

20 MOST COMMON PROBATE PITFALLS

(AND HOW TO AVOID THEM)

Probate Administration is a court-supervised legal process that occurs after someone passes away. The “someone who passed away” is referred to as the decedent. This process transfers the decedent’s assets to his or her beneficiaries. Although it is possible to avoid the probate process by creating an estate plan while a person is living, not everyone chooses to do so. If you need to start a probate administration following a loved one’s death, we can help. We have seen almost every scenario at OC Estate & Elder Law. Here are the 20 most common probate pitfalls to avoid.

1. Thinking that Having a Will is Enough

A Last Will and Testament (“Will”) is a pivotal estate planning document that designates who should receive your assets upon your death. Wills also provide the means to appoint a "personal representative" (a/k/a executor) who assumes the responsibility of executing the decedent's final wishes and distributing assets in accordance with the Will. It is important to note that relying solely on a Will does not avoid the probate process. Probate is the court-supervised process through which a person's Will is validated, assets are inventoried and distributed, and their final financial debts and legal matters are settled. This tedious process is subject to court oversight, which is often a lengthy and financially burdensome process. The best way to avoid probate is by creating a Revocable Trust during one's lifetime.

2. Failing to Pick Up the Mail From the Decedent’s Home

When you are nominated as the personal representative of an estate in Florida, it is your responsibility to obtain the decedent’s mail so that you do not miss important notices from creditors or the court. If you do not have access to the mailbox, you can contact your local post office and have them forward the decedent’s mail to your address. Getting statements from the mail is sometimes the only way to identify where the decedent held financial accounts. Likewise, you can also try to access the decedent’s email, which may have valuable information about accounts and other assets.

3. Failing to Keep the Utilities on in a Vacant Home

If the decedent owned real estate, there will be an interim period in which the residence remains vacant, while the family deliberates on the course of action regarding the property. Make sure to keep making payments to the utility companies (e.g., water, electricity, gas) to ensure the

continuous functioning of the air-conditioning system and running water. This will prevent mold from growing inside the home and keep the property in habitable condition.

4. Failing to Protect the Property

The personal representative has a duty to protect and preserve the assets of the estate, which includes real estate (such as homes, apartments, or plots of land). This may involve securing the property to prevent theft, vandalism, or damage. This also includes routine maintenance tasks such as lawn care, cleaning, and addressing minor repairs to prevent deterioration. Continue to pay the utility bills, property taxes, homeowner's insurance, and maintenance fees (if applicable) and make sure to keep all receipts and proof of payment. The personal representative can get reimbursed for out-of-pocket expenses by petitioning the court for reimbursement.

5. Waiting to Hire an Attorney

Attempting to navigate the probate process without legal counsel will lead to costly mistakes and delays in getting your inheritance. Probate is a complex legal process involving various steps, paperwork, and legal requirements, such as preparing and filing petitions, inventories, and accountings with the court. Attorneys ensure that these documents are accurately completed and submitted to the proper court on time. Many people become the personal representative of an estate without realizing the extensive amount of responsibility they are undertaking. The personal representative is responsible for paying debts in accordance with the priorities of Florida Law, keeping proper records of such payments, and distributing the decedent's assets to the rightful beneficiaries in the correct percentages. For these reasons and many others, Florida requires a probate attorney to oversee the full probate administration process.

6. Assuming Probate is Free

Probate in Florida can be a very costly process. There are many expenses that must be paid, such as court costs and filing fees, newspaper publication costs, accounting fees, and attorneys' fees. Unfortunately, there is no fixed amount on how much the probate process costs, as it varies depending on the size and complexity of the estate, the number of beneficiaries involved, negotiating with creditors, the services provided by attorneys and other professionals such as appraisers or accountants, and any potential family disputes that arise during the probate process. Simply put, probate is not cheap.

7. Assuming Probate is Private

Many people believe that probate in Florida is a private matter. Unfortunately, this is not true. Once you petition the court to start a probate proceeding, it becomes a matter of public record. This means that anybody can request access and look up the decedents' personal information

online in the county court docket. Note that certain documents are not made visible, such as someone's death certificate, whereas most of the other legal paperwork is visible.

8. Assuming You Will Not Have Creditors

Very often we hear clients say the same phrase "I do not have any creditors, I do not have a mortgage, and all my credit cards are paid off." Unfortunately, there are sneaky creditors waiting to pounce. By pounce, we mean that creditors are waiting for the family to start the probate process and open an estate with the court. Creditors then submit their claims directly to the court in hopes of getting paid. Creditors often manifest themselves in the form of unpaid medical bills, especially ambulatory services and hospital bills related to the period surrounding a person's death. Other common creditors include utility and cable bills, as well as credit cards. Prior to the beneficiaries receiving any of their inheritance, all creditor claims need to be paid or negotiated, and settled with the court.

9. Assuming Creditors Will Not Find You

At the start of the probate process, the personal representative has a duty to publish a notice to creditors for 2 consecutive weeks, in a newspaper published in the county where the probate estate proceeding is administered. The notice shall contain the name of the decedent, the file number of the court case, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication. The purpose of such publication is to give notice to any potential creditors that they must file claims against the estate with the court during the time periods set forth in Florida Statute 733.702 or be forever barred (from filing a claim). Creditors then have 3 months to file their claim against the estate.

10. Improperly Paying Creditors and Claims Made Against the Estate

When it comes to managing payment of claims made against a decedent's estate, the personal representative cannot pay them in whatever order they feel is best. Creditors' claims are to be handled in accordance with statutory priority as determined by Florida Law. The law has set forth a schedule of how claims are to be paid, and it outlines who gets paid and in what order. For example, funeral expenses have a higher priority than medical bills. If the personal representative pays out of turn, they could be held personally responsible for paying the creditor a surcharge. Paying debts of the decedent is best handled by an attorney, as the attorney can often negotiate the price down, provide payment to the right department, and obtain the proper "Satisfaction of Claim" paperwork required by the court in order to release that claim.

11. Not Realizing that the Probate Process Will Cause Stress to Your Family

While grieving the death of a loved one, the probate process can be especially overwhelming. Families frequently face internal strife when grappling with intense emotions such as sadness, anger, and resentment. If the estate is going through probate, the decedent's assets are tied up until the matter is resolved by a court. This means that the beneficiaries will not receive any inheritance until a court has determined how the assets will be distributed and any potential creditors' claims are resolved (either paid or stricken by the court). The most common stressors during the probate process come from 1.) a Will that contains unclear or ambiguous language and families cannot figure out who gets what, 2.) family members that are left out of the Will altogether 3.) families disagreeing on whether the decedent's home should be sold, rented, inhabited by a family member, etc. and 4.) family members fighting over sentimental items. To minimize such battles, our law firm can offer professional legal guidance, experience, and techniques that will facilitate a smoother estate administration.

12. Ignoring the Beneficiaries

Personal representatives tend to get nervous when it comes to beneficiaries. Yet personal representatives must fulfill their duties as the "caretaker" of the estate. According to Florida law, "a personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's Will as expeditiously and efficiently as is consistent with the best interests of the estate... and...shall use authority of any order of the court, for the best interests of interested persons, including creditors." When you are the personal representative of an estate, you are expected to maintain regular communication with all interested parties, including the beneficiaries of the estate. Do not ignore beneficiaries, otherwise it could result in them seeking to have you removed if you fail to do what is required of you as the caretaker of the estate. If an heir contacts you, try and return their message as soon as possible. Otherwise, they may become nervous and suspicious, making the entire process even more difficult.

13. Not Realizing that Anyone Can Challenge the Decedent's Will

Even if the decedent left behind a valid Will, beneficiaries and other interested parties can challenge the Will. This is called *contesting the Will*. Often, Wills are challenged by family members or others who feel that they are entitled to certain assets or a greater share of the assets. In Florida, the person filing the Will contest must have legal grounds to challenge the document. Unfortunately, the challenging party must prove this in court, and this can delay the probate process significantly.

14. Not Speaking Up When You Do Not Agree with the Personal Representative

Speak up! Failure to make your point or to raise an issue on time is fatal. The personal representative runs the estate. It is their job to communicate with beneficiaries, get a hold of assets, pay off debts, give notice to creditors, pay the decedent's last income tax return, pay

expenses of probate administration, and then distribute the assets remaining, if any, to the beneficiaries. If you do not like what the personal representative is doing, or how they are overseeing the case, you need to take action. If you do not act, a court could view your silence as acceptance of what the personal representative is doing. Taking action means contacting the personal representative or their attorney and voicing your concerns. Likewise, even if an attorney is already involved in the probate administration, you are always free to seek independent counsel (your own attorney) for a second opinion. Do not hurt your credibility with the probate court if you do not like something going on in the estate by waiting until the end of the probate proceedings to object or say something.

15. Not Realizing the Decedent has Assets in Other States

It is not unusual for decedents to own real property in more than one state. Especially if they live near state borders, or if they are “snowbirds” who have residences in northern states in the summer and southern states in the winter. Real estate is subject to the laws of the state in which it is situated. For example, if the decedent has property in their birth state of New Jersey and also buys property in Florida where they stay during the winter, a probate administration will need to be started in each state.

The first course of action is to determine what state qualifies as the decedent’s domicile, or primary residence. This will be listed on the death certificate as their last residence. Many clients are surprised to find out that the death certificate is what determines which county the initial probate proceeding will need to be commenced in. Once a probate case is initiated in the decedent’s home county and state, a personal representative will be appointed by the court. That personal representative will then need to start a second (or third or fourth) probate in the other states where assets, usually real estate, are located. Probate laws vary from state to state; therefore, it is advisable to enlist the assistance of a separate probate attorney in each state. Often, in the case of neighboring states, there are attorneys who become licensed in both states to handle this exact situation.

16. Failing to Recognize that the Estate may Qualify for Summary Administration

Most states, including Florida, offer a small estate administration (called summary administration) as an alternative to formal probate administration (for estates that qualify). Summary administration is a simplified probate process. This process is generally quicker than full administration and can be completed in several months. According to the Florida Statutes, summary administration can be done if the person has been deceased for over two years or if the assets are less than \$75,000. It can also be used when the only asset is a Florida homestead real estate property (primary residence of the decedent).

The main difference with summary administration is that a personal representative is not appointed by the court. Beware that there are instances where even if the estate qualifies for summary administration, you still may opt for formal administration. One such common scenario is when the real estate of the decedent needs to be sold immediately, and therefore a

personal representative must be appointed through a formal administration in order to list that property on the market through a real estate agent (and only with court approval).

17. Distributing Assets too Early

Beneficiaries naturally are eager to receive their inheritances, so the personal representative may feel pressured to distribute assets as soon as possible. DO NOT DO THAT. Remember that per Florida law, creditors must be prioritized before anyone else. If you distribute assets before paying creditors, you as the personal representative, could be held personally liable. While the pressure to keep beneficiaries happy is real, distributing assets early can cause serious complications – if you are distributing money from an account, it can be remarkably easy to lose track of who has received how much money, and how the early loss of that money will affect the distribution of the remaining funds. Additionally, there is always a possibility for unexpected complications or costs to arise later in the probate process, and if the estate does not have enough money to cover these issues because the funds have already been distributed, the personal representative will be expected to pay these expenses out of pocket.

18. Failing to Recognize Non-Probate Assets

Not all assets of the decedent automatically fall under the category of "probate assets." Non-probate assets bypass the probate process altogether and, therefore, may be distributed to beneficiaries immediately after the decedent's death. Trust assets, certain types of jointly held real estate property, jointly held bank accounts, financial accounts that have beneficiary designations, and proceeds of a life insurance policy (with a beneficiary listed on the policy) are just a few examples of non-probate assets. Failing to properly categorize assets can really mess up the whole probate process and cause unnecessary delays and attorneys' fees. The best way to decipher what is a probate asset verse non-probate asset is to enlist the help of a seasoned probate attorney.

19. Failing to Identify and Locate all the Decedent's Assets

This refers to the risk of not adequately identifying and locating **all** the assets belonging to the decedent at the time of their death. This pitfall can lead to various complications, delays, and potential disputes among heirs. You will be surprised that the best way to discover where the decedent held financial accounts is to simply check their mail and email. Real estate can be searched online in the public records by searching for Warranty Deeds or Quitclaim Deeds recorded with the property appraiser's office in the respective county. Likewise, you can search for business ownership through the Florida Department of State, Division of Corporations at <https://dos.fl.gov/sunbiz/>. This diligent search should be done while the probate administration is commencing. If you wait until the probate case is completed, then discover additional assets, you will need to start the whole probate process over again with the court.

20. Not Engaging Professional Help

Not hiring a probate attorney during the probate process in order to avoid paying an attorney WILL inevitably lead to many challenges and complications. Probate laws are complex and vary from state to state. Without a legal professional's guidance, it is easy to misinterpret or overlook crucial legal requirements and deadlines. Attorneys are seasoned in communicating with creditors and can often eradicate or significantly reduce the debt owed. Attorneys can spot red herrings in advance and avoid potential conflicts from even starting to boil. Finally, attorneys often know the judges and the judicial assistants on a professional and friendly level. Our great legal reputation can lead to expedited and effective results faster than other law firms.

Bonus Round: Going Through Probate and Not Creating an Estate Plan for Yourself

Now that you understand the range of probate NO-NOs and mishaps we encounter at our law firm, you may be wondering if there is a way for your family to avoid probate all together? The good news is that YES, there are several ways to avoid ending up in a Florida probate court. This is best accomplished through proper estate planning, often involving the use of a Revocable Trust. Contact our trusted estate planning attorneys to help provide you with peace of mind that your loved ones will be taken care of.

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