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# 15

## Ancillary Administration

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## I. INTRODUCTION

### A. [15.1] In General

With the increased use of *intervivos* trusts, it is now less common to have ancillary administration in Illinois in estates of nonresident decedents. Attorneys representing nonresidents of the State of Illinois should counsel clients to use a revocable “living” trust for Illinois assets so the delay and expense of administration in Illinois, as an ancillary jurisdiction, will be eliminated.

The state of the decedent’s domicile has exclusive jurisdiction over the administration and distribution of real estate and tangible personal property situated in the state of domicile as well as all intangible personal property owned by the decedent. The situs for all intangible personal property is deemed to be the decedent’s state of domicile.

The corollary to this rule is that administration and distribution of real estate and tangible personal property situated in a state that is not the decedent’s domicile is subject to the exclusive jurisdiction of the situs state. Ancillary probate may be opened in a non-domicile state to protect creditors and heirs in those states and to perfect the vesting of title to real estate there. The power to assess inheritance, estate, or similar transfer tax on real estate and tangible personal property situated in a state that was not the decedent’s domicile is also possessed by the non-domiciliary state.

Section 7-6 of the Probate Act of 1975, 755 ILCS 5/1-1, *et seq.*, provides that a nonresident testator may provide in his or her will that “tangible or intangible personal estate having a situs within [Illinois] as defined in Section 5-2, is to be construed and regulated by the laws of [Illinois], the validity and effect of such disposition [being] determined by such laws.” This provision of the statute is useful when the testator wishes to place reliance on an Illinois executor or on an Illinois attorney who is familiar with the testator’s affairs and wishes to retain the property in Illinois.

If probate is opened in the state of the decedent’s domicile, the probate in the non-domicile state is ancillary administration. If no probate was opened in the state of domicile, probate opened in the non-domicile state will be primary administration, but the personal representative will not have power to administer the decedent’s assets located in another state unless that other state provides statutory authorization for such extraterritorial authority. Illinois provides the power for a representative to whom letters are issued on an estate of a nonresident decedent to collect and remove personal estate under 755 ILCS 5/22-1.

Under Illinois law, title to Illinois real estate vests at the decedent’s death subject only to the right of a personal representative to sell real estate if needed to pay debts, taxes, and administrator expenses. If full administration does not appear necessary, the will may be admitted to probate to perfect Illinois real estate title in the devisees without the need to have a personal representative appointed.

By statute, many non-domiciliary states allow a personal representative appointed in the state of domicile to exercise some control over real estate and tangible personal property located

in the non-domiciliary state; therefore, it is important to review the statutes of non-domiciliary states to determine the necessity for ancillary administration if primary administration has been opened in the state of domicile. See *id.*

Claims not filed within two years after the decedent's death are barred as to Illinois assets if probate was not opened.

## **B. [15.2] Scope of Chapter**

The material in this chapter relates to the procedures to be followed in the administration of both intestate and testate estates and the effect of the law of Illinois with respect to them. In addition, the powers of nonresident personal representatives are outlined.

## **C. [15.3] Descent, Disposition, and Administration**

The Probate Act, governing descent and distribution, provides that the rules set out shall apply only to real estate of a nonresident decedent (755 ILCS 5/2-1) and that, in the case of an illegitimate decedent, the laws of Illinois shall apply only to real estate (755 ILCS 5/2-2). Generally, the devolution of title to tangible property in the state of domicile and intangible personal estate will be governed by the laws of the state of domicile.

In testate estates, the disposition of the personal estate of the nonresident decedent is governed by the Probate Act, which provides:

**If a nonresident decedent who is a citizen of the United States or a citizen or subject of a foreign country, provides in his will that the testamentary disposition of tangible or intangible personal estate having a situs within this State as defined in Section 5-2, is to be construed and regulated by the laws of this State, the validity and effect of such disposition shall be determined by such laws. In respect of a nonresident decedent's tangible or intangible personal estate having a situs within this State, as defined in Section 5-2, the court may direct and, in the case of a decedent who was at the time of his death a resident of a foreign country, shall direct the representative appointed in this State to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible personal estate or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile, as the case may be. 755 ILCS 5/7-6.**

In testate estates, the terms of the decedent's will may direct the administration of the decedent's real estate and tangible and intangible personal property. In the event of a lack of direction, the provisions of 755 ILCS 5/19-1, *et seq.*, and 5/20-1, *et seq.*, will apply to testate as well as intestate estates.

## **D. [15.4] Definitions**

Reference should be made to Probate Act §1-2.03 with respect to the authentication of the documents required for the probate of a foreign will by copy. In the case of a will that has previously been admitted to probate in a foreign jurisdiction, the authentication must be in accordance with statutory language:

**“Authenticated copy” means (1) a certified copy if the office in which the record of the original is kept is in this State or (2) a copy exemplified in pursuance of the law of Congress in relation to records in foreign states if the office in which the record of the original is kept is not in this State. 755 ILCS 5/1-2.03.**

Probate Act §7-3(a) provides the definition of an “authenticated copy of the will” and the probate thereof. Some practitioners are satisfied with the authenticated copy of the will and the authenticated copy of the order entered causing it to be admitted to probate. The better practice is to obtain an authenticated copy of the petition for probate of will in the jurisdiction of domicile, the will, and the order of probate, all of which may be under one certificate.

## II. ANCILLARY ADMINISTRATION

### A. [15.5] In General

For federal tax purposes, a decedent’s estate is one estate, notwithstanding the fact that personal and real estate may be located in two or more jurisdictions. If assets are located in two or more jurisdictions, administration may be necessary in a jurisdiction or jurisdictions other than the jurisdiction of domicile. *Wisemantle v. Hull Enterprises, Inc.*, 103 Ill.App.3d 878, 432 N.E.2d 613, 59 Ill.Dec. 827 (1st Dist. 1981).

A domiciliary personal representative has no authority over and is not responsible for any of the effects of the estate that may be beyond the jurisdiction of the appointment. *Barber v. Keiser’s Estate*, 279 Ill. 287 (1917). In administering the estate, the representative acts only in reference to the effects within the jurisdiction and the debts that may be presented against the estate there.

Exception to the general common-law rule prevails in Illinois and other jurisdictions by statute. The powers granted in Article XXII of the Probate Act (§§22-1 through 22-6) to nonresident representatives with respect to property located in Illinois are discussed in §§15.21 – 15.31 below.

755 ILCS 5/5-1, held under the former section of the Probate Act (Ill.Rev.Stat. (1975), c. 3, ¶54) to be a venue statute and not a jurisdiction statute, determines the place of administration. *In re Estate of Willavize*, 21 Ill.2d 40, 171 N.E.2d 21 (1960). Jurisdiction is established by domicile, with the principal administration of a decedent’s estate being the place of domicile. *Young v. Wittenmyre*, 123 Ill. 303, 14 N.E. 869 (1888); *In re Estate of Elson*, 120 Ill.App.3d 649, 458 N.E.2d 637, 76 Ill.Dec. 237 (2d Dist. 1983). Even though there may be ancillary administration in other jurisdictions, those administrations are independent. The domiciliary representative does not control the ancillary administration, and the ancillary representative has no power in regard to the property of the decedent in other jurisdictions except by comity of those jurisdictions.

The situs of personal property is further defined in Probate Act §5-2. For ease of administration, for a determination of jurisdiction, and for other reasons, intangible personal property is often presumed to have a location. *Kaiser-Ducett Corp. v. Chicago-Joliet Livestock Marketing Center, Inc.*, 86 Ill.App.3d 216, 407 N.E.2d 1149, 41 Ill.Dec. 651 (3d Dist. 1980).

## **B. [15.6] Must There Be Probate in Illinois?**

The object of ancillary letters is the protection of local creditors. *Ramsay v. Ramsay*, 97 Ill.App. 270 (4th Dist. 1901). The necessity of probate in Illinois, therefore, depends on the existence of any outstanding debt in Illinois against a nonresident's estate. That debt would foreclose a domiciliary representative from the right to collect personal assets of the estate located in Illinois. *Carbondale National Bank v. Brown*, 66 F.Supp. 534 (E.D.Ill. 1946). If there are creditors in Illinois, any right of the domiciliary representative to the assets in Illinois must be determined in the Illinois court. *Id.* Debts include taxes of any type, whether federal or state, past or pending.

Before making a determination that ancillary administration is unnecessary in Illinois, a search should be made of the records of each county in which property of the decedent is located, and, if chattel property is involved (other than items related to agriculture), a search should be made for Uniform Commercial Code filings in the office of the Secretary of State.

In addition, it will be necessary to have ancillary administration in Illinois to bar the rights of possible creditors and to bar the contest of a will in Illinois with respect to Illinois assets. Necessity for ancillary administration will depend, therefore, on both the existence of creditors and the type of assets located in Illinois.

### **1. [15.7] Ancillary Administration of Personalty — When Required in Illinois**

Ancillary administration in Illinois is required with respect to personal property if there are unpaid creditors in Illinois. Ancillary administration in Illinois is not required with respect to personalty if there are no creditors in Illinois or if all Illinois creditors have been paid by the representative in the state of the decedent's domicile. Compliance with the Probate Act is required before the transfer of either tangible or intangible personalty located in Illinois to the domiciliary representative. 755 ILCS 5/22-1. See §§15.21 – 15.31 below.

### **2. [15.8] Ancillary Administration of Personalty — When Desired in Illinois**

A testator (though domiciled elsewhere) may select the law of Illinois to govern the validity and effect of his or her will in disposing of Illinois personal property, both tangible and intangible, and, further, that the administration on these assets should be had in Illinois if the property had a situs in Illinois. 755 ILCS 5/7-6.

If the provisions of §7-6 are to be applicable, there must be a provision in the will of the testator, and the property must be kept physically within Illinois. The inclusion of a §7-6 clause in the will of a nonresident testator requires that administration of Illinois property remain in Illinois and that the Illinois court distribute the assets directly to the beneficiaries designated in the will rather than to the domiciliary representative.

In *In re Estate of Maslowe*, 119 Ill.App.3d 776, 457 N.E.2d 151, 154, 75 Ill.Dec. 361 (2d Dist. 1983), the court held:

**At the time of decedent's death the Illinois courts had subject matter jurisdiction over the stocks in question as intangible personalty having their situs in Illinois and**

subject to disposition under Illinois law pursuant to the express terms of the decedent's will. The fact that respondent caused the stock certificates to be sent to Michigan and inventoried in the Michigan probate proceedings in no way caused the Illinois courts to lose subject matter jurisdiction over the decedent's stock.

### 3. [15.9] Ancillary Administration of Personalty — Distribution of Personal Estate

The general rule of law is that when the debts and claims presented in ancillary administration have been paid, it becomes the duty of the ancillary representative to transmit whatever amount remains to the domiciliary representative. *Young v. Wittenmyre*, 123 Ill. 303, 14 N.E. 869 (1888). Comity between the states requires ancillary administrators to make this transmission. *Kelly v. Dyer*, 359 Ill. 46, 194 N.E. 255 (1934).

Under the provisions of 755 ILCS 5/7-6, the legal representative in Illinois may make distribution of tangible or intangible personal estate having a situs within Illinois, as defined in Probate Act §5-2, in the discretion of the Illinois court rather than transmit it to the domiciliary representative.

Probate Act §7-6 further provides that in the case of a decedent who was at the time of death a resident of a foreign country, the court shall direct a representative appointed in Illinois to make distribution directly to those designated by the decedent's will as beneficiaries of tangible or intangible personal estate or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile, as the case may be. This latter provision is an attempt to prevent distribution to a totalitarian state by means of a legal representative that a particular government controls. Circuit court rules for the Cook County Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, Twelfth Circuit, Thirteenth Circuit, Fifteenth Circuit, and Seventeenth Circuit provide for permanent distributive shares to citizens and residents of foreign countries. The remaining Illinois circuits do not have a rule covering this subject.

If the estate in the principal place of administration is insolvent, comity would require that distribution be made to the domiciliary representative.

### 4. [15.10] Ancillary Administration of Real Estate — When Required in Illinois

With intestate estates, ancillary administration is required only to bar the claims of creditors, inasmuch as the devolution of title is governed by the statutes of Illinois. In testate estates, the law of the situs of the real estate controls both the validity and the construction of a will of a nonresident. *Headen v. Cohn*, 292 Ill. 210, 126 N.E. 550 (1920); *Sternberg v. St. Louis Union Trust Co.*, 394 Ill. 452, 68 N.E.2d 892 (1946). If a nonresident decedent owns real estate having a situs in Illinois, the laws of Illinois determine the procedure that is necessary to perfect the title. Illinois law also controls the construction of the will of the nonresident decedent.

Ancillary administration generally will be necessary to vest title in the heirs or devisees and to cut off the claims of creditors and potential contestants of a will by reason of the statutory provision with respect to the filing of claims and contesting of wills.

No statute or caselaw compels the administration of the estate of a nonresident decedent in Illinois if the decedent owed no debts and if administration is unnecessary. *Martin v. Central Trust Company of Illinois*, 327 Ill. 622, 159 N.E. 312 (1927).

If a nonresident decedent dies intestate, clearing and transferring the real estate title may be accomplished through the use of title insurance and the procedures outlined in §§15.27 – 15.29 below.

If a nonresident decedent dies testate, ancillary administration will be necessary in Illinois to pass title to the real estate to the beneficiaries. A will does not pass title in Illinois until admitted to probate. See *Sternberg, supra*. Full administration may be avoided by using the summary administration provisions of 755 ILCS 5/9-8 and 5/9-9 when they are applicable. When full administration does not appear necessary, the will may be admitted to probate to perfect Illinois real estate title in the devisees without the need to have a personal representative appointed.

### **C. [15.11] Relationship of Ancillary Representative and Domiciliary Representative**

A domiciliary representative and any ancillary representative are not in privity with each other, the administrations being separate and distinct, each being governed by the laws of the country or state in which administration is granted, even though the same person or entity may be acting as representative in two or more jurisdictions. Since the chief object of ancillary administration is the protection of local creditors, assets will not be permitted to be removed to a foreign jurisdiction until there is a complete settlement of the estate in the local court and all of the debts and expenses of administration are paid. Following settlement, a surplus remaining in the ancillary administration should be remitted to the jurisdiction of the principal place of administration unless the provisions of 755 ILCS 5/7-6 are applicable.

In testate estates, ancillary administration is usually not granted until the will of the decedent has been admitted to probate in the domicile of the testator. This is not a requirement, as the will could be admitted as an original will in Illinois. In the case of an intestate estate, there is no requirement that the administration be commenced in the state of domicile prior to the commencement of ancillary administration.

Under Probate Act §6-13, which allows a nonresident to act as executor in Illinois, it is possible for the executor acting in the domiciliary state to qualify as the ancillary representative in Illinois also, subject to the requirement of Probate Act §1-11 that the nonresident executor file a designation of a registered agent to accept service of process, notice, or demand required or permitted by law to be served on the representative. See the sample form in §15.17 below. Probate Act §6-13 further provides that “[t]he court may in its discretion require a nonresident executor to furnish a bond in such amount and with such surety as the court determines notwithstanding any contrary provision of the will.” 755 ILCS 5/6-13.

### **D. [15.12] Admission of Nonresident’s Will in Illinois by Copy or by Original Proof**

Upon the death of a nonresident, the testator’s will must be admitted to probate in Illinois before letters testamentary or letters of administration with the will annexed are issued.

Under the provisions of Probate Act §7-3, proof of a foreign will by copy may be made in accordance with the provisions of §7-1 of the Probate Act, or an original will may be admitted to probate upon proof that “the will was executed outside [Illinois] in accordance with the law of this State, of the place where executed or of the testator’s domicile at the time of its execution.” 755 ILCS 5/7-1(b).

“A written will admitted to probate outside [Illinois] is sufficiently proved to admit it to probate in this State by introducing in evidence [in Illinois] an authenticated copy of the will and the probate thereof.” 755 ILCS 5/7-3(a).

The procedure to be followed in the proof of a foreign will by copy requires an authenticated copy of the will. An authenticated copy of the order admitting the will to probate in the place of original admission to probate must be obtained. Request should be made of the clerk of the court in which the will was originally admitted to probate. The clerk’s certificate should be stamped on or attached to the copy of the will and the order admitting the will to probate; one of the judges and the clerk must verify that the signature and acts of the other are genuine and proper. This authentication is sometimes referred to as “under act of Congress.” As stated in §15.4 above, it is good to include the petition for probate of the will in the original place of administration and to cause the petition for probate of the will, the will, and the order probating the will to be authenticated under the certificate of one of the judges and the clerk as exemplified copies. Upon receipt, the exemplified copies should be filed in the office of the clerk where probate will be had as provided in Probate Act §5-1, the same as if the original will of the decedent were being filed. Upon the hearing on the petition to admit the will to probate, the exemplified copy from the foreign jurisdiction will be presented to the court as in the case of an original will.

Under the provisions of Probate Act §7-4, there may be original proof of a foreign will in this state. A will executed outside this state in accordance with the Probate Act is sufficiently proved for admission to probate in Illinois when proved in Illinois in the manner provided in the Probate Act for proving wills executed in Illinois. Likewise, “[a] will executed outside [Illinois] in accordance with the law of the place where executed is sufficiently proved to admit it to probate in [Illinois] when proved in [Illinois] in the manner provided by the law of the place where executed for proving wills there executed.” 755 ILCS 5/7-4(b). A will executed outside Illinois in accordance with the law of the testator’s domicile at the time of its execution is sufficiently proved for admission to probate in Illinois when proved in Illinois “in the manner provided by the law of the testator’s domicile at the time of its execution for proving wills there executed.” 755 ILCS 5/7-4(c).

Under Probate Act §6-4(b), the statements of a witness to prove the will under Probate Act §6-4(a) may be made by “(1) testimony before the court, (2) an attestation clause signed by the witness and forming a part of or attached to the will or (3) an affidavit which is signed by the witness at or after the time of attestation and which forms part of the will or is attached to the will or to an accurate facsimile of the will.” 755 ILCS 5/6-4(b). Even though there may be testimony in conformity with the statute, a will proved as provided in Probate Act §7-4 may not be admitted to probate “when there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will.” 755 ILCS 5/7-4(d).

The admission to probate in Illinois of a will executed and proved in the manner provided by Article VII of the Probate Act has the same effect in all respects as the admission to probate of a domestic will, and letters of office may be issued unless the issuance of letters is excused.

#### **E. [15.13] Responsibilities and Powers of Ancillary Representative**

The ancillary representative is responsible for and is invested with title to assets only within the jurisdiction of the representative's appointment. The representative's power to collect is limited to personalty within the jurisdiction of the representative's appointment, and the representative may act only with respect to the debts that may be presented against the estate within the jurisdiction of the representative's appointment.

With respect to real estate, the ancillary representative is entitled to possession of the decedent's real estate under Probate Act §20-1 and must collect any rents and manage the real estate

1. unless there is a contrary provision in the will (755 ILCS 5/20-1(a)); or
2. unless the real estate or a portion of it is occupied by an heir or devisee as his or her residence (755 ILCS 5/20-1(b)); or
3. unless the court by its order has granted possession to the heir or devisee (755 ILCS 5/20-1(c)).

#### **F. [15.14] Claims Against Estate in Ancillary Administration**

The procedure for filing and allowing claims against an ancillary estate is the same as in normal domiciliary estates with certain modifications to protect Illinois creditors. See Chapter 5 of this handbook.

A creditor may not reassert a claim that was time-barred in the decedent's domiciliary jurisdiction. *Strauss v. Phillips*, 189 Ill. 9, 59 N.E. 560 (1901); *In re Estate of Laschkewitsch*, 507 N.W.2d 65 (N.D. 1993).

Any creditor, either resident or nonresident, may present a claim against the ancillary estate. Illinois law preserves local assets for the satisfaction of local debts. This rule is applicable only if both the domiciliary and ancillary estates are solvent. If both the ancillary and domiciliary estates are insolvent, local creditors would be entitled to a pro rata portion of all estate assets measured by all assets and all liabilities even though the ancillary representative has sufficient funds in the local estate to pay the local creditors. *Ramsey v. Ramsey*, 196 Ill. 179, 63 N.E. 618 (1902). If the estate, in all jurisdictions, is insolvent, the creditors are required to accept pro rata distribution as may be determined by the domiciliary jurisdiction. However, a claim allowed against a foreign representative is not conclusive against a representative in Illinois. *Smith v. Smith*, 174 Ill. 52, 50 N.E. 1083 (1898).

## G. [15.15] Ancillary Proceedings — Accounting and Settlement

If the ancillary estate is solvent following the payment of the debts of local creditors and the payment of the costs and expenses of administration, then upon order, distribution will be made in accordance with the laws of the domicile of the decedent and not the laws of Illinois. If the decedent died testate, the terms of the will are followed. The court may, in either a testate estate or an intestate estate, elect to transfer to the domiciliary representative or to distributees under the Probate Act. 755 ILCS 5/7-6. With respect to foreign country distributees, §7-6 allows distribution only to these distributees. See §15.9 above.

Except when Probate Act §7-6 controls, accounting and settlement among the heirs or the legatees are properly performed by the principal representative, not by an ancillary representative. See §15.9 above with respect to the manner in which Probate Act §7-6 changes the rule in certain circumstances, including with an intestate estate.

Probate Act §§27-1 and 27-2 control the allowance of the fees to the legal representative and to the attorney. See also Chapter 16 of this handbook.

The personal representative in an ancillary proceeding must, upon the closing of the estate and the discharge of the representative, satisfy the court with respect to the payment of the Illinois estate tax (if any) that may be due.

If there is included in the ancillary administration real estate that has not been sold, the representative must comply with Probate Act §20-24 with respect to the filing of a notice of probate.

## H. Ancillary Administration Procedure and Forms

### 1. [15.16] Petition for Probate of Will and Letters Testamentary

The Probate Act outlines the procedure for probate of a foreign will:

**The provisions of this Act concerning the procedure for the admission to probate of a domestic will govern the procedure for the admission to probate of a foreign will sought to be admitted to probate as provided by this Article, except for the manner of proof. 755 ILCS 5/7-2.**

The estate is commenced with the filing of a verified petition of a person desiring to have a nonresident decedent's will admitted to probate. Following the directive of Probate Act §7-2, reference must be made to Probate Act §6-10 with respect to notice or waiver. If all of the heirs and legatees execute waivers in accordance with the provisions of Probate Act §6-10(b), further notice is not required. When proof of a foreign will by copy is made under Probate Act §7-3 and all of the heirs and legatees do not execute waivers, notice must be given in accordance with Probate Act §6-10(a), except as to the rights of heirs and legatees to require formal proof of a will under Probate Act §6-21, the notice being in the form prescribed by Supreme Court Rule 108(b), Foreign Wills Proved by Copy, effective August 1, 1992.

Notice under S.Ct. Rule 108(b) is required with respect to the rights of heirs and legatees to contest the will in Illinois under 755 ILCS 5/8-1 if the foreign will has been admitted in accordance with the provisions of 755 ILCS 5/7-3.

Notice under S.Ct. Rule 108(a) (Form 1) is required with respect to the rights of heirs and legatees “to require proof of the will by testimony of the witnesses to the will in open court or other evidence” under Probate Act §6-21 and to contest the will under Probate Act §8-1 if the foreign will has been admitted in accordance with the provisions of Probate Act §7-4, if all of the heirs and legatees do not execute waivers.

In addition to the petition for admission of the will to probate and any appearances, the following executed forms will be needed with the ancillary administration:

- a. the exemplified copy of the foreign will admitted to probate in the domiciliary state together with the order of probate (see §15.12 above);
- b. an affidavit as to copy of the will, if required (see §15.12 above);
- c. the oath of the representative and bond of the representative unless bond or security is excused by the will or is not required by the court;
- d. the order admitting the will to probate (see §15.18 below);
- e. the order appointing the representative setting out that a bond of the representative in the amount from time to time required by statute shall be in full force and effect without writing if a bond or security is excused in the will and if the court has not required the filing of a written bond or order appointing the representative setting out the amount of the bond and the approval of the bond;
- f. affidavits of heirship; and
- g. the order of heirship.

Generally, the preparation of items b – g above is the same as if prepared for a domiciliary estate. Refer to the suggestions in Chapter 2 of this handbook for the preparation of these forms. In addition, these forms may be provided by the local clerk’s office.

Probate Act §6-13 provides that “the court may in its discretion require a nonresident executor to furnish a bond in such amount and with such surety as the court determines notwithstanding any contrary provision of the will.” 755 ILCS 5/6-13.

Surety may be waived to the extent that the personal estate is deposited within the jurisdiction under an order allowing it to be withdrawn only by further order of the court. See 755 ILCS 5/12-7.

The court may insist on surety on the bond of the representative, even though the representative is the sole beneficiary under the will, to protect Illinois creditors and because the court has no in personam jurisdiction over an individual who resides outside Illinois other than as

may be conferred by Probate Act §1-11. Before the hearing on the petition for admission of a foreign will to probate in Illinois, if proof of the will is to be made by copy under Probate Act §7-3, the exemplified copy of the will and the order admitting the will to probate in the domiciliary state must be filed in the clerk's office in Illinois where probate will be had.

**2. [15.17] Sample Form of Petition for Probate of Will and Letters Testamentary**

**FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.**

**3. [15.18] Sample Form of Order Admitting Will to Probate**

**FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.**

**4. [15.19] Sample Form of Order Appointing Representative and Approving Bond**

**FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.**

**5. [15.20] Sample Form of Order Appointing Representative and Designating Bond as Required by Statute**

**FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO THE IICLE® ONLINE LIBRARY.**

NOTE: If the petition is for letters of administration or for letters of administration with the will annexed, the forms in Chapter 2 should be used. Changes to correspond to the forms in §§15.17 and 15.19 above will need to be made.

### **III. RIGHTS OF LEGAL REPRESENTATIVE OF NONRESIDENT DECEDENT AND LIMITATION OF LEGAL REPRESENTATIVE OF NONRESIDENT DECEDENT WITH RESPECT TO ILLINOIS PERSONALTY AND REALTY**

#### **A. [15.21] Taking Possession of Personal Property of Nonresident Decedent**

The personal representative of a nonresident decedent has the power under the Probate Act to collect and receive the nonresident decedent's personal property located in Illinois and to remove it to the domiciliary jurisdiction. 755 ILCS 5/22-1.

Section 22-1 provides that the nonresident representative, to whom letters are issued, may collect and receive any personal estate in this state and remove it to the jurisdiction in which letters have been issued as long as the representative delivers "to the person or corporation indebted to or holding the personal estate of the decedent" the following:

1. an affidavit by the representative that, to the representative's knowledge, no letters are then outstanding on the estate in Illinois, that no petition for letters is pending on the estate in Illinois, and that there are no creditors of the estate in Illinois; and
2. a copy of the representative's letters issued by the domiciliary state, certified within 60 days before the date of presentation.

The statute further provides that, upon payment or delivery of the assets, following the receipt of the affidavit and certified copy, the person or corporation is released to the same extent as if the payment or delivery had been made to a legally qualified resident representative, and the person or corporation is not required to see to the application or disposition of the property. No payment or delivery may be made sooner than 30 days after the decedent's death.

This latter requirement of the statute provides time for an Illinois estate to be opened. It is unnecessary for the person or corporation to investigate the truthfulness of the affidavit and the certificate since Probate Act §1-8 provides a perjury penalty for a false affidavit.

**B. [15.22] Sample Form of Affidavit To Obtain Property of Nonresident Decedent**

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NOTE: See §15.7 above with respect to debts of the decedent in Illinois. In addition, current or past-due Illinois and federal income taxes due when the decedent had resided in Illinois along with any federal estate tax that might be due with respect to property located in this state are “debts” that would prohibit the use of a Probate Act §22-1 affidavit.

There will be a certified copy of the letters of office from the domiciliary state attached to the affidavit.

### **C. Foreign Personal Representative for Nonresident Decedent — Rights**

#### **1. [15.23] Right To Sue in Illinois**

Under the provisions of the Probate Act,

**[i]f no letters are issued in [Illinois] upon the estate of a nonresident decedent . . . a representative to whom letters are issued on the estate by a court of competent jurisdiction of any other state, territory, country or the District of Columbia may sue in this State in any case in which a resident representative may sue. The court in which the suit is filed may order the nonresident representative to give bond for costs as in case of other nonresidents. 755 ILCS 5/22-3.**

In *LaSalle National Bank v. Pennsylvania R.R.*, 8 F.R.D. 316 (N.D.Ill. 1948), it was held that under former §419 of the Probate Act (now Probate Act §22-3), a nonresident representative lacked capacity to file suit if a resident representative had previously been appointed.

#### **2. [15.24] Proceedings Against Nonresident Legal Representative**

The majority rule is that a foreign representative cannot be sued in his or her representative capacity in any jurisdiction other than one in which he or she was appointed (*Hayden v. Wheeler*, 33 Ill.2d 110, 210 N.E.2d 495 (1965)), except under a “long-arm statute.” Illinois courts cannot ordinarily acquire jurisdiction to render a judgment against a foreign representative. If a claim is to be made, ancillary administration must be instituted first for providing a defendant.

A judgment against an ancillary representative in one jurisdiction is not evidence of indebtedness against another representative of the same decedent in another jurisdiction for affecting assets received in the other state. See *Elting v. First National Bank of Biggsville*, 173 Ill. 368, 50 N.E. 1095 (1898), as to the effect of the judgment.

### **D. [15.25] Sale or Mortgage of Real and Personal Property**

Under the provisions of the Probate Act, a nonresident representative has the power to sell or to mortgage either real or personal property of a decedent. 755 ILCS 5/22-4. Necessity does not exist for the issuance of letters of office, the proving of heirship, or the admission of the will to probate in testate situations.

## 1. [15.26] Sale of Real Estate and Personality

Approval of the court must be obtained before the sale of either personal property or real estate. The special bond required of a resident representative is not required as to realty. 755 ILCS 5/22-4(a), 5/22-4(c). The forms to be used are essentially the same as those discussed in Chapter 6 of this handbook. The statute provides that the petition under Probate Act §22-4 must be filed in the court of the county in which the personal estate or the greater part thereof or the real estate or the greater part thereof, as the case may be, is located.

Section 22-4(b) of the Probate Act provides that the nonresident representative is required to file the following with the petition to sell:

- a. a copy of letters authenticated within 60 days before the date of presentation;
- b. an authenticated copy of the order of the court that issued letters to the representative authorizing the representative to apply to a court in this state for leave to lease, sell, or mortgage the property;
- c. an authenticated copy of any bond required by the court that issued letters to the representative; and
- d. an authenticated copy of the order of the court that issued letters to the representative approving any bond required to be filed.

The statute also provides that the practice and procedure in the proceedings commenced by a nonresident representative are the same, as near as may be, as the practice and procedure in similar proceedings brought by resident representatives.

## 2. [15.27] Sale of Illinois Real Estate Without Illinois Court Approval

In the circumstance of an intestate estate or in which the devisees under a will and the heirs of a decedent are identical and deeds may be obtained from all of the heirs and devisees, arrangements may be made for the furnishing of a title insurance policy to protect against claims against the decedent's estate. In these instances, the title insurance company will request an indemnity agreement, and a bond will have to be furnished. This procedure may be more desirable and less expensive than having complete ancillary administration.

### a. [15.28] Admission of Foreign Will Without Letters of Office

The Probate Act provides that, upon the admission of a foreign will to probate, letters of office shall issue unless their issuance is excused. 755 ILCS 5/7-5.

The effect of the admission of the will to probate is to vest title in the devisees, and a conveyance by the devisees is then sufficient. Under this procedure, claims are not barred within the six-month claims period as notice has not been given by a representative. 755 ILCS 5/18-12. Also, the rights of potential contestants of the will are not barred following the passage of six

months from the date of probate unless notice has been given. 755 ILCS 5/8-1. Again, under these circumstances, arrangements should be made with a title company to issue a policy without exception for claims and without exception for possible contest of the will so title protection may be assured to the buyer.

*b. [15.29] Foreign Will with Power of Sale*

Under the Probate Act, in those instances in which a foreign will contains a power of sale in the executor who is duly qualified and is acting in the state of original probate, the will may be admitted to probate in Illinois without the issuance of letters, following which the foreign executor may make a deed conveying title. 755 ILCS 5/22-6. Caution is advised as possible claimants against the estate and possible contestants of the will are not affected, and, therefore, protection must be afforded to the purchaser through the use of title insurance. Section 22-6 may not be used if letters are issued. Care should be taken to provide that letters will not issue. If notice has been given under Probate Act §8-1 following the entry of the order probating the foreign will, and the six-month period has elapsed when the deed is issued, the rights of possible contestants will have been barred.

If the nonresident representative is a foreign trust company doing business in a state that does not have reciprocity with Illinois, title usually cannot be derived under an executor's power of sale unless the terms of the will are such that a qualified executor appointed in Illinois could exercise the power.

*c. [15.30] Foreign Will Without Power of Sale*

In the absence of a power of sale in a foreign will, 755 ILCS 5/22-4 may be used. This section provides that even though letters have not been issued in Illinois, the foreign representative of the estate of a decedent who owned Illinois real estate may file a petition for the lease, sale, or mortgage of the real estate. See §15.28 above.

*d. [15.31] Qualification by Foreign Legal Representative*

In those instances in which the executor is not qualified or cannot qualify to act in Illinois, an administrator with the will annexed must be appointed. See §4-1 of the Corporate Fiduciary Act, 205 ILCS 620/1-1, *et seq.* In that instance, the foreign trust company may not, as an executor, exercise a power of sale over Illinois real estate even though ancillary proceedings to probate the will are had in Illinois. Therefore, the foreign trust company must decline to act in Illinois.

In accordance with the provisions of 205 ILCS 620/4-2, a foreign trust company incorporated in a state that allows Illinois trust companies to qualify in that state may qualify in Illinois. Under those circumstances, the foreign trust company may act as an Illinois executor. Before the time any foreign corporation acts in this state under the provisions of §4-2, that foreign corporation must obtain a certificate of reciprocity under the provisions of 205 ILCS 620/4-5.

#### **IV. DUTIES OF LEGAL REPRESENTATIVE OF NONRESIDENT DECEDENT WITH RESPECT TO INCOME TAXATION OF THE ILLINOIS ESTATE**

##### **A. [15.32] Illinois Income Tax**

The procedure for filing Illinois income tax returns for an ancillary estate is the same as for normal domiciliary estates except for the provisions for multistate estates. See Chapter 9 of this handbook.

##### **B. [15.33] Federal Income Tax**

When estate property is located in more than one state, the domiciliary representative is required to file the estate's return, including its entire income. The ancillary representative must also file a return showing the name and address of the domiciliary representative, the amount of the gross income received by the ancillary representative, and the deductions to be claimed against such income, including any amounts properly distributed to a beneficiary. When the ancillary representative is a citizen or resident of the United States and is acting as a personal representative of a nonresident alien and the domiciliary representative is a nonresident, the ancillary representative is required to file a full return. Treas.Reg. §1.6012-3(a)(3).