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# Ancillary Probate in Florida

The “Sunshine State” is well-known for attracting individuals, such as snowbirds, who often own Florida property without becoming residents of the state. However, if a non-resident of Florida dies leaving Florida property, administration of the decedent’s estate may be complicated by the need for an ancillary probate proceeding in Florida to dispose of the Florida property. To assist a client in avoiding or navigating this situation, counsel must understand the key laws and procedures regarding ancillary probate proceedings in Florida.



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If a non-resident of Florida dies leaving Florida property, such as 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. An ancillary probate proceeding in Florida is subject to Florida law and is generally brought secondary to an estate proceeding in the decedent's state of domicile (that is, the decedent's state of residence).

This article provides an overview of the key laws and procedures regarding ancillary probate proceedings in Florida, including:

- The preliminary requirements for initiating an ancillary probate proceeding.
- The rules for determining when an ancillary probate proceeding is necessary or potentially required.
- The appointment of a personal representative to maintain an ancillary probate proceeding, referred to as a foreign, domiciliary, or ancillary personal representative.
- The general process for conducting and concluding an ancillary probate proceeding.



Search [Understanding Probate: Ancillary Estate Administration \(FL\)](#) for the complete, online version of this resource, which includes information on procedures that are available in certain circumstances as an alternative to an ancillary probate proceeding in Florida.

## PRELIMINARY REQUIREMENTS

Many clients wish to avoid an ancillary probate proceeding, whether in Florida or elsewhere. An ancillary probate proceeding in Florida is only required if an estate meets certain criteria. For example, an ancillary probate proceeding is generally required in Florida if the decedent both:

- Was not a Florida resident at death.
- Died owning Florida property.

To avoid an ancillary probate proceeding in Florida, counsel should ensure that clients who are non-residents of Florida with Florida ties do not own outright the types of Florida property that require an ancillary probate proceeding (see below *Florida Property*).

### NON-RESIDENT OF FLORIDA

To qualify for a Florida ancillary probate proceeding, the decedent must not have been a resident of Florida at the time of the decedent's death (§ 734.102(1), Fla. Stat.).

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), (34), Fla. Stat.). Establishing Florida domicile generally requires that a person reside in, maintain, and indefinitely intend to maintain the person's principal home in Florida (§ 222.17, Fla. Stat.).

## FLORIDA PROPERTY

A Florida ancillary probate proceeding 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 property varies. For example:

- Debts owed to non-residents 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 PROCEEDINGS

In some cases, a Florida ancillary probate proceeding is required. In other cases, a Florida ancillary probate proceeding 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.
- Did not own real property in Florida at death, but owned other Florida property in the decedent's own name at death.

### DECEDENT OWNED REAL PROPERTY IN FLORIDA

Florida probate courts apply the doctrine of *lex loci rei sitae* (the 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 the laws of those states, regarding the disposition of real property located in those states (*In re Roberg's Estate*, 396 So. 2d 235 (Fla. Dist. Ct. App. 2d 1981); see *In re Estate of Barteau*, 736 So. 2d 57 (Fla. Dist. Ct. App. 2d 1999)).

A non-resident of Florida owning Florida real estate in the non-resident's name at the time of the non-resident's death must open an ancillary probate proceeding in Florida to dispose of the Florida real property.

### DECEDENT DID NOT OWN REAL PROPERTY IN FLORIDA

If a decedent dies owning no Florida real property, but owning other Florida property, it is possible to avoid a Florida ancillary probate proceeding 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, if:

- The delivery or payment occurs after 90 days from the date of appointment as foreign personal representative.
- The individuals holding the personal 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.; see below *Foreign and Domiciliary Personal Representatives*.)

In this case, a Florida ancillary probate proceeding may be unnecessary if:

- No Florida ancillary personal representative is appointed within 90 days from the date that a foreign personal representative is appointed.
- The individuals holding the personal property or the debtors deliver the Florida property or pay their debts, as the case may be, to the foreign personal representative.

If a Florida debtor pays a debt to a foreign personal representative when no Florida ancillary probate proceeding 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.)

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.).

### FOREIGN AND DOMICILIARY PERSONAL REPRESENTATIVES

A foreign personal representative is a personal representative appointed outside of Florida (§ 731.201(17), Fla. Stat.). The foreign personal representative may also act as an ancillary personal representative in Florida, depending on the circumstances.

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.

### ANCILLARY PERSONAL REPRESENTATIVES

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.
- A Florida resident, but certain non-resident family members may act as personal representatives.

(§§ 733.302, 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, counsel should include an appointment of a personal representative specifically designated to administer the Florida property.



Search [Understanding Probate: The Personal Representative \(FL\)](#) and [Probate State Q&A: Florida](#) for more on qualifying as a personal representative in Florida.

Search [Understanding Probate: Ancillary Estate Administration \(FL\)](#) for information on the order of preference for appointment of an ancillary personal representative in a testate or intestate ancillary estate.

### RIGHTS AND RESPONSIBILITIES

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 below *Dealing with Florida Real Property*).
- Raise funds for the payment of debts, claims, and devises in the domiciliary jurisdiction.

(§ 734.102(7), Fla. Stat.)



Counsel should consider the identity of the personal representatives named in the will and whether they qualify to act in Florida.

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.; see below *Creditor Notification and Claims Process*).

### Dealing with Florida Real Property

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

### Representation 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.
- An attorney admitted to practice in Florida. (Fla. Prob. R. 5.030.)

### COMPENSATION

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

- Provision in the will.
- Written 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 including explicit compensation provisions in a client's will.

The statutory commission is based on a percentage of the inventory value 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 all or any part of the compensation. (§ 733.617(3)-(4), Fla. Stat.)

Any interested person may petition the court to:

- Increase or decrease 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.).



Search [Understanding Probate: The Personal Representative \(FL\)](#) and [Probate State Q&A: Florida](#) for more on compensation of personal representatives, including compensation of multiple personal representatives.

## GENERAL ANCILLARY PROBATE PROCESS

### VENUE

The proper venue for probating wills and granting 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.).

### COMMENCEMENT

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

- Filing an oath.
- Posting a bond, if required.
- Filing the petition for ancillary administration.
- Having a valid will under Florida law.
- Giving notice.
- Filing the decedent's 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 (Fla. Prob. R. 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), 733.402(1), Fla. Stat.). Banks and trust companies authorized by law to act as personal representatives 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.

 Search [Understanding Probate: Formal Estate Administration \(FL\)](#) and [Probate State Q&A: Florida](#) for more on a personal representative's bond.

### Petition for Ancillary Administration

Florida statutes require that ancillary probate proceedings be as similar to original probate proceedings as possible (§ 734.102(2), (4), Fla. Stat.; for more information regarding original probate proceedings in Florida, search [Understanding Probate and Probate Alternatives \(FL\): Overview](#) on Practical Law).

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.).

 Search [Understanding Probate: Ancillary Estate Administration \(FL\)](#) for information on what must be included with the petition for ancillary administration in either a testate or an intestate ancillary estate.

### Requirements for Valid Will

To be admitted to probate, any wills or codicils must be executed as required under Florida law (Fla. Prob. R. 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. Dist. Ct. App. 2d 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)-(2), Fla. Stat.).

 Search [Understanding Wills \(FL\)](#) and [Wills State Q&A: Florida](#) for more on the execution requirements for wills in Florida.

### 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 an ancillary personal representative who:
  - are entitled to preference in appointment that is equal to or greater than the petitioner's; and
  - have not waived notice or joined in the petition.
- All domiciliary personal representatives not waiving notice or joining in the petition.

(Fla. Prob. R. 5.470(b); § 734.102(1), Fla. Stat.)


An individual may generally waive, to the extent of the individual's interest or the interest which the individual represents, 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.).

### 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 (Fla. Prob. R. 5.205(a)(2)). 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 that do not state a cause of death are common in Florida and are preferred because the cause of death is considered confidential information under Florida law. Counsel should specifically request these death certificates for all Florida decedents.

### CREDITOR NOTIFICATION AND CLAIMS PROCESS

The creditor notification and claims process in an ancillary probate proceeding is generally identical to the process in an original Florida probate proceeding. The process for searching for and notifying creditors, and for creditors to timely file claims, is the same in an ancillary estate as it is in an original Florida probate.

 Search [Understanding Probate: Creditor Claims in Probate \(FL\)](#) for more on the creditor notification and claims process in Florida.

### Payment of Claims and Distribution of Property

A Florida creditor may petition for the sale of Florida real property, and to have the creditor's claims satisfied out of the

proceeds of such sale, 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.)

The court's order regarding distribution of tangible or intangible personal property having a Florida situs may vary depending on the provisions of the decedent's will and whether the decedent was a US resident or a resident of a foreign country at death. If a decedent who is not a Florida resident directs by will that the testamentary disposition of tangible or intangible personal property in Florida must be construed and regulated by Florida law and 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 proceeding 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 Florida court having jurisdiction over the decedent's 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.; Fla. Prob. R. 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.
- A list of the ancillary estate with reasonable detail.
- The estimated fair market value of each listed item on the date of the decedent's death.

(Fla. Prob. R. 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 who may request it in writing.

(Fla. Prob. R. 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 (Fla. Prob. R. 5.340(e)-(f)). The personal representative may petition the court for an extension of time to file the inventory for cause shown (Fla. Prob. R. 5.340(b)).

## INTERIM ACCOUNTINGS

A personal representative may file interim accountings (Fla. Prob. R. 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 (Fla. Prob. R. 5.345(c)).

Interim accountings are not always used, but they 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 (Fla. Prob. R. 5.346(a)(1)).

## CLOSING THE ANCILLARY ESTATE

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

- Filing any required tax returns, such as income tax returns or estate tax returns.
- Preparing and circulating a final accounting and petition for discharge.
- Receiving an order of discharge.

## INCOME TAX RETURNS

If an estate must file an income tax return on Form 1041 under Section 1.6012-3(a)(1) of the Treasury Regulations, then the domiciliary and ancillary personal 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 personal representative must include in the return prepared by the domiciliary personal representative the entire income of the estate.
- The ancillary personal 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 personal representative to any legatee, heir, or other beneficiary.

If the ancillary personal representative for the estate of a non-resident alien is a citizen or resident of the US and the

domiciliary personal representative is a non-resident 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 with property 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), 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 letter 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 12 months after issuance of the letters of administration for an estate not filing a federal estate tax return.
- Within 12 months from the date that the federal estate tax return is due for an estate that must file a federal estate tax return.

The court may extend the date to file these documents for cause shown after notice to interested persons. (Fla. Prob. R. 5.400(c).)

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



Search [Understanding Probate: Ancillary Estate Administration \(FL\)](#) for information on what must be included in the final accounting and petition for discharge.

## 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), 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 final accounting and the petition for discharge together so the 30-day window to object to the documents is not extended.

## 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 Florida Probate Rule 5.401), the court will discharge the ancillary personal representative. This discharge generally releases the personal representative from state law liability. (§ 733.901, Fla. Stat.; Fla. Prob. R. 5.400(d)-(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 evidencing the filing of a 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 lawsuit may still be brought against the personal representative in the personal representative's individual capacity for various breaches of fiduciary duty, such as:

- Wrongful withholding or disposing of assets where the beneficiary had no notice of the assets (*Kravitz v. Levy*, 973 So. 2d 1274, 1276 (Fla. Dist. Ct. App. 4th 2008)).
- Improper distribution of an asset without disclosing the disposition of the asset (*Van Dusen v. Se. First Nat'l Bank of Miami*, 478 So. 2d 82, 91 (Fla. Dist. Ct. App. 3d 1985)).

An order of discharge also does not prevent further estate administration in cases where additional estate assets are later found, but does prevent further estate administration based solely 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. Dist. Ct. App. 5th 2003)).