one of the owners has died.