ANCILLARY ADMINISTRATION

Ancillary Administration is a completely independent probate action filed in a state outside of the main probate action. Since courts have jurisdiction only over the assets and debts within their borders, assets of a decedent that reach beyond his/her residence are the realm of the "foreign" state. In this case, "foreign" means any state other than the home state of the decedent.

If California is the decedent's home state, and property is discovered in New York, potentially an ancillary probate may be needed in order to transfer the assets in New York. New York is the "foreign" jurisdiction. However, New York may, if it wants to, transfer the assets within its borders pursuant to a California court order. It is usually necessary to check with an attorney in that other state to see if, in fact, an ancillary probate is required. Most states consider probate actions "in personam" as far as jurisdiction is concerned. That means that if the decedent was not a resident of that state, they will not allow a probate action to be filed. Instead, they rely on the court orders of the resident state. Some states, such as California, however, consider probate actions to be "in rem"; that is, if property is contained within the state's borders, the state has jurisdiction to hear the matter. Actually, California considers probate to be both types of actions.

The advantages of filing an ancillary action are that it starts the creditors' period running, provides a form for fixing any inheritance taxes, and avoids further proceedings years later if additional property owned by the decedent is later discovered.

The disadvantages are that it often is a duplication of effort and expense. Also, coordinating the efforts may prove time consuming.

In order to avoid ancillary proceeding, a little pre-death planning is necessary. A testator should change title prior to death by gift, sale, joint tenancy, or living trust. But, there could be adverse tax consequences in doing so, so the wise testator should consult with a tax expert before unilaterally transferring assets.

For tax purposes, it may be necessary to have a court make a determination of a decedent's "domicile". Domicile, which is different from "residence", requires actual physical presence within a state **plus** an intent on the decedent's part to treat a state as his/her residence. However, each state can make a determination of domicile (or jurisdiction, for that matter) on its own. The "full faith and credit" clause of the U.S. Constitution doesn't prevent a challenge to a previous finding by another state that a decedent was a domiciliary of that state. That means that each state can find that a person was a domiciliary of that state for both probate and tax purposes.

The order of a foreign court admitting a Will to probate in that jurisdiction is not conclusive on the question of domicile. California, for example, can hold independent hearings to determine if, in fact, a decedent is a California resident.

If a Will has been admitted in a foreign state, it will be necessary to obtain a certified copy of that state's Order for Probate, a certified copy of the Will, and possibly other documents before probate can be opened in California.