



Probate and the Probate Process

What is Probate?

Probate is the legal process that takes place after someone passes away which includes proving the decedent's Will is valid, appointing an Executor, identifying and collecting assets, satisfying debts and taxes, then distributing the remaining assets to the beneficiaries named in a Will. This process is overseen by the Surrogate's Court in the county where the decedent resided in at the time of their death and carried out by the Executor who is appointed through the Will (and Surrogate's Court).

Our definition of Probate is a lawsuit that you file against yourself, financed with your assets for the benefit of your creditors and disgruntled heirs.

What are the Benefits of Probate?

To be honest there are not many benefits of probate. In general it is time consuming, can be expensive and has high liability for the Executor. The reality is that most people should want to avoid it, if possible. The potential benefits of Probate is that it can limit the time that creditors can file and collect on claims. Also, Probate is currently the only way to set up a Medicaid Trigger Trust (an asset protection technique that is available to married couples interested in protecting assets from nursing home and long term care costs). Finally, Probate can provide a forum to adjudicate issues that could be present in certain family situations.

Who Has to Go Through Probate?

The heirs of anyone who passes away with assets in the decedent's name alone that don't have beneficiary designations on those assets will have to go through Probate. If you don't have a Will, your heirs will have to go through a similar process, but it is referred to as an Administration and is controlled by state law (rather than by your Will). Having a valid will does not mean your beneficiaries will avoid probate.

Other important information about Probate:

The best way to avoid probate is through the use of a Trust.

In New York a Probate or Administration is required to remain open for a minimum of seven months from when the Executor is appointed.

Although joint accounts and accounts with beneficiary designations may avoid probate, they often result in unintended consequences such as increased taxes, availability to creditors of the joint owner (such as a divorcing spouse, lawsuits, taxes and more) or inconsistencies with your Will or Trust that can lead to family discord or litigation.

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