



# EXPEDITED RULE MAKING

**CR-105 (June 2004)**  
(Implements RCW 34.05.353)  
**EXPEDITED RULE MAKING ONLY**

**Agency:** Department of Revenue

**Title of rule and other identifying information:** 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.

### NOTICE

**THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO**

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**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** 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

Copies of draft rules are available for viewing and printing on our website at [dor.wa.gov](http://dor.wa.gov)

**Reasons supporting proposal:** Rules 61A-202 and 61A-210 incorporate legislative changes from Substitute House Bill 2539 passed during the 2016 legislative session.

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

**Statute being implemented:**  
RCW 82.45.197

**Is rule necessary because of a:**

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION:

#### CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

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**TIME: 10:42 AM**

**WSR 16-23-055**

**Date**  
November 10, 2016

**Name**  
Kevin Dixon

**Signature**

**Title**  
Rules Coordinator

**Name of proponent:** Department of Revenue

- Private
- Public
- Governmental

**Name of agency personnel responsible for:**

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**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** None.

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))~~ 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](http://dor.wa.gov) for an example of the lack of probate affidavit that may be used.

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

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

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

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

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).

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