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Wills: Washington

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A Q&A guide to the law of wills in Washington state. This Q&A addresses state laws and customs that impact wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, and information regarding making changes to wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

For a Toolkit providing jurisdiction-neutral will forms that can be used with this Q&A and other resources to help counsel draft wills under Washington law, see State-Specific Will Drafting Toolkit.

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

The rules and laws pertaining to wills and probate proceedings in Washington are found in Title 11 of the Revised Code of Washington, Probate and Trust Law (RCW 11.02.001 to 11.125.903). Title 11 sets out the laws:

- Of intestacy, which defines the parties that inherit in the absence of a will (RCW 11.04.015 to 11.04.290).
- Applicable to wills (RCW 11.12.010 to 11.12.265).
- Applicable to trusts, including testamentary trusts (RCW 11.98.002 to 11.98.930).
- Governing estate administration.
- Governing resolution of estate disputes.

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

A testator must be at least 18 years old to make a valid will in Washington (RCW 11.12.010).

3. What is the standard of mental capacity required to create a will?

A testator must be of sound mind to create a will in Washington (RCW 11.12.010). A testator has sound mind when the will is executed if the testator:

- Has sufficient mind and memory to understand the consequences of executing a will.
- Understands generally the nature and extent of the testator's property and that this property will be disposed of under the will terms.
- Can recollect the objects of the testator's bounty, which are the parties that should naturally inherit the testator's property and their relationships to the testator.

(*In re Bottger's Estate*, 129 P.2d 518, 522 (Wash. 1942).)

4. Can an agent under a power of attorney create a will on behalf of a testator?

Washington's Uniform Power of Attorney Act does not:

- Authorize an agent acting under a power of attorney to create a will on a testator's behalf.

- Expressly prohibit an agent from creating a will on a testator's behalf.

(RCW 11.125.010 to 11.125.903.) There is no case law interpreting this issue under these statutes.

Before January 1, 2017, the effective date of Washington's Uniform Power of Attorney Act, Washington prohibited an agent or attorney-in-fact from making, amending, altering, or revoking a principal's will (RCW 11.94.050). There are also no other Washington statutes allowing any person other than the testator to make a will. Given former law and the lack of any statute or case affirmatively authorizing an agent to make a will on a principal's behalf, counsel should advise the client that this is likely not permissible.

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.
- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

A holographic will is generally understood to be a handwritten will that is signed by the testator but is not witnessed. Washington does not recognize unattested holographic wills. However, a validly executed foreign holographic will or codicil is recognized in Washington. (RCW 11.12.020; *In re Brown's Estate*, 172 P. 247 (Wash. 1918); see Out-of-State Wills.)

Oral (Nuncupative) Wills

A member of the US armed forces or person employed on a US merchant marine vessel may make an oral will disposing of the member's wages and personal property. Anyone else may make an oral will disposing of up to $1,000 worth of personal property. No real estate may be devised by oral will.

For an oral will to be valid in these circumstances, the following requirements must be met:

- The oral will must be witnessed by two witnesses.
- The oral will must be made during the testator's last illness.
- The testator's words must be committed to writing and offered for probate within six months of the testator's death.

Notice of the probate of the testator's oral will must be provided to the testator's surviving spouse and heirs at law. (RCW 11.12.025.)

Contractual Wills

A contract to make a will is valid where the contract adheres to the usual rules of contract law (see *Bicknell v. Guenther*, 399 P.2d 598, 602 (Wash. 1965)). Any contract to devise real property also must be in writing to comply with the statute of frauds (RCW 19.36.010 to 19.36.901).

Statutory Wills

Washington does not provide a statutory will form.

Electronic Wills

Effective January 1, 2022, Washington permits electronic wills under the Washington Uniform Electronic Wills Act (WUEWA) (RCW 11.12.400 to 11.12.491). WUEWA also made certain changes to other statutes affecting wills in Washington.

An electronic will is a will the testator executes with an electronic signature, with similar formalities to those required for regular wills in Washington under RCW 11.12.030 (RCW 11.12.410 and 11.12.440). For more information about executing electronic wills in Washington, see Question 6: Electronic Will Execution Requirements.

Out-of-State Wills

Washington recognizes out of state wills if the will's execution complies with the law of another state where either:

- The will was executed.
- The testator was domiciled in another state when:
  - the will was executed; or
  - the testator died.

(RCW 11.12.020.) Washington recognizes a validly executed foreign holographic will or codicil (RCW 11.12.020; see Handwritten (Holographic) Wills).

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving declaration.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

In Washington, a will must be in writing, except when the narrow requirements for an oral will are met (RCW 11.12.020; see Question 5: Oral (Nuncupative) Wills).

The will must be signed by either:

- The testator.
- Another person:
  - at the testator's direction; and
  - in the testator's presence.

(RCW 11.12.030.)

Washington liberally construes the definition of signature in the context of the execution of wills. A testator's mark alone meets the signature requirement (RCW 11.12.030; *In re Young's Estate*, 598 P.2d 7, 10 (Wash. Ct. App. 1979)).

Although Washington statute does not specifically require a written statement of the testator's proxy that the proxy signed for the testator, counsel generally should include a written statement in the will providing those facts when the testator's proxy signs the will, for example:

> "Due to the physical incapacity of [CLIENT NAME], [PROXY NAME] is signing [CLIENT NAME]'s name at his or her request under RCW 11.12.030."

Witness Requirements

A will must be attested:

- By two or more competent witnesses, either by:
  - subscribing their names to the will; or
  - signing a declaration that complies with RCW 11.20.020(2) (see Self-Proving Declaration).
- In the testator's presence.
- At the testator's direction or request.

(RCW 11.12.020.)

There is generally no statutory requirement that the witness know that the document being attested is a will. The testator's representation that the document is the testator's will satisfies the attestation requirements (*Estate of Lindsay*, 957 P.2d 818, 821 (Wash. Ct. App. 1998)). However, the witness must sign:

- For the purpose of attesting.
- Knowing that the testator signed the document.

(*In re Chambers' Estate*, 60 P.2d 41, 43-44 (Wash. 1936).)

An individual is competent to witness a will signing if, when the individual signed the will as a witness, the individual could legally testify in court to the facts to which the individual attests by subscribing the individual's name to the will (*In re Mitchell's Estate*, 249 P.2d 385, 394 (Wash. 1952)). An individual is incompetent to testify, and thereby incompetent to attest a will, if the individual is either:

- Of unsound mind.
- Intoxicated at the time.
- Not capable of giving a correct account of relevant matters that individual has seen or heard.

(RCW 5.60.050.)

An interested witness is not considered incompetent and a will is not invalid because an interested person witnessed it. However, if a witness receives a gift under the will, there is a rebuttable presumption that the witness obtained the gift by duress, menace, fraud, or undue influence. (RCW 11.12.160(2).) Therefore, it is advisable to always have two disinterested witnesses sign the will in addition to any interested witness.

Notary Requirements

Washington does not require a will to be notarized.

Sample Attestation Clause

The attestation clause states the testator both:

- Signed or acknowledged the will in the witnesses' presence.
- Declared to each witness that the document is the testator's will.

The attestation clause typically takes the following form:

> "EACH OF THE UNDERSIGNED DECLARES UNDER THE PENALTY OF PERJURY under the laws of the State of Washington that the foregoing instrument was on the date hereof, by said Testator, [TESTATOR NAME], signed and declared by [him/her/them] to be [his/her/their] Will in the presence of us who at the Testator's request and in the Testator's presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto; and the Testator appears to be over the age of eighteen years, to be of sound and disposing mind and memory and otherwise to be competent in every respect to make a Will, and to be free of any undue influence or fraud; and the undersigned make this attestation and declaration at the testator's request."

The witnesses generally sign the will and provide their addresses in the space directly below the attestation clause.

Self-Proving Declaration

An attesting witness to a will may make a self-proving affidavit (declaration) that states the facts the witness would be required to testify to in court to prove the will. The declaration is made before any person authorized to administer oaths at the request of either:

- The testator.
- The personal representative or any interested person after the testator's death.

(RCW 11.20.020(2).)

The declaration may be either:

- Written on the will.
- Attached to or logically associated with the will.
- Attached to a photographic or electronic copy of the will.

The court must accept the witness's sworn statement as if it had been taken before the court. (RCW 11.20.020(2).) Being able to preserve a witness's testimony in support of a will when the will is executed is more advantageous than tracking witnesses down later to prove the will.

A person can witness a will by a self-proving (or self-affirming) declaration (RCW 11.20.020(2)) Chapter 5.50 RCW and GR 13. Having the witnesses sign a self-proving declaration when the will is executed simplifies the probate process because it generally avoids the need for those witnesses to appear to testify in court when the will is offered for probate (see *In re Estate of Starkel*, 134 P.3d 1197, 1203 (Wash. Ct. App. 2006)).

For more information on self-proving declarations for traditional paper wills, see Standard Clause, Signature Pages for Will and Self-Proving Declaration (WA).

Electronic Will Execution Requirements

Effective January 1, 2022, Washington authorizes the use of electronic wills (RCW 11.12.400 to 11.12.491). Similar to paper wills, electronic wills must be signed by the testator and witnessed by two competent witnesses. However, unlike paper wills, electronic wills do not:

- Require that the testator and the witnesses be in the same physical place to sign and attest a will.
- Need to be physically signed but may be electronically signed.

(RCW 11.12.440.) A testator and witnesses may execute, attest, or acknowledge an electronic will in counterparts, which together constitute a single will (RCW 11.12.020).

Electronic Signature

In Washington, signing an electronic will means that, with the present intent to authenticate or adopt a record, the testator affixes to or logically associates with the record an electronic symbol, sound, or process (RCW 11.12.410). The electronic will must be signed by either:

- The testator.
- Another person:

- in the testator's name;
- at the testator's direction; and
- in the testator's physical presence.

(RCW 11.12.440.)

Electronic Witnessing

A will must be attested:

- By two or more competent witnesses, either by:
  - subscribing their names to the will; or
  - signing a declaration that complies with RCW 11.12.450 (see Self-Proving Declaration of Electronic Wills and Qualified Custodians).
- In the testator's physical or electronic presence (such as during an online video conference call with the testator and witnesses).
- At the testator's direction or request.
- After:
  - the signing of the will by the testator;
  - the testator's acknowledgment of the signing of the will; or
  - the testator's acknowledgement of the will.

(RCW 11.12.440(c).)

Self-Proving Declaration of Electronic Wills and Qualified Custodians

Similar to a self-proving affidavit (declaration) for a written will, an attesting witness to an electronic will may make a self-affirming (self-proving) declaration that states the facts to which the witness would be required to testify in court to prove the electronic will (RCW 11.12.450(2); see Self-Proving Declaration). The declaration can be made either:

- Before an officer authorized to administer oaths.
- Under penalty of perjury under the Uniform Unsworn Declarations Act.

(RCW 11.12.450(2).) If there are fewer than two attesting witnesses physically present in the same location as the testator at signing, this declaration may be made before an electronic records notary public authorized under RCW 42.45.280 (RCW 11.12.450(2)(a)). The declaration must be evidenced by the officer's certificate under official seal affixed or logically associated with the electronic will (RCW 11.12.450(2)(b)).

A testator or witness signature of an electronic will may be either:

- Physically or electronically affixed to the will.
- Logically associated with the will.

(RCW 11.12.450(4).)

An electronic will may be simultaneously executed, attested, and made self-proving if both:

- The declarations of the attesting witnesses are affixed to or logically associated with the electronic will.
- The qualified custodian maintains custody of the electronic will at all times after execution by the testator and witnesses.

(RCW 11.12.450(1).) Any electronic will not kept by a qualified custodian is treated as a lost or destroyed will (see Question 15).

A qualified custodian may be:

- Any suitable person over 18 years of age who is a resident of Washington when the testator signed the electronic will.
- A Washington trust company and national banks when authorized.
- A Washington nonprofit corporation, if permitted by the corporation's bylaws or articles of incorporation.
- Any Washington professional service corporation, professional limited liability company, or limited liability partnership, owned exclusively by attorneys.
- A will repository in the testator's county of domicile.

(RCW 11.12.460(1).)

However, the following are disqualified from serving as custodian:

- A minor, person of unsound mind, or person convicted of any felony or any crime involving moral turpitude.
- An heir, beneficiary, or otherwise with an interest in testator's estate.
- Corporations, limited liability companies, and limited liability partnerships that do not qualify above.

(RCW 11.12.460(2).)

Within 30 days of receiving notice of the testator's death, the qualified custodian of testator's will must:

- Deliver the electronic will to:
  - the court with jurisdiction; or
  - the person named in the electronic will as executor (also referred to as the personal representative).
- Make a declaration before any person authorized to administer oaths stating:
  - the manner in which the qualified custodian received the electronic will;
  - that the electronic will was at all times in the qualified custodian's custody; and
  - that the electronic will was not altered in any way while in the qualified custodian's possession.

(RCW 11.12.470.)

Certified Paper Copies of Electronic Will

An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that the paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving declarations. (RCW 11.12.480.)

For more information regarding execution of electronic wills, see Standard Clause, Signature Pages for Electronic Will and Self-Proving Declaration (WA).

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Personal Representatives

Washington does not limit gifts to personal representatives named in a will, except where the attorney who drafted the will is the personal representative (see Gifts to Lawyer Draftsperson).

Gifts to Trustees Named in the Will

Washington does not limit gifts to trustees named in a will, except where the attorney who drafted the will is the trustee (see Gifts to Lawyer Draftsperson).

Gifts to Guardians

Washington does not limit gifts to guardians named in a will, except where the attorney who drafted the will is the guardian (see Gifts to Lawyer Draftsperson).

Gifts to Lawyer Draftsperson

An attorney may not prepare a will that names the lawyer or a person related to the lawyer as the recipient of a substantial gift, unless the lawyer or other recipient is related to the client. The following persons are considered related to the client or the lawyer:

- A spouse.
- A child.
- A grandchild.
- A parent.
- A grandparent.
- Any other relative or individual with whom the lawyer or client maintains a close, familial relationship.

(WA RPC 1.8(c).) Washington does not define what is a substantial gift. However, an attorney generally may accept a simple gift such as a present given at a holiday or as a token of appreciation. A more substantial gift may be voidable by the client under the doctrine of undue influence, which treats gifts from clients as presumptively fraudulent. (WA RPC 1.8, cmt. 6.)

If making a substantial gift to the attorney (or to a person related to the attorney), the client first should obtain the detached advice from another attorney, if the client is not related to the attorney (WA RPC 1.8, cmt. 7).

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

Disinheriting a Testator's Spouse

A testator may disinherit the testator's spouse or domestic partner under Washington law. However, a spouse or domestic partner has certain:

- Community property rights in the property of the marriage.
- Rights to a family support allowance.

Community Property Rights

Under Washington law, unless otherwise provided by agreement between spouses or state-registered domestic partners, all real and personal property acquired by a spouse during the marriage (or domestic partner during the state-registered domestic partnership) that is not the spouse's or partner's separate property generally is community property (RCW 26.16.030). Separate property is all property of a spouse owned by the spouse before marriage (or partner before the state-registered domestic partnership) and all property acquired afterwards by gift, bequest, devise, descent, or by an award for personal injury damages, with the rents, issues, and profits from that property (RCW 26.16.010 and 26.16.020).

Spouses and state-registered domestic partners own all their separate property. However, both spouses or domestic partners own an equal, undivided one-half share in the community property. (see *Poe v. Seaborn*, 282 U.S. 101, 111 (1930)). A decedent:

- May devise by will all their separate property (RCW 26.16.010 and 26.16.020).
- May not devise by will more than one-half of the community property or certain property classified as quasi-community property (RCW 26.16.030(1), 26.16.220, and 26.16.230).

Therefore, regardless of the provisions in a decedent's will, the decedent's surviving spouse or partner is entitled to:

- That spouse's or partner's one-half share in the community property.
- Certain portions of the decedent's community and separate property if a deceased spouse or partner died intestate (see Question 16).

If the testator signed the testator's will before marrying a surviving spouse or forming a state-registered domestic partnership, that spouse or state-registered domestic partner may be eligible to take a pretermitted spouse's or state-registered domestic partner's share (see Question 14: Effect of Marriage).

Family Support Allowance

A spouse, state-registered domestic partner, or dependent children may timely petition the court for:

- The continuance of property exempted from creditors to continue post-death, including homestead property or personal property up to $125,000 (RCW 6.13.030, 11.54.008, and 11.54.010).
- A family support award (RCW 11.54.008 and RCW 11.54.010).

A court has the discretion to award $125,000, as adjusted for inflation, of assets from the estate to the petitioner (RCW 11.54.020). In exercising this discretion, the court must consider numerous statutory factors to determine whether an award is appropriate and consistent with the testator's estate plan (RCW 11.54.055).

The court may also, in its discretion:

- Divide this allowance among the surviving spouse (or domestic partner) and dependent children (RCW 11.54.010(3) and 11.54.020(2)).
- Increase this allowance if:

  - basic support and maintenance is not met from other sources; and
  - the increase is not inconsistent with the testator's intent or principles of equity or fairness; and decrease this allowance.

  (RCW 11.54.040.)

- Decrease this allowance, if basic support and maintenance is met from other sources (RCW 11.54.050).

However, there are several statutory conditions to this award, namely:

- The court may not make this award to a claimant until the expenses of administration, funeral expenses, expenses of last sickness, and wages due for labor performed within 60 days immediately preceding the decedent's death have been paid or provided for.
- The court may not make an award to or for the benefit of any person who is a slayer or abuser, under RCW 11.84.010, of the decedent.
- The award petition is timely filed, before the earliest of:
  - 18 months from the date of the decedent's death if, within 12 months of the decedent's death, a personal representative was appointment or a notice agent filed a declaration and oath under RCW 11.42.010(3)(a)(ii);
  - the termination of all proceedings relating to the decedent's probate or nonprobate assets; or
  - six years from the date of the decedent's death.

(RCW 11.54.015.)

Disinheriting a Child of the Testator

A testator may disinherit the testator's children in Washington. Minor children may petition the court for a family support allowance, similar as for a spouse or domestic partner (see Family Support Allowance).

In addition, if a child of a testator is born or adopted by the testator after the testator signs a will and is not provided for in the will, that child may be entitled to a pretermitted child's share (see Question 14: After-Born Child).

Common Will Provisions

9. Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

Incorporation by Reference

In Washington, a will may incorporate by reference a separate writing outside the will if:

- The writing is in existence when the will is executed.
- The will shows the testator intended to incorporate the writing.
- The will describes the writing in sufficient detail to identify the writing.

(RCW 11.12.255.)

A will may also refer to a writing that distributes tangible personal property (such as vehicles or articles of personal or household use or ornament) not otherwise specifically distributed by the will, other than property used primarily in a trade or business. The writing is effective only if:

- An unrevoked will refers to the writing.
- The writing is in testator's handwriting or signed by the testator.
- The writing describes the property and recipients with reasonable certainty.

(RCW 11.12.260(1), (4).)

The testator may both:

- Write or sign the writing before or after the will's execution.
- Make subsequent handwritten or signed changes to the writing.

(RCW 11.12.260(2), (3).)

Disposition of Remains or for Funeral Wishes

A testator can include wishes regarding funeral arrangements and disposition of remains in a will. In Washington, these provisions are more commonly included in a separate Disposition of Remains document or in a power of attorney for health care decisions. (RCW 68.50.160(1); see Standard Document, Power of Attorney for Health Care Decisions (WA): Disposition of Remains; Service.)

No-Contest Clause

No-contest clauses are designed to prevent a beneficiary from contesting the dispositive provisions of a testator's will. They typically provide that a contesting beneficiary and often the contesting beneficiary's children and more remote issue are excluded as beneficiaries under the will if the contest is not successful.

In Washington, no contest clauses are permitted in wills but are not enforceable if both:

- The plaintiff has a good faith basis to challenge the will.
- The challenge is brought with probable cause.

(*In re Estate of Mumby*, 982 P.2d 1219, 1224-25 (Wash. Ct. App. 1999).)

Rule Against Perpetuities

In Washington, any interest in trust, including a testamentary trust, must vest within 150 years after the effective date of the instrument creating the trust, which effective date, for a will creating a testamentary trust, is the testator's date of death (RCW 11.98.130 and 11.98.160).

Sample Rule Against Perpetuities Provision

> "**Rule Against Perpetuities.** If any part or provision of any trust created hereunder violates the rule against perpetuities and is therefore void, it shall not affect the application of such trust as to any beneficiaries whose shares the application of which would not offend the law, but as to the shares of those which would run beyond the period, the trusts shall terminate on that date before the end of the full period permitted by law and the share distributed to the beneficiary or beneficiaries entitled at that time to receive the same."

Executors

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology Used to Identify Person in Charge of Estate

In Washington, the person in charge of administering an estate is called a personal representative but is also commonly called an executor (for a testate estate) or administrator (for an intestate estate) (RCW 11.02.005(1), (7), and (14)).

Qualification as Personal Representative

The following may serve as personal representative of an estate:

- Any person:
  - of sound mind and at least the age of 18 (see Question 3); and
  - not a felon or convicted of a crime involving moral turpitude.

- Trust companies organized under state law.
- National banks, when authorized.
- Law firms licensed to practice in Washington.

(RCW 11.36.010.)

A nonresident person serving as personal representative must appoint a resident agent (RCW 11.36.010(6)).

Regardless of contrary will provisions, a surviving spouse has the right to administer an estate's community property, which includes both the testator's and surviving spouse's community property interests (RCW 11.28.030).

Compensation of Personal Representatives

Personal representatives are entitled to reasonable compensation for their services, as approved by the court. Individuals who bring special and relevant expertise to the estate, like an attorney or accountant serving as personal representative, can charge their normal hourly rate for work involving their expertise. (RCW 11.48.210; see *In re Estate of Mathwig*, 843 P.2d 1112, 1113 (Wash. Ct. App. 1993).)

Professional trustees, like banks and trust companies, typically charge according to their normal fee schedule. Courts have approved hourly rates of $25 to $100 for non-professionals serving as personal representatives (see *Mathwig*, 843 P.2d at 1114-15).

Drafting Attorney as Personal Representative

It is not common practice for a drafting attorney to serve as personal representative of the client's estate in Washington. However, a drafting attorney may do so, provided the service as personal representative does not violate the general conflict of interest provisions in WA RPC 1.7. When a client wants to appoint the client's attorney as personal representative, the attorney must first obtain the client's informed consent after explaining:

- The nature and extent of the attorney's financial interest.
- The options available to the client for naming a personal representative.

(WA R RPC 1.8, cmt. (8).)

Failure of Named Personal Representative to Qualify

If the personal representative named in the will cannot serve and no successor is named, or the decedent died without a will, the following order of priority applies under Washington law:

- The surviving spouse or state registered domestic partner, or the person that the surviving spouse or registered domestic partner requests to appoint.
- The next of kin in the following order:
  - child or children;
  - father or mother;
  - brothers or sisters;
  - grandchildren; or
  - nephews or nieces.
- Any of the following persons, if they controlled or potentially controlled substantially all of the decedent's probate and non-probate assets at the testator's death:
  - the trustee named by the decedent in an *inter vivos* trust instrument;
  - the testamentary trustee named in the will;
  - the guardian of the decedent's person;
  - the conservator of the decedent's estate; or
  - the attorney-in-fact appointed by the decedent.
- One or more of the beneficiaries or transferees of the decedent's probate or non-probate assets.
- The following persons in the following order:
  - the director of the Department of Revenue (or the director's designee) for estates having property subject to the provisions of chapter 11.08 of the Revised Code of Washington; or
  - the secretary of the Department of Social and Health Services for estates owing debts for long-term care services as defined under RCW 74.39A.009(19), (27)).
- One or more of the principal creditors.
- Any suitable person, appointed by the court, if either:
  - the persons entitled to appointment fail for more than 40 days after decedent's death to present a petition for letters of administration; or

– the court is satisfied that there is no next of kin specified above that are eligible for appointment or all kin waive their right, and there are no principal creditor or creditors or all creditors waive their right.

(RCW 11.28.120.)

Multiple Personal Representatives

Two personal representatives acting together act unanimously. Three or more personal representatives serving together act by majority rule. Co-personal representatives can agree to allow one or more personal representative to act on the estate's behalf. (RCW 11.68.095 and 11.98.016(1), (3).)

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

In Washington, the following may serve as trustees:

- Any suitable persons over the age of 18 years, if not otherwise disqualified.
- Trust companies organized under Washington law and national banks when authorized to do so.
- Certain nonprofit corporations.
- Law firms licensed to practice in Washington.
- State or regional colleges or universities.
- Community or technical colleges.
- Any other entity so authorized under the laws of the state.

(RCW 11.36.021(1).)

The following may not serve as trustees:

- Minors.
- Persons of unsound mind.
- Persons convicted of:
  - any felony; or
  - any crime involving moral turpitude.
- A corporation not authorized under Washington law to act as a fiduciary.

(RCW 11.36.021(2).)

Compensation of Trustee

Trustees are entitled to reasonable compensation (RCW 11.98.070(26)). A trustor, also called a settlor or grantor, can provide in the trust instrument (in the will, for a testamentary trust) for the trustee's compensation (RCW 11.97.010).

Professional trustees usually charge according to their normal fee schedule. Individuals with special expertise relevant to the administration of the trust usually charge their normal hourly rate. (RCW 11.98.070(26).)

Failure of Named Trustee

The parties with an interest in the trust may agree to appoint a successor trustee if there are both:

- No named successor trustees.
- No trustee selected under the provisions for the appointment of a successor in the trust agreement.

(RCW 11.98.039(2).)

Otherwise, a beneficiary, trustor, or trustee may petition the court for appointment of a successor trustee (RCW 11.98.039(4)).

Multiple Trustees

Unless the trust (or, for a testamentary trust, the will) provides otherwise:

- Two trustees acting together act unanimously.
- Three or more trustees serving together act by majority rule unless the document provides otherwise.
- Co-trustees can agree to allow one or more of them to act on the trust's behalf.

Powers that are specifically granted to a particular trustee cannot be delegated. (RCW 11.98.016.)

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian or Conservator

In Washington:

- A guardian is a person the court appoints to make decisions regarding an individual's personal affairs (RCW 11.130.010(11)).
- A conservator is a person the court appoints to make decisions regarding an individual's property or financial affairs (RCW 11.130.010(5)).

In Washington, when either parent is deceased, the surviving parent of a minor child may nominate a guardian or conservator of that child through the parent's will or other record. The most recent guardian or conservator designation generally has priority. (RCW 11.130.215(2) and 11.130.415(1).) The nomination is effective when either:

- The surviving parent dies or is incapacitated.
- As to a guardian of a minor, the court finds by clear and convincing evidence that neither parent of a minor is willing or able to exercise parenting functions as defined under RCW 26.09.004.

The court defers to the parent's nomination unless it finds that the nominated individual is not qualified to serve. (RCW 11.130.185 and 11.130.215.)

Qualification as Guardian or Conservator

A guardian or conservator must:

- Be 21 years of age or a parent under age 21.
- With the exception of a court-approved relative, not be convicted of a crime involving:
  - dishonesty;
  - neglect;
  - use of physical force; or
  - any other crime relevant to the functions the individual would assume as guardian.
- Appoint a resident agent for service of process if the guardian or conservator is not a Washington resident.

(RCW 11.130.090(1).)

The guardian or conservator also may be either:

- A professional guardian or conservator, or an individual or guardianship or conservatorship service meeting the certification requirements established by the administrator for the courts, if not otherwise disqualified.
- A financial institution subject to the jurisdiction of the department of financial institutions and authorized to exercise trust powers, and a federally chartered financial institution when authorized to do so, without the institution having to meet the certification requirements established by the administrator for the courts.

(RCW 11.130.090; see Guardianship and Conservatorship Certification and Training.)

Guardianship and Conservatorship Binding or Persuasive

Guardian and conservator nominations are persuasive. A guardian or conservator nomination does not guarantee that the court appoints the nominated person. The court has discretion to determine whether appointment of the nominated guardian or conservator is suitable in the child's best interest. (RCW 11.130.215(2).)

Guardianship and Conservatorship Certification and Training

Professional guardians and conservators, and individual guardian and conservator services, must meet certification requirements established by the courts to be appointed guardian, conservator, limited guardian, or limited conservator of an incapacitated person (RCW 11.130.190(1); see Washington Courts: Certified Professional Guardianship and Conservatorship Program).

Financial institutions authorized to exercise trust powers and federally chartered financial institutions

may act as a conservator of an incapacitated person without having to meet the certification requirements established by the administrator for the courts (RCW 11.130.190(1)).

A lay guardian or conservator must complete a standardized training video or webcast made available by the courts at no cost to the guardian or conservator. The lay guardian or conservator must file a declaration or other evidence with the court of completion of the lay guardian training. (RCW 11.130.090(2); see Washington Courts: Lay Guardians for Adults and Conservators.)

Termination of Guardianship or Conservatorship

A guardianship or conservatorship for a minor generally terminates, subject to certain exceptions:

- On a minor's death, adoption, emancipation, or attainment of majority.
- For a guardianship, when the court finds that the basis in RCW 11.130.185 for appointment of a guardian no longer exists.

(RCW 11.130.240(1) and 11.130.570(1); see Qualification as Guardian or Conservator.)

A minor subject to guardianship or conservatorship, or a person interested in the welfare of the minor, including a parent, may petition the court to terminate the guardianship or conservatorship (RCW 11.130.240(2) and 11.130.570(3)).

Although Washington statute does not require an order from the court terminating the guardianship or conservatorship, in many circumstances there are outstanding fees and expenses that the court should approve. Accordingly, guardians and conservators may want to petition the court for termination (RCW 11.130.240(2) and 11.130.570(3)).

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.
- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

In Washington, a will may be modified by executing a codicil to the will. To be valid, a codicil must be:

- In writing.
- Signed by:
  - the testator; or
  - another under the testator's direction and in the testator's presence.
- Attested to by two or more competent witnesses;
  - while in the testator's presence; and
  - at the testator's direction or request.

(RCW 11.12.020.) Effective January 1, 2022, the testator and witnesses may execute an amendment to an electronic will, like the original will, while in the electronic presence of one another (RCW 11.02.005(2) and 11.12.440(1)).

Handwritten markings by the testator do not modify a will unless the markings have all of the requirements to execute a valid will (the markings were properly executed by the testator and witnessed) (see *In re Brown's Estate*, 172 P. 247, 247-48 (Wash. 1918)).

The court reads together a will and all operative codicils to the will to determine the testator's intent (*Hunt v. Hunt*, 50 P. 578, 579-80 (Wash. 1897)).

Revocation of a Will

A testator may revoke or partially revoke a will by executing a subsequent will or codicil that either:

- Expressly revokes the prior will.
- Is inconsistent with the prior will (the prior will is revoked to the extent of the inconsistency).

(RCW 11.12.040(1)(a).)

A testator may also revoke a will by physically destroying it, such as being burnt, torn, cancelled, obliterated, destroyed, or other physical act with the testator's intent and purpose of revoking the will. These acts may also be completed by another person at the testator's direction, in the testator's presence, if proved by two witnesses. (RCW 11.12.040(1)(b).)

Crossing out language in a will revokes that language. But, inserting handwritten markings do not modify the will unless all the requirements to execute a valid will are met (the markings were properly executed by

the testator and witnessed) (see *In re Brown's Estate*, 172 P. at 247-48).

The revocation of a will in its entirety also revokes its codicils, unless the codicil's revocation is contrary to the testator's intent (RCW 11.12.040(2)).

Reinstatement of a Will

If a testator executes a will and then executes a second will that fully revokes the first will, the destruction, cancellation, or revocation of the second will does not revive the first will unless the testator intended to revive it (RCW 11.12.080(1)). However, revocation of a codicil revives the prior will provision that the codicil modified, unless it was the testator's intent not to revive the prior will provision (RCW 11.12.080(2)).

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.
- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive (Lapse)

In Washington, if a beneficiary does not survive the testator, the gift to that beneficiary is distributed or lapses according to the will's terms. However, if the will is silent on survivorship and a predeceased beneficiary is a descendant of the testator's grandparents, that beneficiary's gift passes to the beneficiary's descendants, by representation (RCW 11.12.110). This is known as the anti-lapse rule. The anti-lapse rule does not apply if the will either:

- Expressly states that gifts to familial beneficiaries should lapse.
- Provides for an alternative distribution.

(RCW 11.12.110.)

For example, testator gives $10,000 equally to sister A and brother B, but sister A predeceases testator, leaving two children, C and D. Under the anti-lapse rule, brother B takes their share of $5,000 and sister A's share does not lapse, but instead passes equally to C and D, who each take $2,500. Under the same distribution pattern, if the testator includes a clause that if either of the testator's siblings predeceases the testator then their share lapses, brother B is entitled to the entire $10,000 gift.

If the will is silent on survivorship and a predeceased beneficiary is not a descendant of the testator's grandparents, and does not survive the testator, the gift to that beneficiary lapses and is distributed under either:

- The will's residuary clause.
- The intestacy statutes, if the gift was a part of the residuary.

(RCW 11.12.120(1).) The appointment of an appointee under a will is to be considered a gift that may form part of the residue (RCW 11.12.120(4)).

Subject to the anti-lapse rule and any contingent beneficiary provisions in the will, if the will makes a gift to two or more beneficiaries and one beneficiary does not survive the testator, then the gift passes proportionately to the remaining surviving beneficiaries unless otherwise provided in the will (RCW 11.12.120(2)).

Gift Not Owned by Testator at Death (Ademption)

Ademption provides that if the testator no longer owns property that is a specific gift in the testator's will, the specific gift is not made. There are two types of ademption:

- Ademption by satisfaction occurs when, during a testator's lifetime, a testator makes a gift or provides a substitute for a bequeathed item evidencing an intention to revoke or cancel the bequest.

- Ademption by extinction occurs when a thing specifically bequeathed no longer exists in the testator's estate at death.

(*In re Estate of Frank*, 189 P.3d 834, 839 (Wash. Ct. App. 2008).)

Ademption does not apply to residuary gifts (see *In re Behre's Estate*, 227 P. 859, 860 (Wash. 1924)).

For example, if the testator's will makes a specific bequest of the testator's blue truck to the testator's son, but the testator sells the truck and buys a red sedan two years before death, then the gift of the truck adeems and the son does not receive a substitute bequest. If the testator makes a specific bequest of the blue truck or any vehicle that the testator owns at death, then the gift does not adeem and the son receives the red sedan as a specific bequest.

Not Enough Assets (Abatement)

Abatement occurs when there are not enough assets to satisfy gifts made under a will. Property abates generally in the following order:

- Intestate property.
- Residuary gifts.
- General gifts.
- Specific gifts.

Real property and personal property abate to the same degree (without preference for one over the other). (RCW 11.10.010(1).)

If the will expresses an order of abatement, or if the testamentary plan or the purpose of the gift is defeated by the statutory order of abatement, then the gift abates as necessary to give effect to the testator's intent (RCW 11.10.010(2)).

If there are not enough assets in the probate estate, non-probate assets may be subject to abatement under similar provisions (RCW 11.10.040).

Gifted Property Encumbered

When any real or personal property is specifically gifted, the beneficiary takes the property subject to any encumbrances on that property unless the will states that the encumbrance should be paid before the beneficiary takes the property (RCW 11.12.070).

Effect of Divorce

Unless the will specifically provides otherwise, the dissolution, invalidation, or termination of the marriage or domestic partnership revokes any provisions in the will affecting a former spouse or domestic partner. Washington interprets the will as if the former spouse or partner predeceased the testator, having died when the court entered the dissolution decree. (RCW 11.12.051(1).) This provision is only applicable once a dissolution decree is final, not on the filing for dissolution or on a legal separation (RCW 11.12.051(2)).

If the testator remarries the former spouse, then the revoked provisions are automatically revived (RCW 11.12.051).

There are similar revocation and revival provisions for non-probate assets (RCW 11.07.010).

Effect of Marriage

If a testator executes a will before a marriage or domestic partnership, Washington presumes the testator would want to provide for the spouse or partner (called an omitted spouse or partner). Unless it appears from the will or other clear and convincing evidence that the testator's failure to name or provide for a spouse or partner was intentional, Washington considers the spouse or partner to be an omitted spouse or partner. (RCW 11.12.095(1).)

Washington statutes offer guidance on whether or not the testator named or provided in the will for the testator's spouse or partner:

- A spouse or partner identified in a will by name is named whether or not identified as a spouse or partner.
- A reference in a will to the decedent's future spouse or partner or a similar term is a naming of a spouse with whom the decedent later marries or enters into a domestic partnership. However, a reference to another class like the decedent's heirs or family is not a naming of a spouse or partner in the class.
- A nominal interest in an estate does not constitute a provision for a spouse or partner.

(RCW 11.12.095(2).)

An omitted spouse or partner generally receives an amount equal to that which the spouse or

partner receives if the decedent died intestate. This includes all community property and a portion of the decedent's separate property. However, the court awards the spouse or partner a smaller share or no share at all if, based on clear and convincing evidence, it is more in keeping with the decedent's intent. (RCW 11.12.095(3); see Question 16.)

In deciding on this award, a court may also consider other evidence of the testator's intent not in the will, such as whether or not the spouse or partner was provided for:

- With non-probate assets.
- Under marriage settlement agreements.
- Under community property laws.

(RCW 11.12.095(3); see *Bay v. Estate of Bay*, 105 P.3d 434, 438 (Wash. Ct. App. 2005); see Question 8: Community Property Rights.)

After-Born Child

If the testator executes a will before the birth or adoption of a child, Washington presumes the testator would want to provide for the child (called an omitted child). Unless it appears from the will or other clear and convincing evidence that the testator's failure to name or provide for a child was intentional, Washington considers the child to be an omitted child. (RCW 11.12.091(1).)

Washington statutes offer guidance on whether or not the testator named or provided in the will for the testator's child:

- A child identified in a will by name is named whether or not identified as a child.
- A reference in a will to a class described as the "children, descendants or issue of the decedent" born after the will's execution, or a similar term, is a naming of a child in that class. However, a reference to another class like the decedent's heirs or family is not a naming of a child in that class.
- A nominal interest in an estate is not a provision for a child.

(RCW 11.12.091(2).)

An omitted child generally receives an amount equal to that which the child receives if the decedent died intestate. However, the court awards the child a smaller share or no share at all if, based on clear and convincing evidence, it is more in keeping with the decedent's intent. In deciding on this award, the court may also consider:

- The disposition of non-probate assets.
- Provisions for the decedent's other children.
- Provisions for the child's other parent.

(RCW 11.12.091(3).)

Beneficiary Causes Testator's Death

Any person participating in the willful and unlawful killing of another person, either as a principal or an accessory before the fact, may not inherit from the decedent under the Slayer Statute (RCW 11.84.010 to 11.84.900). This person is known as a slayer (RCW 11.84.010(5)). If a potential beneficiary is convicted for the willful and unlawful killing, is found not guilty by reason of insanity, or is found to be a slayer based on a preponderance of the evidence, Washington deems the beneficiary to predecease the decedent (RCW 11.84.030 and 11.84.140).

Washington deems only the slayer to predecease the decedent and not the slayer's descendants. Therefore, because of Washington's anti-lapse statute, the slayer's inheritance may pass to the slayer's descendants unless the will provides otherwise. (See *In re Estate of Evans*, 326 P.3d 755, 760 (Wash. Ct. App. 2014); Beneficiary Does Not Survive (Lapse).)

The slayer statute prevents an inheritance from passing to any person participating the willful and unlawful financial exploitation, either as a principal or an accessory before the fact, of a vulnerable adult (RCW 11.84.010). A vulnerable adult includes a person either:

- 60 years of age or older with the functional, mental, or physical inability to care for themselves.
- Found incapacitated under statute.
- With a developmental disability, as defined under statute.
- Admitted to any care facility.
- Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under statute.
- Receiving services from an individual provider.
- Self-directing the person's own care and receiving services from a personal aide under statute.

(RCW 11.84.010(6) and 74.34.020(21).)

Washington deems a person found to be an abuser of a vulnerable adult by clear, cogent, and convincing evidence to predecease the decedent for inheritance purposes. However, due to Washington's anti-lapse statute, the abuser's inheritance may pass to the abuser's descendants unless the will provides otherwise. (RCW 11.84.030 and 11.84.150; see Beneficiary Does Not Survive (Lapse).)

Simultaneous Death

Washington adopted the Uniform Simultaneous Death Act. Unless the will provides for another survival requirement, an individual generally must survive another individual by 120 hours to take under a will. Survival must be established by clear and convincing evidence. (RCW 11.05A.020 and 11.05A.060.)

Lost Wills

15. Please describe what happens if the original will is lost.

In Washington, if a will was lost or destroyed and the loss or destruction did not revoke the will (the testator did not intend to revoke the will), the court may accept a copy of a will or other evidence to establish the will's contents. At a noticed hearing, the court may accept written evidence of the will's execution and validity signed by the witnesses and filed with the clerk. (RCW 11.20.070(1).)

The proponent of a will must provide the lost or destroyed will's provisions by clear, cogent, and convincing evidence, with at least a witness to either the will's contents or the copy's authenticity (RCW 11.20.070(2)).

When a will proponent establishes a lost or destroyed will, the court must state the will's provisions in the judgment establishing the will. The judgment must be recorded, as wills are required to be recorded. The court may appoint a personal representative for a lost or destroyed will the same as with reference to original wills presented to the court for probate. (RCW 11.20.070(3); see Question 10.)

To satisfy the recording requirement and ensure that letters are issued, the order admitting the lost will should include language directing the clerk of the court to:

- Promptly record the order, as wills are required to be recorded.
- Issue letters testamentary to the petitioner on the filing of petitioner's sworn oath of personal representative.

These same provisions apply to electronic wills, the custody of which were not maintained by qualified custodians, and these wills must be treated as lost or destroyed wills (RCW 11.20.020(3) and 11.20.070).

For more information regarding admitting wills to probate and probate generally, see State Q&A, Probate: Washington.

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

If there is no will or if the will's terms distribute assets according to intestacy laws, the decedent's estate assets are distributed according to Washington's intestate succession laws (RCW 11.04.015 to 11.04.290). Under these laws, when a decedent dies intestate, assets are distributed as follows:

- A surviving spouse or state registered domestic partner receives the following when the decedent is survived by descendants (also called issue):
  - all the decedent's share of the net community estate; and
  - one-half of the net separate estate.
- A surviving spouse receives the following when the decedent is not survived by any issue:
  - all the decedent's share of the net community estate; and
  - three-quarters of the net separate estate if the decedent is survived by one or more parent or by one or more of the issue of one or more of the decedent's parents; or
  - all of the net separate estate, if there is no surviving parent or issue of parent.

For more information on community and separate property in Washington, see Question 8: Community Property Rights.

- The share of the net estate not distributable to the surviving spouse or registered domestic partner, or the entire net estate if there is no surviving spouse or registered domestic partner, is distributed:
  - to the decedent's issue; if they are all in the same degree of kinship to the decedent, they take equally or, if not, those of more remote degree take by representation;
  - to the parent or parents surviving the decedent if the decedent is not survived by issue;
  - to the issue of the parent or parents surviving the decedent (if the decedent is not survived by issue or by either parent); if they are all in the same degree of kinship to the decedent, they take equally or, if not, those of more remote degree take by representation;
  - to the grandparents surviving the decedent (if the decedent is not survived by issue or by either parent, or by any issue of the parent or parents); if both maternal and paternal grandparents survive the decedent, the maternal grandparent or grandparents take one-half and the paternal grandparent or grandparents take one-half; or
  - to the issue of any grandparent surviving the decedent (if the decedent is not survived by issue or by either parent, or by any issue of the parent or parents, or by any grandparent or grandparents); as a group, the issue of a maternal grandparent share equally with the issue of the paternal grandparent, also as a group; within each group, all members share equally if they are all in the same degree of kinship to the decedent or, if not, those of more remote degree take by representation.

(RCW 11.04.015.)

Taking by representation is a method of determining distribution where the takers are in unequal degrees of kinship to a decedent. After first determining those entitled to the estate in the nearest degree of kinship where there are takers then living, the estate is divided into equal shares. The number of shares is the sum of the number of persons surviving the decedent in the nearest degree of kinship and the number of persons in the same degree of kinship dying before the decedent but leaving issue surviving the decedent. (RCW 11.02.005(17).)

Each share of a deceased person in the nearest degree is divided among those of the deceased person's issue surviving the decedent with no ancestor then living in the line of relationship between them and the decedent, those more remote in degree taking together the share which their ancestor would take if the ancestor survived the decedent (RCW 11.02.005(17)).

For example, if a decedent left two surviving children and two children of a deceased child, the estate would be divided into three shares, one for each of the surviving two children and one for the deceased child, which share would be subdivided for the deceased child's two children.