



Personal Estate Planning for the 99%

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Chapter 3

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Planning Considerations for Nonprobate Assets

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1. Planning Considerations for Nonprobate Assets

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1. Article - Planning Considerations for Nonprobate Assets

Planning Considerations for Nonprobate Assets

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Planning Considerations for Nonprobate Assets

- o Why should you care about nonprobate assets?
- o What are nonprobate assets?
- o General Devices for Creating Nonprobate Assets
- o Post-Mortem Options to Consider When Advising Clients

Why do Nonprobate Assets Matter?

Planning Considerations for Nonprobate Assets

- o Why do nonprobate assets matter?
 - o Sometimes a large part of a client's estate
 - o Poor planning can lead to tax problems, confusion or litigation
 - o Can help client tailor estate plan
 - o Maybe eliminate need for probate
 - o Quick access to financial resources

Nonprobate Assets: Real Property

Joint Tenancy with Right of Survivorship
Transfer on Death Deeds

Nonprobate Assets – Real Property

- o Joint Tenancy with Right of Survivorship
 - o Joint owners own an equal undivided interest in the property and upon death, interest passes to surviving co-tenant(s)
 - o CAUTION:
 - o Might be a gift for IRS and Medicaid purposes
 - o Does new joint owner have potential for judgments?
 - o Can't be undone without consent of all parties
 - o If one co-tenant is married, does spouse have interest in property through a community property agreement?

Nonprobate Assets – Real Property

- o Transfer on Death Deed (Beneficiary Deed)
 - o Created as other deeds are and recorded
 - o No interest passes during life of transferor
 - o Can be revoked at any time following deed process
 - o Property passes to beneficiary upon death of transferor
 - o If beneficiary is dead, interest lapses

JTWROS Deed vs. TOD Deed

	JTWROS Deed	TOD Deed
Creates present interest in property?	YES	NO
Freely revocable by the grantor?	NO	YES
Can property be freely sold by grantor?	NO	YES
Transfer is free of gift consequences?	NO	YES
Free from liability for grantee's debts?	NO	YES
Full step-up in cost basis?	NO	YES

JTWROS Deed & TOD Deed

o Remember:

- o Only real property is transferred
- o Survivors take property subject to liens and encumbrances

Nonprobate Assets: Financial Accounts

Nonprobate Assets – Financial Accounts

- o Joint Bank Accounts with Right of Survivorship
 - o Joint owners own interest in proportion to their contribution
 - o Both account holders can withdraw and manage funds
 - o But does it belong to them?
 - o Vests in surviving account holder upon death of joint owner
 - o Can lead to disputes over true intent of the primary depositor

Nonprobate Assets – Financial Accounts

- o Pay on Death (POD) Bank Accounts
 - o Vests in designee(s) upon death of depositor
 - o Less dispute over true intentions of depositor
 - o Compare RCW 30A.22.100(3) & (4)
 - o Lack of control by designee during life of depositor
 - o Solved by Power of Attorney

Nonprobate Assets – Financial Accounts

- o Transfer on Death (TOD) Securities & Brokerage Accounts
 - o Can register securities or open account with a TOD beneficiary
 - o No present right to securities or account
 - o Can also be titled as JTWRROS
- o US Savings Bonds
 - o If surviving co-owner or beneficiary = nonprobate
 - o For details see Treasury Direct website

Other “Nonprobate Assets”

- o Nonprobate assets that aren't “nonprobate assets”
 - o Retirement Accounts
 - o Make sure designations are made
 - o Keep designations updated
 - o Be cautious when transferring retirement accts
 - o Insurance Policies
 - o Keep designations updated
 - o Sometimes useful to name estate as beneficiary
 - o Pass free of creditors and expenses of administration

Abatement

- o ABATEMENT = Priorities by which a decedent's estate expenses and creditors are paid
 - o Intestate Estate
 - o Residuary Estate
 - o General Gifts
 - o Specific Gifts
 - o Nonprobate Assets = Specific Gifts
 - o Nonprobate Assets \neq Life Insurance and Retirement Plans

General Devices for Creating Nonprobate Assets

Revocable Living Trusts

- o What is it: Trust into which all assets are titled and held during life of trustor
- o Purpose: Avoiding probate, confidentiality
- o No tax benefit
- o All probate assets must be titled into name of trust
- o Still must follow Washington's Trust Act after death
- o At times used to capture out of state real property only
 - o Consider using beneficiary deeds if available in other states

Community Property Agreements

- o What is it: Agreement that converts present and future acquired property into community property, and vests all property into name of surviving spouse
- o Purpose: To avoid probate upon death of first spouse
- o Caution:
 - o Educate clients on community property
 - o Ensure consistency with other assets and designations

Superwill Statute

- o What is it: Provision(s) in will
- o Purpose: To change via will beneficiary designations of specific or general categories of nonprobate assets
- o Caution:
 - o Does not cover all nonprobate assets
 - o Not to be used in regular estate planning
 - o Race to the bank

Post-Mortem Options for Passing Assets Outside of Probate

Small Estate Affidavit

- o Decedent is resident of Washington at date of death
- o \$100,000 or less, net of liens and encumbrances
- o No real property – Consider using TOD Deed to cover this
- o No significant debts – must be paid or provided for
- o Family is generally cooperating

Other “Nonprobate Assets”

- o Securities, use small estate affidavit, if applicable
- o Vehicles, use DOL’s on-line form if no probate
- o Credit union balances up to \$1,000 for spouse
- o Bank account balances up to \$2,500 for creditors and next of kin
- o Unpaid wages for some family members
- o Tax refunds via Form 1040 and 1310

Final Thoughts

- o Gifting
- o Taxes
- o Probate isn't so bad
- o Thanks for listening

Planning Considerations for Nonprobate Assets

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PLANNING CONSIDERATIONS FOR NONPROBATE ASSETS

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I. Introduction

Understanding a client's full financial picture is vital in providing sound estate planning advice. An attorney's advice is incomplete without a discussion and review of a client's nonprobate assets and how those assets are titled or designated. Even though a client may execute a will giving his or her entire estate to a person or class of persons, that's often not the full story. The client will likely have some assets that do not pass through the will. In fact, for some clients, the will might pass only a small fraction of a client's estate.

The proper use of nonprobate assets can have many advantages. Typically, nonprobate assets can be accessed quickly after a person dies, often with only an original death certificate. This can make liquid assets available quickly for certain final expenses of the decedent. Also, in the right circumstances, a person's entire estate could be designated to pass through nonprobate assets, possibly making a probate, and its cost, unnecessary.

On the other hand, the improper use of nonprobate assets can lead to problems. Establishing a joint account with another person, merely for the convenience of having that person able to pay bills, could lead to disagreements later when that person inherits the full balance of the account upon the client's death. Improper designations of IRAs and other retirement plans can lead to tax problems. Inconsistent designations, such as through the use of a community property agreement and joint tenancy designation, can lead to confusion and possible litigation upon the death of a client. Careful planning, review of all assets, and a thorough discussion with your clients about their wishes are essential.

II. Nonprobate Assets

Joint Tenancy Real Property. Joint tenancy is a form of ownership of real property whereby the ownership of the property immediately vests in the co-tenant(s) upon the death of one of the other owners. Among the most common methods for creating joint tenancy is through executing a deed to real property declaring the owners “joint tenants with right of survivorship.” When joint tenancy ownership is created in real property, the joint owners own an equal undivided interest. *In re Estate of Politoff*, 36 Wn. App. 424, 427, 674 P.2d 687 (1984). This is different than when the owners are designated as “tenants in common.” As tenants in common, the owners own an interest in the property proportionate to their contribution—during their lives and after an owner dies. *Cummings v. Anderson*, 94 Wn.2d 135, 140, 614 P.2d 1283 (1980).

Transfer on Death Deeds. Washington recently adopted a new form of transferring real property called the “Transfer on Death Deed” (also known as a beneficiary deed). Ch. 64.80 RCW. Real property has always been the classic probate asset, usually triggering a probate if a person passes with such property in his or her name. With this newly recognized beneficiary deed, clients can convert this otherwise-probate asset into an asset that will pass outside of probate. This deed has the effect of conveying a parcel of real property to the beneficiary named in the deed at the moment the owner passes away. The deed has no effect on title during the owner’s lifetime. The transfer on death deed is only effective with respect to the specific parcel of real property described in the deed.

To become effective, the beneficiary deed must meet the elements of a properly recorded deed, must state that the transfer to the beneficiary is to occur at the death of the owner (also known as “transferor”), and must be recorded before the death of the owner in the public records at the auditor’s office of the county where the property is located. RCW 64.80.060. There is no need for a beneficiary to get notice of the deed, acknowledge the deed, or pay consideration for the deed. RCW 64.80.070.

During the transferor’s life, the beneficiary deed can be revoked at any time without the consent or notice to the beneficiary. The document that revokes the deed must be signed by the transferor and acknowledged in the presence of a notary, must expressly revoke the transfer on death deed, and must be recorded before the owner’s death in the records of the county in which the real property is located. RCW 64.80.080.

If the beneficiary dies before the transferor, the beneficiary's interest lapses and does not pass to the heirs of the beneficiary or as part of his or her estate. The property would pass under the transferor's will through the probate process to the beneficiaries designed in his or her will.

A beneficiary who takes title to the real property after the death of the owner takes title subject to all conveyances, encumbrances, mortgage liens, or other interests to which the parcel of real property is subject at the moment of the transferor's death. In addition, the beneficiary's interest is subject to any claim for Medicaid recovery that is recorded within two years after the death of the owner.

After the death of the owner, the beneficiary should record a certified copy of the death certificate in the recording records of the county in which the property is located. The beneficiary will also be required to present a real estate excise tax affidavit when the death certificate is recorded. However, there is no liability for excise tax on a conveyance by transfer on death deed unless some contractual obligation of the owner to the beneficiary is satisfied by the deed.

Comparing Joint Tenancy and Transfer on Death Deeds

Before adding a joint tenant to a client's real property, a practitioner should consider whether a beneficiary deed would be more appropriate, noting the following differences:

- The creation of joint tenancy creates a present interest in all joint tenants. Beneficiary deeds do not.
- The creation of joint tenancy cannot be revoked without the consent of all joint tenants. Beneficiary deeds are freely revocable by the grantor.
- The creation of joint tenancy will usually be considered a gift, subject to federal gift tax rules and could be seen as a gift for Medicaid purposes. Beneficiary deeds are not considered gifts during the life of the owner.
- Judgments against a joint owner can attach to the real property, whereas judgments against a beneficiary listed in a beneficiary deed would not.
- Upon the death of the transferor, beneficiary deeds get a full step-up in the cost basis whereas a joint tenancy would not as to the gifted portion.

Joint Tenancy Bank Accounts. Clients commonly create joint bank accounts with other individuals. State law permits banks to establish accounts as joint *with* right of survivorship and joint *without* survivorship. RCW 30A.22.050(2)-(3). While the joint account holders are alive, they own a share of the account “in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account is created.” RCW 30A.22.090(2). This means that prior to the death of one of the joint account holders, each depositor only owns the amount that he or she deposited into the account, absent some other evidence. *In re Krappes*, 121 Wn. App. 653, 660-63, 91 P.3d 96 (2004); *see also Estate of Lennon v. Lennon*, 108 Wn. App. 167, 183-84, 29 P.3d 1258 (2001) (holding that stepson had no right to write checks to himself and his two sisters as gifts from his and his stepmother’s joint account when stepmother was depositor and when she had not authorized the gifts).

When an owner of a joint account *with* right of survivorship dies, however, the share of the deceased account holder vests in the surviving account holder(s). RCW 30A.22.100(3); *Doty v. Anderson*, 17 Wn. App. 464, 466-467, 563 P.2d 1307 (1977). Joint accounts *without* right of survivorship, however, are dealt with differently at death. With such accounts, the funds are always held proportionate to each account holder’s contribution—during their lives and after one joint account holder dies. RCW 30A.22.090(2). Upon the death of one of the account holders, that person’s funds would belong to his or her estate. RCW 30A.22.100(2).

Many times, bank accounts are established as joint accounts with right of survivorship with little thought as to the ramifications, namely, that the surviving owner will be entitled to all the funds in the account upon the death of the other owner. Parents and children often establish these accounts for convenience, and bank officers have been known to recommend such accounts as a way to avoid probate. While it is true that such accounts can avoid probate as to the funds in that account, it can be contrary to the primary account holder’s intentions.

The case of *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 230 P.3d 199 (2010), presents a classic situation. In that case, a woman went to her bank to establish a joint account with her friend. Without telling her, the banker established a joint account *with* right of survivorship. She subsequently executed a will giving her friend her house, but giving other specific bequests and the residue of her estate to various charities and other individuals. Due to certain unexpected deposits, the joint account grew significantly prior to the woman’s death. After her death, the

friend sued the estate, claiming that the funds were his. The law presumes that the funds held in a joint account belong to the joint owner after the death of the other account holder, but this presumption is rebuttable. *See* RCW 30A.22.100(3). And in this case, the estate successfully rebutted the presumption by presenting evidence that the decedent only asked the banker to set up a joint account and they never discussed whether it would be with right of survivorship.

Pay on Death (POD) Bank Accounts. Pay on death designations (also known as POD accounts) is a way to designate a certain person to receive the funds in a bank account upon the death of the account holder. *See* RCW 30A.22.050(5); RCW 30A.22.040(18). A POD designation has advantages and disadvantages over the traditional joint tenancy account. A POD designation brings more certainty regarding the account holder's wishes upon his or her death. However, the person who is designated on a POD account cannot access or help manage the account like a joint account holder could. Of course, this lack of control can be overcome by executing a power of attorney whereby a family member or friend can manage the account if the main account holder becomes incapacitated.

Transfer on Death (TOD) Securities Account. Washington State specifically authorizes the use of transfer on death (TOD) and pay on death (POD) designations for securities and security accounts, aka brokerage accounts. Ch. 21.35 RCW. The statute states that such a designation can take the form of "John Doe TOD [or POD] to John Doe, Jr" or "John Doe transfer on death [or pay on death] to John Doe, Jr." RCW 21.35.025. Such designations can be changed at any time during the owner's life without the consent of the TOD designee.

U.S. Savings Bonds. U.S. Savings Bonds can be transferred outside of the probate process in a couple ways. First, if two people are named on the bond, the survivor becomes the owner of the bond. The survivor can redeem the bond for cash or can have the bond reissued in the survivor's name alone. The owner may also register the bond payable on death to another person. RCW 11.04.240. The Treasury Direct website is a good source for questions on naming beneficiaries and transferring U.S. Savings Bonds.

Beneficiary Designated Retirement Accounts. A common form of nonprobate asset is the beneficiary designated retirement account, such as an IRA or 401k. A full discussion of the complexity of retirement account designations is well beyond the scope of these materials. A good investment for practitioners who work in this area is Natalie Choate's *Life and Death Planning for Retirement Benefits*.

Above all other non-probate assets, practitioners should ensure that clients have named primary and secondary beneficiaries on their retirement accounts and be wary of ever advising a client to name “the estate” as a beneficiary. When the proceeds of such accounts fall into the estate, beneficiaries will be unable to roll the account over into his or her own retirement account (as for spouses) or into an inherited account (for other beneficiaries). Instead, the account will be required to be distributed within five years following the participant’s death. This five-year rule applies even if the decedent’s will had a single beneficiary.

Estate planners should also remember that most retirement accounts are governed by the Employee Retirement Income Security Act (“ERISA”), which pre-empts state law related to any employee benefit plan. The significance of this pre-emption is highlighted by cases where the designated beneficiary on an employee’s retirement plan is a former spouse. Under Washington law, dissolution of marriage revokes all prior beneficiary designations to the former spouse. RCW 11.07.010. But ERISA has no such rule. If the employee-spouse were to die with the former spouse as a beneficiary, ERISA requires the plan administrator to follow the designation notwithstanding state law. *Egelhoff v. Egelhoff*, 121 S.Ct. 1322 (2000) (holding that ERISA’s requirement that the plan administrator pay out the policy to the beneficiary designated on the plan documents pre-empts Washington’s law that revokes designations of a former spouse).

Like life insurance policies, discussed below, retirement plans are exempted from the definition of nonprobate assets and can therefore pass to beneficiaries free of creditors and estate expenses. RCW 11.02.005(15).

Life Insurance. While life insurance policies might be one of the best known of the nonprobate assets, they are specifically exempted from the definition of “nonprobate assets.” RCW 11.02.005(15). They still pass “outside of probate” if a beneficiary is properly designated, and are therefore technically “nonprobate assets” even if they do not meet the statutory definition of the term.

But because life insurance policies are not defined by statute as a nonprobate asset, the beneficial interest passes free of creditors and free from liability for the expenses of the estate. Therefore, life insurance policies can be especially effective for families with large amounts of debt. Of course, failing to properly designate a beneficiary on a life insurance policy might result in it passing to “the estate,” and thereby becoming a probate asset, subject to the rights of creditors and estate expenses. So, before naming “the estate” as a beneficiary of a life insurance

policy, which can be helpful in some circumstances, the amount of a client's debt should be reviewed.

As with ERISA pre-emption issues involving employee benefit plans, practitioners should be aware of federal pre-emption involving insurance policies of federal employees. As with all estate planning documents, it is important to keep the beneficiary designations current. In *Hillman v. Maretta*, 133 S.Ct. 1943 (2013), a federal employee failed to remove his ex-wife from his Federal Employees' Group Life Insurance policy. After he died, the policy was paid to the ex-wife. Like the Washington law in *Egelhoff, supra*, Virginia had a law that revoked such designations. But Virginia law had an additional "work-around" the federal pre-emption: it allowed the parties who would have otherwise received the policy—had it not been for federal pre-emption—to sue the party who received the funds. The Supreme Court held that this Virginia law too was pre-empted by federal law.

Gifting. While *inter vivos* gifts are not technically nonprobate assets, gifting assets during life, if properly done, is often an effective way to remove that asset from a decedent's estate for probate purposes. For a client with a taxable estate under Washington law, but not a taxable estate under federal law, this can also be a successful way to eliminate or reduce state estate tax. As a reminder to practitioners, Washington State does not have a gift tax, therefore, clients can give as much as they want without impacting any *state* gift or estate tax. On the other hand, gifts will reduce the lifetime exemption amount under federal law, and clients would need to report any gifts above \$14,000 (for 2015) to any one individual. For clients, however, who have little or no threat of federal estate tax, gifting funds over the annual exclusion amount could save their estates on state estate tax later.

III. General Devices for Creating Nonprobate Assets

There are several ways that a group of probate assets can be transformed into assets that pass outside of probate. The most common ways of doing this is through a revocable living trust, community property agreements, and superwills, which are all discussed below.

Revocable Living Trusts. Revocable living trusts (RLTs) have been traditionally used and marketed as probate-avoidance devices. These trusts are very common in states like California where the probate system tends to be expensive and arduous. On the other hand, in Washington, where the probate process is more streamlined, RLTs are not as widely recommended by practitioners.

To use a RLT effectively, clients should ensure that all their presently owned probate assets (real property, bank accounts, vehicles, etc.) are titled in the name of their RLT. Usually, an attorney will assist in the initial titling process to ensure that this is done properly. However, at times—well after the trust was created by their attorney—clients might acquire property or create a bank account and forget that it also needs to be titled in the name of the trust. Depending on what the asset is, this could undermine the purpose of the RLT and require a probate because of that single wrongly-titled asset. RLTs are usually coupled with pour-over wills that will capture such property. The pour-over will states that all assets that are not in the RLT are transferred to the RLT upon the death of the testator. But to make this transfer, a probate is sometimes needed.

If everything is done properly, however, upon the death of the creator(s) of the RLT, the beneficiaries receive a possessory interest in the property and the assets are transferred by a successor trustee. Clients should remember, however, that Washington has trust rules that trustees should follow. *See Washington Trust Act, Ch. 11.98 RCW.*

While typically all of a client's assets that would otherwise pass through a probate would be placed into such a trust, that's not required. For example, such a trust could be created solely for out-of-state property that would be subject to a non-domiciliary probate (i.e., an ancillary probate). This is an important consideration when a client is domiciled in Washington, yet owns property located in a state like California. A much simpler solution for clients with out-of-state real property would be the use of a beneficiary deed, if the states where the client's property is located has such a law.

Community Property Agreements. Community property agreements are often entered into by spouses in order to avoid the risk of probate on the death of the first spouse. Such agreements typically declare all presently-owned and future-acquired property as community property. More importantly, however, they also declare that upon the passing of one spouse, all the community property will pass to the surviving spouse (the “third prong” of the classic community property agreement).

Upon the death of the first spouse, this instrument can be used to access and obtain the deceased spouse's assets, including funds in a decedent's bank account and transfer and obtain securities. To clear the title of real property from the name of the two spouses to the one surviving spouse, the agreement needs to be filed with the county recorder's office, along with a

death certificate and an affidavit affirming several facts, including that the agreement is still in effect. Banks and transfer agents will often also require a certified copy of the recorded community property agreement and affidavit. *See* RCW 30A.22.190(1) & RCW 11.02.120.

Community property agreements are powerful tools. Practitioners should be careful to explain to clients that this simple document converts all presently-owned and future-acquired property into community property. Often clients do not understand the difference between separate and community property, and assume that because they live in Washington all property is community property. On the other hand, some clients might understand the difference, and have purposefully kept property separate and might not realize that a community property agreement will change this.

Clients should also understand that community property agreements override contrary designations in a will, joint tenancy designations and other designations. *See Estate of Lyman*, 7 Wn. App. 945, 503 P.2d 1127 (1972), *affirmed by* 82 Wn.2d 693 (1973). In *Lyon v. Lyon*, 100 Wn.2d 409, 670 P.2d 272 (1983), two brothers inherited land from their father, which was titled as joint with right of survivorship. One brother later executed a community property agreement with his wife. When that brother passed away, his wife became a tenant in common in the property with the surviving brother and the joint tenancy was severed.

Superwills. Washington law includes a unique chapter that permits a person to create a will that overrides certain nonprobate designations that were made prior to execution of the will. This is commonly referred to as the “superwill statute.” Ch. 11.11 RCW (formally referred to as the Testamentary Disposition of Nonprobate Assets Act).

The superwill statute does not cover all nonprobate assets. It covers nonprobate assets described in RCW 11.02.005, but specifically excludes (1) real property passing under a joint tenancy with right of survivorship, (2) a deed or conveyance for which possession has been postponed until the death of the owner, (3) a transfer on death deed, (4) an interest passing under a community property agreement, and (5) an individual retirement account or bond. RCW 11.11.010(7).

Drafting language in a will that is intended to override nonprobate asset designations should be done with care. Under the law, the following language would be satisfactory to pass nonprobate assets to the beneficiaries in the will: “all nonprobate assets,” “all of my payable on death bank accounts,” or similar language. RCW 11.11.020(3).

If the owner of an account later changes the beneficiary designation on the account, that subsequent designation will control the disposition of the asset, not the superwill provision. If the owner later revokes the subsequent designation and there is no designation to control how the asset is to be distributed, it will be distributed pursuant to the general terms of the owner's will.

While this seems straightforward, it is easy to create ambiguities that lead to litigation without a thorough knowledge of a client's assets. In *Estate of Burks v. Kidd*, 124 Wn. App. 327, 100 P.3d 328 (2004), a decedent had created two Pay on Death bank accounts, but later drafted a will with the following language: "I have certain bank accounts and savings accounts and may in the future have other evidences of property which are or may be in the joint name of myself and one of my children. Such designation is for business convenience only and is not intended as a gift to such child." The residuary beneficiaries of the will claimed that this language changed the nonprobate status of the POD accounts. The court disagreed, reasoning that the language in the will does not specifically refer to the POD accounts, nor does it identify an entire category of nonprobate assets. The POD accounts remained nonprobate assets and not controlled by the superwill provision.

It is not recommended that superwill provisions be used as a regular estate planning tool. The biggest disadvantage of using a superwill provision involves the possibility of litigation and disputes. When banks or other financial institutions learn of the death of an account holder, they will typically pay out funds to the named beneficiary with only a death certificate. By the time the personal representative contacts the bank, the funds may be gone. If the funds aren't gone, litigation still might ensue over whether the beneficiary designation or the superwill controls the disposition of the account.

Superwill provisions are sometimes used when clients are leaving on a trip and do not have time to change beneficiary designations. In these cases, it's wise to advise clients to correct the beneficiary designations when they return.

IV. Other Post-Mortem Options for Passing Assets Outside of Probate

The following "non-probate" options are sometimes first considered only after a person passes away. It's advisable, however, to keep them in mind before a client passes away as options that can be used later to avoid the probate process.

Small Estate Affidavits. Most clients come to their attorney seeking to avoid probate when they pass away, or at least making the process as easy as possible on their family.

Considering the use of small estate affidavits later by the family may be appropriate when advising such clients.

Chapter 11.62 RCW contains the requirements for obtaining assets using a small estate affidavit. Under this process, an heir completes an affidavit and submits the document, along with the decedent's death certificate, to the holder of a probate asset. If the holder of an asset receives a properly prepared affidavit and proof of death, the person or financial institution must deliver the asset to the requestor.

An heir can only use a small estate affidavit if the decedent had no more than \$100,000 in probate assets. While a small estate affidavit may be used for a decedent who had real property, the affidavit cannot be used to acquire title to the real property. Furthermore, the equity in the real property is used in the \$100,000 calculation. Therefore, it is rare when a small estate affidavit could be used for an estate of a decedent who died with real property. Prior to death, however, the client may consider executing a transfer on death deed, discussed above, which would remove the property from the probate estate.

Even if the estate meets the financial threshold, however, other requirements need to be satisfied. The elements of the small estate affidavit provide a nice outline of the issues that need to be addressed. Under RCW 11.62.010, the affidavit must contain the following statements and information:

- (a) The name and address of the person requesting delivery of the assets. The only person who can request an asset is a "successor," which is defined as either (1) a person entitled to the asset under a last will and testament or under the laws of intestate succession or (2) a surviving spouse or domestic partner to the extent that that person is entitled to the asset as his or her undivided one-half interest in the community property.
- (b) That the decedent was a resident of Washington on the date of death.
- (c) That the value of the decedent's probate estate, minus liens and encumbrances, and not including a surviving spouse's community property interest, does not exceed \$100,000.
- (d) That at least 40 days have elapsed since the death of the decedent.
- (e) That no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.
- (f) That all debts of the decedent including funeral and burial expenses have been paid or provided for.

- (g) A description of the personal property that is being claimed, along with a statement that the property is subject to probate. Personal property is defined by RCW 11.62.005(1) to include tangible and intangible personal property. Therefore the affidavit can be used to get assets in financial accounts, as well as tangible assets of the decedent.
- (h) A statement that the person claiming the asset has given written notice to all other “successors” of his or her claim, and that at least 10 days have elapsed since the mailing or service of the notice. The successors would include those entitled to the claimed property under the decedent’s will and those who would take under the laws of intestate succession.
- (i) A statement that the person claiming the asset is either personally entitled to full payment or delivery of the property or is entitled to full payment or delivery on behalf and with the written authority of all other successors who have an interest in it.

Securities. The small estate affidavit process described above can be used to transfer shares of stock from the decedent to an heir. RCW 11.62.010(3) instructs a transfer agent to change the registered ownership of a security to the claimed successor upon the receipt of a death certificate and a properly completed small estate affidavit.

Vehicles. The Washington State Department of Licensing has its own form for the transfer of vehicles when no probate has been started. It is called an Affidavit of Inheritance/Litigation and can be found easily on-line.

Small Credit Union Balances. The spouse of a deceased account holder can obtain the proceeds of an account with \$1,000 or less upon simply providing an affidavit swearing that no personal representative has been appointed and the account holder has died. RCW 11.62.030.

Small Bank Account Balances. When a bank holds \$2,500 or less of a deceased account holder, a surviving spouse, next of kin, or even a funeral director or creditor, can take the funds in the account. The person or institution requesting the funds must provide a proof of death and an affidavit swearing that no personal representative has been appointed for the deceased account holder. The bank is permitted to require any such waiver, indemnity, receipts, and additional proofs that it considers proper. RCW 30A.22.190.

Wages. A spouse, child or parent (in that order) may request a deceased employee’s unpaid wages up to \$2,500, as long as no personal representative has been appointed. RCW 49.48.120(1). The employer should require proof of the claimant’s relationship through an affidavit or declaration and require receipt of the payment in writing. If the employer follows these rules, it will be released from liability to the decedent’s estate for the payment. RCW

49.48.120. If the employee was employed by Washington State, the unpaid wages cap is higher and increases by the consumer price index for Seattle. RCW 49.48.120(2). This cap in 2013 was \$12,500.

Taxes and Tax Refunds. A person claiming property of a decedent should determine whether the decedent owed any taxes to the IRS. A person can file a Form 1040 for a deceased tax payer even when no personal representative has been appointed. If there is a refund owed, the person claiming the property can file a Form 1310, along with the Form 1040, and receive the tax refund due to the deceased tax payer. The person claiming the refund must assert that he or she will pay out the refund according to laws of the state where the decedent was a legal resident.

V. Other Issues

Abatement and Nonprobate Assets. Nonprobate beneficiaries should be aware that often funds they are entitled to can still be accessed to pay the decedent's estate expenses and creditors. Abatement is the way in which an estate's assets are expended to pay these debts. Under Washington's abatement statute, absent different instructions in a person's will, the decedent's intestate estate will be used first to pay any debts. Next, the assets in the decedent's residuary estate will be used. If the residuary estate is insufficient, the debts must be paid from any general gifts. If general gifts are also insufficient, the debts must be paid from specific bequests.

Nonprobate assets are considered specific bequests under the abatement statute. RCW 11.10.040(2)(a); *see also* RCW 11.18.200. Typically, therefore, nonprobate assets will be protected, unless the estate is heavily indebted, or the estate is primarily comprised of nonprobate assets. The proceeds from life insurance policies and employee benefit plans, however, are exempted from the abatement statute. Therefore, heirs take these assets free of creditors and the expenses of the estate. RCW 48.18.410; RCW 6.15.020 & RCW 11.18.200(h) & (i).

Taxes. The creation of nonprobate assets is not an effective way to avoid estate taxes. Nonprobate assets, including life insurance, are includable in a decedent's estate if owned at the time of death.

Final Caveat. These materials are not intended to leave the impression that avoiding probate should be the primary goal of any estate plan. Fortunately, Washington has a relatively efficient probate system that provides a helpful court-approved structure through which heirs and fiduciaries are protected from future creditor claims or allegations of improper distributions. At

the conclusion of a properly administered probate, your client should feel comfortable that a loved one's final wishes have been met and your client will not likely face any future legal liability. Nevertheless, the use of nonprobate assets can make the emotional and financial difficulties of dealing with a loved one's passing a bit easier.