A Beginner's Guide to Asset Protection and Estate Planning for Washington Residents

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II. ABSTRACT

The purpose of this project is to present legal considerations and options available to residents of Washington State in planning for transferring their property at death. The project focuses on issues unique to Washington and recent additions to more widely available trusts.

Washington is one of the few remaining community property states. Married persons in Washington should understand how the default community property laws affect the disposition of their property. Washington recognizes several types of will substitutes, an idea growing in popularity as people seek to avoid the probate process.

Washington's default rules of passing property through intestacy are also explored as an option for people who may be satisfied with those results. For individuals who prefer to rely on a will, the project delves into Washington laws regarding disposition through a will. Washington is currently the only state allowing residents to change the beneficiaries of certain will substitutes, or non-probate assets, in a will. The project explores this recent law in more detail.

Finally, the project includes options for passing property through a trust: Washington's Charitable Trusts; IRS allowed Charitable Remainder Trusts; Domestic Asset Protection Trusts available from four state jurisdictions; and, The Bahamas Purpose Trusts created in 2004.

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IV: INTRODUCTION

The purpose of this project is to present legal considerations and options available to Washington State residents planning their estates. This paper is written for Washington residents asking the question, “What are the basic legal tools I can use to leave my property to the recipients of my choice?” This project is unique to the field of estate planning in its broad scope of estate subjects written to a specific Washington State consumer audience. The project focuses on: individual interests in jointly held property; the use of will substitutes; intestacy; wills; and, specific trusts. The paper is not exhaustive on any of the subjects covered, yet does present enough detail that even new state residents or clients unfamiliar with estate planning will garner a sufficient base of knowledge to make informed decisions.

Individuals can generally leave their individual property to whomever they wish, after fulfilling one’s tax and credit obligations. An interest in property jointly held with other individuals adds another layer of complexity. This project delineates estate-planning considerations for property owned as: community property; quasi-community property; joint tenancy; and, tenancy in common. A short section highlights community property-like concerns for those involved in meretricious relationships.

Washington recognizes several types of will substitutes, an idea growing in popularity as people seek to avoid the probate process or leave certain assets directly to specified individuals. Will substitutes discussed in this paper include revocable living trusts, contracts to make wills, community property agreements, life insurance, joint bank accounts, Totten Trusts and U.S. Savings Bonds.

Washington’s default rules of passing property through intestacy are also explored as an option for people who may be satisfied with those results. Special emphasis is given to intestacy rules for community property, separate property and escheat.

For individuals who prefer to resolve their own distribution of property, the project delves into Washington laws regarding disposition through a will. The paper looks at the legal effects of a will, the requirements of a will in Washington, and Washington’s public policy to uphold certain responsibilities through placing statutory limitations to disposing of an estate as one might desire. Washington is currently the only state allowing residents to change the beneficiaries of certain non-probate assets in a will. The project explores this trendy law in more detail.

Finally, the project includes options for passing property through a trust. Washington's Charitable Trust is contrasted to the IRS allowed Charitable Remainder Trust. Domestic Asset Protection Trusts are now available in four state jurisdictions. Washington residents may take advantage of these trusts even though Washington does not offer such trusts in state. The Bahamas passed legislation in 2004 to create a new type of Purpose Trusts; an option higher net-worth individuals may wish to investigate.

Many estate-planning strategies focus on reducing taxes and limiting exposure to future creditors. While trusts can provide this dual protection, the section on trusts in this project focuses instead on how certain trusts function rather than analyzing the potential tax savings or creditor protection available from each type of trust included.

V: REVIEW

Several books, although not specific to Washington State, offer excellent interstate overviews of estate planning and wills. Roger Andersen's *Understanding Trusts and Estates;* Alexander Bove's *Complete Guide to Wills, Estates, and Trusts;* John Price's *Contemporary Estate Planning*; and *Wills, Trusts, and Estates* by Jesse Dukeminier & Stanley M. Johanson are among the better tome's available. Price, perhaps because he is a Washington attorney, includes several references to Washington law as it differs from the majority of states. These works supplement the analysis of regulations can case decisions in the sections on wills (Section VI.A.4.a – 7.C.3) and Charitable Trusts (Section 7.D.1).

The jointly held property section (Section 7.A) brings Washington statutory law and Washington judicial precedence under scrutiny as the research exclusively analyzes those sources to describe the operation of jointly held property in the state.

Perhaps one of the nation's foremost commentators on issues related to wills and will substitutes, Professor John Langbein (1987) observed a fundamental change in the nature of wealth with the increase in demand for probate avoidance. He argued for unifying the constructional law of wills and will substitutes. Several researchers demonstrated one method to accomplish this goal entails allowing a will to change the beneficiary of a will substitute (called a "Superwill" or "Blockbusterwill" clause).

More than a decade before Washington passed the nation's first Superwill regulation, Debra Dubovich (1987) and Mark Kaufmann (1988) discussed will substitutes and the theoretical framework for effective Superwill legislation. Roberta Kwall & Anthony Aiello expanded the discussion with concerns about unilaterally changing enforceable contracts or a necessity of including will substitutes in the probate process for resolution of disputes. When Washington finally created Superwill statutes, Cynthia Artura published an article describing the boundaries of the legislation, urging the Washington legislature to consider expanding the will substitutes included. Section 7.B in this project evaluates Washington's will substitutes and section 7.D.4 describes the operation of Washington's Superwill legislation.

Kris Bulcroft, PhD., Dept. of Sociology, Western Washington University and Phyllis Johnson, Ph.D., School of Family and Nutritional Sciences, University of British Columbia (2000) compared the statutory regulations regarding legal standards of succession and inheritance in British Columbia and Washington State. Their research revealed not only the rules of testacy and intestacy in each jurisdiction, but also included how social values regarding family support, government taxation policies and succession laws, have real implications for the way in which assets are transferred. Section 7.C merely summarizes the Washington default Intestacy rules, leaving for others the task of providing meaning to these rules.

Alaska's passage of their asset protection trust triggered similar legislation in financially progressive states and a wave of law journal articles. Jonathan Blattmachr (1997) contrasted the estate-planning benefits of domestic to offshore asset protection trusts, as did John Sullivan (1998) the following year. When Delaware became the second state to offer these trusts, Amy Wagenfeld (1999) delineated the differences between the legislation in the two states. Randall Gingiss (1999) argued that the trusts should be eliminated to strengthen creditor's rights, although Susanna Brennan (2000) countered that, compared to offshore trusts, domestic trusts actually strengthened the ability of creditors to reach certain types of assets. Two more states, Nevada and Rhode Island, joined the list of states offering these trusts. Washington residents may take advantage of them and should at least be aware of the options. Section 7.E.2 dissects the Alaska trust law, and then compares legislation from the other three states to Alaska's law so consumers can determine if one jurisdiction better meets their individual needs.

Jonathan Mezrich wrote a stellar article (1994) on asset protection trusts available in the Bahamas and cross-referenced transfers made to such trusts with the Pennsylvania Fraudulent Transfers Act. His research highlights the legitimate objectives behind offshore trusts. In 2004 the Bahamas added a new type of trust and lengthened the time period for the rule against perpetuities. Based on information obtained from the Bahamas Department of Finance, this project extends Mezrich's research by concentrating on the new Purpose Trust concept. Some Washington residents may find that the Bahamas Purpose Trust idea meets their needs better than other trusts discussed.

VI: METHODOLOGY

A. Analysis and findings:

1) Individual Interests in Jointly Held Property

Disposing of property held jointly with another person may involve legal rights held by the other property owners. This section analyzes the Washington State regulations and case law regarding the ownership of property held as community property, joint tenancy or tenancy in common.

A) Community Property

Washington statutes recognize the validity of a marriage as determined by the law of the jurisdiction where the marriage took place. For example, Washington recognizes common law marriages of partners who resided in a state that recognizes common law marriage and met that State's requirements before moving to Washington. All property owned by married persons in Washington can be categorized as individual separate property of the husband or wife or as community property. All property acquired during the marriage by a married person while domiciled in Washington is presumed community property. [RCW §26.16.030] Property takes the character of assets used to acquire. For example, if a married person purchases rental office space with separate property, the office and income from the office are considered separate property. [RCW §26.16.010] The character of an asset, such as the primary residence, purchased with part primary funds and part community property is proportioned accordingly. Wages of both the husband and wife earned during marriage are community property. Retirement benefits provided by an employer are considered additional compensation for services, therefore community property to the extent earned during marriage and an interest to be divided upon dissolution of the marital community. [*Wilder v. Wilder*]

Inheritances and gifts are the separate property of the recipient even if received during marriage. [RCW §26.16.010] Gifts to both spouses jointly are presumed community property. [*In re Salvini's Estate*] The cash value of life insurance policies are prorated according to the percentage acquired with community or separate property.

As long as one spouse is not attempting to defraud the other, United States Savings Bonds, registered to one spouse, are the property of the registered owner, or the owner's heirs, even if purchased with community funds. [*Free v. Bland*] Railroad retirement benefits are separate property to the extent they parallel social security benefits. [45 U.S.C. §231m(b)(2)] Military disability benefits are separate property of the military person. [*Mansell v. Mansell*] Other federal government pensions are treated as community property. [10 U.S.C. §1408(c)]

Separate property may be converted to community property, or community property to separate property of either spouse, by an agreement between the spouses. Spouses may also convert their community ownership into joint tenancy or tenancy in common. The validity of such agreements depends on whether both parties entered into the agreement voluntarily, and with full disclosure and full knowledge of the rights involved. [*In re Marriage of Hadley*] Agreements converting community held real property must be acknowledged in writing.

Commingling separate and community property to the extent that it is impossible to ascertain each source results in a presumption of community property for the entire asset. This presumption can be rebutted in two ways. First, commingled separate property retains its character if it can be traced back with particularity. [*Berol v. Berol*] Second, family expenses are presumed paid from community property. If, at the time of acquisition of a disputed item, one party shows that all of the community property was exhausted with family expenses, then remaining funds and items purchased by them are deemed separate property. [*Pollack v. Pollack*]

The community property statute gives equal powers of management and control over community property to both spouses. [RCW §26.16.030] Either spouse, acting alone, may manage and control community property with the same power as their separate property except for specific situations that require joint decisions. In Washington, both spouses must agree to the purchase, sale, conveyance or encumbrance of community real property or community business assets where both spouses participate in management; and to the sale, conveyance or encumbrance of community household goods, furnishings or appliances. [*Id.*] This means that one spouse, acting alone to purchase household goods, furnishings or appliances on credit, encumbers community property assets for the payment but not the separate property of the other spouse.

Washington courts extend community property principles to two situations that are not different ways of owning property but can change the way an individual's property is divided. The first, quasi-community property, operates at the first to die of a couple who move to Washington from a non-community property state. The second, meretricious relationships, is imposed by a court when requested at the dissolution of a non-marital relationship. Single individuals should understand the latter legal fiction to prevent potential undesirable property transfers.

B) Quasi-Community Property

Quasi-community property concerns the interest of a surviving spouse in the property of a deceased spouse brought into Washington from another state. The surviving spouse is entitled to one-half of all non-community property acquired by the deceased spouse while living out-of-state (except out-of-state property not controlled by Washington law), was owned by the spouse at time of death and would have been community property if acquired while the spouse lived in Washington. The surviving spouse may even regain one-half of quasi-community property that was transferred by the deceased spouse to a third party if the transfer occurred within three years of death, if the transfer was made without the surviving spouse’s consent and for less than adequate consideration, and if the transfer was incomplete, leaving the deceased spouse some control over the right in the property. [RCW §26.16.220-.250]

C) Meretricious Relationships

Washington courts examine the division of property of unmarried cohabitants if there is a meretricious relationship. A meretricious relationship is defined as a “stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.” [*Connell v. Francisco*] The key to meretricious relationships in Washington is the stable quality of the relationship, not necessarily a minimum length. Where such a relationship is asserted, the court will make a just and equitable division of the property, examining each case on its facts and considering each party’s contribution to the property in question. Factors the courts examine include:

- The length of the relationship
- The time the parties have cohabitated continuously
- The nature of the relationship
- The extent to which funds and assets have been commingled
- The intent of the parties in question

If the court finds that a relationship meets the meretricious definition, then the “relationship property” will be evaluated and divided in an equitable distribution.

Traditionally Washington did not apply this doctrine to same-sex partners. An appellate court reversed that trend to allow this doctrine to apply to same-sex couples. [*Gormley v. Robertson*] Washington State then passed domestic partnership rules which are a more appropriate legal basis for property disputes between same-sex partners if their relationship is registered.

D) Registered Domestic Partnerships

Washington State Legislature created domestic partnerships in 2007. Property belonging to a domestic partner is treated the same as a married spouse. Any privilege, immunity, right (such as community property), benefit, or responsibility granted to an individual because the individual is or was a spouse, is granted on equivalent terms to an individual when the individual is in a state registered domestic partnership. [RCW §26.60.015]

To enter into a state registered domestic partnership the two persons involved must meet the following requirements [RCW §26.60.030]:

(1) Both persons share a common residence;

(2) Both persons are at least eighteen years of age;

(3) Neither person is married to someone other than the party to the domestic partnership and neither person is in a state registered domestic partnership with another person;

(4) Both persons are capable of consenting to the domestic partnership;

(5) <u>Both</u> of the following are true:

(a) The persons are not nearer of kin to each other than second cousins, whether of the whole or half blood computing by the rules of the civil law; and

(b) Neither person is a sibling, child, grandchild, aunt, uncle, niece, or nephew to the other person; <u>and</u>

(6) Either

(a) both persons are members of the same sex; or

(b) at least one of the persons is sixty-two years of age or older.

E) Joint Tenancy Property

A joint tenancy in property can be created between two or more co-tenants. The distinguishing feature of a joint tenancy is the right of survivorship. Conceptually, when one joint tenant dies, the survivor(s) retains an undivided right in the property no longer subject to the interests of the deceased co-tenant. The right of survivorship aspect of joint tenancy acts as a will substitute, discussed further *supra*, meaning that a joint tenant cannot bequeath a joint tenancy interest in a will. Individuals who hold property as a joint tenant should also understand their property rights in case of a severance of the joint tenancy.

Common law required four unities to create joint tenancy: time, title, interest and possession. [*Merrick v. Peterson*] In Washington, an owner can create a joint tenancy in a single deed even though the unities of time and title are not satisfied. However, Washington requires a clear expression of intent to create a joint tenancy or a tenancy in common will be presumed. Washington does not recognize tenancy by the entirety. Specifically, a joint tenancy requires the intention to create a right of survivorship. [RCW §§64.28.010-.020]

A joint tenancy can be terminated by a suit for partition, which can be brought by any tenant, or by specific acts of any joint tenant. When a joint tenant conveys an undivided interest to an outside party, the transferee takes that interest as a tenant in common. Washington follows the majority of states in that a lien against one interest in a joint tenancy does not destroy the joint tenancy. [*Logan v. Brooks*] A severance only occurs if a lien is foreclosed and the property sold. [RCW §7.28.230] Washington is in the minority, however, regarding contracts to convey a joint tenancy interest in the future. If the conveying tenant dies before title is transferred, the transferee does not have an equitable conversion claim to become a tenant in common with the original joint tenant(s). [*Estate of Phillips v. Nyhus*]

Joint tenancy does not protect property from creditors or taxes. The obligations of one tenant do not implicate the remaining co-tenants. If one individual transfers property into a joint tenancy without receiving adequate consideration, a current, equally divided interest is created for the other tenant(s) for which a gift tax may apply. That individual's creditors cannot reach the other interest(s), other than for fraud, but the individual does not have a right to reclaim or control the other interests other than the right of survivorship. Any co-tenant can transfer, convey or sell their interest in the joint tenancy without approval from the remaining tenant(s). Joint tenancy should only be entered into when the parties intend to create a right of survivorship in that property.

F) Tenancy in Common

A tenancy in common is a concurrent estate with no right of survivorship. Each tenant is entitled to possession of the entire property even if they acquire their interest at different times, by different instruments or have unequal interests. Each owner has a distinct, proportionate, undivided interest in the property. This interest is freely alienable by inter vivos and testamentary transfer, is inheritable, and is subject to the claims of the tenant's creditors.

In Washington, multiple grantees of a property are presumed to take as tenants in common. A tenancy in common is also created when a joint tenancy is severed or when community property is not divided upon dissolution of a marriage.

2) Passing Property Through Will Substitutes

The use of will substitutes allows a decedent to achieve a nontestamentary estate disposition. (Kaufmann, at 1019). Will substitutes are created by documents that have the legal effect of passing asset title directly to stated individuals. Washington State recognizes the inherent validity of will substitutes as a means to dispose of assets at death. Will substitutes benefit both testators and beneficiaries by simplifying the disposition of a testator's estates and avoiding the formalities of will execution required by the Statutes of Wills. They enable beneficiaries to avoid the delays and costs of probate, protect the assets from attachment by estate creditors, and avoid delays in beneficiaries' receipt of title and possession of the property. While the disposition of probate assets can entail a complicated process taking up to one year, beneficiaries generally receive nonprobate property shortly after the decedent's death. Trusts are discussed in more detail in a separate section (*infra*) but the basic concept of revocable living trusts, a popular will substitute and estate-planning tool, is discussed here.

Assets transferred through will substitutes do not become part of the testator's probate estate. Generally, probate courts do not have jurisdiction over nonprobate transfers. [Andersen, at 123] However, individuals using will substitutes should not assume the property passes completely free of probate procedures. Washington probate law impacts the transfer of nonprobate assets at several junctures, including:

- Revocation of the designation of a former spouse as a beneficiary (RCW §11.07.010);
- Rules of abatement (RCW §11.10.040);
- Creditors' claims, including notice requirements (RCW §11.18.200);
- Notice requirements to beneficiaries or transferees (RCW §11.28.237);
- Administration by the personal representative (RCW §11.48.010); and
- Inclusion in the determination of estate solvency and the availability of nonintervention powers (RCW §11.68.011).

A) Revocable Living Trusts

Revocable living trusts (RLTs) are the most flexible will substitutes because a donor has the ability to draft the dispositive and administrative provisions according to his wishes. [Dukeminier & Johanson, 344] Under a RLT, an interest passes to the beneficiary while the settlor is alive, but becomes possessory only on the settlor's death. The Statute of Wills is avoided because the interest passes while the settlor is alive. While granting the trustee legal title to the property, the trustor generally retains the right to the income of the trust for life as well as the power to amend, alter, or revoke the trust in accordance with its terms. [Kwall & Aiello, 283]

RLTs are frequently combined with a pour-over will, a disposition in a will that transfers property, usually the remainder of an estate, into an already established trust. A pour-over provision into an established RLT does not make the RLT testamentary. [RCW §11.12.250] RLTs can also save administrative costs since a judicial accounting is not required over the trust if the settlor so provides.

B) Contracts to Make (or Not Make) Wills

A contract to make a particular testamentary disposition or to die intestate is not against public policy in Washington. The property included in such a contract, if any, passes under the contract rather than the will. The validity of such a contract is determined under usual rules of contract. The testator's will is entitled to probate even though it fails to dispose of the property as agreed in the contract. The proper remedy is a suit against the decedent's personal representative for breach of contract. Most contracts promise specific property on death and Washington usually grants specific performance in a suit by the promisee.

A contract not to revoke a will does not make the will irrevocable since, by statutory definition, a will is an ambulatory instrument that may be revoked at any time before the testator's death. [RCW §11.12.060] Such a contract is still enforceable and breach of it raises claim for damages enforceable against the estate. The contract may be a separate agreement or evidenced by the terms of the will as in joint or mutual wills.

C) Community Property Agreements

Washington authorizes spouses to enter into an agreement concerning the status or disposition of community property to take effect upon the death of either. A statutory community property agreement (CPA) must be witnessed, acknowledged and certified. [RCW §26.16.120] Rescinding a community property agreement requires mutual consent of both parties. The CPA expires with divorce because there is no longer any community property. Assets covered by the agreement are disposed by the agreement and are not part of the deceased contracting party's estate. Where there is a valid CPA converting all separate property into community property, and the agreement conveys all property to a surviving spouse, the agreement even defeats a joint tenancy. [*Lyon v. Lyon*]

A later inconsistent will cannot supercede an effective CPA because the assets governed by the agreement are not part of the estate and are not subject to administration. A surviving spouse who acts as executor of the deceased spouse's will, and elects to probate the will and accept its benefits, is estopped from claiming benefits under conflicting CPA provisions. [*Norris v. Norris*]

D) Life Insurance

Life insurance is arguably the most widely used will substitute. Life insurance contracts and proceeds are not considered non-probate assets in Washington. [RCW §11.02.005(15)] A life insurance contract passes an economic interest to a beneficiary at the insured's death, but its disposition, including naming the beneficiary, is governed by the terms of the contract, not the statute of wills.

Life insurance can also be construed as a trust. In Washington, any life insurance policy or retirement plan payment provision may designate a trustee beneficiary by will or under a trust agreement. Where the trustee is named by will, the proceeds of the insurance policy or retirement plan are paid immediately to the trustee after the proving of the will. [RCW §11.98.170] Where the trustee is named under a trust agreement, proceeds paid into the trust do not need to wait for a proving of the will.

E) Joint Bank Accounts

Joint bank or investment accounts can be created as tenants in common or as joint tenants with right of survivorship (JTWROS). Some banks do not create joint accounts as tenants in common because of the complications of tracking proportionate ownership. Traditionally, joint tenants must receive their interest at the same time and through the same document (see Joint Tenancy, supra). However, with assets such as bank or investment accounts, account owners can usually create or change an existing ownership arrangement to a joint tenancy by simply notifying the institution. The IRS may treat a change in ownership as a taxable gift depending on who contributed the funds and the amounts involved. A JTWROS account means that the co-owners of the account each have full access to all of the funds in the account and that at the death of one of the owners, the account is fully owned by the remaining owner(s).

Sometimes people misunderstand the concept and legal ramifications of a JTWROS account, as evidenced by the following provision in a will disputed recently in a WA court:

"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." [*In re Estate of Burks*]

One disturbing aspect of this provision, which the court did not need to consider (see Superwills, infra), is that the testator attempted to use her will to redefine the characteristics of her JTWROS accounts. She conveniently created joint accounts so her children could write checks for her rather than create the more expensive option of a power of attorney, taking advantage of an agreement with the bank to consider the other party a co-owner of the entire fund. In her will she claimed that she never intended to consider the property as joint property between her and the other owner(s). Courts should not, as a matter of public policy, enforce testamentary provisions such as this one, and individuals should abstain from joint tenancy when they don't intend to create that type of account.

F) Bank Account (Totten) Trusts

A Totten trust is a simple form of a revocable grantor trust typically used to pass assets outside of probate. Most banks have a fill-in-the-blank form that a depositor can use to create this type of trust. In a Totten trust, the depositor is the trustor, the trustee and the only beneficiary during his or her life. A contingent beneficiary, named in the trust instrument, takes ownership of the account upon the death of the trustor.

A Totten trust is revocable, allowing the trustor to amend or revoke the trust during his or her lifetime. The easiest way to do this is simply to spend the money in the account. Because the contingent beneficiary has no rights in the account during the trustor's life, the Totten trust is safer than, for example, joint tenancy. Creditors of the beneficiary cannot reach the account, the beneficiary cannot spend the money in the account during the trustor's lifetime, and the beneficiary does not have a right to any minimum amount of funds.

G) U.S. Savings Bonds

United States Savings Bonds are specifically recognized in Washington statutes as passing ownership to a co-owner or payable on death payee in the event a registered owner dies. If either co-owner of bonds registered in two names as co-owners dies without having surrendered the bond for payment, the surviving co-owner will be the sole and absolute owner of the bond. [RCW 11.04.230] In the case of bonds registered in the name of one person payable on death to another, if the registered owner dies without having surrendered the bond for payment, and is survived by the beneficiary, the beneficiary will be the sole and absolute owner of the bond. [RCW 11.04.240]

3) Passing Property Through Intestacy

Property passes under Washington Probate law relating to descent and distribution when the decedent dies without leaving a will, the decedent's will is denied probate due to improper execution or successful contest; or the decedent's will fails to completely dispose of all property either because a gift failed or because the will does not contain a proper residuary clause.

Since creating a will neither avoids probate nor reduces estate taxes, individuals satisfied with the results of Washington's default intestacy rules and the length of time involved in the probate process could rely on intestacy statutes to allocate their property at death. Intestacy rules primarily concern community property, individual or separate property and kinship groups.

A) Community Property

Upon death, one-half of the decedent's community property passes to the spouse by operation of community property law. The other one-half is subject to testamentary disposition or intestate distribution. Intestate distribution passes the second one-half share of community property to the surviving spouse in addition to the one-half share that passed under community property law. In contrast to rules governing separate property, all intestate community property passes to the surviving spouse regardless of whether the decedent is survived by issue, parents, or other relatives. [RCW §11.04.010]

The whole of the community property is subject to probate administration, including the payment of obligations and debts of the community, the award in lieu of homestead, the allowance for family support, and any other matter for which the community would be responsible or liable if the decedent were living. [RCW §11.02.070]

B) Separate Property

A surviving spouse receives the entire net separate property if the decedent has no issue, three-quarters of the net separate property if the decedent has no issue but is also survived by parents or issue of parents, and one-half of the net separate property if the decedent is also survived by issue.

Shares of the net separate property not distributable to the surviving spouse, or if there is no surviving spouse, are distributed equally if the surviving relations are in the same degree of kinship but by representation for those of unequal degree. [RCW §11.04.015]

C) Escheat

Whenever any person dies leaving property subject to Washington jurisdiction and without being survived by any person entitled to it under Washington laws, such property is designated escheat property and becomes property of the state of Washington. [RCW §11.08.140] Property escheats to Washington rather than the state where the decedent was domiciled at the time of death. [*O'Keefe v. State*]

A stepchild or foster child has no right to inherit via intestacy from a stepparent or foster parent who is not related by blood. [*In re Smith*] However, if no blood relatives of the decedent survive, a stepchild (but not foster child) can inherit to avoid escheat. [RCW §11.04.095]

4) Passing Property With a Will

A) The Effects of a Will

A properly drafted and executed will is essential in virtually every estate plan. A will allows individuals to identify the person they wish to administer their estate at death (referred to as the "executor" or "personal representative"), designate guardians for minor children and establish a scheme for the proper distribution of their estate. For portions of estates left to minors, young adults or others who may lack the skills to properly care for the assets received from the estate, a testator should consider including appropriate provisions for the management of the estate (referred to as a trust) until the intended beneficiaries reach an appropriate age or position in life before the estate is distributed. The trust may include appropriate distributions for the beneficiary and a testator may name the trustee of the trust under terms of the will.

Many people mistakenly believe if they have a will they can avoid probate. A will is a blueprint for the probate of an estate upon death. Will substitutes, which may avoid probate, are discussed *infra*. Because the probate process has been vastly simplified under Washington law, there is rarely a reason to use will substitutes solely for the purpose of avoiding probate.

The essential characteristic of a will is that, even though an individual executes it during his lifetime, it has no legal force or operative effect until the testator's death. A court will uphold the validity of a will only if it deals with one or more of the following:

(1) the testator's property, whether real or personal and whether whole or in part, of which he has the power to dispose;

(2) the appointment by the testator of an executor to dispose of property at the testator's death in accordance with the terms of the law and will; or

(3) the appointment, upon the testator's death, of a guardian for the testator's minor children. [Bove, p.27]

Understanding Washington's statutory requirements of wills is important as an asset protection measure to circumvent someone challenging the validity of a will and thwarting the testator's intent.

B) Washington's Will Requirements

Washington statutes require that all wills be: a) in writing; b) signed by the testator; and c) attested by two or more competent witnesses who subscribe the will or accompanying affidavit in the testator's presence and by the testator's direction or request. [RCW §11.02.020] The purposes of the statutory requirements regulating the execution of wills are to ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another. [*Malloy v. Smith*]

Washington recognizes oral, or nuncupative, wills to a limited extent. Members of the armed services may make oral wills to dispose of personalty. Anyone else may use an oral will to dispose of up to $1,000 worth of personalty. [RCW §11.12.025] Washington also provides a simple procedure for the transfer of personalty of estates not exceeding $100,000 providing no application for probate has already been made. [RCW Ch. 11.62]

A will or codicil executed in another state in a manner recognized by the laws of either the state where executed or the state of the testator's domicile at the time of execution is admissible to probate in Washington. [RCW §11.12.020] Washington does not recognize holographic wills, unattested wills that do not adhere to the statutory formalities. However, Washington will admit to probate holographic wills or codicils valid where executed.

A testator must be at least 18 years old at the time of the will's execution. Unlike contracts, a will is not ratified by subsequent attainment of the age of majority. A testator has the requisite capacity to make a will if he understands the nature and effect of his act, measured at the time the will is executed. A will is properly signed if the testator, knowing the contents of the document, puts her signature or mark on the document with the intention of adopting the document as her will. Washington allows for proxy signatures if the proxy signs at the testator's direction, in the testator's presence and is identified on the document.

In Washington, two competent witnesses must attest a will. [RCW §11.12.020] The witnesses do not have to attest the will in each other's presence but must attest it in the presence of the testator. Washington does not require publication of the will, meaning that the statute does not require the testator to disclose the witnesses are signing a will, only that each witness either watched the testator or proxy sign the will or received the testator's acknowledgement that that the instrument has been adopted by him as his act.

At the hearing for admission of the will to probate, the two attesting witnesses must testify that each was present and witnessed the signature or received the proper acknowledgement; that they each signed the will in the testator's presence; and that they each believed the testator to be of sound mind at the time of signing. The potential death or forgetfulness of the witnesses by the time of admission to probate can be avoided by having the witnesses execute a self-proving affidavit stating that the will was properly executed. [RCW §11.12.020]

C) Washington's Limitations on Disposition

Under RCW 11.04.050, community property is subject to testamentary disposition only to extent of spouse's half interest. [*German-American State Bank v. Godman*] All property acquired after marriage is presumed community property unless proved otherwise. [RCW §26.16.030] Each spouse has a present, vested, undivided one-half interest in community property. [*Patton Estate*] Any provision that attempts to dispose of a spouse's community property interest will not be enforced.

Washington has a longstanding tradition of administering the whole community property fund under probate to pay community debts even though only one-half is disposable by the deceased spouse. [*Ryan v. Ferguson*] Deductions for community debts and administration expenses are made from the gross community estate to arrive at a net community estate. The surviving spouse owns absolutely one-half interest in this net community estate. [RCW §11.02.070] The deceased spouse's interest becomes the gross separate estate against which further deductions are applicable to arrive at a net separate estate disposable by will or intestacy.

D) Washington's Superwill Statute

In 1998, Washington became the first state to allow for the testamentary disposition of specified nonprobate assets. [Artura, at 813] Commentators refer to such statutes as "Superwill" provisions because they enhance an individual's ability to dispose of nonprobate property without subjecting it to the probate process. [Kaufman, at 1020] Community property rights trump Superwill actions, meaning a testator does not have the right, in a will, to change the beneficiary of a nonprobate asset property that would pass to the testator's spouse under community property laws. [RCW § 11.11.020(1)]

Rather than requiring the testator to follow the established procedures for changing the terms of a will substitute, the Superwill statute permits a testator to make those changes in his will. Thus, a testator must comply with both Washington's Statute of Wills and the Superwill statutes for a Superwill provision to take effect.

Washington's Superwill provision enables a testator to alter the beneficiary designation of a limited class of nonprobate assets, including:

- Joint bank accounts with right of survivorship;
- Payable on death or trust bank accounts;
- Transfer on death securities or security accounts;
- Trusts of which the person is grantor and that become effective or irrevocable only upon the person's death, and;

Notes or other contracts the payment or performance of which is affected by the death of the person. [RCW §11.11.010.(7)(a) incorporating RCW §11.02.005(15)]

The legislature specifically excluded several nonprobate assets from the Superwill provision [RCW §11.11.010.(7)(a)]:

- An interest in real property passing under a joint tenancy with right of survivorship;
- Conveyance for which possession has been postponed until the death of the owner;
- A right or interest passing under a community property agreement; and
- An individual retirement account or bond.

The following are also not included in the Superwill statutes because Washington does not consider these items as nonprobate assets [RCW §11.02.005(15)]:

- A payable-on-death provision of a life insurance policy, annuity, or other similar contract, or of an employee benefit plan;

- A right or interest passing by descent and distribution [RCW chapter 11.04]
- A right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement; or
- A right or interest held by the person solely in a fiduciary capacity.

To avoid legal battles over implementation of a provision changing beneficiaries of nonprobate assets, testators should ensure that their Superwill provision references only allowable assets for changes in beneficiaries and does so specifically mentioning the assets by name or category. Two Washington appellate decisions overturned lower court decisions and found that the testator did not meet the specific statutory requirements for invoking the Superwill provision. In the *Furst* case, a testator created a revocable living trust and a will. The testator, Furst, was the trustee and the trust agreement reserved the right to revoke the trust by delivering a written instrument to the trustee. Before he died, Furst executed a second will. The residuary beneficiary of the second will argued that the second will revoked the trust and he should receive the trust property. The court disagreed, reasoning that although a later will could have revoked the trust, the one at issue did not because it did not purport to do so and it did not even mention the trust. The court concluded that Furst had not followed the procedure set forth in RCW 11.11.020. [*In re Estate of Furst*, at 843-44]

The court, in *In re Burks*, likewise concluded that when a will provision mentioned that joint accounts with her children did not imply a gift to them (for exact provision see Joint bank Accounts, *supra*), the testator did not meet the statutory requirements for changing the beneficiaries on her two POD certificates of deposit. Thus, the court determined that the POD payees would receive the certificate funds rather than the beneficiaries of the residuary clause.

It has been argued elsewhere that "Having a Superwill provision would avoid a result like that in *Damon v. Northern Life Ins*." [Artura, endnote 122] The court in *Damon* held that "Where a life insurance policy reserves the right in the insured to change the beneficiary, the change of beneficiary must be made in the manner and mode prescribed by the policy and any attempt to make such change by will for which no provision is made in the policy is ineffective." [*Damon v. Northern Life Ins.* at 880-881] The Superwill statute does not, and should not, allow someone to unilaterally change the terms of an insurance contract; and the Washington legislature wisely does not include life insurance policies (or other similar contracts) within the Superwill umbrella.

5) Passing And Protecting Property With Trusts

Trusts provide lifetime management of a grantor's property and serve as a will substitute to pass the trust property to the stated beneficiaries following the grantor's death. Trusts owned by the grantor, such as a Revocable Living Trust (*infra*), denote that the grantor retains authority to revoke the trust and rights to income produced by the trust during the grantor's lifetime. Such trusts provide little additional asset protection. Income produced by these trusts is taxed to the grantor, although other types of trusts may be taxed as a separate legal entity. [Price, at 1037] Assets in an RLT are fully included in a grantor's gross estate. [Id., at 1036] Transfers to an RLT do not constitute a completed gift. [Id.] Finally, a grantor's creditors can reach any beneficial interest a grantor retains in a trust. [Id., at 1074]

Asset protection increases as the grantor's rights to make decisions or receive benefits decreases. The remainder of this section analyzes the extent to which assets in a trust are protected yet available to the grantor when constructed as a charitable or charitable remainder trust, the recently developed domestic asset protection trusts, and the new purpose trusts available in the Bahamas.

A) Charitable and Charitable Remainder Trusts

Charitable trusts are created under Washington State law. [RCW § 11.110.010 *et seq*.] Charitable trusts must be established for charitable purposes, including: advancing education or religion; promoting health, civic responsibility or other goals beneficial to society; or, accomplishing governmental purposes. Trusts that qualify as charitable trusts may be perpetual (Rule Against Perpetuities does not apply), may substitute a new beneficiary if required to continue accomplishing the trust purpose, must be registered with the attorney general, and the attorney general may bring suit to enforce the trust.

All beneficiaries of a charitable trust must be charitable, either a specific charity or an indefinite and sizeable class of beneficiaries. The grantor may receive a present tax deduction. The trust property is not included in the grantor's estate and the grantor's future creditors may not reach the assets, but the grantor has no further rights in the property. Thus, a charitable trust should only be created to satisfy charitable purposes and not as a method to avoid taxes and creditors.

Charitable Remainder Trusts (CRTs) are very different. CRTs must conform to IRC §664(d). Unlike Charitable Trusts, the beneficiaries of a CRT need not all be charitable and may include the grantor. As of July 28, 1997, the charitable interest in the trust must be at least ten percent of the fair market value of all property transferred to the trust. CRTs are an irrevocable trust designed to convert an investor's highly appreciated assets into a lifetime income stream without generating estate and capital gains taxes.

CRTs have become very popular in recent years because they represent a valuable tax-advantaged investment while providing gifts to one or more charities. A CRT can potentially eliminate immediate capital gains taxes on the sale of appreciated assets, reduce estate taxes, reduce current income taxes with the corresponding income tax deduction, avoid probate and maximize the assets beneficiaries will receive after a grantor’s death. CRTs can include unmarketable assets provided a qualified appraisal is performed whenever the trust is required to value the assets.

A grantor can serve as a trustee of the CRT provided the trustee(s) do not have discretionary authority over distributions to the noncharitable beneficiaries. [Price, at 882] Payments to the noncharitable beneficiaries are taxed to them as characterized; ordinary income, capital or undistributed gains, other income or principal. [IRC §664(b)(1)-(4)] A grantor’s creditors can only reach that portion of the income required to be paid to the grantor.

B) Domestic Asset Protection Trusts

Historically, asset protection trusts did not exist in the United States because of creditor protection laws and common-law rules against self-settled spendthrift trusts. In 1997, Alaska became the first state to create a type of trust formerly found only in offshore jurisdictions. [Brennan, at 769] The Alaska Trust Act "allows an individual to create in Alaska a trust from which the grantor can receive distributions ... without exposing the trust to claims of the grantor's creditors" [Blattmachr, et al., at 347] The Alaska domestic asset protection trust is irrevocable, the grantor may be a beneficiary, and the assets of the trust cannot be reached by creditors of any trust beneficiary, including the grantor. [AS §34.40.110] The Alaska legislation included jurisdictional provisions intended to ensure that Alaska law would apply when enforcing their trust protections. [AS §13.36.310] It also limited the reach of the traditional exceptions, such as child support claims, to spendthrift protection. [AS § 13.36.310(b)]

If a trust contains a provision restricting access by creditors to a beneficiary's interest, then such creditors cannot satisfy a claim by from the beneficiary's interest in the trust, unless [AS § 34.40.110(a)-(d)]:

- there was actual intent to defraud creditors;
- the trustor has the power to revoke or terminate the trust without consent of a person who would be adversely affected if the trust were terminated;
- there are mandatory distributions to the trustor; or
- the trustor owed child support at the time the trust was created.

If any of these four conditions exist, the creditor can reach only that part of the trust to which the condition applies. The trustor may be a beneficiary of a trust and receive spendthrift protection as long as the trust is irrevocable and distributions to the trustor are at the complete discretion of the trustee. If the trustor retains the right to revoke the trust, or if the trust agreement requires any mandatory payments to the trustor, the protection against creditors will not be available. Further, the trustor cannot avoid paying back child support or intentionally defraud creditors.

This type of Alaska trust, or property transferred into such an Alaska trust, may not be voided on the grounds that "the trust or transfer avoids or defeats a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the settlor or by way of a marital or similar right." [AS § 13.36.310(a)]

According to Alaska law, fraudulent transfers occur when "made with the intent to hinder, delay, or defraud creditors or other persons." [AS § 34.40.010] Creditors may have to prove the debtor's subjective intent regarding the transfer without the assistance of objective factors since this provision does not specifically include them. Section 34.40.010 arguably bars constructive fraud as grounds for a fraudulent conveyance action. [Wagenfeld, at 855]

Present creditors may bring a fraudulent transfer claim either four years from the time of transfer or one year from the date the transfer would have reasonably been discovered. [AS §34.40.110(d)(1)] Future creditors must bring a claim within four years of the time of transfer, regardless of their knowledge about the transfer. [AS §34.40.110(d)(2)]

Alaska's 1997 Act permits the settlor to choose Alaska law to govern "the internal affairs of trusts," which include "the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts." [AS §13.36.035(a)] The Act outlines specific requirements as to when a trust with an Alaska jurisdiction provision is considered valid and effective. Alaska courts are also granted jurisdiction over non-Alaska trusts under certain circumstances, [AS §13.36.045(a)] and a self-settled spendthrift trust created in another state or country may be transferred to Alaskan jurisdiction so long as the trust is valid and effective under Alaska law. [AS §13.36.043]

Shortly after Alaska enacted its new trust statute, the Delaware legislature enacted similar legislation. [Brennan, at 772] Like Alaska's, Delaware's laws address self-settled spendthrift trusts, the rights of involuntary creditors, the role of fraudulent conveyance laws, and the settlor's choice of law rights. Delaware places limits on the settlor's control over the trustee and distributions from the trust. [DAC tit. 12 § 3570(9)(b)] The Delaware statutes require these new trusts, called "qualified dispositions", to [DAC tit. 12 § 3571]:

- be an irrevocable spendthrift trust which limits principal distributions to the trustor to distributions made only at the discretion of a trustee,
- have a trustee who is not a relative or subordinate of the trustor, and
- contain a Delaware choice of law provision.

Creditors who wish to pierce a Delaware trust must first prove that the trust does not meet at least one of these three requirements. If a Delaware trust required mandatory income distributions to the trustor, those income distributions would be reachable by his creditors. [DAC tit. 12 § 3571] Delaware retains the rule against self-settled spendthrift trusts with regard to present creditors, but repeals it in relation to future creditors. [DAC tit. 12 § 3570(9)(c)] The trust is safe from any claims arising after the date of creation as long as the settlor does not violate the UFTA when creating a Delaware trust. [Sullivan, at 442]

Unlike Alaska law, Delaware recognizes the rights of involuntary creditors by according preferred status to certain creditors. Priority over the trust assets is given to

(1) former spouses and children of the debtor for alimony and support payments and (2) tort victims injured by the debtor on or before the date of the trust's creation. [Sullivan, at 452]

Like Alaska, the Delaware law limits creditors' actions against debtors for fraudulent conveyances. The exclusive means of invalidating a trust are provided under Delaware's version of UFTA, which applies even if the settlor's powers exceed those required for a valid Delaware trust. However, creditors are only limited to using UFTA if the trust meets the three requirements under the 1997 legislation. [DAC tit. 12 §3571] If the trust does not meet all of these requirements, creditors are free to choose laws that are more favorable to their position. Present creditors are limited to bringing a claim against a Delaware trust within four years or after the trust was discovered or one year after the trust could have reasonably been discovered, [DAC tit.

12 §3572(b)(1)] and future creditors must bring a claim within four years of the creation of the trust regardless of when it was discovered. [DAC tit. 12 §3572(b)(2)]

If the language of the trust so provides, Delaware law governs a dispute involving a qualified disposition. [DAC tit. 12 §3570(10)(a)] Unlike Alaska law, the Delaware Act does not contain a detailed provision specifying which affairs Delaware law governs. However, the Delaware Act does require that a challenge to a transfer into trust only occur under Delaware's fraudulent transfer law. [DAC tit. 12 §3572(a)] It is important to remember, however, that creditors are not limited to the UFTA if the three requirements of a qualified disposition are not met.

Nevada passed self-settled spendthrift trust statutes in 1999. Nevada's law extends spendthrift protection to self-settled trusts so long as they are irrevocable and all distributions to the settlor are discretionary. [NRS § 166.040(1)(b)] The statute sets a two-year statute of limitations for fraudulent conveyance claims concerning transfers to spendthrift trusts and gives existing creditors six months after learning of the transfer to file a complaint, if longer. The choice of law rules provide that the Nevada spendthrift provisions apply if at least one trustee is a Nevada resident or is a bank or trust company that maintains a Nevada office, and:

- any of the trust property is located in Nevada,
- the trustor is domiciled in Nevada,
- the trustor created the trust in Nevada, or
- the local trustee maintains records and prepares tax returns for the trust and at least part of the trust is administered in Nevada. [NRS § 166.025]

Rhode Island's statute applies to trusts that have a Rhode Island trustee, allowing a national bank or other financial institution to serve as trustee as long as it is qualified to act as a trustee in Rhode Island. [RIGL § 18-9.2-2] It appears Rhode Island modeled their statute after Delaware’s since it describes the trusts as "qualified dispositions," contains a four-year limitations period [RIGL § 18-9.2-4(b)] and exempts claims for existing alimony, child support, spousal property settlement, and tort claims where the injury occurred before the trustor created the trust. [RIGL § 18-9.2-5]

Domestic asset protection trust laws potentially weaken the ability of creditors to reach assets under fraudulent conveyance law, leading at least one commentator to describe them as an affront to public policy. [Gingiss, at 1032] State and federal courts reinforce creditor rights by remaining suspicious of asset protection trusts and the settlors' motives behind the creation of these trusts. [Brennan, at 791] The increasing availability of domestic trusts makes them a viable and legitimate option for individuals interested in protecting assets against some types of future claims.

C) Bahamas Purpose Trusts

The Bahamas, Cook Islands and British West Indies, are popular jurisdictions for asset protection trusts due to their adherence to English common law and the English language, their vigorous trust laws that often deter creditors, their government-mandated bank secrecy laws and their traditions of confidentiality. [Mezrich, 666-667] IRS and foreign regulations eliminate most tax advantages so that foreign trusts in many foreign jurisdictions are taxed in similar if not equal fashion as if the trust existed in the United States. Foreign trusts offer some significant advantages over even domestic asset protection trusts. [See Mezrich, 659] For example, in 2004 the Bahamas altered their existing law relating to perpetuities by extending the period from 80 to 150 years, effectively enabling families to plan for five generations. [The Perpetuities (Amendment) Act, 2004] Trust assets are generally protected from all litigation in respect of existing claims started more than two years after assets are placed into the trust. Trust assets are immediately protected from any claims arising after such assets are placed in the Trust. [The Fraudulent Dispositions Act, 1991] However, foreign trusts exist for the benefit of solvent settlors seeking to safeguard their property from possible future claims, not to provide assistance to proposed settlors willfully seeking to defeat an existing or contingent obligation owed to a creditor of which they had notice.

Also in 2004 the Bahamas created a new “Authorized Purpose Trust”. [The Purpose Trusts Act, 2004 (“the Act”)] Authorized purpose trusts must satisfy the following requirements;

- the purpose must be possible and sufficiently certain to allow the trust to be carried out;
- the purpose must not be contrary to public policy or unlawful; and
- the trust instrument must specify the event upon the happening of which the trust terminates and provide for the disposition of surplus assets of the trust upon its termination.

One interesting feature of purpose trusts is the fact that beneficial ownership is not vested in the trustee as the trust is not for the trustee’s benefit and there is no one else in whom beneficial entitlement in the trust property is vested. Consequently, an authorized purpose trust has many estate planning or asset protection applications, including a trust depository for assets of an unusual nature and a trust that has both philanthropic and charitable purposes. With the current coordination between the Bahamas and IRS on taxing foreign trusts, it is conceivable that one could set aside the required minimum charitable contribution in a Purpose Trust and have the trust qualify as a Charitable Remainder Trust while also taking advantage of non-taxable benefits inherent in the Bahamas jurisdiction.

B. Conclusion:

Individuals with estates valued at less than $100,000 (Washington's maximum estate value for settling estates by affidavit), or individuals satisfied with Washington's default intestacy rules, might not need or want a will. Owning property in conjunction with one or more individuals does not instantly require the use of a will or other estate documents, but such ownership does add legal considerations an individual should consider when planning for disposition.

Washington recognizes three types of joint property: community property, joint tenancy and tenancy in common. All property acquired during a marriage is presumed community property. One individual in the marriage can make decisions binding on both partners, but Washington requires certain decisions, such as real estate purchases, to include both partners in a marriage. All intestate community property passes to the surviving spouse regardless of whether the decedent is survived by issue, parents, or other relatives, so if a married individual desires to leave their portion of the community property to someone other than their spouse a will becomes necessary. Washington created a legal fiction of quasi-community property for the interest of a surviving spouse in the property of a deceased spouse brought into Washington from another state. Washington also applies community-type equitable solutions to the division of meretricious relationships. An individual who owns property jointly with another needs to be aware, when creating estate plans, of the legal rights or claims others possess against the property.

Washington statutes recognize several will substitutes, including; revocable living trusts, will contracts, community property agreements, life insurance, joint bank accounts, Totten trust accounts, and U.S. Savings Bonds. Will substitutes create the legal effect of passing asset title directly to stated individuals generally outside of the probate process.

Wills do not avoid probate, the legal process of passing title from the decedent to the individuals of his or her choosing. Washington courts will only uphold wills that conform to specific statutory requirements. Wills created in Washington State must be in writing, signed by the testator, and attested by two or more witnesses. Washington does not require publication of wills and does provide for self-proving affidavits. Other regulations govern the extent to which an individual has complete or unfettered discretion to dispose of property at death. Washington uniquely allows a testator to alter the beneficiary of specified nonprobate assets. Many Washington residents may be unaware of this new legislation and wills drafted to incorporate such changes should, based on subsequent judicial decisions, limit the exercise of this power to the allowable assets.

Washington law explicitly outlines guidelines for revocable living trusts and charitable trusts. Charitable trusts, a state creation, differ significantly from federally fashioned charitable remainder trusts. While a majority of Washington residents may be familiar with these trusts at least in name, only residents currently working with savvy estate planning professionals have likely even heard of domestic asset protection trusts. These new trusts, created in four states (Alaska, Nevada, Delaware and Rhode Island) and currently legal in all fifty, add a dimension of trust management and protection previously unavailable to individuals who desired to keep all of their funds within the security of the domestic United States financial system. Perhaps as a response to potential overseas assets remain stateside, countries such as the Bahamas expanded the types of trust they offer that may even qualify for domestic tax benefits.

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Title 12 – Decedents' Estates and Fiduciary Relations

Part V – Fiduciary Relations

35. Trusts, §§ 3501 to 3591

C) Nevada Revised Statutes:

Title 13 -Guardianships; Conservatorships; Trusts

Section 166 -Spendthrift Trusts

D) Revised Code of Washington (RCW):

Title 11 – Probate and Trust Law

Chapter 11.02 – General Provisions

Chapter 11.04 – Descent and Distribution

Chapter 11.11 – Testamentary Disposition Of Nonprobate Assets Act

Chapter 11.12 – Wills

Chapter 11.62 – Small Estates – Disposition of Property

Chapter 11.98 – Trusts

Title 26 – Domestic Relations

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D. Analytical techniques:

This paper follows the explanatory procedures of analytical theory rather than the scientific theory of formulating and testing a hypothesis. The primary explanatory technique incorporated is observation: judgment on or inference from the observed materials. Secondarily, the paper classifies habitually complex legal concepts into a logical order and categories easily understood by even inexperienced clients.

Axiomatic state regulations, or at least a true representation of the rules by which all asset protection trusts are judged, frequently contain enough ambiguity that a full discussion of the issues also requires empirical methods of comparing and contrasting judicial decisions or policy discussions. This paper expands upon the letter of the law to include ideas designed to increase the probability the client's objectives will materialize.

VII: RESULTS / CONCLUSION

Although the project's primary objective is to provide Washington resident's with an overview of factors to consider when transferring property at death or through trusts, the regulations and reviews covered in this project also includes implications for attorney's in the field and suggestions for further research.

Single individuals with property within Washington jurisdiction are free to leave their individual property to anyone they choose subject to federal and state estate taxes, creditor claims, and statutory obligations such as child support. Property owned jointly with other individuals adds another layer of restraint on disposition. Washington's strong community property laws, especially, should be understood by anyone in a married or meretricious relationship.

Although the use of will substitutes is growing in popularity, many Washington residents would likely utilize additional substitutes if they fully understood the availability and ramifications of various options. Even though setting up a will substitute does not require an attorney in most cases (revocable living trusts the most notable exception), attorneys should make their clients aware of all the options as a basis for fully informed decisions regarding their estate plan.

Washington's intestacy and small-estate default procedures allow for a simplified processing of such estates. Washington does not have a form where someone could signify their choice for default settlement and it is not clear whether having such a form would eliminate any quarrels before the court. Research into intestacy cases on this point might prove useful.

Washington's recent Superwill statute is likely unknown among most state residents, although no survey data is available to confirm or deny that remark. Some court cases where the statute was used as a basis to challenge a settlement decision show that even some attorneys, based on their legal arguments, might not understand the operational parameters of this legislation. A CLE on this statute should help attorneys help their clients employ this technique when applicable in ways that will survive a court challenge. Research into all of the court cases involving this law would help not only Washington attorneys understand procedures involved but might also provide a guideline for other states to learn from our mistakes in drafting their own Superwill legislation.

Trusts are no longer beneficial just for the wealthiest of clients. Many professionals would benefit by placing long-term assets in a trust for several reasons, including a smooth transfer of the trust property at the trustor’s death. Domestic asset protection trusts in particular, also perhaps relatively unknown to most state residents due to the recent emergence of the concept, offer strong protections when created in full compliance with Washington State’s Fraudulent Claims Act and the trust regulations of the chosen jurisdiction. Foreign trusts, such as the Purpose Trusts available in the Bahamas, provide additional asset protection and may now also allow domestic tax advantages. Further research is needed into the correlation of the Purpose Trusts and the IRS Charitable Remainder regulations.