

Ancillary Probate in Florida

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A Practice Note summarizing the procedure for ancillary probate in Florida. This Note identifies and discusses the key laws and procedures regarding Florida ancillary probate proceedings, including, but not limited to, determining when a Florida ancillary probate proceeding is necessary or permissible, preliminary requirements for initiating an ancillary probate proceeding, appointment of a personal representative to maintain an ancillary probate proceeding in Florida, the general process for conducting and concluding an ancillary probate proceeding and alternative ways to address the disposition of Florida property for a non-Florida resident decedent.

If a non-resident of Florida dies leaving assets in Florida, credits due from Florida residents or liens on Florida property, an ancillary probate proceeding in Florida may be necessary to dispose of the Florida property. The Florida ancillary probate proceeding is subject to Florida law and is generally brought secondary to the estate proceeding in the decedent's state of domicile (the decedent's state of residence). If two years have passed since the decedent's death or the decedent's Florida estate is relatively small, there are also alternative procedures available to administer the decedent's Florida estate. This Note provides an overview of the ancillary probate process in Florida and its alternatives.

REQUIREMENTS FOR ANCILLARY PROBATE

Many clients wish to avoid an ancillary probate proceeding, whether in Florida or elsewhere. An ancillary probate in Florida

is only required if an estate meets certain criteria. An ancillary probate proceeding is generally required in Florida if the decedent both:

- Was not a Florida resident at death (see Non-Resident of Florida).
- Died owning Florida property (see Florida Property).

To avoid an ancillary probate in Florida, counsel should ensure that non-Florida resident clients with Florida ties do not own outright the types of Florida assets that trigger a requirement for Florida ancillary probate (see Florida Property).

NON-RESIDENT OF FLORIDA

To qualify for a Florida ancillary probate, the decedent must not have been a resident of Florida at the time of the decedent's death (§ 734.102(1), Fla. Stat.; see *Loewenthal v. Mandell*, 170 So. 169, 171 (Fla. 1936)).

Under the Florida Probate Code, the decedent's domicile and residence are synonymous and mean the decedent's usual place of dwelling (§ 731.201(13) and (34), Fla. Stat.). Establishing Florida domicile generally requires that a person typically reside in, maintain, and indefinitely intend to maintain the person's principal home in Florida (§ 222.17, Fla. Stat.).

When an individual is provided due process in a foreign court's proceedings that makes a determination of domicile, a Florida court should:

- Give full faith and credit to the foreign court's determination.
- Bind individuals to that determination.

(See *Cuevas v. Kelly*, 873 So. 2d at 372 (citing *Loewenthal*)).

FLORIDA PROPERTY

A Florida ancillary probate may be required if a non-resident decedent died leaving either:

- Assets in Florida.
- Credits due from Florida residents.
- Liens on Florida property.

(§ 734.102(1), Fla. Stat.)

The situs of these types of Florida assets varies based on the type of property. For example:

- Debts owed to nonresidents are generally located in the county where:
 - the individual debtor resides; or
 - the entity debtor maintains its principal office.
- Commercial paper, investment paper, and other instruments are deemed to be located in the county where the instrument is when the decedent dies.

(§ 731.106(1), Fla. Stat.)

REQUIRED VERSUS POTENTIAL ANCILLARY PROBATE

In some cases, a Florida ancillary probate is required and in other cases a Florida ancillary probate may be, but is not always, required. The rules differ depending on whether the decedent:

- Owned real property in Florida in the decedent's own name at death (see Ancillary Probate When Decedent Owns Real Property in Florida).
- Did not own real property in Florida at the decedent's death but owned other Florida property in the decedent's own name (see Ancillary Probate When Decedent Does Not Own Real Property in Florida).

ANCILLARY PROBATE WHEN DECEDENT OWNS REAL PROPERTY IN FLORIDA

Florida probate courts apply the doctrine of *lex loci rei sitae* (law of the place where the property is situated) when disposing of Florida real property under a decedent's will (*Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940)). Therefore, Florida probate courts apply Florida law to construe a will that disposes of Florida real property even though the same will may be construed by courts in other states, using their own state law, regarding the disposition of real property located in those other states (*In re Roberg's Estate*, 396 So. 2d 235 (Fla. 2d DCA 1981); see *In re Estate of Barteau*, 736 So. 2d 57 (Fla. 2nd DCA 1999)).

A nonresident of Florida owning Florida real estate in the nonresident's name at the time of the nonresident's death must open an ancillary probate proceeding in Florida to dispose of the Florida real property. To avoid an ancillary probate proceeding, a non-Florida resident may:

- Make a lifetime transfer of Florida real property into a revocable trust (for example, *Becklund v. Fleming*, 869 So. 2d 1, 5 (Fla. Dist. Ct. App. 2003)).
- Own the property jointly with another individual with a right of survivorship, in which case the real property passes by operation of law at the decedent's death to the joint owner and no probate proceeding is required to make the transfer (for example, *Ebanks v. Ebanks*, 198 So. 3d 712 (Fla. 2d DCA 2016)).

It is also possible to avoid a full ancillary probate proceeding in Florida and to instead use a simplified procedure if certain criteria are met (see Alternatives to Ancillary Administration).

ANCILLARY PROBATE WHEN DECEDENT DOES NOT OWN REAL PROPERTY IN FLORIDA

Florida Tangible Property, Intangible Property, and Debts

If a decedent dies owning no Florida real property but does own other Florida property, it is possible to avoid a Florida ancillary probate in some circumstances. For example, a foreign personal representative may receive delivery of personal property located in Florida or payment of debts that are liens on Florida property:

- After 90 days from the date of appointment as foreign personal representative.
- If at that time the individuals holding the property or the debtors have not yet received from a Florida ancillary personal representative or curator a written demand for delivery of the property or payment of the debts.

(§ 734.101(4), Fla. Stat.)

A foreign personal representative is a personal representative appointed outside of Florida (§ 731.201(17), Fla. Stat.).

In the context of an ancillary probate proceeding, a foreign personal representative is sometimes also referred to as a domiciliary personal representative to indicate that the foreign personal representative was appointed:

- Outside of Florida.
- In the state or country where the decedent was domiciled at death.

A Florida probate may be unnecessary if:

- No Florida personal representative is appointed within 90 days from the date that a foreign personal representative is appointed.
- The debtors or other individuals holding the Florida property deliver the property to the foreign personal representative.

If a debtor pays a debt to a foreign personal representative in a situation where Florida debts exist but no Florida ancillary probate is opened, the Florida debtor should obtain from the foreign personal representative and record in the public records:

- A satisfaction of mortgage or lien executed by the foreign personal representative.
- An authenticated copy of the ancillary letters of administration or other evidence of the foreign personal representative's authority.

(§ 734.101(3), Fla. Stat.)

An authenticated copy of a document under the Florida Probate Code means a copy that is either:

- Certified.
- Authenticated according to the Federal Rules of Civil Procedure.

(§ 731.201(1), Fla. Stat.)

Satisfaction of a debt in this manner is an effective discharge of the mortgage or lien, whether or not the debtor received a written demand before paying the debt (§ 734.101(3), Fla. Stat.).

Another alternative to an ancillary probate proceeding that applies in certain circumstances when a decedent dies owning only Florida personal property is a disposition of personal property without administration. For more information on this process, including

the criteria to qualify for this type of disposition, see *Disposition of Personal Property Without Administration*.

Section 655.936 of the Florida Statutes provides a separate rule for the disposition of the contents of safe-deposit boxes held in a decedent's name. A personal representative appointed by a Florida court, on presentation of a certified copy of that personal representative's letters of authority is:

- Entitled to access to any safe-deposit box held in the decedent's name.
- Permitted to remove the contents of any safe-deposit box held in the decedent's name.

(§ 655.936(1), Fla. Stat.)

Before this is done the personal representative and the lessor institution must comply with certain additional requirements including preparing an inventory of the contents of the safe-deposit box (§ 733.6065, Fla. Stat.).

A foreign personal representative, on the other hand, may not gain access to the contents of a safe-deposit box held in the decedent's name until three months after receiving letters of authority from a court in any state other than Florida (§ 655.936(2), Fla. Stat.).

Subject to the discretion of the lessor of the safe-deposit box and if the lessor has not received notice of the appointment of any Florida personal representative, the foreign personal representative may gain access to the property in the decedent's safe-deposit box on delivery to the lessor of both:

- An affidavit setting forth facts showing the domicile of the deceased lessee to be other than Florida and stating that there are no unpaid creditors of the deceased lessee in Florida.
- A certified copy of the foreign personal representative's letters of authority.

(§ 655.936(2), Fla. Stat.)

ANCILLARY PERSONAL REPRESENTATIVE

APPOINTING AN ANCILLARY PERSONAL REPRESENTATIVE

Under the Florida Probate Code, the executor or administrator of the decedent's probate estate is referred to as the personal representative (§ 731.201(28), Fla. Stat.). Florida law requires that, at the time of the decedent's death, a personal representative be both:

- At least 18 years of age.
- In most cases, a Florida resident.

(§§ 733.302 and 733.304, Fla. Stat.)

Certain non-resident family members may act as personal representative (§ 733.304, Fla. Stat.). When drafting a will for a client with Florida property that may be subject to ancillary administration in Florida, counsel should consider the identity of the personal representatives named in the will and whether they qualify to act in Florida. If the named personal representatives do not qualify to act in Florida (if they are not a Florida resident or a family member that is authorized under Florida statutes), counsel should include an appointment of a personal representative

specifically designated to administer the Florida property. For additional information regarding qualifying as a personal representative in Florida, see Practice Note, *Understanding Probate in Florida: Appointment of the Personal Representative* ([w-000-3003](#)) and State Q&A, *Probate: Florida: Question 7* ([w-007-4125](#)).

Ancillary Personal Representative of Testate Estate

If an individual meets the minimum requirements for qualifying as personal representative, the order of appointment for ancillary personal representatives is:

- Personal representative named in the decedent's will specifically designated to administer the decedent's Florida property.
- Foreign personal representative of the decedent's estate.
- Alternate or successor foreign personal representative named in the decedent's will.
- Personal representative selected by those entitled to a majority interest of the Florida property.

(§ 734.102(1), Fla. Stat.)

Ancillary Personal Representative of Intestate Estate

If the foreign personal representative of an intestate estate is not qualified to act as a personal representative in Florida, the order of preference for appointment of a personal representative is:

- Surviving spouse.
- The person selected by a majority in interest of the heirs.
- The heir nearest in degree or, if more than one, the best qualified.
- The individual appointed by the court.

(§ 734.102(1), Fla. Stat.; see *Piloto v. Lauria*, 45 So. 3d 565, 569 (Fla. 4th DCA 2010); §§ 733.301(1)(b)(1)-(3) and 733.301(3), Fla. Stat.)

If an individual is appointed by the court to serve as personal representative of the ancillary probate proceeding, the individual must:

- Neither work for or hold public office under the court.
- Not be employed by or hold office under any judge exercising probate jurisdiction.

(§ 733.301(3)(a) (b), Fla. Stat.)

RIGHTS AND RESPONSIBILITIES OF ANCILLARY PERSONAL REPRESENTATIVE

Ancillary personal representatives have the same rights, powers, and authority as all personal representatives in Florida to manage and settle estates, including the rights to:

- Sell, lease, or mortgage local property (see *Dealing with Florida Real Property*).
- Raise funds for the payment of debts, claims, and devisees in the domiciliary jurisdiction.

(§ 734.102(7), Fla. Stat.)

Property cannot be sold, leased, or mortgaged to pay a claim that is otherwise barred by any relevant statute of limitation or of nonclaim in Florida (§ 734.102(7), Fla. Stat. and see *The Creditor Notification and Claims Process*).

Dealing with Florida Real Property

A personal representative, without order of court, may dispose of real property located in Florida if the decedent's will specifically confers a power to sell or mortgage the real property or generally provides a power to sell any asset of the estate (§ 733.613(2), Fla. Stat.). Otherwise, the personal representative may sell Florida real property at a public or private sale if:

- The personal representative determines that a sale is in the best interests of both the estate and those interested in the real property.
- The court authorizes or confirms the sale.

(§ 733.613(1), Fla. Stat.)

Other than regarding existing mortgages or other liens against real property, the purchaser or lender of Florida real property in this circumstance takes title free of:

- Claims of creditors of the estate.
- Entitlements of estate beneficiaries.

(§ 733.613(3), Fla. Stat.)

Rights of Ancillary Personal Representative to Sue and be Sued

Lawsuits may be brought in Florida in connection with Florida property against any appointed personal representative, whether foreign or not. Any appointed personal representative, foreign or not, may defend against any of these actions. (§ 734.101(2), Fla. Stat.)

A personal representative that is appointed in any US state or territory may maintain actions in Florida courts if the personal representative produces either:

- Authenticated copies of probated wills.
- Letters of administration obtained in the US.

(§ 734.101(1), Fla. Stat.)

For example, a foreign personal representative that has received letters of administration in the US or any of its territories may initiate a wrongful death action in Florida courts without having to first be appointed personal representative of the decedent's Florida ancillary estate under the Florida Probate Code (see *Barfield v. Schmon*, 537 So. 2d 1056 (Fla. 4th DCA 1989)). However, a personal representative that has been appointed personal representative of the decedent's estate by a court in a foreign nation must also be appointed as personal representative of the ancillary estate under Florida law to initiate an action in Florida courts (see *Gubanova v. The Blackstone Grp. L.P.*, 12-22319-CIV, 2013 WL 12064500, at *5 (S.D. Fla. Feb. 25, 2013)).

Florida's long-arm statute and probate code provisions provide how and to what extent a foreign personal representative may be subject to the jurisdiction of Florida courts by an act of either:

- The foreign personal representative.
- The decedent.

(§§ 48.193, 734.201 and 734.202, Fla. Stat.; see *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla. 1989).)

Personal Liability of Ancillary Personal Representative

The appointed personal representative may incur personal liability in certain circumstances. For example, the personal representative can be personally liable:

- On a contract if the personal representative fails to reveal the personal representative's representative capacity and identify the estate in the contract.
- If personally at fault for:
 - obligations arising from ownership or control of the estate; or
 - torts committed in the course of the estate administration.

(§ 733.619, Fla. Stat.)

Representation of Ancillary Personal Representative by Florida Attorney

An ancillary personal representative must be represented by an attorney admitted to practice in Florida unless the ancillary personal representative is either:

- The sole interested person in the estate.
- Admitted to practice law in Florida in which case the ancillary personal representative may represent himself.

(FL ST PROB Rule 5.030.)

ANCILLARY PERSONAL REPRESENTATIVE COMPENSATION

Florida statutes provide a schedule of presumptively reasonable personal representative commissions. This statutory schedule is not mandatory and may be adjusted by either:

- Provision in the will.
- Contract between the personal representative and the testator.

If compensation provisions are included in the will, in certain circumstances a personal representative can renounce those compensation provisions and receive statutory compensation instead. (§ 733.617(4), Fla. Stat.) The drafting attorney should consider inserting explicit compensation provisions into a client's will.

The statutory commission is based on a percentage of the Florida probate estate and the income earned on the probate assets during administration (§ 733.617(1), Fla. Stat.). A personal representative may also:

- Receive additional compensation for performing extraordinary services.
- Reject compensation entirely.

(§§ 733.617(3) and (4), Fla. Stat.)

Any interested person may petition the court to:

- Increase or decrease the personal representative's compensation for ordinary services.
- Award compensation for extraordinary services.

(§ 733.617(7), Fla. Stat.)

Members of the Florida Bar may receive fees for legal services in addition to personal representative fees if acting in both capacities (§ 733.617(6), Fla. Stat.).

For additional information about compensation of personal representatives, including compensation of multiple personal representatives, see Practice Note, Understanding Probate in Florida: Compensation of the Personal Representative ([w-000-3003](#)) and State Q&A, Probate: Florida; Question 9 ([w-007-4125](#)).

THE ANCILLARY PROBATE PROCESS

VENUE FOR ANCILLARY PROBATE PROCEEDING

The proper venue for the probate of wills and the granting of letters of administration in Florida ancillary probate proceedings is in any Florida county where either:

- The decedent's property is located.
- Any debtor of the decedent resides if the decedent possessed no Florida property.

(§ 733.101(1)(b)-(c), Fla. Stat.)

If the initial venue for the proceeding is in an improper county and is later transferred to a proper venue, actions taken before the transfer are not invalidated for lack of proper venue (§ 733.101(3), Fla. Stat.).

BEGINNING AN ANCILLARY PROBATE PROCEEDING

There are several requirements that must be met and steps that a petitioner for ancillary probate must take to open an ancillary probate proceeding in Florida, including:

- Filing an oath (see Personal Representative's Oath).
- Posting a bond if required (see Bond).
- Filing the petition for ancillary administration (see Petition for Ancillary Administration).
- Having a valid will under Florida law (see Requirements for Valid Will).
- Giving notice (see Notice of Petition for Ancillary Administration).
- Filing the decedent's death certificate (see Death Certificate).

Personal Representative's Oath

A Florida personal representative must file an oath to "faithfully administer the estate of the decedent" before a probate court will grant letters of administration (FL ST PROB Rule 5.320).

Bond

Florida ancillary personal representatives must give bond unless the decedent's will or the probate court having jurisdiction over the proceeding waives the bond requirement (§§ 734.102(4) and 733.402(1), Fla. Stat.). Banks and trust companies authorized by law to act as personal representative are not required to give bond (§ 733.402(3), Fla. Stat.). Different circuits have different policies regarding waiving bond and counsel should contact the clerk to determine local practices. For additional information regarding a personal representative's bond, see Practice Note, Understanding Probate in Florida: Bond Requirement ([w-000-3003](#)) and State Q&A, Probate: Florida: Question 8 ([w-007-4125](#)).

Petition for Ancillary Administration

The Florida Probate Rules provide the method with which to begin Florida ancillary probate proceedings. Florida statutes require that ancillary probate proceedings be as similar to original probate proceedings as possible. (§§ 734.102(2) and (4), Fla. Stat.) For additional information regarding original probate proceedings in Florida see Practice Note, Understanding Probate in Florida ([w-000-3003](#)) and State Q&A, Probate: Florida ([w-007-4125](#)).

Any interested person may petition to open an ancillary probate proceeding in Florida (§ 733.202, Fla. Stat.). Interested persons are generally defined as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." (§ 731.201(23), Fla. Stat.).

For a testate estate, an ancillary probate petition must include an authenticated copy of the portion of the domiciliary proceedings necessary to show:

- The will.
- The petition for probate.
- The order admitting the will to probate.
- The authority of the personal representative.

(FL ST PROB Rule 5.470(a)(1).)

For an intestate estate, the petition must include an authenticated copy of the portion of the domiciliary proceedings necessary to show:

- The petition for administration.
- The authority of the personal representative.

(FL ST PROB Rule 5.470(a)(2).)

Requirements for Valid Will

To be admitted to probate, any wills or codicils must be executed as required under Florida law (FL ST PROB Rule 5.470(c); § 734.102(3), Fla. Stat.). Florida law recognizes wills that are validly executed under the laws of the state or country where the will was executed if the will is not a holographic or nuncupative (oral) will (§ 732.502(2), Fla. Stat.; see *Lee v. Estate of Payne*, 148 So. 3d 776 (Fla. 2d DCA 2013)). Wills that are in the testator's handwriting and otherwise executed under Florida law are not considered holographic wills and are admissible to probate in Florida (§§ 732.502(1) and (2), Fla. Stat.). For additional information regarding execution requirements for wills in Florida, see Practice Note, Understanding Wills (FL): General Requirements for Wills ([w-000-2999](#)) and State Q&A, Wills: Florida: Questions 5 and 6 ([w-006-9828](#)).

Notice of Petition for Ancillary Administration

The petitioner must give formal notice of a petition for ancillary administration to:

- All known persons qualified to act as ancillary personal representative:
 - entitled to preference in appointment that is equal to or greater than the petitioner's; and
 - not waiving notice or joining in the petition.
- All domiciliary personal representatives not waiving notice or joining in the petition.

(FL ST PROB Rule 5.470(b); § 734.102(1), Fla. Stat.)

Individuals may generally waive, to the extent of the individual's interest, any right to notice under the Florida Probate Code and may consent to any actions or proceedings under the Florida Probate Code (§ 731.302, Fla. Stat.). When interested parties are willing to waive notice and consent to the personal representative's actions, the probate process is generally faster and more efficient (see Waivers of Final Accounting and Petition for Discharge).

Death Certificate

Within three months of first publication of notice to creditors, the ancillary personal representative must file the decedent's official record of death with the Florida court that has jurisdiction over the ancillary probate proceeding (FL ST PROB Rule 5.205(a)(2) and see Notifying Creditors). If the decedent dies in Florida, the decedent's official record of death must not include the cause of death (§ 382.008(6), Fla. Stat.). Death certificates without cause of death are common in Florida because they are required for probate. Counsel should be able to obtain them without any problem but should know to specifically request death certificates without cause of death for all Florida decedents.

THE CREDITOR NOTIFICATION AND CLAIMS PROCESS

The creditors process in an ancillary probate proceeding is generally identical to the creditor process in an original Florida probate proceeding. For additional information on the creditor claims process in a Florida original probate proceeding, see Practice Note, Understanding Probate in Florida ([w-000-3003](#)).

Notifying Creditors

To notify creditors of an ancillary probate proceeding, the ancillary personal representative must:

- Make a diligent search to locate all reasonably ascertainable creditors, wherever located, and serve a copy of the notice on those creditors. Some creditors do not need to be served, including creditors that have already filed a claim or the claim of which has been paid in full. (§ 733.2121(3)(a), Fla. Stat.)
- Publish notice to creditors once a week for two consecutive weeks in a newspaper published in the county where the estate is administered or, if there is no newspaper published in that county, in a newspaper that is generally circulated in that county. (§ 733.2121(2), Fla. Stat.)
- If the decedent was 55 years of age or older at the time of the decedent's death, the notice to creditors and a copy of the decedent's death certificate must be provided to the Agency for Health Care Administration within three months of publication, unless the agency has already filed a claim (§ 733.2121(3)(d), Fla. Stat.).

The notice to creditors must include:

- The decedent's name.
- The file number of the ancillary estate.
- The designation and address of the Florida court in which the proceedings are pending.
- The name and address of the ancillary personal representative.
- The name and address of the ancillary personal representative's attorney.
- The date of first publication of the notice to creditors.
- A statement that creditors must file claims against the estate with the court during the time periods set forth in Section 733.702, Florida Statutes, or be forever barred (see Deadlines for Filing Creditor Claims).

(§ 733.2121(1), Fla. Stat.)

Filing Creditor Claims

A creditor with a claim against the estate must either:

- Be included on the personal representative's proof of claim filed with the court that states that the creditor has been paid or that the personal representative intends to pay the creditor. The proof of claim must be filed within the time allowed by Section 733.702, Florida Statutes, which provides the general deadlines for filing creditor claims (§§ 733.703(2) and 733.702, Fla. Stat.)
- File a written statement of claim (§ 733.703(1), Fla. Stat.).

Deadlines for Filing Creditor Claims

Known or reasonably ascertainable creditors must file a claim within the later of:

- Three months after the first publication of the notice to creditors.
- Thirty days after service of the notice to creditors.

(§ 733.702 (1) and (2), Fla. Stat.)

For known or reasonably ascertainable creditors served with a notice to creditors, it is generally best to have the end of the thirty day notice period coincide with the end of the three-month publication period to avoid inadvertently extending the period in which a creditor can file a claim (see Practice Note, Understanding Probate in Florida, Strategies for Serving Creditors ([w-000-3003](#))).

If a known or reasonably ascertainable creditor is not served with notice to creditors, the claims period does not begin to run. In this case, a known or reasonably ascertainable creditor can file a claim at any time within two years of the decedent's death. (§ 733.710, Fla. Stat. and *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015).)

Unknown or not reasonably ascertainable creditors have three months from the first publication of the notice to creditors to file a claim (§ 733.702 (1) and (2), Fla. Stat.).

A court may grant an extension to file a claim if the claim is not otherwise barred under Section 733.710, Florida Statutes because two years have passed since the decedent's death. Extensions can be granted on limited grounds including:

- Fraud.
- Estoppel.
- Insufficient notice of the claims period.

(§ 733.702(3), Fla. Stat.)

Regardless of whether notice is ever served or published, if not sooner barred by the 30-day or three-month deadlines, creditors have two years from the date of the decedent's death to file a claim against the decedent's estate or the claim is forever barred. When this two-year bar applies, it is an absolute bar. (§ 733.710 (1) and (2), Fla. Stat. and *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015).) However, no time bars affect liens or the right to foreclose and enforce liens, perfected by duly recorded mortgages, security interests, or possession of personal property (§§ 733.702(4)(a) and 733.710(3), Fla. Stat.).

Payment of Claims and Distribution of Florida Property Held in the Ancillary Probate Estate

A Florida creditor may petition for the sale of Florida real property and to have their claims satisfied out of the proceeds of the Florida

real property even if there are sufficient assets in the decedent's domiciliary estate to pay the creditor's claims (see *In re Wilson's Estate*, 197 So. 557, 561 (Fla. 1940)).

After all expenses of administration and all claims against the estate are paid, the court may order the remaining property held by the ancillary personal representative either:

- Transferred to the foreign personal representative.
- Distributed directly to the beneficiaries.

(§ 734.102 (6), Fla. Stat.)

If a non-resident decedent directs by will that the testamentary disposition of tangible or intangible personal property in Florida must be construed and regulated by Florida law, if the decedent:

- Was a resident of a foreign country at the time of the decedent's death, the Florida court having jurisdiction over the decedent's ancillary probate estate must direct the Florida ancillary personal representative to distribute any Florida tangible or intangible property directly to the beneficiaries named in the decedent's will or to those entitled to that property under the laws of the decedent's domicile.
- Was not a resident of a foreign country at the time of the decedent's death, the court having jurisdiction over the decedent's Florida ancillary probate proceeding may, but is not required to direct the Florida ancillary personal representative to distribute any Florida tangible or intangible property directly to the beneficiaries named in the decedent's will or to those entitled to that property under the laws of the decedent's domicile.

(§ 731.106 (2), Fla. Stat.)

FILING AN INVENTORY

The ancillary personal representative must file a verified inventory that lists all Florida property in the decedent's estate with the Florida court that has jurisdiction over the ancillary estate (§ 733.604(1)(a), Fla. Stat.; FL ST PROB Rule 5.340(h)). The inventory must be filed within 60 days after the issuance of letters of administration and must include:

- Notice of the beneficiaries' rights to certain additional information regarding the inventory under subdivision (e) of Rule 5.340.
- A list of the ancillary estate with reasonable detail.
- For each item listed, its estimated fair market value on the date of the decedent's death.

(FL ST PROB Rule 5.340(a).)

The inventory and any amendments or supplements to the inventory must be served on:

- The surviving spouse.
- Each heir at law in an intestate estate.
- Each residuary beneficiary in a testate estate.
- Any other interested person that may request it in writing.

(FL ST PROB Rule 5.340(d).)

The personal representative should obtain appraisals or be able to provide written explanations that describe how the value of the property listed on the inventory was determined (FL ST PROB

Rule 5.340 (e) and (f)). The personal representative may petition the court for an extension of time to file the inventory for cause shown (FL ST PROB Rule 5.340(b)).

INTERIM ACCOUNTINGS

A personal representative may file interim accountings (FL ST PROB Rule 5.345(a)). Any interested person receiving an interim accounting must object to the accounting within 30 days from the date of service of notice on that individual or the objections are deemed abandoned (FL ST PROB Rule 5.345(c)).

Interim accountings are not always used but are an effective way to:

- Limit a personal representative's liability.
- Make the final accounting, particularly in a large and complex estate, more manageable and inclusive only of the period since the last interim accounting.

(FL ST PROB Rule 5.346(a).)

For additional information about accountings for the ancillary estate, see Final Accounting and Petition for Discharge.

CLOSING THE ANCILLARY PROBATE ESTATE

Before closing a Florida ancillary probate estate, the ancillary personal representative must complete several steps to ensure the estate has been fully administered and that the personal representative can be properly discharged. These steps include:

- Filing any required tax returns (see Filing Tax Returns).
- Preparing and circulating a final accounting and petition for discharge (see Final Accounting and Petition for Discharge).
- Receiving an order of Discharge (see Order of Discharge).

FILING TAX RETURNS

Income Tax Returns

If an estate must file a Form 1041 under Section 1.6012-3(a)(1) of the Treasury Regulations, then the domiciliary and ancillary representatives must each file a return on Form 1041. Each return should include different information depending on the party filing the return, for example:

- The domiciliary representative must include in the return prepared by the domiciliary personal representative the entire income of the estate.
- The ancillary representative must:
 - file the return prepared by the ancillary personal representative with the district director for the ancillary personal representative's internal revenue district; and
 - show the name and address of the domiciliary personal representative, the amount of gross income received by the ancillary personal representative, and the deductions to be claimed against that income, including any amount of income properly paid or credited by the ancillary representative to any legatee, heir, or other beneficiary.

If the ancillary personal representative for the estate of a nonresident alien is a citizen or resident of the US and the domiciliary personal representative is a nonresident alien, the

ancillary personal representative must file the return otherwise required of the domiciliary personal representative. (Treas. Reg. § 1.6012-3(a)(3).)

Estate Tax Returns

Even though there is no Florida estate tax for decedents dying on or after January 1, 2005, Florida still imposes a 12-year estate tax lien on the gross estate of a decedent the property of which is subject to Florida law. The lien is for satisfaction of state estate taxes despite the fact that there currently is no Florida estate tax. (§§ 198.32 (1) and 198.22, Fla. Stat.)

The Florida Department of Revenue may release this lien if it is satisfied that either:

- There is no Florida estate tax liability.
- The Florida estate tax liability of an estate has been fully discharged or provided for.

(§ 198.22, Fla. Stat.)

Because there is no Florida estate tax currently, obtaining a release of lien is merely a formality. However, it is still required.

To receive a Florida estate tax lien release, the personal representative must sign and file with the court:

- An Affidavit of No Florida Estate Tax Due (Florida Department of Revenue Form DR-312) if there is no Florida estate tax due and a federal estate tax return is not required.
- An Affidavit of No Florida Estate Tax Due When Federal Return is Required (Florida Department of Revenue Form DR-313) and an IRS Estate Tax Closing Document or account transcript (see IRS Letter 627 and IRS Notice 2017-12) if there is no Florida estate tax due but a federal estate tax return must be filed.

(§ 198.32 (2), Fla. Stat.)

If there is real property in the Florida probate estate, title companies generally require that these documents be recorded before they are filed.

FINAL ACCOUNTING AND PETITION FOR DISCHARGE

A final accounting and petition for discharge must be filed and served on interested persons:

- Within twelve months after issuance of the letters of administration for an estate not filing a federal estate tax return.
- Twelve months from the date that the federal estate tax return is due for an estate that must file a federal estate tax return.

If cause is shown by an interested person, the court may extend the date to file these documents. (FL ST PROB Rule 5.400(c).)

Objections to the accounting and the information included in the petition for discharge must be filed within 30 days from the date of service of the last of the petition for discharge or final accounting (FL ST PROB Rule 5.400 (b)).

The petition for discharge must include a statement:

- That the personal representative has fully administered the estate.

- That all claims that were presented have been paid, settled, or otherwise disposed of.
- That the personal representative has paid or made provision for taxes and expenses of administration.
- Showing the amount of compensation paid or to be paid to the personal representative, attorneys, accountants, appraisers, or other agents employed by the personal representative and the manner of determining compensation.
- Showing a plan of distribution which must include:
 - a schedule of all prior distributions;
 - the property remaining in the hands of the personal representative for distribution;
 - a schedule describing the proposed distribution of the remaining assets; and
 - the amount of funds retained by the personal representative to pay expenses that are incurred in the distribution of the remaining assets and termination of the estate administration.
- That any objections to the accounting, compensation, or the proposed distribution of assets must be filed within 30 days from the date of service of the last of the petition for discharge or final accounting and that within 90 days after filing the objection, a notice of hearing must be served or the objection is abandoned.
- That any objections must be in writing and state with particularity the items to which the objection is directed and the grounds on which the objection is based.

(FL ST PROB Rule 5.400 (b).)

A final accounting must include:

- All cash and property transactions since either:
 - the date of the last accounting; or
 - if there was no prior accounting, from the commencement of the ancillary administration.
- A schedule of assets at the end of the accounting period.

(FL ST PROB Rule 5.346(a).)

Additional accounting standards are outlined in Rule 5.346(b) of the Florida Probate Rules and generally require that final accountings:

- Contain the required information.
- Be understandable to a layman.

The Committee Notes to Probate Rule 5.346, though not authoritative, state that accountings must comply with the Florida Principal and Income Act (§§ 738.101 to 738.804, Fla. Stat.).

Appendix A to Probate Rule 5.346 contains a model format for a “two balance” accounting, which is not required but may be effectively used to properly maintain the separate income and principal balances of the estate. For more basic accountings, a more simple accounting method is likely sufficient.

Waivers of Final Accounting and Petition for Discharge

A personal representative can seek waivers from all interested persons of the requirement to file the final accounting and of the right to receive formal notice of the petition for discharge (§§ 731.201(23) and 731.302, Fla. Stat.).

If all interested persons sign waivers of the final accounting and of the right to receive formal notice of the petition for discharge, the personal representative should file the waivers with the petition for discharge. In these cases, informal accountings may, but need not be, provided to interested persons.

If all interested persons do not sign waivers, the personal representative should consider serving both the Petition for Discharge and Final Accounting together so the 30-day window to object to the documents is not extended.

Waiver by Trustee of Revocable Trust on Behalf of Trust Beneficiaries

Absent a conflict of interest, fiduciaries can consent on behalf of and bind beneficiaries of the estate in certain circumstances (§ 731.303, Fla. Stat.). This may become relevant, for example, if the will being probated in a Florida ancillary probate is a pour over will. In this situation, if the ancillary personal representative and the trustee appointed under a revocable trust agreement are the same individual and there is no trustee that is not also a personal representative:

- There is a deemed conflict of interest.
- Beneficiaries of the revocable trust become interested persons in the probate estate proceeding.

(§ 731.303(1)(b)(2), Fla. Stat.)

To avoid including beneficiaries of the decedent's revocable trust as interested persons in the decedent's ancillary probate proceeding, counsel for a non-Florida resident client should ensure that at least one trustee is not also a personal representative if the client has:

- Florida property.
- An estate plan that uses a pour over will and revocable trust.

Alternatively, the nominated personal representatives and trustees may be able to use post-mortem fiduciary appointments or declinations to vary the identity of those serving as ancillary personal representative and as trustee.

When the trustee of the revocable trust is able to bind the estate beneficiaries, counsel should consider whether it is beneficial for the personal representative to circulate an informal accounting to the trust beneficiaries despite the fact that they do not need to sign any waivers or consents as part of the probate proceeding. If there is any reason to believe there may be potential conflict among revocable trust beneficiaries, having the trust beneficiaries sign off on an estate accounting may help to protect the ancillary personal representative and the trustees of the revocable trust. This is not always necessary but should be considered any time there is potential conflict among beneficiaries.

ORDER OF DISCHARGE

After completing administration, including distribution of any remaining estate property under the plan of distribution shown on the petition for discharge (after any objections have been resolved under Probate Rule 5.401, if any), the court will discharge the ancillary personal representative. This discharge generally releases the personal representative from state-law liability. (§ 733.901, Fla. Stat.; FL ST PROB Rule 5.400(d) and (e).)

To show the court that the estate has been fully administered, the personal representative should file a Report of Distribution with the

court and should include ample evidence, including receipts obtained from beneficiaries.

If a beneficiary refuses to sign a receipt, the personal representative may consider filing a Notice of Filing of Distribution with the court that includes a copy of the check sent to the beneficiary and should serve a copy of that notice on the beneficiary.

Even if a personal representative has been discharged by the court, a suit may still be brought against the personal representative in the personal representative's individual capacity for various breaches of fiduciary duty. Examples include:

- Breach for wrongful withholding of assets where the beneficiary had no notice of the assets (*Kravitz v. Levy*, 973 So. 2d 1274, 1276 (Fla. 4th DCA 2008)).
- Breach for distributing an asset improperly without disclosing the disposition of the asset (*Van Dusen v. Se. First Nat. Bank of Miami*, 478 So. 2d 82 (Fla. 3rd DCA 1985)).

An order of discharge also does not prevent further estate administration in cases where additional estate assets are later found (§ 733.903, Fla. Stat.). However, the "order of discharge may not be revoked based on the discovery of a will or later will," except in limited cases, such as those involving fraud (§ 733.903, Fla. Stat.; see *Dean v. Bentley*, 848 So. 2d 487 (Fla. 5th DCA 2003)).

ALTERNATIVES TO ANCILLARY ADMINISTRATION

If the decedent is a non-Florida resident that dies with Florida property but meets certain other criteria, it is possible to avoid an ancillary probate.

Alternatives to an ancillary Florida probate proceeding include:

- Admission of foreign will to record (see Admission of Foreign Will to Record).
- Small estate proceedings (see Small Florida Ancillary Estates).
- Disposition of personal property without administration (see Disposition of Personal Property Without Administration).
- Summary administration for an ancillary estate (see Summary Administration).

ADMISSION OF FOREIGN WILL TO RECORD

Any person may file an authenticated copy of a nonresident decedent's will that devises Florida real property or any right, title, or interest in Florida real property, in a Florida court in the county where the property is located and have the document be admitted to record if either:

- Two years have passed since the decedent's death.
- The personal representative in the domiciliary estate proceeding has been discharged and there has been no Florida probate proceeding.

(§ 734.104(1), Fla. Stat.)

To use this procedure, the will must:

- Be executed under Florida law (see Requirements for Valid Will).
- Have been previously admitted to probate in any other state, territory or country.

(§§ 734.104(1)(a), (b) and 734.104(3), Fla. Stat.)

A Petition to Admit Foreign Will to Record must generally be accompanied by authenticated copies of:

- The foreign will.
- The petition for probate in the domiciliary proceeding.
- The order admitting the will to probate in the domiciliary proceeding.

(§ 734.104(2), Fla. Stat.)

The foreign will is then effective to pass title to real property in Florida and is treated as if the will had been admitted to probate in Florida (§ 734.104(4), Fla. Stat.).

SMALL FLORIDA ANCILLARY ESTATES

Instead of opening a Florida ancillary probate and appointing a Florida ancillary personal representative, a foreign personal representative may, within two years of the decedent's death, file in the circuit court of the county where any property is located, an authenticated transcript of the portion of the foreign proceedings that shows:

- The will.
- The beneficiaries of the estate.

This procedure is only applicable if a nonresident:

- Dies with a will (not intestate).
- Leaves an estate that is subject to Florida administration not in excess of \$50,000.

(§ 734.1025(1), Fla. Stat.)

To qualify for this small estate procedure, the will and any codicils must have been executed in compliance with Florida law (§ 734.1025(1), Fla. Stat. and see Requirements for Valid Will).

The foreign personal representative may serve and publish the notice to creditors and wait for the claims period to pass (§ 734.1025(2), Fla. Stat. and see The Creditor Notification and Claims Process). If:

- No claims are filed, the foreign personal representative may dispose of the Florida estate.
- Any claim is filed, a Florida ancillary personal representative must be appointed and the estate is administered under the general ancillary administration process.

DISPOSITION OF PERSONAL PROPERTY WITHOUT ADMINISTRATION

On application by any interested person, Florida courts may authorize the disposition of a decedent's personal property without a probate administration proceeding (FL ST PROB Rule 5.420(d)). A disposition of personal property without administration is available when the decedent's estate consists of:

- Certain exempt personal property, such as household furniture and furnishings up to \$20,000 and two qualified motor vehicles (§ 732.402, Fla. Stat.).

- Nonexempt personal property of a total value that does not exceed the sum of:
 - the amount of preferred funeral expenses, which are reasonable funeral expenses not exceeding \$6,000 (§ 733.707, Fla. Stat.); and
 - reasonable and necessary medical and hospital expenses of the last 60 days of the last illness.

(§ 735.301(1), Fla. Stat.)

The application for a disposition of personal property without administration must include:

- The description and value of any exempt property.
- The description and value of the decedent's other Florida assets.
- The amount of preferred funeral expenses and reasonable and necessary medical expenses for the last 60 days of the decedent's last illness with statements or receipts.
- Each requested distribution of personal property.

(FL ST PROB Rule 5.420(a).)

Similar disposition is available for certain small income tax refunds (§ 735.302, Fla. Stat.).

SUMMARY ADMINISTRATION

Under Sections 735.201 to 735.2063, Florida Statutes, summary administration is available for estates of \$75,000 or less and for estates of decedents dead more than two years. The decedent's will also must not have directed administration of the decedent's estate under chapter 733 of the Florida Statutes, which contains the rules governing probate proceedings (§ 735.201(1), Fla. Stat.). Summary administration generally is an efficient way to deal with a small Florida ancillary probate estate consisting of primarily tangible personal property.

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