

## LACK OF PROBATE AFFIDAVITS

The use of Lack of Probate Affidavits have been around for years, and have been used primarily by title insurance companies to "clear" title in given situations. Remember from our bar exam days, that real estate in Washington "vests" immediately in his or her heirs or devisees, unless a probate is necessary. See RCW 11.04.250 and 11.04.290 (Washington's "vesting" statutes). These two statutes are the basis from which all title insurance companies can insure title in an heir or devisee without probate. As a reminder, however, in order to vest and not need to probate, the Will (if there is one) **must** match the "intestate" succession scheme of 11.04.015. It is also important to note that a "Lack of Probate Affidavit" is not a conveyance vehicle like a deed. It is simply an informational document (usually recorded) to provide to a subsequent title insurance company (found when the title examiner does their search of the record) simply to induce a title company to rely on the information and insure vesting of title in the name of the Affiants (i.e., the person or persons inheriting the property). Here are some examples where a Lack of Probate Affidavit works and when it does not work (assuming there are no other assets requiring probate):

1. Husband dies with a Will (all to surviving spouse) and a Community Property Agreement with either separate or community real estate. In this case, you would routinely do a "Will only filing" at the county clerk's office of the decedent's residence (make reference to the county and Cause No. of the filed Will in the Affidavit even if not in the county where the property lies), and record the Community Property Agreement at the county Auditor's office where the property lies (make reference of the county and AF No. in the Affidavit where it is recorded, even if not in the county where the property lies). In this instance, title transferred and vested via the Community Property Agreement (not RCW 11.04.250 or 290) and the Lack of Probate Affidavit (routinely recorded in the County where the property is located) is used to confirm the vesting and convince a title company to insure title in wife's name based upon that agreement. Of course, you would want the Lack of Probate Affidavit to recite that she was married to the decedent at the time of his death and recite the date of marriage. Since there is a Community Property Agreement, it wouldn't matter if the real property was community or separate property. **LACK OF PROBATE AFFIDAVIT CAN BE USED** (provided that there are no other assets held in the decedent spouse's name requiring probate).

2. Husband dies with a Will (all to surviving spouse) and NO Community Property Agreement, and the real estate is Community Property. In this case, since there is no Community Property Agreement, title would vest in wife via RCW 11.04.250 and 290, without the need to probate, since Husband's Will matches the intestate statute (RCW 11.04.015(1) wherein all community property passes to the surviving spouse). Then it is critical to include in the Lack of Probate Affidavit that they were married at the time of his death and to include the date of marriage. Then when the title company views the original Deed of acquisition, if it occurred after the date of marriage, then it is presumed to be "community property". In addition, if the deed of acquisition recites the Grantees to be "John Smith and Jane Smith, **husband and wife**", then this will be additional reassurance that they were married at the time of purchase (confirming that it would pass to wife in the absence of a Will to the contrary). The "Will only" filing of husband's Will at the county clerk's office and the recital of that Will and Cause No. in the Lack of Probate Affidavit, simply adds more confirmation and inducement to the title company to insure vesting of title in wife (i.e., vested automatically by virtue of RCW 11.04.250 and 290). **LACK OF**

**PROBATE AFFIDAVIT CAN BE USED.** The Will can be probated at any time thereafter if needed, or if there are other assets requiring probate.

3. Husband dies with NO Will and NO Community Property Agreement, and the real estate is Community Property. In this case, since there is no Will and no Community Property Agreement, title would still vest in wife via RCW 11.04.250 and 290, without the need to probate, since Husband's estate would pass to wife via the intestate statute (RCW 11.04.015(1) wherein all community property passes to the surviving spouse). As with above, it is critical to include in the Lack of Probate Affidavit that they were married at the time of his death and to include the date of marriage. Then when the title company views the original Deed of acquisition, if it occurred after the date of marriage, then it is presumed to be "community property". In addition, if the deed of acquisition recites the Grantees to be "John Smith and Jane Smith, **husband and wife**", then this will act as additional reassurance that they were married at the time of purchase (confirming that it would pass to wife in the absence of a Will to the contrary). Then, as with the above, a Lack of Probate Affidavit simply induces a title company to insure vesting of title in wife (i.e., vested automatically by virtue of RCW 11.04.250 and 290). **LACK OF PROBATE AFFIDAVIT CAN BE USED.** A probate administration can be used at any time thereafter if needed.

4. Husband dies with a Will (all to surviving spouse) and NO Community Property Agreement, and the real estate is husband's separate property. Since the intestate statute would be contrary to the terms of the Will (i.e., RCW 11.04.015 would pass separate property 50% to spouse and 50% to kids), then you would be required to probate in this instance. **LACK OF PROBATE AFFIDAVIT CANNOT BE USED.**

5. Husband dies with NO Will and NO Community Property Agreement, is survived by wife and two kids, and the real property is husband's separate property. The intestate statute would provide that separate property pass 50% to wife and 50% to the two kids. In this instance, title would instantly vest in wife and the two kids via the vesting statute (RCW 11.04.250). Assuming that wife and kids get along well, then the three of them could sign the Lack of Probate Affidavit (reciting that wife was married to husband at the time of his death), thereby confirming the vesting in the three (in their respective percentages of 50% to wife and 25% to each of the two children). **LACK OF PROBATE AFFIDAVIT CAN BE USED, but should it be used?** If the kids do not get along, then wife may want to do instigate an intestate probate administration simply to have control over the manner in which the property may be sold prior to distribution. On the other hand, if wife and the kids do get along, but the property is not to be sold for years (i.e., the cabin on the lake), then it may be a consideration simply to probate the estate simply to have the PR Deed, or to use a Lack of Probate Affidavit and have wife and the two kids simply purchase a title insurance policy (based upon the value of the property) to confirm their ownership (may be less expensive than probating). If wife and kids get along but intend to sell the property shortly thereafter, then frequently I use a Lack of Probate Affidavit (signed by wife and two kids), then order a preliminary commitment for title insurance (notifying the title officer of the recorded Affidavit), confirm that the commitment vests title in wife (50%) and two kids (50%), before the three of them list the property for sale. Remember, the buck stops with insurability. If a title insurance company is willing to insure that it vested in the three, pursuant to their respective percentages, then why spend the money to probate, if they will insure the sale a month or two later.

6. Single parent dies with Will (residue to two kids). In this case, if the Will matches the intestate succession statute (RCW 11.04.015(2)(a)), as it does, then title will vest in the two kids via RCW 11.04.250. Then a **LACK OF PROBATE AFFIDAVIT CAN BE USED, but should it?** If the two kids get along well (i.e., they will be partners), and if they plan to sell the property shortly thereafter, then a Lack of Probate Affidavit used to clear title is a cost effective way to handle this. Make sure the Lack of Probate Affidavit references the Cause No. of the Will previously filed with the court (so the title company can see in the parent's own handwriting in the Will, the names of all the children he had), and to reference all the children of the deceased, born or adopted, along with any children who predeceased the parent and whether they died with issue surviving or any parents or grandparents surviving (i.e., all the fact necessary to show that it would pass via the intestate statute to these two kids). After the two kids sign and record the Lack of Probate Affidavit, then as above, they would order a preliminary commitment for title insurance (notifying the title officer of the recorded Affidavit), confirm that the commitment vests title in the two kids, before the two of them list the property for sale. If the two kids get along well (i.e., as future partners), but do not intend to sell the property for years (i.e., the cabin on the lake), then it may be prudent to either probate the Will to get their PR Deed, or to use a Lack of Probate Affidavit and have the two kids simply purchase a title insurance policy (based upon the value of the property) to confirm their ownership (may be less expensive than probating). Finally, if the two kids do not get along well, then it is often best to simply probate the Will so one child, as PR, can avoid disagreement with the other sibling as to how the property is to be sold (i.e., subject to their fiduciary duty to prudently administer the estate).

7. Single parent dies with NO Will and is survived by two kids. The same result occurs in this instance as with the facts under item 6 above, in that a **LACK OF PROBATE AFFIDAVIT CAN BE USED, but should it?** Kids get along and selling the property immediately, then this is a viable cost effective solution (provide the title company will insure the sale). Kids do not get along, then probate the estate (intestate administration) so as to avoid conflict. Kids get along but do not plan to sell for years (i.e., the cabin on the lake), then either probate or use a Lack of Probate Affidavit and obtain a policy of title insurance.

The above examples cover most situations where a Lack of Probate Affidavit can be used, with RCW 11.04.250 and 290 as our key vesting statutes, unless it passes via a Community Property Agreement to a surviving spouse. However, there may be an assortment of other reasons to probate instead of using a Lack of Probate Affidavit, such as (a) using the 4-month Probate Notice to Creditors (rather than a Non-Probate Notice to Creditors procedure) to deal with creditors, (b) negotiating down a TEFRA/DSHS lien with the Office of Financial Recovery, and (c) difficulty in obtaining new hazard insurance on a home without a deed or without title insurance, to name a few.

If you use a recorded Lack of Probate Affidavit to clear title at the death of the first spouse, and then if the surviving spouse were to subsequently Quit Claim Deed the property to the kids, I have rarely encountered title issues with my clients in the past. In addition, I have frequently used two Lack of Probate Affidavits for married couples, the first being used to clear title when husband dies with a surviving spouse, and then subsequently used a Lack of Probate Affidavit when wife dies to clear title in the name of the kids. It's all about insurability.

With respect to a surviving spouse obtaining a loan on property after using a Lack of Probate Affidavit to clear husband's interest in wife. Remember, any lender will order a Lenders Policy of Title insurance before they will lend on the property. When the preliminary commitment is ordered (lender's policy), it will come back showing that it is vested in wife's name. The only time it would not be that way, is if the title company did not pick up the recorded Lack of Probate Affidavit during their search of the record (showing that it is still vested in husband and wife). In that case, simply email a recorded copy of the Affidavit to the title company and ask that they issue a supplemental report correcting the vesting. I have done this on a number of situations and it is an easy fix.

When kids are selling property they acquired via the vesting statute (as confirmed by the Lack of Probate Affidavit), then I usually like to order the preliminary commitment for title insurance before they list so I can give the title officer the recording number of the Lack of Probate Affidavit, the death certificate, and the Cause Number of the "Will only" filing (if there was one). If there is a DSHS lien, and if I know it is substantially less than the fair market value of the property (i.e., not needing a probate to negotiate down the lien), then I will reference the lien in the recorded Lack of Probate Affidavit (after confirming with OFR the amount of the lien), make sure OFR records the lien (i.e., easier to have it paid out of escrow), and notify the title officer at the time I order the preliminary commitment that a lien exists. Then once the commitment has been ordered, I tell the real estate agent to require all offers to include the use of our title company and my previously ordered commitment number.

Though I have been using Lack of Probate Affidavits for years to clear title without the necessity of probate, I find that I have been using them in less instances than before, either because they do not plan to sell in the near future (more often when kids inherit), a title office will not insure based on the Affidavit (which should be less of an occurrence now that Lack of Probate Affidavits are now a mainstream device), kids just do not get along well enough to risk dispute, or lien issues arise where a probate is a better way of handling them. In any case, it's all about insurability, and if you have not used Lack of Probate Affidavits much in the past, it would be prudent for all attorneys considering their use, to get to know one of the senior title officers at a title company in your area, and to discuss Affidavit use with them (what format they use, what information they would want to see, whether or not they charge an extra fee to insure off an Affidavit (as was broadly done in the past, but infrequent now). Remember, whatever the situation (with the exception of a surviving spouse with a CPA), Lack of Probate Affidavit use must match the intestate succession scheme of RCW 11.04.015. Consider asking your title officer to give their opinion on the 7 scenarios I illustrated above, and whether or not they would insure in those situations. And remember, not all title companies insure in the same manner. Insurance is simply a risk analysis for them. No one can make a title company insure, and if they won't, then simply probate.

Real Estate Excise Tax Affidavit use. With the recent changes in Inheritance WAC 458-61A-202 (recently codified as of 2/25/17), then the subsequent recording of a Lack of Probate Affidavit may require that it be accompanied by a Real Estate Excise Tax Affidavit. Recently, in Snohomish County, they are not requiring a REETA form when the Lack of Probate Affidavit is vesting to a surviving spouse. However, they are requiring a REETA form when the Lack of Probate Affidavit is vesting from a parent to their children. In contrast, in King County, they are not presently

requiring a REETA form for either spouse to spouse or parent to children. As such, I am presently preparing REETA forms for all cases and simply asking that the particular county disregard the REETA form if not required. Finally, since the Lack of Probate Affidavit now requires you to attach a certified copy of the death certificate, most counties will want you to redact the decedent's social security number and mother's maiden name. Recently, however, I found out that Jefferson County does not want you to redact anything on the certified copy of the death certificate (not even to mark on it "Exhibit A"). As such, I am hoping that the counties will eventually sort out their differences, or I will simply attach a certified copy of the death certificate, without redaction, and let the county Auditor redact what they feel is necessary.

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Example Lack of Probate Affidavits attached.

When recorded return to:

**SURVIVING SPOUSE VERSION**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**INSTRUCTION NOTES (Delete after drafting):** Requires Certified Copy of Death Certificate (possibly redacting social security and mother's maiden name, except for Jefferson County), Recorded Community Property Agreement (if applicable), and Copy of attached filed Will ("Will Only" filing, if applicable). The subsequent recording Lack of Probate Affidavit may need to be accompanied with Real Estate Tax Affidavit depending on the county

DOCUMENT TITLE:           Lack of Probate Affidavit

GRANTOR:                    **Smith, John A.** (deceased)

GRANTEE:                    **Smith, Jane A., a single woman**

LEGAL DESCRIPTION:      **[insert legal description]**

ASSESSOR'S TAX  
PARCEL NOS.:               **[insert parcel number]**

REFERENCE NOS. OF  
DOCUMENTS RELEASED  
OR ASSIGNED:              **[N/A if no community property  
agreement, or insert recording number of  
community agreement if there is one]**

**LACK OF PROBATE AFFIDAVIT**  
(Succession)

STATE OF WASHINGTON )  
   ) ss  
COUNTY OF SNOHOMISH)

I, **JANE A. SMITH**, being first duly sworn on oath, depose and say:

THAT I am the surviving spouse of JOHN A. SMITH, who died [intestate] on the 4th day of April, 2008, in Lynnwood, Snohomish County, Washington, and who was a resident of Lynnwood, Snohomish County, Washington, with a certified copy of said death certificate attached hereto as Exhibit A [redact SSN and mother's maiden name];

THAT the said JOHN A. SMITH and I were married on the 7th day of December, 1957, and that there were three children born of this marriage, namely, KEVIN A. SMITH, KERRI A. SMITH, and KRISTIN A. SMITH, all of whom are adults; that there were no other children born of JOHN A. SMITH who are now deceased leaving issue surviving, nor had he ever adopted any children;

THAT JOHN A. SMITH executed his Last Will and Testament on the 31st day of July, 2002, which Will has been filed with the Snohomish County Clerk, under Snohomish County Cause No. 16-4-00909-31, with a conformed copy of said Last Will and Testament attached hereto as Exhibit B. Since title to the subject community property herein passed to the Affiant, surviving spouse, via operation of law, then it is Affiant's intent not to probate said Will (as it is not required); OR THAT JOHN A. SMITH never executed a Last Will and Testament; however, JOHN A. SMITH'S entire estate, including real property interests (all of which were community property), passed to his wife, JANE A. SMITH, pursuant to intestate succession laws, RCW 11.04.015(1)(a);

THAT JOHN A. SMITH and I entered into a Community Property Agreement on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, which Agreement has been recorded with the Snohomish County Auditor, under Auditor's File No. \_\_\_\_\_, which is attached hereto as Exhibit C; [delete this paragraph completely if no Community Property Agreement]

THAT, pursuant to the above referenced documentation and pursuant to operation of law [choose this when no Community Property Agreement] OR pursuant to said Community Property Agreement [choose this when there is a Community Property Agreement], I am the sole and rightful heir to the real property described hereinbelow. My name, age, relationship and address is as follows:

JANE A. SMITH, age 78, Surviving Spouse

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

THAT the expenses of the last illness and funeral and burial of the decedent have been paid, as evidenced by receipts in my possession, or provisions have been made for full payment of any and all future and currently unknown expenses connected therewith;

THAT the decedent had never received from the State of Washington assistance consisting of nursing facility services, home and community-based services, related hospital and prescription drug services, or any other type of medical assistance; OR THAT the decedent did receive from the State of Washington nursing facility services, home and community-based services, related hospital and prescription drug services, and/or other needs-based benefits, and as such, there is maybe a Medicaid lien owing to the State of Washington in amounts to be determined after notice has been provided, {OR} a TEFRA/Medicaid lien owing to the State of Washington in the amount of \$\_\_\_\_\_, recorded under \_\_\_\_\_ County Auditor's File No. \_\_\_\_\_, which will be satisfied by Affiants herein, or satisfied upon closing of the subsequent sale of said property. [modify language as applicable]





When recorded return to:

SINGLE PARENT TO KIDS VERSION

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

INSTRUCTION NOTES (Delete after drafting): Requires Certified Copy of Death Certificate (possibly redacting social security and mother's maiden name, except for Jefferson County), and Copy of attached filed Will ("Will Only" filing, if applicable). The subsequent recording Lack of Probate Affidavit may need to be accompanied by Real Estate Tax Affidavit depending on county

DOCUMENT TITLE: Lack of Probate Affidavit

GRANTOR: Smith, Jane A. (deceased)

GRANTEE: Smith, Kevin A., a married man, but as his sole and separate estate,  
Smith, Kerri A., a married woman, but as her sole and separate estate, and  
Smith, Kristin A., a married woman, but as her sole and separate estate

LEGAL DESCRIPTION: [insert legal description]

ASSESSOR'S TAX PARCEL NOS.: [insert parcel number]

REFERENCE NOS. OF DOCUMENTS RELEASED OR ASSIGNED: N/A

LACK OF PROBATE AFFIDAVIT  
(Succession)

STATE OF WASHINGTON )  
  ) ss  
COUNTY OF SNOHOMISH)

We, KEVIN A. SMITH, KERRI A. SMITH, and KRISTIN A. SMITH, being first duly sworn on oath, depose and say:

THAT we are the surviving children of JANE A. SMITH, who died on the 4th day of April, 2008, in Lynnwood, Snohomish County, Washington, and who was a resident of Lynnwood, Snohomish County, Washington, with a certified copy of said death certificate attached hereto as Exhibit A [redact SSN and mother's maiden name];

THAT the said JANE A. SMITH was a single woman and that she had three children, namely, KEVIN A. SMITH, KERRI A. SMITH, and KRISTIN A. SMITH, all of whom are adults; that there were no other children born of JANE A. SMITH who are now deceased leaving issue surviving, nor had she ever adopted any children;

THAT JANE A. SMITH executed her Last Will and Testament on the 31st day of July, 2002, which Will has been filed with the Snohomish County Clerk, under Snohomish County Cause No. 16-4-00909-31, with a conformed copy of said Last Will and Testament attached hereto as Exhibit B. Since title to the subject property herein passed to the undersigned Affiant(s), via operation of law, then it is Affiants' intent not to probate said Will (as it is not required); OR THAT JANE A. SMITH never executed a Last Will and Testament; however, JANE A. SMITH'S entire estate, including real property interests, passed to her three children, namely KEVIN A. SMITH, KERRI A. SMITH, and KRISTIN A. SMITH, pursuant to intestate succession laws, RCW 11.04.015(2)(a), and via operation of law;

THAT, pursuant to the above referenced documentation and pursuant to operation of law we are the sole and rightful heirs to the real property described hereinbelow. Our names, ages, relationships and addresses are as follows:

KEVIN A. SMITH, age \_\_\_, Surviving Son

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

KERRI A. SMITH, age \_\_\_\_, Surviving Daughter

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

KRISTIN A. SMITH, age \_\_\_\_, Surviving Daughter

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

THAT the expenses of the last illness and funeral and burial of the decedent have been paid, as evidenced by receipts in my possession, or provisions have been made for full payment of any and all future and currently unknown expenses connected therewith;

THAT the decedent had never received from the State of Washington assistance consisting of nursing facility services, home and community-based services, related hospital and prescription drug services, or any other type of medical assistance; [use if deceased was not on Medicaid] OR THAT the decedent did receive from the State of Washington nursing facility services, home and community-based services, related hospital and prescription drug services, and as such, there is a TEFRA/Medicaid lien owing to the State of Washington in the amount of \$ \_\_\_\_\_, recorded under \_\_\_\_\_ County Auditor's File No. \_\_\_\_\_, which will be

satisfied by Affiants herein, or satisfied upon closing of the subsequent sale of said property. [use if decedent was on Medicaid]

THAT there is no State of Washington Inheritance Tax due as a result of the decedent's death;

THAT there is no Federal Estate tax due as a result of decedent's death;

THAT no probate of the Estate of JANE A. SMITH has been instituted, nor is such probate contemplated;

THAT all of the real property owned by the decedent at the time of her death, or in which she had an interest, was situated in Snohomish County, Washington and is more particularly described as follows:

[insert legal description]

Parcel No.: \_\_\_\_\_

THAT this affidavit is made solely to induce a title company to issue its policies of title insurance on real property passing to the affiant(s) in reliance upon the representations set forth above. Affiant(s) agree(s) to indemnify and hold the title company harmless from loss or damage which it may suffer as a result of said reliance.

\_\_\_\_\_  
KEVIN A. SMITH DATED: \_\_\_\_\_

\_\_\_\_\_  
KERRI A. SMITH DATED: \_\_\_\_\_

\_\_\_\_\_  
KRISTIN A. SMITH DATED: \_\_\_\_\_

STATE OF WASHINGTON )  
 )  
COUNTY OF SNOHOMISH)            ss

I certify that I know or have satisfactory evidence that **KEVIN A. SMITH** signed this instrument and acknowledged it to be **his** free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this \_\_\_\_ day of \_\_\_\_\_, **2016**.

\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at \_\_\_\_\_  
My commission expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 )  
COUNTY OF SNOHOMISH)            ss

I certify that I know or have satisfactory evidence that **KERRI A. SMITH** signed this instrument and acknowledged it to be **her** free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this \_\_\_\_ day of \_\_\_\_\_, **2016**.

\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at \_\_\_\_\_  
My commission expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF SNOHOMISH)

I certify that I know or have satisfactory evidence that **KRISTIN A. SMITH** signed this instrument and acknowledged it to be **her** free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this \_\_\_\_ day of \_\_\_\_\_, **2016**.

\_\_\_\_\_  
Notary Public in and for the State of Washington  
Residing at \_\_\_\_\_  
My commission expires: \_\_\_\_\_

**WAC 458-61A-202****Inheritance or devise.**

(1) **Introduction.** Transfers of real property through a devise by will or inheritance are not subject to the real estate excise tax. For the purpose of this exemption, it does not matter whether the real property transferred was encumbered by underlying debt at the time it was inherited or devised.

(2) **Definitions.** For the purposes of this rule, the following definitions apply:

(a) "Heir" means a person, including the surviving spouse or surviving domestic partner, who is entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate;

(b) "Lack of probate affidavit" means a signed and notarized document declaring that the affiant or affiants are the rightful heir or heirs to the property and containing the following information:

(i) The names of the affiant or affiants;

(ii) The relationship of the affiant or affiants to the decedent;

(iii) The names of all other heirs of the decedent living at the time of the decedent's death;

(iv) A description of the real property;

(v) Whether the decedent left a will that includes a devise of real property; and

(vi) Any other information the department may require.

(c) "Nonpro rata distribution" is a distribution in which the transfer of real property to the heirs or devisees may not be in proportion to their interests.

(3) **Examples.** This rule contains examples that identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(4) **Nonpro rata distributions.** A nonpro rata distribution made by a personal representative of a probated estate or by the trustee of a trust is not subject to the real estate excise tax if:

(a) The transfer is authorized under the nonintervention powers of a personal representative under RCW 11.68.090 or under the nonpro rata distribution powers of a trustee under RCW 11.98.070(15); and

(b) If no consideration is given to the personal representative or the trustee for the transfer.

For the purpose of this rule, consideration does not include the indebtedness balance of any real property that is encumbered by a security lien.

(c) **Example 1.** Aunt Mary wills her entire estate equally to her three nieces, Meg, Beth, and Jo. The estate consists of her primary residence, a cottage at the ocean, and significant cash assets, among other things. Rather than take title to the two parcels of real estate in all three names, the estate may be distributed by deeding the primary residence to Meg, the oceanfront property to Beth, and the majority of the cash assets to Jo.

(5) **Subsequent transfers.** A transfer of property from an heir to a third party is subject to the real estate excise tax.

(a) **Example 2.** Steve inherits real property from his mother's estate. He sells the property to his son for \$50,000. The transfer of the property from the estate to Steve is exempt from real estate excise tax. The subsequent sale of the property to his son is a taxable event, and real estate excise tax is due based upon the full sales price of \$50,000.

(b) **Example 3.** Susan inherits real property from her father's estate. She decides to sell it to a friend on a real estate contract for \$100,000. Real estate excise tax is due on the \$100,000.

(c) **Example 4.** Sheri and her two sisters inherit their father's home, valued at \$180,000, in equal portions. Sheri wants sole ownership of the home, but there are not "in-kind" assets of sufficient value to be distributed by the personal representative to her two sisters in a nonpro rata distribution. In order to take title directly from the personal representative, Sheri pays each of her sisters \$60,000, and they quitclaim their right to the property under the will. Real estate excise tax is due on the total of \$120,000 paid for the property.

(6) **Exemptions and required documentation.** A transfer of real property through a devise by will or inheritance is exempt from the real estate excise tax for the following types of transfers. Refer to WAC 458-61A-303 (Affidavit) to determine if a real estate excise tax affidavit is required to document the exempt transfers. Additional documentation may be required to substantiate each exemption, and must be provided to the county treasurer of the county in which the real property is located and recorded with the county auditor:

(a) **Community property agreement or right of survivorship.** If the transfer of real property to a surviving spouse or surviving domestic partner is in accordance with a community property agreement or right of survivorship clause, copies of the recorded agreement and a certified copy of the death certificate are required.

(b) **Joint tenants with rights of survivorship and remainder interests.** If real property is transferred upon the death of a joint tenant to the remaining joint tenants under right of survivorship, a certified copy of the death certificate is required.

(c) **Life estates and remainder interests.** The transfer of a life estate to the grantor with a remainder interest to another party is not a taxable transfer if no consideration passes.

**Example 5.** Nate and Libby convey their property to their son, Rex, and retain a life estate. The transaction is not subject to real estate excise tax because Rex pays no consideration. Upon the deaths of Nate and Libby, the title will vest in Rex and no real estate excise tax is due. However, if Nate and Libby convey their property to Rex, while retaining a life estate, and Rex pays any consideration for his future interest, the transaction is taxable. Real estate excise tax is due on the total consideration paid.

(d) **Transfer on death deeds.** If the transfer of real property is pursuant to a previously recorded transfer on death deed, upon the death of the transferor to the beneficiary(ies) named in the transfer on death deed, a certified copy of the death certificate is required. However, if the transfer of real property pursuant to a transfer on death deed satisfies a contractual obligation of the transferor owed to the beneficiary(ies) designated in the transfer on death deed, real estate excise tax is due on the transfer.

(e) **Trusts.** If real property is transferred under the terms of a trust instrument, a certified copy of the death certificate and a copy of that portion of the trust instrument showing the authority of the grantor are required. For additional information on the application of real estate excise tax to transfers of real property under the terms of a trust, see WAC 458-61A-210 (Irrevocable trusts) and WAC 458-61A-211 (Mere change in identity or form—Family corporations and partnerships).

(f) **Probate.** For real property transferred under a probated will, a certified copy of the letters testamentary, or in the case of intestate administration, a certified copy of the letters of administration, showing that the grantor is the court appointed executor/executrix or administrator is required.

(g) **Court order.** If real property is transferred pursuant to a court order, a certified copy of the court order requiring the transfer of property and confirming that the grantor is required to do so under the terms of the order is required.

(h) **Community property interest.** If the community property interest of the decedent is transferred to a surviving spouse or surviving domestic partner absent the documentation described in (a), (b), (e), (f), or (g) of this subsection, a certified copy of the death certificate and a signed lack of probate affidavit from the surviving spouse or surviving domestic partner affirming that he or she is the sole and rightful heir to the property are required. Refer to the department's web site at [dor.wa.gov](http://dor.wa.gov) for an example of the lack of probate affidavit that may be used.

(i) **Nonprobated will or operation of law.** If the property is transferred to one or more heirs by operation of law, or transferred under a will that has not been probated, but absent the documentation described in (a), (b), (e), (f), or (g) of this subsection, a certified copy of the death certificate and a signed lack of probate affidavit affirming that the affiant or affiants are the sole and rightful heirs to the property are required. When the property is transferred and the decedent-transferor also inherited the property from his or her spouse or domestic partner, but never transferred title to the property into the decedent-transferor's name, the transferee (s) must provide:

- (i) A certified copy of the death certificate for the decedent-transferor;
- (ii) A certified copy of the death certificate for the spouse or domestic partner from whom the decedent-transferor inherited the real property; and
- (iii) A lack of probate affidavit affirming that the affiant or affiants are the rightful heirs to the property.

[Statutory Authority: RCW 82.45.150 and 82.01.060(2). WSR 17-04-042, § 458-61A-202, filed 1/25/17, effective 2/25/17. Statutory Authority: RCW 82.45.150, 82.32.300, and 82.01.060(2). WSR 15-02-018, § 458-61A-202, filed 12/29/14, effective 1/29/15. Statutory Authority: RCW 82.45.150, 82.32.300, and 82.01.060. WSR 14-06-060, § 458-61A-202, filed 2/28/14, effective 3/31/14. Statutory Authority: 2009 c 521. WSR 10-09-050, § 458-61A-202, filed 4/15/10, effective 5/16/10. Statutory Authority: RCW 82.45.150. WSR 08-24-095, § 458-61A-202, filed 12/2/08, effective 1/2/09. Statutory Authority: RCW 82.32.300, 82.01.060(2), and 82.45.150. WSR 05-23-093, § 458-61A-202, filed 11/16/05, effective 12/17/05.]





PLEASE TYPE OR PRINT

REAL ESTATE EXCISE TAX AFFIDAVIT

CHAPTER 82.45 RCW - CHAPTER 458-61A WAC

This form is your receipt when stamped by cashier.

THIS AFFIDAVIT WILL NOT BE ACCEPTED UNLESS ALL AREAS ON ALL PAGES ARE FULLY COMPLETED

(See back of last page for instructions)

Check box if partial sale of property

If multiple owners, list percentage of ownership next to name.

Form sections 1-3: Seller/Grantor and Buyer/Grantee information, including names, addresses, and tax correspondence details.

Form sections 4-5: Property address, location selection, and land use code selection.

Form sections 6-8: Continuation notices, owner signatures, and certification of truth.

Form sections 7-8: Personal property included in selling price and tax calculation table.

Form sections 9-10: Tax calculation table and final certification.



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Form sections 1-3: Seller/Grantor and Buyer/Grantee information, including names, addresses, and tax correspondence details.

Form section 4: Property address, location selection, and legal description.

Form section 5: Land Use Code selection and exemption questions.

Form section 6: Continuation and compliance questions.

Form section 7: Assessor and owner signature lines.

Form section 7: Personal property inclusion and tax calculation table.

Form section 8: Certification and signature lines for Grantor and Grantee.

Perjury: Perjury is a class C felony which is punishable by imprisonment in the state correctional institution for a maximum term of not more than five years, or by a fine in an amount fixed by the court of not more than five thousand dollars (\$5,000.00), or by both imprisonment and fine (RCW 9A.20.020 (1C)).