

WASHINGTON PROBATE ADMINISTRATION CLE

SPOKANE COUNTY BAR ASSOCIATION

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Introduction to Probates – Opening a Probate

by

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INTRO

It's Monday morning, you are preparing for your first meeting of the week. They're new clients, coming to discuss "Dad's death and how to handle his affairs." You didn't do Dad's estate planning and don't have any background on the situation. And your potential clients didn't really tell you who all is coming, or what information they have.

Wanting to be prepared, you begin an outline of potential topics and issues. Here you sit in your office, sketching out an outline of your presentation.

WHERE TO START?

I. WHAT TYPES OF ESTATES?

- a. Probate assets – assets are transferred/administered under the Will or Washington's intestacy statute.
 - i. Testate? – Does Decedent have a valid Will? Are there assets in decedent's name requiring probate administration? Are there alternatives to probate?
 - ii. Intestate? – Decedent does not have a valid Will, or some assets aren't addressed through probate or nonprobate designations. Assets pass

¹ Along with CLEs, everything I know about probate came from: (1) a long line of experienced probate paralegals, partners, and attorney colleagues; and (2) very understanding clients.

through intestate succession;

1. Descent and Distribution (RCW 11.04)

a. Surviving Spouse – all of the net community estate and one-half of the net separate estate; the other one-half to the decedent’s “living issue” (unless there are no living parents or issue of parents)

b. “Living Issue”

i. Decedent’s living issue (children, grandchildren, etc.), or

ii. Decedent’s parents or issue of parents (siblings, nieces/nephews, etc.)

iii. Grandparents or issue of grandparents (aunts/uncles, cousins, etc.)

b. Pourover Will/Trust. In cases where the decedent has an existing Trust (usually a Revocable Living Trust,) the Will may simply “pour over” any non-trust assets into the Trust for administration at the decedent’s death.

Watch for the “empty” Trust – the Revocable Living Trust was created, but assets were not transferred into the Trust prior to death. For those assets, and probate is needed.

c. Nonprobate assets – assets that pass outside of the Will or Intestacy to beneficiaries, survivorship owners, transfer on death designees

i. RCW 11.02.005(10) - nonprobate assets defined – includes joint tenancy with right of survivorship (JTWROS,) pay on death (POD,) transfer on death (TOD,) transfer on death deed, community property agreement

ii. RCW 11.11 - Testamentary Disposition of Nonprobate Assets; (also RCW 11.07 Nonprobate Assets on Dissolution of Invalidation of Marriage)

1. Nonprobate asset designations made in a Will control, unless nonprobate asset designation made after the date of the Will.

Nonprobate assets are not covered by the residuary clauses of a Will.

- iii. RCW 30A.22.100 for ownership of funds on the death of the depositor; including POD and survivorship (JTWROS) accounts
- d. Small Estate? – an estate with less than \$100,000 in “assets subject to probate” and doesn’t involve real estate.
 - i. RCW 11.62.010 – disposition of personal property; Affidavit of Successor
 1. A “successor” uses an Affidavit of Successor to claim personal property of the decedent
 2. At least 40 days after the date of death
 3. No application or petition for probate has been filed
 4. All debts (including funeral expenses) have been paid or provided for
 5. Includes a description of the property claimed
 6. The “successor” is personally entitled to the property or will deliver the property
 7. A copy sent to DSHS Office of Financial Recovery
- e. Community Property; Community Property Agreement.

- i. Community Property. RCW 11.02.070 – one-half of community property confirmed to the surviving spouse; one-half subject to testamentary disposition of the decedent, or by intestate succession.

The whole of community property is subject to probate administration.

- ii. Community Property Agreement. RCW 26.16.120 – look for a provision that transfers the decedent’s interest in community property to the

surviving spouse

1. Bank accounts – transferred with a copy of the Agreement and a death certificate
 2. Real Estate – record the Agreement and Death Certificate to remove the decedent’s interest
- f. Ancillary Probate? For out of state assets/issues.
- g. Insolvent Estate - RCW 11.68.080 – claims from alleged creditors, when added to taxes and expenses, appear to exceed estate assets; notice to the Court and parties for Court to determine whether to “reaffirm, rescind, or restrict” nonintervention powers

II. BASIC INFORMATION.

- a. Assets, Liabilities
- i. What does Dad own? House? Bank Accounts? Life Insurance? Retirement Accounts? Vehicles? Other real estate? Personal Property/Valuables? Out of state assets?
 - ii. How are the assets held? Dad’s name? With others? JTWROS/POD/TOD? Community property? Separate property? Owned with third parties? In Trust?
 - iii. Dad’s debts, liabilities, unpaid bills? Mortgage, Liens/encumbrances, unpaid bills, loans, lines of credit, credit cards, personal or business debts/guarantees
- b. Who are the people involved?
- i. Dad’s family? Spouse? Intimate relationship? Children? Stepchildren? Grandchildren? Adopted children?
 - ii. Family/interpersonal dynamics?

- iii. Nontraditional relationships?
- iv. Charities? Beneficiaries? Specific Bequests?
- c. What arrangements were made?
 - i. Does Dad have a Will? Codicil? Trust? Community Property Agreement?
 - ii. Non-probate designations?
- d. Other information?

III. STARTING THE PROBATE.

- a. Nonintervention Powers?
 - i. RCW 11.68.010, *et. seq.*
 - ii. Granted without notice or hearing if:
 - 1. Testate estate; solvent; PR is named in the Will; and there is no stated restriction on nonintervention powers
 - iii. Otherwise:
 - 1. Petition; 10 days' notice to heirs, legatees, and devisees; Hearing
 - iv. Does not require Court supervision of most PR activities.
 - v. 2021 UPDATE – SB 5132:
 - 1. In a nonintervention probate, the Personal Representative “may administer and settle an estate without supervision or intervention; (RCW 11.68.085)
 - 2. Personal Representative has the power to construe and interpret provisions of a Will; a rebuttable presumption that the Personal Representative’s construction of an ambiguous provision is consistent with the testator’s consent; (RCW 11.68.130)

3. Personal Representative's Powers are listed in RCW 11.68.090

b. Will Filed in Superior Court.

- i. Custodian of the Will – must file the Will within 30 days after learning of decedent's death with a Court having jurisdiction or deliver the Will to the person named as personal representative (See RCW 11.20.020)
- ii. Jurisdiction. - Superior Court has jurisdiction over the probate of Wills and administration of an estate; RCW 11.96A.040(1)
- iii. Venue. - Venue is proper in any county the petitioner selects (RCW 11.96A.050(4), but venue can be moved to county of the decedent's residence, where decedent died, or where decedent has real estate.
- iv. RCW 11.40.020(2) – notice to creditors in county of decedent's residence if probate not brought in that county

c. By a person interested in the estate – usually the Personal Representative

- i. When would an heir walk away/choose not to initiate a probate?
 1. There won't be anything to leave to an heir (i.e., all assets will go to paying the remaining debts)
- ii. An heir or creditor can start the probate.
- iii. But an interested heir can get a PR's Fee for administering the Estate, and sometimes creditors will negotiate to leave a small amount to the heirs to avoid having to take over a probate.

d. Personal Representative.

- i. Qualifications. RCW 11.36; RCW 11.28
 1. Surviving spouse has right to administer community property; RCW 11.28.030

2. Preference – if the decedent died intestate or the named Personal Representative declines or is unable to serve (RCW 11.28.120):
 - a. Surviving spouse/registered domestic partner; next of kin (child(ren), parent, siblings, grandchildren, nieces/nephews)
 - b. Trustee from inter vivos trust or as named in the Will
 - c. Beneficiary or Transferee
 - d. Director of Revenue, or designee
 - e. Secretary of DSHS
 - f. Principal creditor
 - g. Any suitable person
3. Not qualified (RCW 11.36.010):
 - a. Corporations, minors, persons of unsound mind, convicted of a felony or misdemeanor involving moral turpitude
 - ii. Resident Agent for a Personal Representative located out of state. RCW 11.36.010
- e. Include the original Will and Codicils (or petition to admit a copy)
 - i. Original Will and Codicils may already have been filed in Superior Court (see RCW 11.20.010)
 - ii. Include witness affidavits if not included with the Will
- f. Bond. RCW 28.185.
- g. Include names of known heirs, legatees, and devisees RCW 11.28.237

- h. Obtain an order admitting the Will, appointing the PR, and issues Letters Testamentary (or Letters of Administration).
- i. Initial pleadings:
 - i. Petition.
 - ii. Will.
 - iii. Oath of Personal Representative
 - iv. Other supporting pleadings?
 - v. Order Admitting Will (or Intestacy); Appointing PR; Issuing Letters Testamentary (or Letters of Administration.)
 - vi. (and case cover sheet and filing fee!)
 - vii. E-filing
- j. Lost or Destroyed Will; RCW 11.20.070
 - i. Is a lost or destroyed will evidence of intent to revoke?
 - ii. If not, the Court can admit a copy of a will after determining by clear, cogent, and convincing evidence the authenticity of the will
 - iii. Provide evidence of the execution and validity of a copy of the Will through written testimony, signed by the witnesses
 - iv. notice to all interested parties

IV. ONCE THE PROBATE IS OPENED.

- a. Notice of Pendency of Probate; RCW 11.28.237
 - i. Personally served or first class mail within 20 days of appointment

- ii. To all “heirs” (RCW 11.020.005(6)), “legatees” (receives personal property), and “devisees” (receives real property)
- b. Notice to Creditors by PR under RCW 11.44 (or use of Notice Agent under RCW 11.42)
- c. Notice to DSHS; RCW 11.28.238; and RCW 11.40.020
- d. Requests for Special Notice of Proceedings; RCW 11.28.240
- e. Family Support Award; RCW 11.54
 - 1. Surviving Spouse.
 - 2. Children/Grandchildren from other marriage/relationship.
 - 3. Award - \$125,000 or median sale price of single family home - \$318,200 in Spokane County (RCW 6.13.030)
 - 4. Subject to adjustment by the Court
- f. Gathering information/documents.
- g. Estate accounts; Taxpayer Identification Number for Estate.
- h. Available cash? Any immediate needs?
 - i. For money?
 - 1. Sell assets?
 - 2. Borrow money?
 - 3. Advances from heirs?
 - ii. To protect assets?
 - iii. To hold off creditors?

- i. Safety Deposit Box.

V. DISCUSSIONS WITH THE PR.

- a. How to hold Estate assets.
 - i. Estate bank and investment accounts.
 - ii. Estate real estate.
- b. How long will this probate take?
- c. How much will this probate cost?
 - i. Filing fees, fees for Letter Testamentary, Form K, publication of notice to creditors
 - ii. Appraisals, accounting, tax returns; PR Fees; legal fees
- d. To manage and protect real estate.
- e. Need to keep good records; prepare accountings.
- f. Gather information for General Estate Inventory.
- g. Difficult situations.
- h. Will Contests; RCW 11.24
- i. Digital assets.
- j. Incapacitated Heirs; Distributions to Minors
- k. Estate Tax issues.
 - i. Decedent's Estate – all separate property and one-half community property; valued at date of death.
 - ii. State: \$2.193 million exemption; Federal: \$11.7 million exemption

iii. Other exemptions – unlimited marital exemption, charitable exemption, etc.

iv. Filing a return (or an extension) within 9 months of date of death

l. Income Tax issues.

i. Decedent's personal tax return in year of death; joint with spouse?

ii. Decedent's required minimum distributions for year of death

iii. Capital gain; step-up in tax basis?

iv. Estate's income tax return

m. Disclaimer. Within 9 months of date of death.

VI. HELPFUL RESOURCES.

a. WASHINGTON PROBATE DESKBOOK (Wash. State Bar Assoc. 2005)

b. ESTATE PLANNING, PROBATE, AND TRUST ADMINISTRATION IN WASHINGTON (Wash. State Bar Assoc. 2020)