

# Probates

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# Types of proceedings in probate court

- Probate action to administrate estate upon death.
- Guardianship.
- Conservatorship.

The superior court of every county has jurisdiction over the probate of wills and the administration of estates of incapacitated, missing and deceased individuals.

*R.C.W. 11.96A.040*



Probate upon death.

# Relevant Definitions

- The “Decedent” is the deceased person.
- If the Decedent died “testate” they left a will.
- If the Decedent died “intestate” they left no will.
- “Heirs” are relatives of the Decedent who inherit property upon the death of the Decedent.
- “Devisees” are people identified in the Decedent’s will as individuals they want to receive their property – an heir may also be a devisee under the will.
- “Residuary Devisee” (also referred to as “residuary beneficiary”) is someone who may receive property under the residuary clause in the will which addresses all property that is not specifically bequeathed by the will.

# What is the benefit of a probate?

- For title insurance purposes, a probate is beneficial because it is a legal process for establishing the rightful owner of the Decedent's property.
- It also addresses the debts of the estate and ensures that creditors of the decedent are given an opportunity to make a claim against the decedent's estate. The estate is "solvent" if it is able to pay all claims against the estate.
  - Under Washington law, if a probate is not commenced within 6 years after the death of the owner of real estate, all unsecured creditors have lost the right to enforce their claims against the real estate of the decedent.

# Vesting

- Upon death, title immediately transfers to the heirs and/or devisees of the Decedent.
- When we know the property owner is deceased and there has been no conveyance by a Personal Representative of the Decedent's estate or the heirs of the Decedent it is typical to vest in "The Heirs and Devisees of John Doe, deceased". We do not vest in "The Estate of John Doe" or the PR.
- The Grantor clause on the conveyance deed out of the PR should read "John Doe, Personal Representative of the Estate of Jane Doe, deceased".

# Personal Representative

- The identity of the PR is established after the will is admitted to probate by letters testamentary.
- If there is no will, the identity of the PR is established by letters of administration.
- Within 20 days after appointment, the PR must give written notice of the probate proceedings and their appointment to the heirs and devisees, to be served personally or by mail.
- The PR cannot delegate authority by POA or other means.



# Nonintervention Powers

- Nonintervention Powers - the ability to manage and settle the estate without supervision by the court.
- The court will issue an order granting nonintervention powers.
- As part of the process of granting nonintervention powers the court will determine that the estate is solvent. Prior to 1997 a separate order of solvency was required. This is no longer the case.
- If nonintervention powers are granted the PR can sell, convey, mortgage or lease real property without a court order. Otherwise, a court order is required.
- Nonintervention powers cannot be applied if the will specifically states that the estate should be under court supervision.



# Conveyance During Probate

- If there is a pending probate, a deed or mortgage should be executed by the Personal Representative rather than the heirs or devisees.
- No court order is necessary if there are nonintervention powers.
- If the PR deeds to someone other than the devisees the conveyance is insurable if proper notice was given to all of the devisees and heirs. The devisees and heirs may choose to accept payment for the property rather than the property itself.

# Surviving Spouse or Domestic Partner

- State registered domestic partnerships are treated the same as marriages with respect to probate.
- The surviving spouse or surviving domestic partner has the right to become the Personal Representative to administer the community property within 40 days immediately following the death of the decedent. *R.C.W. 11-28-030*
- If any person besides the surviving spouse or domestic partner makes an application to administer the property prior to the expiration of the 40 days notice is required to be given to the surviving spouse or domestic partner.
- It is unlikely that we would be asked to close a transaction within 40 days of the date of death, but if you are and the PR is someone other than the surviving spouse or domestic partner, consult an Underwriter.

# Dissolution/Termination

- If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. *RCW 11-12-051*
- Property passes as if the former spouse or former domestic partner failed to survive the testator.
- Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner.

# Minors

- If a minor inherits real property a Guardianship is established and the property is distributed to the guardianship estate
- or
- The property is transferred to a custodian and dealt with according to the Uniform Transfers to Minors statute.
- Title can be vested in a minor, but the minor cannot convey or encumber the property.

# Missing Persons

- The estate of a missing person can be probated and real property distributed to the presumptive heirs or devisees.
  - An example of a scenario in which this would be appropriate would be someone missing after a natural disaster.
- If you receive a request to insure title out of such a probate consult an Underwriter.

# Testamentary Trusts & Pour Over Wills

- A testamentary trust is a trust that is created in a will which becomes active upon the death of the maker of the will.
- There is typically no separate trust agreement – the will outlines all the terms of the trust.
- A pour-over will provides that an asset which is not included in the Decedent's pre-established trust be "poured over" into the trust upon their death.
- The existence of a testamentary trust or a pour-over will does NOT automatically vest title into the Trustee of the trust - A conveyance from the PR is still required.

# Judgments against Decedent

- All judgments entered against the Decedent should be disclosed as liens on your Commitment.
- A judgment creditor may not execute on the judgment when the debtor is deceased, however, the judgment remains a lien on the property and must be paid when the property is sold.

# Judgments against heirs/devisees

- If a probate is filed judgments against the heirs and/or devisees do not attach until the property is distributed. If the PR conveys the property to a third party while the probate is still open, the conveyance is not subject to judgment. Any judgments against the heir/devisee would attach upon distribution to the heir/devisee.
  - Disclose any judgments you locate against the heir/devisee on your report with a note that the judgments will attach upon distribution to the judgment debtor.
- If a probate is not filed and you are asked to rely on a Lack of Probate Affidavit, you should consider all judgments against the heirs liens on the property and they should be disclosed on your Commitment.



# Federal Tax Liens

- Federal tax liens against the Decedent attach to the property immediately regardless of whether or not there is a pending probate.
- Federal Tax Liens against heirs/devisees attach to the property immediately regardless of whether or not there is a pending probate.
- Show all Federal Tax Liens on your Commitment.

# Bankruptcy

- If an heir or devisee is in bankruptcy, their share of the property is considered an asset of the bankruptcy estate.
- You must contact the bankruptcy trustee to address how they want to manage this asset.
- If you are trying to facilitate a sale out of the heir or devisee, an order authorizing sale from the bankruptcy court needs to be obtained.

# Estate Tax

Both the state of Washington and the federal government have an estate tax.

- **Federal:**
  - Payable if the value of the estate exceeds certain threshold limits.
  - If there is a federal estate tax due it should be paid prior to insuring.
- **State:**
  - Estates valued at \$1 million are subject to WA estate tax.
  - This is a stand alone tax that is NOT the same thing as the federal estate tax.
- Note that we are referring to the value of the entire “estate” which may include more than just the property that is the subject of your transaction.
- Even if the estate is deemed solvent, you should confirm payment of estate taxes.

# Closing the Estate

- If there is an order granting nonintervention powers the personal representative may distribute the estate and close the estate with a declaration of completion without any order of the court. Alternatively, the court can issue a Decree of Distribution confirming the acts of the PR.
- If the nonintervention powers have not been granted then a final Decree of Distribution must be entered by the court before the estate is closed.
- Once the estate is closed, the PR's powers are terminated.
- If the probate is closed without distribution by the PR, title may be vested in the named devisees and/or residuary beneficiaries.

# Foreign Probate

- A probate court in another state does not have jurisdiction over Washington property.
- An ancillary proceeding should be filed in the county in which the property lies.
- In some circumstances, a title insurer may choose to waive this requirement, depending on the facts of the transaction
- If you are presented with documentation from a probate in another state and asked to insure based on this documentation, consult your Underwriter.

# Transfer on Death Deed

- A Transfer on Death Deed is not a legal way to distribute assets in the State of Washington.
  - Consult with Underwriting – a formal probate or lack of probate procedure should be followed.
- Legal in Oregon.
- Pending legislation in Alaska.

# Lack of Probate

- There is no statutory requirement for a probate when someone dies who owns real property.
- It is becoming more common for title insurers to close and insure based on a Lack of Probate Affidavit.
- The determination to rely on a Lack of Probate Affidavit is dependent on the specific facts of the transaction and usually requires underwriting approval.
- It's never a good idea to insure based on a Lack of Probate Affidavit if you are aware of disputes among interested parties unless those disputes can be resolved to the satisfaction of your Underwriter.

# Lack of Probate

- Premium surcharge
  - Most underwriters will charge an extra “lack of probate” premium for taking on the additional risk.
  - Depends on filed rate, could be up to 100% additional premium, depending on how recent the death.
  - This is still less expensive and certainly must faster than going through the formal probate court.



# Lack of Probate – General Requirements

- Proof of death (death certificate).
- Community Property Agreement (if applicable).
- Executed Lack of Probate Affidavit (do not record).
- Copy of any existing will (helps identify heirs).
- Evidence of payment to potential creditors.
  - i.e. Liens for Medical Assistance to the state (DSHS) which attach to the property owned by the Decedent at the time they were receiving care, regardless of when it was recorded.
- Confirmation of payment or exemption from estate taxes.

# Lack of Probate – Who signs?

- If the property is not community property all of the heirs (including spouse or domestic partner) must join in the conveyance or encumbrance (or execute separate deeds).
- If the will bequeaths the property to a devisee that is not an “heir” under the laws of descent, that person must join in the conveyance or encumbrance.
  - The Lack of Probate Affidavit should disclose whether or not there is a will

# Wills

Things to consider when reviewing a will:

- Has the will been executed by the Decedent?
- Who produced the will? How old is it?
- Are there any life events which would lead you to believe a new will may have been executed (i.e. marriage)?
- Is there any evidence that the maker of the will was incompetent at the time the will was executed?
- Is there any evidence of undue influence or coercion?
- Were there witnesses to the will? If so, how are they associated with the maker?
- Remember: If it has not been probated, it is not “proved” and therefore can be considered invalid.
  - A devisee is not a devisee until the will is probated. However, in order to eliminate risk, it is still prudent to ask all devisees identified in the will to join in the conveyance or encumbrance.

# Examples of Non-Probate Assets

- Community Property can pass as a non-probate asset outside of the estate to the surviving spouse.
  - Note, however, that a former spouse or domestic partner is no longer an heir after a dissolution of marriage or termination of domestic partnership. If the parties re-marry or re-register as domestic partners prior to the death of the Decedent, they are a valid heir.
  - A legal separation does not dissolve or terminate a marriage or domestic partnership for the purposes of inheritance.
- Property that is owned by joint tenants with rights of survivorship can pass outside the estate to the surviving joint tenant.
- Both of these scenarios still require a Lack of Probate Affidavit.

# Community Property-no will

- If the Decedent died intestate (no will) and the property to be insured is community property then:
- After 1974
  - If the property was acquired by husband and wife or domestic partners as community property, the property transfers to surviving spouse or domestic partner.
  - No community property agreement required.
  - No deed is required to vest in the surviving spouse or domestic partner, but you should still obtain a Lack of Probate Affidavit.
- Prior to 1974
  - Community property agreement required to vest fee simple in surviving spouse.
  - Otherwise, vesting would be 50% in surviving spouse and 50% in heirs of deceased.

# Community Property- Conflicting will

- If you have a will that conflicts with a valid and properly executed community property agreement, the community property agreement should control.
- If there is a pending probate, the surviving spouse or domestic partner should assert rights to the property under the community property agreement in the probate to avoid the property passing to the devisee(s) under the will.
- Any time you have a conflict between a CPA and a will consult with an Underwriter.



# Joint Tenancy – Conflicting will

- Check to be sure there was a valid joint tenancy created and it has not been severed.
- If the property was held by joint tenants with rights of survivorship and the will specifically provides for a different distribution of that property, the property should still pass to the joint tenant.
- Depending on the facts of the transaction, it may be appropriate to set up an exception for the right, title and interest of the devisee(s) under the will.
- If you encounter a conflicting will in a joint tenancy situation consult with an Underwriter.

# Laws of Descent

- The laws of descent establish how property is distributed when there is no probated will.

## Order of Distribution:

1. Spouse or Domestic Partner
2. Children
3. Children of Children (Grandchildren)
4. Parents
5. Brothers & Sisters
6. Grandparents



# Descent – Surviving Spouse or Domestic Partner

According to R.C.W. 11.04.015, the surviving spouse or domestic partner receives:

- All of the Decedent's share of the community property;  
and
- One-half of the separate property of the Decedent if the Decedent is survived by issue (lineal descendants – children, grandchildren, etc.); or
- Three-quarters of the separate property if there is no surviving issue but there are surviving parents or siblings;  
or
- All of the separate property if there is no issue, parent, sibling or grandparents

# Remaining Separate Property

- If the Decedent had children, the remaining one-half interest of the separate property that is not distributed to the surviving spouse or domestic partner is distributed equally among the children.
- If the Decedent had no children but there are surviving parents, the remaining one-quarter interest in the separate property goes to the parents.
- If there are no surviving children or parents of the Decedent, the remaining one-quarter interest goes to the Decedent's siblings.
- If there are no children, parents or siblings, the remaining one-quarter interest goes to the grandparents of the Decedent.

# Remaining Separate Property

- If there is no surviving spouse or domestic partner, the entire estate is distributed to the children, parents, brothers & sisters or grandparents of the Decedent in the order of priority previously outlined.
- In the event there is no surviving spouse or domestic partner, no children, no parents, no siblings and no grandparents, the entire estate will escheat to the State of Washington.

# Descent – Additional Info.

- Adopted children enjoy the same rights as natural children, but adopted children do not inherit from their natural parents.
- The marital status of parents is irrelevant to inheritance rights.
- Half-siblings inherit as if they and their sibling had the same parents.
- A step-child that is not adopted by the Decedent is not an heir. This individual may be a devisee under a probated will.

# Slayers and Abusers

- Under Washington law, slayers and abusers cannot inherit. These scenarios are treated as if the slayer or abuser predeceased the Decedent.
- If there is party involved in your transaction that is not eligible to inherit because they are a slayer or abuser the estate should be probated to settle all claims of interest and the distribution of the estate.

# Conservatorship

- A Conservator is typically appointed to handle the financial affairs for the protected person.
- A Conservator is often appointed due to a mental incapacity and therefore, an inability to manage finances.
- A Conservator may or may not be the same person as the Guardian.
- In Washington, Guardians may also have the ability to manage financial affairs.

# Guardianship

- A Guardian is typically appointed to care for a minor or for an adult to promote independence and self-reliance.
- The Guardian usually makes decisions regarding education, medical treatment, housing, etc.
- An adult protected person who has been appointed a Guardian is not always presumed incompetent; A Guardian is often appointed strictly because of a physical incapacity.



# Guardianship in WA

- In the State of Washington a General “Guardian” or a “Limited Guardian” can be appointed.
  - A General Guardian more often has powers to handle financial affairs due to a mental incompetency, similar to a Conservator.
- A Limited Guardian is appointed by the court for a ward who is a disabled person that is NOT incompetent.
- You should be dealing with a General Guardian who has unlimited powers over the individual and their estate.
- If you are dealing with a Limited Guardian, the order appointing the Limited Guardian must specifically set forth the powers that a limited guardian can exercise.
- Either way, a court order is required authorizing the guardian to sell or encumber the property on behalf of the protected person.



# Guardianship/Conservatorship

- Remember – A Guardian or a Conservator is appointed for the benefit of a protected person.
- There is a reason this person is protected.
- Elderly or mentally incompetent parties are susceptible to being taken advantage of – especially by family members.
- Pay close attention to scenarios wherein a Guardian or a Conservator is acting on behalf of a protected party. Ask questions and if the transaction feels questionable at all, consult an Underwriter.

# Conclusion

- Transactions involving probates are often complicated, sensitive and risky.
- Be sure to consult with your internal legal counsel or Underwriter if you are in need of guidance.
- Thanks for your time and attention! My contact info:

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