

ESTATE PLANNING and its benefits

By

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ESTATE PLANNING AND ITS BENEFITS

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Overview: The death of a family member is a rigorous and spiritually taxing event. Many issues confront the grieving loved ones, financial and personal. It may be, tactfully and tastefully speaking, the worst time for an attorney to lecture the same about the intricacies and processes of Probate Proceedings. Unfortunately, it is an issue that need be addressed and soon after the death of the loved one.

Fortunately, planning before death will help ease the legal process of administering a deceased person's estate. Several tools are available to limit costs and time spent administering a decedent's Estate.

One should consult an attorney soon after a family member's death. It may be emotionally difficult, but it need be done and it will spare numerous problems later. Look for an attorney acquainted with and comfortable handling probates.

DO NOT, under any circumstances, take belongings of the deceased until an attorney is consulted and one has legal authority to so do. It does not matter whether one was promised such items, or believes one is entitled to the same. Taking property from a deceased person, without legal authority, may subject one to criminal penalties and/ or

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civil liability. Additionally, it may cause bitter and acrimonious disputes with other relatives.

The following information is NOT intended to be LEGAL ADVICE. It cannot serve as a substitute for an attorney, or tax specialist. Rather, the author intends to inform the reader about the legal processes that may unfold after the death of an individual. Further, it will help the reader understand the existence of probate alternatives, and other tools available to help avoid the time and cost associated with Probate.

This is not a “Do it yourself” probate or estate planning kit, or anything of that nature. So said, the author hopes it sheds light on the legal issues surrounding the death of a loved one. Indeed, the death need not be in the family. It may be a friend, or remote relative. Finally, the author hopes the article prevents, through consideration of estate planning, costly and emotionally devastating court entanglements. However, such requires consultation with estate planning professionals, and not simply the reading, no matter how detailed, of this article.

Bearing the above in mind, the author suggests, for simplicity’s sake, the reader view a deceased and living persons, as falling into one of two camps: 1) Those that made a Will or have made a Will, 2) and those that did not make a Will or have not made a Will.

For the purposes of this article, a superficial understanding of the law of community property may be needed. Washington State is a community property state. Generally, community property is that property consisting of income earned during the time of marriage and gifts of property to the marital community. Generally, separate property is that income earned before the marriage and property obtained by gift, or inheritance.

Further, this article will periodically refer to statutory law in Washington. Specifically, the Revised Code of Washington (RCW) will be cited numerous times—particularly, Title 11 of the RCW. RCW Title 11 specifically deals with probate and trust law and should be consulted for an in-depth understanding of probate law in Washington.

This article is in question and answer format. The author realizes the reader may only be interested in one section of this article and thus divides it into three sections. The sections are: 1) Intestacy (No Will), 2) Wills, Testacy and Probate, and 3) Probate Alternatives. Each section contains a table of contents.

Please Note: For those individuals having custody of a deceased person's Will, they are legally required to deliver the Will to the Court having jurisdiction over the Decedent's Estate (Please refer to Section 2 for a more detailed description of this law).

SECTION I: INTESTACY (NO WILL)

SECTION I: TABLE OF CONTENTS

- A. What is Intestacy? _____ Page 5.
- B. What is the Estate? _____ Page 6.
- C. Who administers an intestate estate? _____ Page 6.
- D. What does an Administrator do? _____ Page 7.
- E. What means will the Court use to ensure the Administrator faithfully executes his or her duties? _____ Page 8.
- F. How does the Administrator distribute the assets of the decedent? _____ Page 9.
- G. What are “non-intervention” powers? Should an Administrator seek them? _____ Page 10.
- H. When does the Intestate Administration end? _____ Page 11.

A. **What is Intestacy?** Intestacy is a term used for an individual who dies without a Will. Upon death, all the individual’s assets and liabilities comprise what is known as the “Estate”.

B. What is the Estate? An intestate individual may or may not have assets when he or she dies. Further, an intestate person's liabilities may exceed the value of their assets; in this case, the individual's estate is deemed "insolvent" and the distribution of the assets and payment of the liabilities may require close court supervision. The distribution and payment, among other duties, are known as the "Administration" of the estate.

C. Who administers an intestate estate? Usually, the Superior Court located in the county where the individual resided at death appoints the Administrator of the estate. The party seeking appointment must petition the court and must be an "interested" party. The Superior Court will hear the petition and sign the order if a proper showing is made and no interested party objects to the appointment. The party may then obtain "Letters of Administration" from the Court Clerk. Please note this assumes a straight forward application and acceptance from the court. The heirs may challenge the appointment and the matter may become a protracted legal fight.

Generally, a spouse is entitled to administer the estate of a deceased intestate spouse and is given the opportunity to administer the community property of the marriage.

Otherwise, RCW 11.28.120 provides for "interested" parties that may be entitled to administer an estate. The statute lists "interested" parties that may serve in order of priority. The spouse of the deceased has first priority, followed by the next of kin.

However, should none of these parties petition the court to administer the estate, even a creditor of the decedent may be able to obtain letters of administration.

Therefore, loved ones should seek legal assistance in obtaining letters of administration for the estate of a deceased intestate person. Should none step forward, the estate may be administrated by parties such as creditors, the Secretary of the State Department of Social and Health Services, or the State Director of Revenue, or its designee.

D. What does an Administrator do? Generally, an Administrator pays the decedent's debts from the Estate, pays tax obligations, and then distributes the remaining assets to the heirs of the decedent pursuant to legal statutes (See Title 11 of the Revised Code of Washington).

The Administrator has a fiduciary duty to the creditors and heirs, alike. The Administrator may not favor one party at the expense of another, unless legally entitled to so do. The Administrator may elect to pay the liabilities of the decedent, or may wait for the creditor to file a claim against the estate and allow or deny such claim (an action here may trigger litigation).

Generally, the Administrator should notify any creditor of the decedent. It may do so individually, or by publication. The Administrator may elect not to notify creditors.

However, such action dramatically extends the period of time a creditor has to file its claim, and thus keeps the estate open for a much longer period of time. For a more detailed description of creditors' claims and statutory filing deadlines, see RCW 11.40.

Additionally, the Administrator is charged with maintaining the estate. Such likely will include paying ongoing expenses and bills of the estate (like utilities and taxes on the decedent's home). The Administrator need also ensure the decedent's final income tax return is filed (an accountant should be consulted here). The Administrator may also have to file a State and/ or Federal Estate Tax Return if the estate is valued at more than Two Million dollars (\$2,000,000.00)—this figure is subject to change.

The Administrator may have to maintain and manage an ongoing business of the decedent. All of these tasks may be delegated, but the Administrator may be subject to liability for their mishandling.

E. What means will the Court use to ensure the Administrator faithfully executes his or her duties? An intestate estate may require a bond be posted. Many insurers are willing to post a bond for estate administrators. However, the bond may be large, and as such, costly. The more assets an estate possesses, the greater the bond likely required. The distance of interested parties from the site of probate will likely influence whether a court will require an administrator to hold a bond while administering an estate. The

Court may waive the bond requirement under certain circumstances, particularly where the heirs agree to such, and the creditors of the estate are not likely harmed.

Should the Administrator abuse his or her power, and distribute in violation of the law, the bond and the Administrator may be subject to claims by creditors, heirs and other interested parties.

The bond requirement stresses the importance of a Will. A Will may specifically waive the bond requirement and the waiver is likely to be enforced by the Court. The Court may waive the bond requirement for an intestate estate. However, a Will is a more secure method of obtaining the same.

F. How does the Administrator distribute the assets of the decedent? (Very carefully!) RCW 11.04 controls the distribution of assets to the heirs. RCW 11.04 is entitled “descent and distribution”. This is an important statute and a key reason for each and every person to execute a Will. Often, this statute determines how the Administrator **MUST** distribute the assets of the decedent. It does **NOT** matter what the decedent said during his or her lifetime; it may not matter how loved ones believe the decedent would have wanted to distribute his or her assets; indeed, it does **NOT** matter how the **DECEDENT** actually wanted his assets to be distributed upon his or her death. The statute controls the distribution.

The Administrator should compile an inventory of assets and liabilities of the estate. The inventory may be viewed by “interested” parties, such as heirs and creditors. In Washington, the inventory does not have to be filed with the court.

It is important to remember some assets may pass outside of the ambit of RCW 11.04. Such assets may include bank and brokerage accounts held in Joint Tenancy with Right of Survivorship (JTWROS). Additionally, real estate held in JTWROS will pass outside the distribution scheme of RCW 11.04. However, these assets ARE still subject to creditor’s claims, and the liabilities of the decedent.

G. What are “non-intervention” powers? Should an Administrator seek them?

The Court may grant non-intervention powers under RCW 11.68. Non-intervention powers allow an Administrator to administer the estate with far less court supervision. However, the estate must be solvent, that is, its assets must exceed its liabilities.

Obviously non-intervention powers are desirable if the same can be obtained. However, they may be denied if contested by heirs, or “interested” parties.

Again, a Will is a more desirable way to obtain non-intervention powers. A Will may specifically request the Executor administer the estate with non-intervention powers.

H. When does the administration end? The Administrator need petition the court for discharge when liabilities of the estate are paid and the heirs receive their share of the estate. Upon discharge, the administration of the estate ends. The estate may be opened at a later time only for certain purposes. The Administrator is discharged from liability and may only be subjected thereto for certain acts such as fraud or embezzlement.

SECTION II: Wills, Testacy and Probate

SECTION II: TABLE OF CONTENTS

- A. What is probate? _____ Page 12.
- B. What does it mean to be Testate? _____ Page 13.
- C. What does the Will control? _____ Page
13.
- D. What should a Will contain? _____ Page 14.
- E. What requirements must be met for the Will to be valid?
_____ Page 15.
- F. How does a Will get admitted to Probate? _____ Page 16.
- G. How does the party named in the Will obtain Letters Testamentary
and begin the administering the estate? _____ Page 16.
- H. What duties will an Executor have in administering the estate?
_____ Page 17.

A. What is Probate? Probate is the legal process of proving the validity of a Will, and then executing the testator's wishes, as expressed in the Will.

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B. What does it mean to be Testate? A person who makes a Will is the Testator, and such person dies testate.

C. What does the Will control? The Will controls the distribution of probate assets. Certain assets are not probate assets. The Will does not control the distribution of those assets. The Will trumps the descent and distribution scheme of RCW 11.04. The Will allows an individual to dispose of the probate assets as he or she pleases, with some restrictions. For example, an individual may not distribute all of the community property to parties other than the individual's spouse. In such a case, the spouse may "force" a share as an "Omitted Spouse". This process is further explained in RCW 11.12.095. Similarly, a child omitted may take a similar action under certain circumstances. This process is further explained in RCW 11.12.091.

Non probate assets include, but are not limited to: bank and brokerage accounts held in JTWRROS; real estate held in JWTRROS; trusts, insurance policies and annuities with named beneficiaries. These assets pass to the named beneficiaries INSPITE of what any valid Will states. Changing a Will does not alter the distribution of the aforementioned assets. HOWEVER, despite not being controlled by the Will, the assets ARE usually subject to creditor's claims and the liabilities of the decedent.

D. What should a Will contain? A Will should name an Executor and may name Co-Executors. The Will should specify whether the testator wishes the Executor(s) serve with or without a bond. The Will should specify whether the Executor will serve with non-intervention powers.

A Will should provide for a handwritten list, to be executed by the testator, and attached to the Will. The list should be of tangible personal property of which the decedent wants to dispose. It should list the specific person to whom the decedent wishes to give the specified item. The list cannot dispose of real estate, or intangible items, such as copyrights, patents, stocks or bonds. The list does include items such as jewelry, cash, clothing, etc.

A Will should include specific bequests of specific property. Here the testator may bequest real estate and intangible items.

A Will should include a provision for the residuary estate. Here the testator disposes of what is left of the Estate, after specific bequests have been made, creditor's claims have been paid, and tangible personal property has been given. The residuary estate provision is vital and should not be omitted from the Will.

A Will may have a “No-Contest” provision. This provision bars parties from challenging the validity of the Will. It usually strikes the challenging party from benefiting under the Will. Please note, if the contestant is successful, the Will may be thrown out, and the contestant may succeed in obtaining part of the estate. If the Will is thrown out, the estate may be administered as an intestate estate. To lessen the likelihood of this, safeguards need be taken, and formalities should be met.

Finally, the Will should have an affidavit for witnesses to sign and a public notary need sign the affidavit.

E. What requirements must be met for the Will to be valid? A Will must be signed in front of two witnesses. The witnesses need sign the instrument. The testator should initial each page of the Will.

Additionally, the witnesses should sign an affidavit stating they witnessed the testator sign the instrument. The affidavit should state the testator was lucid, clear-minded, and not acting under duress. The affidavit need be signed by a public notary. The public notary should physically see the witnesses sign the Will and the affidavit.

If the affidavit is properly executed the Will can be admitted to probate without having the witnesses testify in court. Obviously, this is the considerate thing to do for the witnesses!

F. How does a Will get admitted to Probate? Anyone in possession of a Will must deliver the Will to the Court having jurisdiction upon learning of the death of the Testator. The Superior Court of the County wherein the decedent resided usually has jurisdiction. For a more detailed description of this requirement, please see RCW 11.20.010.

After the Will is filed, probate may commence. To commence probate, the Court must have the Will, a Certified Death Certificate, a Petition to Admit the Will to Probate, and an Order to Admit the Will to Probate—this document is signed by a Commissioner, or Judge. The filing fee for commencing probate is Two Hundred dollars (\$200.00).

Please note: Once the Will is filed with the Court Clerk it is public information. Anyone may obtain a copy of the Will.

G. How does the party named in the Will obtain Letters Testamentary and begin administering the estate? After the Will is filed, and the Court Clerk obtains the Death Certificate; a signed and completed Petition to Admit the Will to Probate; and an Order to

Admit the Will to Probate, signed by a Commissioner or Judge, the Clerk will require a signed Oath of Personal Representative. After these steps are completed, the Clerk will issue Certified Letters Testamentary. These Letters allow the Executor to commence administering an estate.

H. What duties will an Executor have in administering the estate? The duties and responsibilities of an Executor of an Estate are quite similar to those of an Administrator of an intestate estate. Additionally, the testate estate is closed in a similar manner as the intestate estate.

Please note: Executors and Administrators are sometimes called, collectively, “Personal Representatives.” Do not be confused by the name, it can be used to refer to those administering an intestate or testate estate.

SECTION III: Probate Alternatives

SECTION III: TABLE OF CONTENTS

A. How can one avoid Probate, and Intestate Proceedings altogether?	Page 18.
_____	_____
B. The Joint Tenancy with Right of Survivorship.	Page 18.
C. The Community Property Agreement.	Page 19.
D. The Small Estate affidavit.	Page 20.
E. The Revocable Living Trust.	Page 20.
F. The Insurance Policy.	Page 22.
G. Retirement Plans, Annuities and Other Income Vehicles.	
_____	Page 23.
H. Conclusion	Page 24.

A. How can one avoid Probate or Intestate Proceedings altogether? (Its simple, just don't die) A variety of tools exist to bypass probate. They include:

B. The Joint Tenancy with Right of Survivorship (JTWROS): The JTWROS makes a deceased person's interest in property pass immediately and by law, to the remaining joint tenants. The interest passes outside of probate and generally without court proceedings. Please note, court forms often need be filled out to get the title actually changed. However, this is easier and less expensive than probate. The JTWROS can be used with bank and brokerage accounts, real estate, vehicles and some personal property, amongst others.

Please note: An omitted spouse, or child may be able to force a share of property held in JTWROS, despite what the title reads. Furthermore, a joint tenant loses control over the property interest upon death; the property interest passes to the other joint tenant(s)—potentially cutting off heirs that would otherwise take under the descent and distribution scheme of RCW 11.04.

C. The Community Property Agreement (CPA). The CPA can only be used between a husband and wife. It only controls community property, and may alter the nature of any separate property held by either spouse. Hence, this document may have serious consequences and should not be attempted without the help of an attorney.

Nevertheless, the CPA bypasses Probate and can save much cost. When one spouse dies, the CPA automatically vests many property interests in the surviving spouse. However,

some forms may need to be completed to get various institutions to actually change title to the assets.

The CPA does not control property as between a surviving spouse and children. Thus, the CPA may initially save on costs, but in reality may be just a cost-deferment.

D. The Small Estate Affidavit. In Washington, assets may be distributed without Probate by using the small estate affidavit if: 1) The decedent died a resident of Washington, 2) the value of probate assets is less than \$100,000.00, 3) there is no real property and 4) creditors have been paid, or arrangements have been made to satisfy their claims.

One should consult an attorney to utilize the small estate affidavit. The affidavit need be sent to the Department of Financial Recovery. Additionally, the affidavit need be given to any party in possession of the decedent's property in order to recover said property. Finally, the affidavit need be signed by a public notary.

E. Trust Instruments. Trust instruments bypasses Probate and are desirable when a party owns real estate outside the state of residence. Normally, the real estate would be subject to probate proceedings in the outside state, in addition to probate that may already exist in the state of residency.

The trust has a trustee, a beneficiary and settler/trustor. The trustor creates the trust and gives or “funds” Property to it. The trustee holds and manages the trust property for the beneficiary. The beneficiary may receive the income and/or principal from the trust depending upon the nature of the trust. The trustee has a fiduciary duty to the beneficiary and generally may not self-deal or use trust property for its own benefit. However, Revocable Living Trusts often nullify this in the instrument, due to the trustor customarily being the trustee and the beneficiary all in one.

Often, a written trust agreement outlines the trustee’s duties and powers. However, statutory and case law binds the actions of a trustee if there is no such written agreement. Further, statutory and case law may nullify provisions of a written trust agreement. A trustee may be a single individual, corporate entity, or a combination thereof. Co-trustees may be appointed.

A revocable living trust may be set up by a single individual, or a husband and wife for various purposes, including probate avoidance and reducing estate and gift tax liabilities. Additionally, various other trusts may be utilized for the benefit of disabled children and/or charities.

The trust is a private document and does not become public information after the death of the trustor, trustee, or beneficiary. Those who wish to avoid the publication of a Will should consider a trust.

Generally, property of any sort may be titled in the name of the trust and become trust property. A written trust agreement may outline the distribution of the trust property. However, a trust containing no property is of little, if any use and in practice, controls nothing. Thus, a trustor must ensure property is properly titled to the trust. However, a Will may contain a “pour-over” clause that funds all of his or her property to the trust upon his or her death. However, the individual should consider funding the trust while still living.

A trust is not a sure means of avoiding legal disputes. Interested parties may challenge the validity or terms of the trust. Thus, one should consider a no-contest provision in a trust—similar to that sometimes found in a Will. One must draft the trust instrument carefully if one fears beneficiaries or interested parties may challenge trust validity in the future.

Some instruments cannot be titled to certain trusts. For example, a life insurance policy, or IRA; the transfer may trigger a taxing event. Instead, one should name the trust as beneficiary of these instruments to avoid negating one’s estate planning intentions.

Caution: Numerous laws control trusts. One should not attempt to create a trust without seeking the assistance of an attorney experienced in drafting trust instruments. RCW 11.98 provides some of the important laws applicable to trusts in Washington State. However, additional case and statutory law apply.

F. The Insurance Policy: Ideally, an insurance policy has named primary and contingent beneficiaries. The contingent beneficiary takes proceeds under the policy should the primary beneficiary die before the policy holder. Further, an insurance policy may be term (that is, payable upon an occurrence—usually, death) or whole. A whole life insurance policy has a cash value that may increase over time; the value may be cashed out under certain circumstances; and the policy is payable upon an occurrence, usually death again.

The proceeds of an insurance policy pass outside of probate. Hence, A WILL, OR A CHANGE THEREOF, DOES NOT change the beneficiary under an insurance policy. If one seeks to change the beneficiary of an insurance policy, one need contact the insurance company to do so.

One should periodically review their outstanding insurance policies to ensure their overall estate planning goals are being met.

G. Retirement plans and other income vehicles: Many retirement plans operate like insurance policies in that they have primary and contingent beneficiaries. Additionally, these plans usually bypass probate and pay the beneficiary regardless of Will instructions. Hence, it is important to ensure the beneficiaries are acceptable to the policy holder. Again, changing the Will DOES NOT alter the beneficiaries in most, if not all, of these plans.

One should review all outstanding retirement plans and ensure they distribute in accordance to one's wishes. Fortunately, one need not be a lawyer to complete this task. However, one should have a seasoned financial advisor or attorney review any change made or about to be made to a retirement plan.

H. Conclusion: The aforementioned instruments provide a means of avoiding probate altogether. For example, assume an individual owns a home, a bank account, an insurance policy and various items of personal property. The individual wishes to pass his estate to his two children, in equal shares. The individual may put the home in a joint tenancy with the two children; put the bank account in joint tenancy with the two children; name the two children as beneficiaries of the insurance policy; and the two children may utilize the small estate affidavit to collect and divide the personal property upon the death of the individual. The individual thus completely bypasses Probate.

The aforementioned example is hypothetical, and assumes certain outcomes. Several factors could disrupt and alter such a hypothetical. Thus, an individual SHOULD ALWAYS contact an attorney when estate planning. Other professionals may also need to be contacted, such as financial planners, accountants, real estate and insurance agents.

One should not dismiss estate planning, nor should one keep putting it off for a “later” day. A person works hard for the assets he or she accumulates and should be entitled to control their distribution upon death.

Do not let the courts and rote statutes determine the heirs of your estate. Plan ahead now and take comfort in knowing the accumulation of your hard work will pass to those whom you want. Furthermore, litigious heirs cause grief and stress in families. A few documents, carefully drafted, can help avoid lengthy legal disputes.