

**CHAPTER 3**

**PROBATE AND SMALL ESTATE PROCEDURE**

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### **Is Formal Probate Required?**

Many estates in Washington do not require a "formal" probate process.

Formal Probate proceedings are required in Washington when:

1. The value of the ***probatable assets*** is more than \$100,000.<sup>1</sup> (RCW 11.62).
2. The probatable estate includes real property.<sup>2</sup>
3. Some legal proceeding is necessary on behalf of the deceased, such as a suit for wrongful death, or some other claim to be pursued on behalf of the decedent.

If the total net value of all assets is less than \$100,000, and the probatable estate does not include real estate, and no legal proceeding such as a wrongful death action is necessary, then a simple affidavit procedure can be used and formal probate need not be initiated at all. I will first cover handling a "small estate," including the simple affidavit procedure, and then examine handling an estate that does not meet the criteria of a small estate.

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<sup>1</sup>As will be discussed below, many assets can pass directly to a beneficiary without going through a probate process. For example, life insurance proceeds, property held by a married couple under a property agreement, property jointly owned with a right of survivorship.

<sup>2</sup>Although a married couple may own a home, the home may not need to be probated -- it may be jointly owned with a right of survivorship, there may be a transfer-upon death deed, the husband and wife may have executed a property agreement. If any of this is true, and the home therefore does not need to pass through a probate, then the estate does NOT include real property.

**I.**  
**SMALL ESTATE PROCESS**  
**RCW 11.62**

The small estate process can be used whether there is a Will or not. In order to qualify as a small estate for probate purposes, the total net value of the estate (value of the assets minus liens and encumbrances) must not exceed \$100,000. Real property cannot be probated using the small estate process. Therefore, you may consider conveying the real real property outside of probate, such as with a community property agreement or by using a trust or a transfer upon death.

The procedure for probating a “small estate” is simple: Forty days after the death, the surviving spouse, domestic partner or anyone (or any identifiable group) entitled to the deceased’s property by Will or otherwise (intestate succession) prepares an affidavit. The affidavit together with the death certificate is then submitted by mail or personal service to anyone holding property that belonged to the decedent, to anyone owing the decedent a debt, and to any governmental licensing agency. (The statute specifically provides that any government agency that issues certificates of ownership or license registration to personal property (e.g., cars, boats, etc.) is required to issue new certificates of ownership or license registrations to the person claiming the property in the affidavit.) Recipients of the affidavit, accompanied by the death certificate, are required to surrender the personal property or pay the debt to the person(s) claiming under the affidavit.

The affidavit states that:

1. The net value of the estate (not including the surviving spouse’s community property interest) does not exceed \$100,000;
2. that forty days have elapsed since the death;
3. that no personal representative has been appointed or requested;
  
4. that all funeral and burial expenses have been paid or provided for;

5. a description of the personal property requested;
6. a statement that the survivor has provided written notice to everyone else who may have a right to claim any of the deceased's property; and
7. that the survivor is entitled to the personal property claimed or payment of the debt identified; or that the person submitting the affidavit has the authority of others who are also entitled to receive the property or payment of the debt as heirs of the decedent.

### **Estates Passing without Probate – Referred to as “Settlement of Creditor Claims”**

Washington statutes permit some estates to pass to heirs or beneficiaries without requiring any probate at all, and still providing protection of the heirs from creditors appearing months later making claims against the assets. This process, outlined in Chapter 11.42 RCW, is possible if one person or an identifiable group is entitled to receive substantially all of the assets from the deceased (both probate assets and nonprobate assets). For example, if there is only a surviving spouse or perhaps a surviving spouse and a few children, this process<sup>3</sup> can be used. The steps outlined in the statute, are simple and straightforward:

1. The beneficiary, beneficiaries, or trustee (all of whom the statute refers to as the, “Notice Agent”) files a declaration and oath with the superior court;
  
2. the Notice Agent notifies the deceased's creditors that any claims against the decedent must be presented within a specific time and if not presented within that period the claim will be permanently barred<sup>4</sup>. This

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<sup>3</sup>. The statute permits a trustee to use this process as well. RCW 11.42.010(1).

<sup>4</sup>. The statutorily-required form of this notice is presented in Appendix J.

notice is also filed with the court. Additionally, the notice must be published once each week for three consecutive weeks in a legal newspaper. And, finally, the notice must be sent to the Washington Department of Social and Health Services' office of financial recovery.

Creditors who are provided actual notice, either by being served or being mailed the notice have either thirty days from the date they were served (or from the date the notice was mailed), or four months after the notice was first published in the newspaper. The later of these dates will control. Creditors who were not provided actual notice (either by personal service or by being mailed the notice) have four months from the date the notice was first published in the newspaper, or twenty-four months after the decedent's date of death.

Whether the four-month period or the twenty-four-month period controls depends upon whether the creditor could have been easily discovered and identified by a reasonable search of the deceased's records. If the notice agent diligently examined the deceased's records, including the deceased's financial material, and mail, etc., and did not come across the creditor, the statutory limit is four months; if the creditor could have been easily identified by a diligent search of the decedent's records, the statute will allow the creditor twenty-four months to file the claim. Failure to make a claim within the periods allowed by statute will permanently bar a creditor's claim against both probate and nonprobate assets.

Although this is a very simple and straightforward process, it must be used with caution where there are heirs in addition to a single surviving spouse or domestic partner. In circumstances where there are several children, or where there are others who may be beneficiaries such as siblings, this process should be very carefully considered because if conflict develops between the potential beneficiaries, this process will not only fall apart, it will engender and exacerbate intra-family conflict – the very result good estate planning should be designed to avoid.

## **II. ESTATES NOT MEETING THE SMALL ESTATE CRITERIA**

### **What Does Probate Look Like?**

Washington state probate is known for its simplicity. If the Will grants the Personal Representative "nonintervention powers," and the estate is solvent (the value of assets exceeds the value of debts and taxes), the Personal Representative has the freedom to handle the estate without seeking court permission for several major decisions regarding the estate.<sup>5</sup> Additionally, most Washington probates can be closed without formal notice, court hearing, or any final court order.

If probate is necessary, here are the steps that must be taken:

1. Find and read the Will and any codicils (amendments) that may have been made.
2. Gather all financial and legal documents and information such as deeds, vehicle titles, loan agreements, documents

pertaining to life insurance policies, retirement accounts, trusts, and accounts held in financial institutions, including savings accounts, investments accounts, stocks and bonds.

3. Identify and list all possible beneficiaries under the Will and beneficiaries of non-probatable assets such as life insurance beneficiaries, those holding deeds with a right of survivorship, etc..
4. Identify and list all creditors of the deceased.

The following documents must be gathered<sup>6</sup>:

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<sup>5</sup>Importantly, estates where the total value of all claims exceeds the total value of all assets (both probatable and nonprobatable assets) the Personal Representative may not proceed without court supervision unless the court permits it after it has been notified that the estate is insolvent.

1. Last Will and Testament
2. Death Certificate.
3. Trust documents (if any)
4. Community property agreement (aka Agreement as to Status of Property).
5. Any lists the decedent may have made directing that specific personal property be received by specific persons (if any were made).
6. Prenuptial or postnuptial agreements (if there are any).
7. Divorce decrees.
8. Names and addresses of all heirs (those listed in the Will as well as family members not listed in the Will). This includes all family members – children, grandchildren, siblings, parents, etc.
9. A list of the decedent's assets and an estimated value of each. Importantly, this list must include both probatable assets and nonprobatable assets, since *all* assets must be counted when determining if the estate is solvent.
10. A list of decedent's liabilities and an estimate of the balance owing on each.

All these steps are usually taken by the Personal Representative, who is typically named in the Will. If no one is named in the Will, the spouse of the deceased may act as a Personal Representative. If no one asks to serve as Personal Representative, the court can appoint any qualified person.

Before we move on to the specific duties of the Personal Representative of the estate, we must spend some time determining if the Will is actually valid.

**Determine if the Will is valid:** Once the Will is located and spread out on the dining room table, the family must determine if it is valid. To be valid a Will must meet the following tests:

1. It is written;

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<sup>6</sup> . Permit me to digress for just a moment. Survivors of the death of a loved one deal with enormous emotional trauma. They have enough to deal with without having to search for all these documents. A big part of planning for your death is gathering all of these documents, and storing them where everyone knows where they are. In this regard, it is now possible for a person to file their Will with the Superior Court in their county. The Will will be filed under seal, and can only be withdrawn by the testator. This can avoid the problem of not being able to find a Will. The family can simply check with the Clerk of the Superior Court and retrieve a copy after the testator's death.

2. it is signed either by the testator or someone else who the testator told to sign for him or her in the testator's presence;
3. it is attested to by at least two witnesses who have signed an affidavit that accompanies the Will in the presence of the testator and at the testator's direction<sup>7</sup>

This is probably the best place to point out that Washington law permits a person to create a list of personal property and identify the recipient of each item if the list is referenced in the Will and the Will expressly incorporates the

list into the Will. If the Will contains wording expressly incorporating the list, the list is just as valid and enforceable as the balance of the Will even if the signature on the list is not witnessed or notarized. So, if the Will contains a reference to such a list, it must be located as well.

The next step is to **convince a court** that the Will is valid and that the testator was mentally competent ("of sound mind") when they signed the Will. To do that those who signed as witnesses must testify, unless a statutorily permitted short cut was created when the Will was written and witnessed. Absent this short-cut, the witnesses would be required to testify in court that the testator declared to them that the document was his or her last Will, that the testator asked the witness to sign it, that the witness signed it in the testator's presence, and that the witness believed that the testator was "of sound mind and memory and subject to no constraint or undue influence." Here is the short-cut. Attach the following affidavit to the Will: RCW 11.20.020.

If a Will includes this attached affidavit the witnesses need not testify in court.<sup>8</sup>

The required affidavit is presented on the next page.

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<sup>7</sup>. Washington law does not require that witnesses sign in the presence of each other, but only that each witness sign in front of the testator and at the testator's request. And, although there is no requirement for magic words required of the witnesses, as will be discussed in subsequent paragraphs in this section, there are magic words that will greatly simplify the court process required to prove the validity of a Will.

<sup>8</sup>. The entire Will form, which includes this "self-proving affidavit" can be found as an Appendix of this workbook.

STATE OF WASHINGTON )

) ss.

COUNTY OF )

The undersigned, being sworn on oath, and being of lawful age and competent witnesses, depose and say that: We reside in the State of Washington. We knew \_\_\_\_\_ [your name] on the \_\_\_\_ day [day the Will is signed] of \_\_\_\_\_ [month the Will is signed], \_\_\_\_ [year of signing], the date on which \_\_\_\_\_ [your name] in our presence executed the foregoing instrument consisting of \_\_\_\_ number of pages] pages, including this page, and declared it to be [your name] Will and requested us to subscribe our names as witnesses and to make this affidavit. We hereby, in the presence of \_\_\_\_\_ [your name], and in the presence of each other, subscribe our names as witnesses to this Will.

On this date, \_\_\_\_\_ [your name] is over the age of eighteen, appeared to be of sound and disposing mind and memory and was not acting under duress, menace, fraud, undue influence or misrepresentation

\_\_\_\_\_ [signature of witness]

[printed name of witness]

\_\_\_\_\_ [signature of witness]

[printed name of witness]

Sworn and subscribed to before me this \_\_ day of \_\_\_\_\_, \_\_\_\_\_ by \_\_\_\_\_ [your name] and \_\_\_\_\_ [witness name] and \_\_\_\_\_ [other witness name], as witnesses.

\_\_\_\_\_  
Notary Public in and for the State of Washington

My commission expires on: \_\_\_\_\_

**Duties of a Personal Representative:**

A Personal Representative has the following specific duties: (Each is discussed separately below.)

1. File the Will and Petition within 40 days of the testator's death;
2. File an oath of office;
3. post a bond (unless one is not required -- see below).
4. Send a Notice of Appointment and a Pendency of Probate to:
  - (a) all the heirs,
  - (b) beneficiaries who are entitled to nonprobate assets,
  - (c) the Washington state Department of Social and Health Services, and
  - (d) the state Department of Revenue.
5. File an affidavit with the court stating that the notices required by step 4, above, were all mailed.
6. Obtain a Tax Identification Number for the estate (EIN) from the IRS. The easiest way of doing this is by using the internet. (IRS web site is [www.irs.gov](http://www.irs.gov).) The IRS website will enable you to print the necessary tax form (SS-4).
7. Obtain and fill out IRS Form 56, "Notice Concerning Fiduciary Relationship." (This form, with the Personal Representative's signature must be filed with the IRS upon closing probate.)
8. Prepare an inventory of the property contained in the estate with an appraisal of its value (this inventory must also include any liens that may exist against any of the property, and the outstanding balance of any such liens). This list includes both assets subject to probate and assets not subject to probate. This inventory must be prepared within three months of the Personal Representative's appointment.
9. Notify creditors (if any) of the estate or having liens or claims against any assets within the estate.

10. Pay valid claims (e.g., creditors, etc.) against the estate (or reject invalid claims). **This is important: If the Personal Representative distributes property to the heirs under the Will and has failed to first pay all valid claims by creditors, the Personal Representative may be made to be personally liable.**
11. Distribute assets to the devisees.

### **Some Specifics Regarding Personal Representative's Duties:**

**File the Petition:** Normally the initial petition is filed by the person identified in the Will as the personal representative of the estate. The petition asks the court to declare that the Will is valid, and to appoint a personal representative to handle the estate (usually the person named in the Will). The petition also identifies the heirs and beneficiaries, and includes a statement that the estate is either solvent (assets exceed debts) or insolvent. The petition can be filed in any county in the state; however, if a request is made within four months of the petition's filing, the proceeding must be moved to the county of the deceased's residence.

If there is a Will and the personal representative is named in the Will, the court issues, "Letters of Testamentary." On the other hand, if the person died without a Will, or if the court appoints someone other than the person identified in the Will, the court issues what is called, "Letters of Administration."

When the court appoints the person named in the Will as the personal representative, there is no need for the court to hold a hearing and the court merely signs an order appointing that person as the personal representative of the estate.

A Personal Representative must file a bond payable to the State of Washington unless the Will provides that no bond is required. Additionally, a surviving spouse is not required to obtain a bond if the spouse is to receive the entire estate. The reasoning behind the bond requirement is that a Personal Representative is handling property belonging to others – devisees under the Will,

other heirs, or creditors, for example. Consequently, the law imposes a duty on the Personal Representative to act honestly and without serving their self interests at the expense of others. A bond is thought to protect against potential dishonesty by a Personal Representative. (A spouse, will usually receive all or most of the assets, therefore, the risk of dishonesty is minimal.)

A Personal Representative must identify, gather, and assess the value of all assets that belonged to the deceased at the time of death. This includes assets subject to probate as well as assets not subject to probate. The assets of the decedent must be maintained separately from property owned by the Personal Representative. For example, if there is a bank account owned by the decedent, it would not be appropriate (or legal) to deposit those funds to the private account of the Personal Representative.

A Personal Representative may receive reasonable compensation.

### **What Assets Are Probable:**

In handling a probate one of the first question that must be asked is what assets are included in the probate estate and what assets are not included in a probate estate.

Upon death, a married person owns (1) their separate property (for example, property they owned prior to their marriage, and property they received as a gift or inheritance during the marriage); and (2) one-half of the community property owned by the married couple.

The next step in determining what assets must be probated is to identify property that is NOT subject to probate.

### **Assets Usually Not Subject to Probate:**

Assets usually not subject to probate include property that usually does not pass under the Will, e.g., property that automatically goes to a designated beneficiary. For example, life insurance proceeds, a home owned by a husband

and wife as joint tenants with a right of survivorship<sup>9</sup>, bank accounts with the right of survivorship, some financial accounts with transfer-upon-death provisions, property covered by Agreements Regarding the Status of Property entered into by a married couple, and some individual retirement accounts.

But, be carefull here. Do not assume that property that usually passes outside of probate is not to be included in the estate you are probating. Although assets can pass outside of probate (e.g., life insurance proceeds), it is also possible to include them in a Will thereby making them subject to probate. A Will that has included assets that usually are not probated is called a "super will." A "super will" is simply a Will that includes disposition of an asset(s) that would normally not be conveyed in a Will, such as life insurance proceeds. The Will must be read very carefully to make sure the testator did not create a "super will" by including assets in the Will that would usually not pass under the Will. If it is a "super will" (expressly disposes of an asset normally not passing under a Will), and the **date of the Will is later than the date of the beneficiary designation in the other instrument (such as a life insurance policy beneficiary designation)** the provisions of the later will prevail. If any such assets (such as life insurance proceeds) have already been distributed to the person designated as the beneficiary under

the life insurance policy, the Personal Representative must file a petition with the superior court asking that the asset be returned to the estate if it (or the proceeds) have already been transferred.

But, a warning must be inserted here: Although a Personal Representative has no obligation to administer nonprobate assets, **those nonprobate assets may**

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<sup>9</sup>. This is an important issue. It is not uncommon for a deed to be held simply as "husband and wife." That wording alone does not create a right of survivorship. The right of survivorship must be specifically stated on the deed. If a right of survivorship is not stated on the deed, the house is subject to probate (and, therefore, the decedent's estate must be probated).

**become subject to pay claims against the probate estate if the total value of probated assets is less than the total amount of all claims owing.** And, as noted elsewhere in this chapter, if a Personal Representative distributes assets under a Will when there are claims against the estate that remain unpaid, the Personal Representative **can be personally liable** for those unsatisfied debts. So, before a Personal Representative distributes assets under the Will, the Representative must make absolutely sure all claims and debts against the estate are paid.

### **Debts and Claims Against the Estate:**

The **separate debts and claims** for which the decedent was responsible at the time of death are payable out of the decedent's separate property and if the separate property is insufficient to satisfy the deceased's separate debts, then the decedent's half of the community property may become liable to pay these debts. **Community debts and claims** are payable or charged against all the community property (the deceased's half and the surviving spouse's half are charged equally).

If there are insufficient probatable assets, nonprobatable assets must be used to satisfy claims before any distribution is made<sup>10</sup>. (However, a surviving spouse or partner has a prior claim to a percentage of these assets under a Family Allowance, which is discussed below.) As a consequence, under the

Washington statutes, the Personal Representative is required to identify nonprobate assets and have their value assessed. RCW 11.02.005; and 11.10.040.

The entire issue of what property is subject to what debts can become extraordinarily complex since it involves identifying separate property, community property, and what is now called "quasi-community property" (RCW 26.16.220). If there are creditors whose claims threaten a substantial portion of the assets being probated and possibly more, a lawyer must be consulted.

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<sup>10</sup>Washington statutes provide for a "Family Allowance" that can be provided out of the assets of a pending probate, and a Family Allowance takes precedence over all other claims, both as to probatable and nonprobatable assets. See below under Family Allowance.

**Family Allowance:**

The surviving spouse of a deceased (and/or a deceased's minor children) may be awarded a family allowance from the probate estate. This award can be made from the deceased's separate property or the deceased's half of the community property. And, importantly, the family allowance is not subject to debtor claims, in fact the amount withdrawn from the estate for a family allowance is not subject to any debts or claims of creditors. A Family Allowance award may be made even if probate has not been initiated.RCW 11.54.070.

The family allowance may be awarded by the court only after:

1. funeral expenses are paid;
2. expenses of the last sickness are paid; and
3. expenses of probate administration have been paid or provided for.

A petition asking for a Family Allowance must be filed: (1) Within

eighteen months from the date of death if a Personal Representative is appointed or a Notice Agent<sup>11</sup> has filed a declaration and oath. (2) Prior to the termination of any probate proceeding, or (3) Within six years from the date of death.

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<sup>11</sup>A "Notice Agent" can be appointed in cases where probate is not required, and a Personal Representative has not been appointed, and yet there are (or may be) creditors. RCW 11.42. A Notice Agent may be anyone who will receive the entire estate or a large portion of the estate. A Notice Agent provides notice to creditors of the death. The form of the notice to creditors is presented in the statutes at RCW 11.42.030. If a creditor fails to file a claim against the estate within the period set by the statute after getting notice, the claim is barred. (Twenty-four months is the longest period; four months is more typical depending upon the circumstances.) See RCW 11.42.050.

Land granted or money awarded as a Family Allowance is immune from all debts, including judgments and judgment liens against the deceased or the deceased's spouse which existed at the time of death.

From this point forward, the procedures vary dramatically depending upon what powers the personal representative has and how large the estate is. I am going to distinguish three general types of probate: (1) A small estate (the value of all estate assets is not more than \$100,000; (2) an estate where the personal representative is granted *nonintervention powers*; and (3) what I will call a traditional probate (where the personal representative is not granted nonintervention powers). The differences are very important, as illustrated in the following chart. However, before we examine the comparison chart, I want to provide an overview of what Washington statutes call “nonintervention powers.”

#### **Nonintervention Powers:**

The “traditional” probate process, as presented on the comparison chart below, requires that a personal representative be supervised by the court when paying estate expenses, managing estate assets and accepting claims against

the estate. This court supervision frequently necessitates the retention of a lawyer, and/or the personal representative interacting with the court. On the other hand, when the personal representative is granted “nonintervention powers,” much of this court supervision is eliminated. The personal representative is free to manage the estate without obtaining court permission.

Although having nonintervention powers greatly simplifies the tasks of a personal representative, there are times when a court order directing a debt be paid, or some asset management decision be made (e.g., investment decisions, real estate sales, etc.) provides the personal representative with protection from those who may later disagree with the decision and initiate proceedings

questioning the representative's action. Generally, however, granting a personal representative nonintervention power is the norm.