



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Department of Revenue

Permanent Rule Only

Effective date of rule:

Permanent Rules

31 days after filing.

Other (specify) (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

Yes No If Yes, explain:

Purpose: WAC 458-61A-202 Inheritance or devise (Rule 61A-202), and WAC 458-61A-210 Irrevocable trusts (Rule 61A-210), describe the required documentation to substantiate an exemption to real estate excise tax when real property is transferred. Rules 61A-202 and 61A-210 are being amended to reflect legislative changes due to the passage of Substitute House Bill 2539 (2016) which clarified the documentation requirements to qualify for an exemption to real estate excise tax when real property is transferred. The Department is proposing revisions to Rule 61A-202 and Rule 61A-210 that include:

- Adding the following definitions:
 - Heir
 - Lack of probate affidavit
 - Nonpro rata distribution
- Clarifying the types of documents required when real property transfers through a devise by will or inheritance
- Reorganizing subsections and examples for readability purposes

Citation of existing rules affected by this order:

Repealed:
Amended: WAC 458-61A-202 and WAC 458-61A-210
Suspended:

Statutory authority for adoption: RCW 82.45.150 and RCW 82.01.060(2)

Other authority :

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 16-23-055 on November 10, 2016.

Describe any changes other than editing from proposed to adopted version:

None.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting: A preliminary cost-benefit analysis was not prepared.

Date adopted:

January 25, 2017

NAME

Kevin Dixon

SIGNATURE

TITLE

Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: January 25, 2017

TIME: 11:16 AM

WSR 17-04-042

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	Amended	Repealed
Federal rules or standards:	New	Amended	Repealed
Recently enacted state statutes:	New	Amended	Repealed

The number of sections adopted at the request of a nongovernmental entity:

New	Amended	Repealed
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The number of sections adopted in the agency's own initiative:

New	Amended	2	Repealed
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	Amended	2	Repealed
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The number of sections adopted using:

Negotiated rule making:	New	Amended	Repealed
Pilot rule making:	New	Amended	Repealed
Other alternative rule making:	New	Amended	Repealed

AMENDATORY SECTION (Amending WSR 15-02-018, filed 12/29/14, effective 1/29/15)

WAC 458-61A-202 Inheritance or devise. (1) **Introduction.** Transfers of real property (~~((by inheritance or))~~) through a devise by will or inheritance are not subject to the real estate excise tax. For the purpose of this exemption, it does not matter whether the real property transferred was encumbered by underlying debt at the time it was inherited or devised.

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

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

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

(i) The names of the affiant or affiants;

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

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

(iv) A description of the real property;

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

(vi) Any other information the department may require.

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

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

(4) **Nonpro rata distributions.** A nonpro rata distribution ((is one in which the transfer of real property to the heirs or devisees may not be in proportion to their interests. For example, Aunt Mary wills her entire estate equally to her three nieces. The estate consists of her primary residence, a cottage at the ocean, and significant cash assets, among other things. Rather than take title to the two parcels of real estate in all three names, the estate may be distributed by deeding the primary residence to Meg, the oceanfront property to Beth, and the majority of the cash assets to Jo. Such distribution by a personal representative of a probated estate or by the trustee of a trust is not subject to the real estate excise tax if the transfer is authorized under the nonintervention powers of a personal representative under RCW 11.68.090 or under the nonpro rata distribution powers of a trustee under RCW 11.98.070(15), if no consideration is given to the personal representative or the trustee for the transfer. For the purpose of this section, consideration does not include the indebtedness balance of any real property that is encumbered by a security lien.

(3)) made by a personal representative of a probated estate or by the trustee of a trust is not subject to the real estate excise tax if:

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

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

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

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

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

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

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

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

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

(a) **Community property agreement or right of survivorship.** If the transfer of real property to a surviving spouse or surviving domestic partner is in accordance with a community property agreement or ((a survivorship clause is not subject to real estate excise tax.

(5)) right of survivorship clause, copies of the recorded agreement and a certified copy of the death certificate are required.

(b) **Joint tenants with rights of survivorship and remainder interests.** ((The transfer of)) If real property is transferred upon the death of a joint tenant to the remaining joint tenants under right of survivorship ((is not subject to the real estate excise tax.

(6)), a certified copy of the death certificate is required.

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

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

~~((7))~~ **(d) Transfer on death deeds.** If the transfer of real property is pursuant to a previously recorded transfer on death deed, upon the death of the transferor to the beneficiary(ies) named in the transfer on death deed (occurs upon the death of the transferor and is generally not subject to the real estate excise tax), a certified copy of the death certificate is required. However, if the transfer of real property pursuant to a transfer on death deed satisfies a contractual obligation of the transferor owed to the beneficiary(ies) designated in the transfer on death deed, real estate excise tax is due on the transfer.

~~((8))~~ **Documentation.** In order to claim this exemption, the following documentation must be provided:

~~(a))~~ **(a) Community property agreement.** If the property is being transferred under the terms of a community property agreement, copies of the recorded agreement and certified copy of the death certificate;

~~(b))~~ **(b) Trusts.** If property is being transferred under the terms of a trust instrument, a certified copy of the death certificate, and a copy of the trust instrument showing the authority of the grantor;

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

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

~~(e))~~ **(d) Joint tenants with rights of survivorship and remainder interests.** A certified copy of the death certificate is recorded to perfect title;

~~(e))~~ is required.

~~(f))~~ **(g) Court order.** If ~~((the))~~ real property is ~~((being))~~ transferred pursuant to a court order, a certified copy of the court order requiring the transfer of property~~((7))~~ and confirming that the grantor is required to do so under the terms of the order~~((+)~~

~~(g))~~ **(f) Transfer on death deeds.** If the property is being transferred pursuant to a transfer on death deed, the beneficiary(ies) of the transfer on death deed must record a certified copy of the death certificate to perfect title.

~~(g))~~ **(g) Other.)** is required.

~~(h))~~ **(h) Community property interest.** If the community property interest of the decedent is ~~((being))~~ transferred to a surviving spouse or surviving domestic partner absent the documentation ~~((set forth in (a) through (f))~~ described in (a), (b), (e), (f), or (g) of this subsec-

tion, a certified copy of the death certificate and a signed lack of probate affidavit from the surviving spouse or surviving domestic partner affirming that he or she is the sole and rightful heir ((of)) to the property are required. Refer to the department's web site at dor.wa.gov for an example of the lack of probate affidavit that may be used.

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

(i) A certified copy of the death certificate for the decedent-transferor;

(ii) A certified copy of the death certificate for the spouse or domestic partner from whom the decedent-transferor inherited the real property; and

(iii) A lack of probate affidavit affirming that the affiant or affiants are the rightful heirs to the property.

AMENDATORY SECTION (Amending WSR 14-06-060, filed 2/28/14, effective 3/31/14)

WAC 458-61A-210 Irrevocable trusts. (1) **Introduction.** The distribution of real property to the beneficiaries of an irrevocable trust is not subject to the real estate excise tax if no valuable consideration is given for the transfer and the distribution is made according to the trust instrument.

(2) **Transfer into trust.** A transfer of real property to an irrevocable trust is subject to the real estate excise tax if:

(a) The transfer results in a change in the beneficial interest and not a mere change in identity or ownership; and

(b) There is valuable consideration for the transfer.

(3) **Examples.** The following examples, while not exhaustive, illustrate some of the circumstances in which a transfer of real property to a trust may or may not be exempt from real estate excise tax. The status of each situation must be determined after a review of all the facts and circumstances.

(a) **Example 1.** Eric and Annie, husband and wife, transfer real property valued at \$500,000 to an irrevocable trust. The property has an underlying debt of \$300,000 that is secured by a deed of trust. Under the terms of the trust, the trustee is required to pay all the income annually to the grantors (Eric and Annie), or to the survivor if one of them dies. Upon the death of both Eric and Annie, the property will be divided equally among their children. The conveyance of the property into the trust is not subject to the real estate excise tax, even if the trust pays the indebtedness, because there has been no change in the present beneficial interest, and Eric and Annie did not receive consideration for the transfer.

(b) **Example 2.** Jim and Jean, husband and wife, own real property valued at \$800,000. Upon Jean's death, her one-half interest in the property is transferred to Jean's testamentary trust under the terms of her will. Jim, as trustee, has sole discretion to accumulate income or to pay income to himself, or to their children, or to their grandchildren, or to each. The transfer to the trust is not subject to real estate excise tax. See WAC 458-61A-202.

(c) **Example 3.** Same facts as in Example 2, but upon Jean's death, Jim's remaining half-interest in the property is valued at \$400,000, with an underlying debt of \$30,000, for which he is personally liable. Jim transfers his half-interest to Jean's testamentary trust, and the trust pays or is obligated to pay the indebtedness. The conveyance of Jim's one-half interest is subject to real estate excise tax, because the transfer involves both a present change in the beneficial interest (after Jean's death, assets in Jean's trust are legally separate from assets belonging to Jim) and there is valuable consideration in the form of relief of liability for the debt. The real estate excise tax is due on the amount of the consideration (\$30,000).

(4) **Revocable trusts.** See WAC 458-61A-211 for the taxability of transfers into a revocable trust.

(5) **Documentation.** When real property is transferred to or from a testamentary trust, or real property is transferred to or from an irrevocable trust, the following must be available to the department upon request, and provided to the county treasurer (~~or the department upon request~~) and recorded with the county auditor:

(a) A certified copy of the death certificate and a copy of that portion of the trust instrument showing the authority of the grantor; or

(b) A statement signed by the trustee or the grantor, or the representative of the trustee or grantor containing the following information:

(i) The name, address, and telephone number of the trustee or grantor, and/or representative of the trustee or grantor who is authorized to represent the trustee or grantor before the department of revenue;

(ii) The character of the trust, e.g., testamentary, irrevocable living trust, etc.;

(iii) The nature of the transfer:

(A) If the transfer is to or from a testamentary trust, the nature of and reason for the transfer.

(B) If the transfer is to or from an irrevocable living trust:

(I) The nature and reason for the transfer;

(II) Whether or not the property is encumbered with debt; and

(III) Whether or not the trustee may, at the time of the transfer, distribute income and/or principal to a person(s) other than the grantor(s).