

# NON-PROBATE TRANSFERS

## Side Notes

- I. Community Property Agreements. Community property agreements are authorized by statute. RCW 26.16.120. This agreement acts as a will substitute and transfers assets to the surviving spouse outside of probate. The statute requires the agreement to be in writing, signed by both the husband and wife and “witnessed, acknowledged and certified in the manner required for deeds of real property” (under RCWs, transfers by deed do not need require witnesses, notary acknowledgement is required).
  - A. Pitfalls regarding Community Property Agreements.
    1. A community property agreement is a contract and general rules of contract rescission apply.
    2. A community agreement cannot be revoked by just one of the parties. For example, if one party drafts a new will, that unilateral act is insufficient to revoke the community property agreement. Mutual intent to abandon or rescind the contract must be demonstrated.
    3. A community property agreement prevails over an inconsistent Will. This may frustrate the estate plan under a Will and present a problem in a taxable estate when a credit bypass trust was contemplated.
    4. The surviving spouse under a community property agreement can effectively make a Will following the death of the first spouse which is inconsistent with the intent of the deceased spouse (children from a prior marriage may be disinherited).
    5. A community property agreement can convert separate property to community property at the time of execution if it is a standard form three-pronged community property agreement.(the first prong converts the separate property of each spouse to community property, the second prong provides that all future acquired property that would otherwise be considered separate property shall be community property, and the third prong vests title of all community property in the survivor upon the death of the other spouse). Paragraph One (option 5) of the sample attached is a standard three prong agreement.

6. Potential problems if parties separate, one party qualifies for Medicaid, or the parties move to another state, must be recognized by counsel when providing a community property agreement.

B. Administration of the Estate Under a Community Property Agreement.

1. Community property agreements often exist in conjunction with a valid Will. If the decedent leaves both a community property agreement and a Will, the Will need not be probated.
2. The disposition of property by community property agreements occurs on the death of one spouse by operation of law. The following steps should be followed when settling an estate under a community property agreement:
  - a. The community property agreement must be recorded with the county auditor of any county in which the decedent owned real property.
  - b. A certified copy of the death certificate must be recorded with the county as well.
  - c. An affidavit as to the nonexistence of indebtedness and an inventory and valuation is sometimes required to transfer title to real property.

II. Revocable Trust Agreement.

- A. The typical revocable trust (also referred to as Revocable Living Trust) is generally established by the grantors to avoid probate for both spouses. The grantors are the primary beneficiaries during their lifetime, and normally serve as trustees. Probate is avoided if the trust is properly funded, because the distribution of assets transferred to the trust is controlled by a successor trustee and do not require the appointment of a personal representative.
- B. For tax planning purposes, or to provide for blended families, an A/B trust can be used. Upon the death of the first spouse, a trust for the property of the deceased spouse is funded with one-half of the trust assets, which is then irrevocable. The surviving spouse can receive the income from this one-half, and can invade the principal under an “ascertainable standard”, but the remainder

beneficiaries cannot be changed. The rest of the assets remain in the revocable trust for the benefit of the surviving spouse. The surviving spouse has the authority to change the terms of distribution of only this one-half.

- C. Some clients prefer to use a revocable living trust because it is not filed with the court and is therefore considered more private (with regard to assets and terms of distribution).
- D. A living trust may also be appropriate for someone who is facing a disability or incapacity and needs to have continuing management over his or her affairs by successor trustee. The need for a full guardianship thus may be eliminated by use of a living trust, in conjunction with a durable power of attorney for financial matters and health care.
- E. A living trust is very advantageous when the grantor has additional real property located in another state. Placing the real property in a trust will avoid the need for an out-of-state “ancillary” probate.
- F. If a revocable trust is used, a will should also be prepared to account for any property which is not placed in the trust. This “pour-over” will simply provides that assets are to be distributed in accordance with the provisions and terms of the trust. The will gives the client flexibility to dispose of specific items of personal property. It also serves as a backup to the trust if a personal representative needs to be appointed to pursue a wrongful death action, or to transfer title to assets that were not funded into the trust.

### III. Joint Tenancies.

- A. Joint-tenancy is a form of co-ownership whereby the property held generally passes automatically to the surviving joint tenants on the death of one of them. RCW 64.28.010.
- B. In this state, bank and stock accounts are routinely titled in joint accounts. Real property is normally titled in both spouses’ names, as “husband and wife”.
- C. Property held by husbands and wives as joint tenants is presumed to be community property. However, if registered as joint tenants, with right of survivorship, the property passes to the surviving spouse automatically on the death of the first spouse without the need for a community property agreement or a Will. RCW 64.28.040

D. Although property held by joint tenants is not subject to probate, it may be subject to the rights of creditors. RCW 64.28.010 provides that a transfer to joint tenancy “shall not derogate from the rights of creditors”. Further, a beneficiary of property held in joint tenancy with the right of survivorship takes the property subject to the decedent’s liabilities, claims, estate taxes and administrative expenses to the extent of the decedent’s beneficial ownership interest in the property immediately before death. RCW 11.18.200

IV. Disposition of Estates By Affidavit. For estates involving only personal property with an aggregate value of \$60,000.00 or less, the disposition by a small estate affidavit can be used. RCW 11.62, *et. seq.* The statute defines personal property to include: tangible personal property, instruments evidencing a debt, obligation, stock, chose in action, license, or ownership, and any debt or any other intangible property. RCW 11.62.005(1). When determining whether the personal property in the estate has an aggregate value not greater than \$60,000.00, only probate assets are considered. Thus the surviving spouse’s one-half interest in community property is not included. Further the \$60,000.00 amount is an aggregate value and thus any debts and encumbrances reduce the value.

A. Procedure for Disposition of Property by Affidavit. The statute provides that a beneficiary of an estate may obtain property of the decedent which is held by another upon presenting a statutory affidavit and proof of death. The affidavit must state:

1. The claimant’s name and address and that he or she is a “successor” as defined by RCW 11.62.005;
2. That the decedent was a resident of the State of Washington on the date of death;
3. That the value of the decedent’s entire estate, subject to probate, wherever located, less liens and encumbrances, does not exceed \$60,000.00;
4. That forty days have passed since the date of death;
5. That there is no pending application for appointment of a personal representative and that no personal representative has been appointed in any jurisdiction.
6. That all debts of the decedent have been paid or provided for;

7. A description of the personal property and the portion claimed and that the property is subject to probate;
8. That the claimant has given 10 days written notice to all other “successors”; and is claiming such property on their behalf (or)

That the claiming successor is entitled to the property.

B. Effect of the Affidavit.

1. Any person who is indebted to or who has possession of the personal property belonging to the decedent must pay the indebtedness or deliver the personal property to the successor upon presentation of the statutory affidavit and proof of death. RCW 11.62.010. If the holder of the property or death refuses to deliver the property to pay the debt, the successor may obtain a court order compelling the payment. RCW 11.62.020.
2. Any person delivering property pursuant to an affidavit is discharged and released to the same extent as if he or she was dealing with a duly appointed personal representative, unless at the time of deliver the holder had actual knowledge that all or part of the affidavit was false.
3. Transfer agents of securities and government agencies responsible for issuing certificates of ownership and licenses are specifically directed to act under the procedure. RCW 11.62.010(3).

AFTER RECORDING RETURN TO:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**COMMUNITY PROPERTY AGREEMENT**

THIS AGREEMENT, made this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, by \_\_\_\_\_ ("Husband") and \_\_\_\_\_ ("Wife"), both of whom are domiciled in the State of Washington, residing in \_\_\_\_\_ County. In consideration of their mutual agreements set forth below, the parties agree as follows:

(CHOOSE OPTIONAL PARAGRAPH 1, 2, 3, 4, OR 5 (usual choice)).

1. Property Covered. This Agreement shall apply to all community and separate property now owned or hereafter acquired by Husband and Wife or either of them (except for assets for which a separate beneficiary designation has been or is hereafter made by Husband and Wife and approved by the other spouse) even though some items may have been or may be purchased or acquired by one or the other or both or may have been or may be registered in the name of one or the other or both. All such property is declared to be community property of Husband and Wife and is referred to in this Agreement as the "described community property".

2. Vesting at Death of a Spouse. If Husband dies and Wife survives him by thirty (30) days, all of the described community property shall vest in Wife as of the moment of Husband's death. Otherwise, the said community property shall be distributed pursuant to Husband's Last Will and Testament. If Wife dies and Husband survives her by thirty (30) days, all of the described community property shall vest in Husband as of the moment of Wife's death. Otherwise, the said community property shall be distributed pursuant to Wife's Last Will and Testament.

3. Disclaimer. Upon the death of either spouse, the surviving spouse may disclaim any interest passing under this Agreement in whole or in part, or with reference to specific parts, shares, or assets thereof, in which event the interest disclaimed shall pass as if the provisions of Paragraph 2 had been revoked as to such interest with the surviving spouse entitled to the benefits provided by any alternate disposition.

4. Automatic Revocation. The provisions of Paragraph 2 shall be automatically revoked:

- (a) Upon the establishment of a domicile out of the State of Washington by either party; or
- (b) Upon the filing by either party of a petition, complaint or other pleading for separation, dissolution or divorce; or
- (c) Immediately prior to death, if the order of death cannot be ascertained; or
- (d) If the parties have applied for federal or state benefits for the benefit of a disabled spouse and the non-disabled spouse dies first.

5. Optional Revocation by One Party. If either party becomes disabled, the other party shall have the power to terminate the provisions of Paragraph 2 and each party designates the other as Attorney-in-Fact, solely with regards to this Community Property Agreement, to become effective upon disability thereof to the disabled spouse and to the guardian(s), if any, of the person and of the estate of the disabled person. For the purposes of this paragraph, a spouse shall be deemed disabled if: (a) a physician who has treated the spouse for at least two (2) years certifies that the spouse is unable to manage his or her own affairs; or (b) two (2) independent physicians so certify.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

\_\_\_\_\_

STATE OF WASHINGTON )  
 : ss  
County of \_\_\_\_\_)

This is to certify that on this \_\_\_\_ day of \_\_\_\_\_, 200\_\_, before me, a duly commissioned Notary Public in and for the State of Washington, personally appeared \_\_\_\_\_ and \_\_\_\_\_, to me personally known to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at \_\_\_\_\_  
My commission expires: \_\_\_\_\_

### OPTIONAL PARAGRAPH NO. 1

(Present and after-acquired community property; converts separate property to community property at death.)

1. Property Covered: This Agreement shall apply to all community property now owned or hereafter acquired by Husband and Wife (except for assets for which a separate beneficiary designation has been or is hereafter made by Husband or Wife and approved by the other spouse) even though some items may have been or may be purchased or acquired by one or the other or both or may have been or may be registered in the name of one or the other or both. If Husband dies and Wife survives, any separate property of Husband which is owned by Husband at the time of his death (except for assets for which Husband has made a separate beneficiary designation other than by Will) shall become and be considered community property vested as of the moment of his death, and if Wife dies and Husband survives her, any separate property of Wife which is owned by Wife at the time of her death (except for assets for which Wife has made a separate beneficiary designation other than by Will) shall become and be considered community property vested as of the moment of her death. All such property is regarded to in this Agreement as the "described community property."

### OPTIONAL PARAGRAPH NO. 2

(Present and after-acquired community property only.)

1. Property Covered: This Agreement shall apply to all community property now owned or hereafter acquired by Husband and Wife (except for assets for which a separate beneficiary designation has been or is hereafter made by Husband or Wife and approved by the other spouse) even though some items may have been or may be purchased or acquired by one or the other or both or may have been or may be registered in the name of one or the other or both. All such property is referred to in this Agreement as the "described community property".

### OPTIONAL PARAGRAPH NO. 3

(Specific property only.)

1. Property Covered: This Agreement shall apply to the following-described property now owned or hereafter acquired by Husband and Wife even though some items may have been purchased or acquired by one or the other alone or may be registered in the name of one or the other or both:

The above-described property shall be considered and is declared to be the community property of the parties and is referred to in this Agreement as the "described community property".

OPTIONAL PARAGRAPH NO. 4

(Present community and separate property and after-acquired community property.)

1. Property Covered: This Agreement shall apply to all property now owned by Husband and Wife and all community property hereafter acquired by Husband and Wife (which shall be considered and is declared to be the community property of the parties) (except for assets for which a separate beneficiary designation has been or is hereafter made by Husband and Wife and approved by the other spouse) even though some items may have been or may be purchased or acquired by one or the other or both. All such property is referred to in this Agreement as the "described community property".

OPTIONAL PARAGRAPH NO. 5

(Present and after-acquired community and separate property.)  
(Usual choice.)

1. Property Covered: This Agreement shall apply to all community and separate property now owned or hereafter acquired by Husband and Wife or either of them (except for assets for which a separate beneficiary designation has been or is hereafter made by Husband or Wife and approved by the other spouse) even though some items may have been or may be purchased or acquired by one or the other or both or may have been or may be registered in the name of one or the other or both. All such property is declared to be community property of Husband and Wife and is referred to in this Agreement as the "described community property".

**NOTICE OF CLAIM OF SUCCESSOR**

In the Matter of the Estate of: ) Cause No.  
 )  
\_\_\_\_\_, ) AFFIDAVIT OF  
 ) \_\_\_\_\_  
Deceased. )  
\_\_\_\_\_ ) RCW 11.62.010

STATE OF WASHINGTON)

: ss  
County of \_\_\_\_\_)

\_\_\_\_\_, as the "Claiming Successor" of \_\_\_\_\_, who died on \_\_\_\_\_, 200\_\_, solemnly affirms as follows

1. The claiming successor's address and relationship to the decedent are:  
\_\_\_\_\_.
2. Decedent was a resident of the State of Washington on the date of death.
3. The value of the total estate of decedent subject to probate, wherever located, less liens and encumbrances, does not exceed \$60,000.
4. More than 40 days have elapsed since decedent's death.
5. No application or petition for the appointment of a personal representative of the decedent's estate is pending or has been granted in any jurisdiction.
6. All of decedent's debts, including funeral and burial expenses, have been paid or provided for or will be paid from assets above mentioned.

7. Decedent left surviving the following heirs in accordance with the intestacy statute, RCW 11.04.015:

<u>Name</u>	<u>Address</u>	<u>Relationship</u>
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**(IF THERE ARE NO OTHER SUCCESSORS OF THE DECEDENT USE ONLY**

**7. IF THERE ARE OTHERS, USE ALTERNATES 7 AND 8.)**

8. There is no other successor of decedent, and the claiming successor is personally entitled to delivery of decedent's property, which consists of \_\_\_\_\_.

**ALTERNATES:**

7. The claiming successor has given written notice by mail (personal service), identifying his claim, and describing the property claimed, to all other successors of the decedent, and at least ten days have elapsed since the mailing (service) of such notice.

8. The claiming successor is personally entitled to full payment or delivery of the property claimed (ALT. Entitled to full payment or delivery of the property claimed on behalf and with the written authority, of all other successors of the decedent who have an interest therein.)

\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
of Washington, residing at \_\_\_\_\_  
My commission expires: \_\_\_\_\_