

WHAT IS PROBATE AND IS MY ESTATE SUBJECT TO PROBATE? IS "PROBATE" NECESSARY AT DEATH?

"Probate" is a protective, court supervised, legal process established by the state to oversee the settlement of an individual's estate at death. During this process, "a Personal Representative" is appointed to "administer," or manage the "assets" of a decedent, who resided and owned assets in Washington. Administration includes: collection and valuation of the estate assets, payment of the decedent's bills, investigation and settlement of tax issues, and finally distribution the estate according to the terms of the decedent's Will, or by the state rules of "intestacy" if the decedent died without a Will.

Though it sounds simple, the Personal Representative is required to carefully follow the laws and procedures established by the state of Washington. This includes providing proper notice to family members and persons named in the Will and following special procedural probate rules established by the Court. Below are some common questions that arise:

How do I know if probate is necessary?

Is there a Surviving Spouse?

A probate is not always needed upon the death of the first spouse. The title of property owned by the decedent usually indicates the types of procedures necessary to settle the estate. Typically, spouses are named as co-owners on bank accounts, brokerage accounts and real estate. Sometimes spouses have executed a "Community Property Agreement" which can effectively vest all interest in the surviving spouse upon the death of the first spouse; or the title is held as "joint tenants," which requires only a simple document to finalize a transfer into the survivor's name; or if the total assets consist of tangible property valued at less than \$100,000, no formal probate is required.

However, there are many situations where a probate is required or even recommended. For example, if the deceased spouse designates assets in his or her Will to be distributed to another individual besides the spouse, if the Will contains a testamentary trust for one or more heirs, or if the Decedent leaves separate property assets to third parties. Additionally, probate may be advisable for estates with post-mortem tax planning needs, or creditor issues.

Is there real property?

If the Decedent owned real property, i.e., a residence, vacation home or investment property, a probate is usually necessary to clear title. Without a probate, the Administrator will not have authority to transfer or sell the property.

Is the value of the estate over \$100,000?

In some circumstances, we can gather estate assets through a "Small Estate Affidavit" instead of probate. However, the value of the decedent's estate, subject to probate, must not exceed \$100,000. Other caveats and rules associated with this provision, may also apply.

If I have a Will, can I avoid probate?

A Will does not allow you to avoid probate in Washington. Instead, the Will provides your instructions for how you wish your estate to be administered and distributed, and who should be appointed as Personal Representative, i.e., the person or entity who will manage the process.

How long is probate?

The duration of a probate is not fixed. A probate is concluded after satisfaction of each step required by the State of Washington, and this can take from four months at the least, to several years at the maximum. The statutes allow a person to challenge the Will or challenge the proposed Personal Representative's appointment up to four-months after commencement of the probate proceedings. Additionally, the Personal Representative is required to publish a "Notice to Creditors" if it is likely that the Decedent had any debts at death. A Creditor then has four months after the publication to file a Claim against the estate, and if a Creditor fails to file a claim within this period the debt is extinguished. Estate Taxes, both Federal and Washington, if any, must be paid and a tax return filed nine months after death. These are the fixed filing deadlines within a probate proceeding. As soon as all estate assets are marshalled, creditors and taxes paid, the Personal Representative may file an estate accounting and petition the Court to finally distribute the estate assets in accordance with the Will, or the rules governing intestate succession, if the decedent died without a Will.

Is the estate "testate" or "intestate"?

A "testate" estate is an estate in which the decedent died with a Will. By contrast, an "intestate" estate occurs when the decedent did not leave a validly executed Will. If the decedent left a Will, then the assets are distributed in accordance with the terms of the Will, and if the decedent died without a Will, the estate assets are distributed in accordance with Washington's default law dividing the estate assets among "intestate" heirs, defined according to traditional family relationships.

What is a "Personal Representative"?

A "Personal Representative" is the person nominated in the Will to administer the estate, often also called the "executor," or if female, the "executrix," under earlier law. These persons have no authority until they are appointed by the Court, after the Court reviews the Personal Representative's filing a Petition for Probate. Once appointed, the Personal Representative receives "Letters Testamentary," which evidence the appointment and become the license authorizing the Personal Representative to exercise control over estate assets.

What is an Estate Administrator?

An "Estate Administrator" is a person appointed by the Court to act with the same types of authority over an *intestate* estate as the Personal Representative. Although individuals may act as a Personal Representative or as an Estate Administrator without being represented by an attorney, the probate procedural rules are complex, form driven and tricky to navigate, so most people are best served by retaining legal counsel. If you have questions about an estate, our attorneys can help you settle any probate issues. We represent Personal Representatives, Administrators, as well as Beneficiaries in probate matters.

ESTATE PLANNING IS MORE *THAN JUST A WILL*

When people talk about "*Estate Planning*" what do they mean? Typically, a Will is on the agenda, and talk about planning for death... not the sexiest or easiest of topics! But actually *real* "Estate Planning" involves much more than death-time planning using just a Will – as this planning encompasses planning for lifetime emergencies as well as planning how assets will be distributed at death. In effect, a large swath of lifetime situations should be covered.

PLANNING FOR DISABILITY – NOT DEATH

Disabilities can strike at any age and are almost always unexpected. The most important protections to have in place at such times are documents that nominate a person or persons who can assume legal responsibilities and make decisions on your behalf in the event of a medical, physical or financial emergency, while knowing your wishes. To provide this back-up planning, the key documents are:

A. **Power of Attorney for Health Care** – names an agent (as well as a successor) to make medical and health care decisions for you, according to your guidelines. You may describe end of life planning, administration of drugs, specific treatments you prefer or do not wish to utilize, and your wishes for burial and funeral arrangements.

B. **Power of Attorney for Asset Management** – names an agent (as well as successor) to manage financial decisions and obligations, including right to sign checks, buy/sell assets, deal with taxes, etc. You may make the authority conditional on a finding of your "incapacity", or make it effective immediately, so it will be available without delays in the event of an emergency.

C. **Advance Health Care Directive** - provides specific authority to your Agent, typically the Agent under your Power of Attorney for Health Care, to carry out your directions for treatment, or withdrawal of treatment, including withdrawal of artificial life support at the time of death.

D. **Revocable "Living" Trust** -- gives your named successor trustee immediate power to manage and deal with assets held by the trust, in the event of incapacity without the necessity of creating a conservatorship through the Court, or at death, without having to initiate a probate proceeding.

PLANNING FOR DEATH – WITHOUT PROBATE - ASSETS THAT DO NOT PASS UNDER A WILL

A. **Joint Tenancy Accounts.** Joint tenancy titled assets pass by affidavit to a named "surviving joint tenant" after death of an owner. Frequently used for assets owned by spouses, these assets can pass to more than a single person, to be divided after death. All named joint owners' control and "co-own" asset during life.

B. **Retirement Assets.** Retirement assets, including IRA's, ROTH IRA's, 401(k) assets, 503(b) plans etc. pass by "Beneficiary Designation," that is they pass to the persons named on the attached Beneficiary Designation form, without any formal probate. These assets are not typically subject to a Will and cannot be added to a Revocable Trust. A "Beneficiary Designation" form is attached to the account record, held by the custodian of the plan, and names a primary beneficiary, as well as typically a secondary or "contingent" beneficiary. The named beneficiary claims the asset in full after filing proof of death (death certificate) with the asset custodian. A substantial amount of property can be transferred by this means, typically securities and cash.

C. **Beneficiary Designated Accounts.** Some bank accounts and securities accounts, that are not specifically retirement assets, may pass by Beneficiary Designation, as described above.

D. **Annuities.** Annuities are life insurance types of assets sold typically to be effective during the life of a beneficiary, to provide income and then either pass to a remainder beneficiary at the first death or expire. Some annuities are held for the life of a designated beneficiary, during which period principal grows, and then pass outright to a remainder beneficiary after the designated life. Annuities are frequently used with retirement assets and to make charitable gifts.

E. **Life Insurance.** Many planning options are available with life insurance plans. This asset class passes exclusively according to its terms at the death of the insured, outside of probate. Trusts can be the beneficiary of a life insurance policy, typically to ensure long term planning for the ultimate beneficiary but cannot own life insurance.

F. **Other special purpose gifting vehicles - qualified college expense - IRC. Sec. 529 plans.** College funding plans, organized by an educational institution or by government entity, these plans serve as a savings vehicle for the specific goal of paying for education. These plans are not subject to probate.

G. **Payable on Death Accounts (PODs or Totten Trusts).** This asset class includes accounts specially designated by a bank or brokerage as "POD" accounts. They pass to the named beneficiary, only upon the death of the owner, upon presentation of the owner's death certificate.

H. **Transfer on Death Deeds, or "TOD" Deed.** A deed transferring real property may state specifically that it is "transferable on the death of the Owner," in accordance with RCW 64.80.010. In this case, the deed, signed by the living owner, and describing the successor owner, must be recorded in the County in which the property is located, prior to death. The named beneficiary, at the death of the original owner, need only present a certified copy of the owner's death certificate, complete specific transfer county documents, and pay the County transfer tax, to transfer title.

I. **Business Assets.** Business Assets deserve special planning. The

specific planning depends on the type of entity involved – is the business a solo business, or “Schedule C” business? A Partnership? A Corporation? An LLC? Or a professional organization? Each type requires tax as well as legacy planning, and likely requires a tailored business entity agreement to ensure continuity, or disposition according to owner(s)’ specific plans.

PLANNING FOR LIFETIME GIFTS

Whether or not estate taxes are of concern, making gifts prior to death may be a satisfying and efficient means of carrying out legacy planning. Certainly, if estate taxes – Washington or federal estate taxes, are of concern, making lifetime gifts is a very effective tax reduction planning tool. By gifting, tax rates are reduced over the long term, as appreciation of gifted assets takes place outside of the grantor’s estate and therefore avoids tax, and the overall tax rate is reduced due to a smaller estate at death. Additionally, the grantor can use the gifts to incentivize the next generation, give the next generation a beginning for a business, or make real estate affordable.

Annually, each individual (the “donor”) may give up to \$17,000 per person (to the “donee”) per year (plus may directly pay tuition/medical expenses for another) for 2023, with no tax consequences, and without the necessity of filing a gift tax return.

“Estate Tax,” is the tax paid to the federal government and the State of Washington on the transfer of wealth at death. A simple explanation is: (a) an accounting is made of the market value of all assets owned at death, (b) plus taxable gifts made prior to death, (c) less certain allowable deductions and credits, and (d) the final amount in excess of the “applicable exclusion” – for an **individual dying in 2023, the federal amount is \$12.92 million, or \$25.84 million** for a married couple, is subject to tax. The 2023 federal estate tax rate on the amount in excess of the exemption is 40%. **Washington Estate Tax is levied on estates in excess of \$2.19 million, at the rate of 14%.**

Due to these high rates, and the fact that all tax is payable within 9 months after the date of death, this is a tax to avoid – if you are in these brackets! We can assist with analysis and planning. To eliminate, reduce or defer estate tax.

LOCATION OF IMPORTANT PERSONAL DOCUMENTS

FOR: _____ DATED: _____

The estate planning is complete – I/we have a binder of new documents from our estate planning attorney. Here are the keys to implementation - in an emergency!

1. My estate planning attorney is: (Name) _____
Address/Contact Information: _____
2. My CPA/Tax Preparer is (Name): _____
Address/Contact Information: _____

3. My Financial Advisor is (Name): _____
Address/Contact Information: _____

4. My principal bank is: _____
Address/Contact Information: _____

5. My Stock Broker is: _____
Address/Contact Information: _____

6. My safe deposit box is located at: _____
Box #: _____
Key is located: _____
7. My legal documents and important papers can be found (at home, e.g. desk drawer in bedroom):

8. My closest family member is: _____
Contact info: _____
9. My closest friend is: _____
10. My funeral and burial contracts and/or wishes can be found: _____

11. My wishes for disposition of my furniture, furnishings, person property are written and located:
_____ /or are as attached.
12. My religious preferences are and/or/ my spiritual advisor is:

13. Other important information: