Understanding the Probate Process and How to Avoid It

The Law Offices of Vlad Portnoy, P.C.
NYWillsAndEstates.com

Many people believe that it is crucial to “avoid probate.” But just because people may have heard that term doesn’t mean they know what probate means, why it can be a problem, or how to avoid it successfully. In this brief E-book, from the Law Offices of Vlad Portnoy, P.C., We will look at the term “probate” to understand what it means and what the probate process includes.

What is Probate?

The term probate most literally means “to prove” a will. Today, it covers the entire legal process necessary to settle a person’s estate after they die. The appointed representative (usually a family member) opens the probate case in court. With the court’s help, they will work through all of the financial business that the decedent left behind. The term "estate" encompasses all of the person's assets they owned at the time of death.

During the probate process, a deceased person’s will is authenticated, their assets are reviewed, their outstanding debts and taxes are paid, and then the remaining estate is distributed to their inheritors. After an asset-holder dies, the court will appoint a valid will’s executor to administer the process. In the absence of a will, the court will appoint an estate administrator under the State’s rules of intestacy in what is called an Estate Administration. Surrogate's Court's laws vary by state, but there are steps in the process that are common.

An estate administration (whether it's administration or probate), includes disposing of personal property, money, real property, or anything else that the deceased owned at the time of their death (also referred to as "estate assets"). The process also includes dealing with any debts that were in existence at the time of death.

Probate or Administration are required for any asset or account that does not have a joint owner or beneficiary named. If a joint owner or beneficiary is named, then the title changes automatically, and the Court's involvement becomes unnecessary for the transfer of that specific asset.

Each person’s estate is unique, but an experienced New York estate planning attorney can help you determine what planning tools are best for you.

Why is Probate Such a Negative Thing?

Probate is not inherently evil. It is merely a legal system that oversees the way estates are handled. However, there is some truth when people say that probate should be avoided, if possible. Some of these cons are listed below:

A Lack of Privacy

Probate cases are filed in the court and are in the public record. If, for any reason, a person wants to maintain a sense of privacy after they die, it could be a good idea to avoid probating the estate in court. Famous people or other potentially controversial people usually don’t want their financial and family affairs dragged out into the open.

Probate Can Create Family Disagreements

One reason that wills go to probate court is to allow interested persons the opportunity to represent their own claim on the estate by challenging or contesting a will that does not favor them. For people with complicated family dynamics, unpopular second marriages, or estranged loved ones, avoiding probate should be a top priority. When handling an estate through non-probate channels, like trusts, it becomes much less likely that a will becomes successfully challenged.

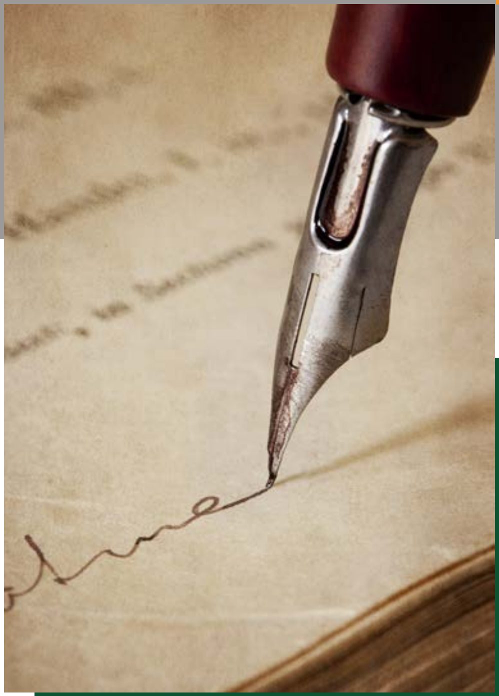
Probate is Slow

Like most things that end up in court, probate can be time-consuming. In more complex estates, the entire process can last months or years. And, while the family waits for this time to pass, the decedent’s assets or property may be slowly losing value or be lost entirely.

Probate is Costly

Probating an estate requires the help of a competent probate lawyer to facilitate the matter. Since the process may require court appearances and extensive paperwork, the legal fees can mount up quickly. With proper pre-planning, you or a loved one can avoid the high cost of probate.

An Hypothetical Example of the Probate Process with a Will



One day Edward's daughter read in an article that a will was not the best way to leave property to heirs. A will often involves long and expensive court proceedings, and there are other, more efficient ways to pass on savings to family. But Edward was a person who knew his own mind, and he felt sure that a simple will would be good enough for him.

A will without court approval is worth nothing more than the paper it's written on. Wills, by themselves, are not enough to prevent the property from staying "stuck" in a decedent's name. The only way a will could be practical to give Edward's daughter the inheritance he wanted her to have, was for his daughter to go to court after he passed. Courts make sure that wills are valid, debts are paid, and – despite whatever the will may say – whether other family members might also have a legal right to a portion of the estate. Worse, because Surrogate's Court files are public records, anybody off the street could have open access to all documents filed there, including wills.

So, when Edward's daughter filed in probate court after he died, she soon found herself be-sieged by additional creditors. Edward's estranged second wife's children showed up to demand a piece of his estate. When a small loan Edward owed on his house was discovered, a property broker flagged the house for foreclosure, and the daughter's lawyer had to move fast to keep the house off the auction block.

It took over three years and substantial legal fees to resolve these complications. Edward's daughter had to pay a lot in court costs, attorneys' fees, and accounting expenses.

If only Edward had heeded his daughter's advice, these difficulties could have been avoided or minimized. **Many better alternatives would have kept Edward's financial affairs more efficiently managed and private when it came to his wishes.**

An experienced estate planning attorney can help you and your family navigate the estate planning or probate process and warn you about potential issues that should be immediately addressed.

How Can Families Prevent the Need for Probate?

Creating a smart estate plan is the best way to avoid probate. Vlad Portnoy, Esq., an experienced attorney, can work with you and your loved ones to draft the proper legal documents and carefully time asset transfers.

Revocable Living Trust

The revocable living trust is an instrument that dictates the management or distribution of property. The property is transferred in title to the trust during the owner’s lifetime. The property owner also chooses someone to act as a trustee, an appointed fiduciary who will manage the trust property and any distributions after the trust’s creator’s disability or death.

The other good thing about a trust is in Surrogate's Court because the assets in the the trust pass by operation of Law.

Joint Title

Another way to avoid probate hassles is by placing your assets into joint ownership with right of survivorship your future beneficiaries. This way, when you pass away, the ownership interest will automatically transfer to the joint owner.

Payable-On-Death and Transfer-On-Death

Payments on death accounts (POD) have a designation that names a person who will receive the assets in the account when the original account owner dies. At the same time, transfer on death (TOD) is a designation on the title or deed to a real estate piece or a car that will automatically change ownership once the owner dies.

How A New York Attorney Can Help If You or a Loved One is Facing Probate

Whether you are the Executor or an heir of the probate estate, knowing the lawyer's role is one of the first steps you should take at the beginning of the probate process. One of the most significant conflict sources in probating the estate is understanding the role of the lawyer hired by the Executor of a probate estate. Many Executors do not understand the probate process and leave the tasks up to the lawyer.

Some of the shared responsibilities of an executor that a lawyer assists with include:

DUTY TO COMMUNICATE. The duty to notify the beneficiaries the estate exists, identify the Executor, provide a copy of the inventory, provide copies of court filings, generally explain documents that require a beneficiary's signature, etc. This duty to communicate is not the same as an attorney-client relationship, which means there is no attorney-client privilege, and the attorney cannot give legal advice.

DUTY TO ACCOUNT. Provide regular estate accountings, which include explaining funds paid out of estate accounts for expenses.

DUTY TO TREAT ALL BENEFICIARIES EQUALLY. To distribute estate funds simultaneously. If a question arises about how something in the Will is to be interpreted, the attorney cannot interpret it, and the court must interpret it.

Don't Be Tempted to Give Away Your Assets

Some people assume that the easiest way to avoid probate is to give everything away before you die. However, doing this could cause seniors problems when they may need to qualify for assistance for long-term care.

We can help you plan responsibly for the future and navigate the probate process. Take the first step and contact our New York office at 212-920-6371 and schedule an appointment with us. The Law Offices of Vlad Portnoy P.C. has locations in Midtown Manhattan, Brooklyn, and Northern New Jersey to best serve your legal needs.

NY WILLS & ESTATES

The Law Offices of Vlad Portnoy, P.C.
450 7th Avenue, Suite 1408
New York, NY 10123
(212) 920-6371
NYWillsAndEstates.com
vportnoy@nywillsandestates.com