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Administering Property in More Than One Jurisdiction

If a decedent holds property in more than one jurisdiction, the law of each jurisdiction may have an effect on how the estate is administered, and separate proceedings may be required. Although a good many states (including Utah) have a version of the Uniform Probate Code ("UPC"), many other states have different probate statutes and processes. Utah's version of the UPC is UCA § 75-1-101, *et seq.* It was originally adopted in 1976, effective in 1977, and has been updated since then. Its territorial effect is specified at UCA § 75-1-301.

The variety of potentially-applicable law can make dealing with a decedent's property in more than one jurisdiction complex. Although one could hope for coordination among various proceedings, this does not always occur, and anyone with an interest in such an estate will need to keep track of, and may need to participate in, the various proceedings in order to protect that interest.

1. **Key Concepts**. Before turning to some procedural issues, let's first examine some key concepts which will be important in deciding where and how to proceed.

a. **Domicile**. The decedent's domicile needs to be determined because the jurisdiction of domicile is the jurisdiction which typically is the most important.

i. Passage of Property. The law of the jurisdiction of domicile will govern the validity of any will (it needs to be valid under that state's rules or, as all states now provide, under the rules of the state in which it was executed). Execution of a will is valid if valid at the time and in the place of execution, or at the time of death of the testator if valid in the place of the testator's domicile, abode, or where he or she is a national. UPC § 2-506. The law of the place of domicile generally will govern spousal elective share rights (see UPC § 2-202) (or family forced shares in Louisiana and Wisconsin) and the passage of property where there is a will and, to the extent there is no will, will govern the descent and distribution in intestacy of personal property located anywhere and of real property located in the domicile jurisdiction. The decedent's will is generally probated in the state of domicile, and in some states, ancillary proceedings may not be allowed until a period of time has passed to allow proceedings in the domicile state to be initiated. Homestead, exempt property, and family allowance may be governed by the law of the state of domicile. UPC § 2-401. See also UPC § 2-703 (law chosen in instrument applies to meaning and effect of the instrument unless contrary to spousal elective share, exempt property provisions, or other public policy).

ii. Tax Nexus. Domicile is important for determining the passage of property, but it also provides a nexus for the imposition of a state's taxes, including income tax and estate or inheritance taxes.

iii. Determining Domicile. Domicile is the decedent's home, and home is where the heart is. There is only one domicile. Where a decedent has more than one residence, the facts which are used to determine domicile include matters with financial and civic importance, but also include more emotionally-tied matters showing the decedent's intentions and preference.

(1) Economic Factors. Economic factors include where business property is located and where business is conducted; where investment assets are kept; where bank and brokerage accounts are maintained; where safe deposit boxes are maintained; where the most valuable real and personal property is located.

(2) Civic Factors. Civic factors include where the person has registered to vote, holds a driver's license, holds professional licenses, holds public positions, files tax returns, states as his or her residence in a passport or in deeds, trusts, wills, and other legal documents;

(3) Personal Factors. Personal factors include where pets live, where family photos are kept, where the largest residence is located, where most time is spent, where family connections are, where deceased family members are buried, where charities are supported, where newspaper and magazine subscriptions are delivered, where the person was born and raised, where hobbies are practiced, where the person clearly and unequivocally says is where he or she intends to make home.

iv. Risk of Inconsistent Findings. State taxing authorities (and perhaps creditors or others) will have some incentive to assert a particular jurisdiction as the place of domicile. If the matter is not clear, inconsistent findings as to domicile by courts in different jurisdictions are possible. This can lead to double taxation as shown by the classic and tragic case of the Heinz ketchup heir, Mr. Dorrence. See *In re Dorrence's Estate*, 163 A. 303 (Pa.) *cert denied*, 287 U.S. 600 (1932) (on Pennsylvania's assertion of jurisdiction to tax the estate); and see 170 A. 601 and 172 A. 503, *aff'd sub nom*. *Dorrence v. Martin*, 176 A. 902, *aff'd* 184 A. 743 (N.J.), *cert denied* 298 U.S. 678 (1936) (on New Jersey's assertion of jurisdiction to tax the same estate); and see *Hill v. Martin*, 296 U.S. 393 (1935) (with respect to that same estate, the New Jersey District Court is without jurisdiction to enjoin Pennsylvania's tax collection, and neither New Jersey or Pennsylvania need give credit for the other state's tax). See also, *Texas v. Florida*, 306 U.S. 398 (1939) (death taxes would need to exceed total value of estate for Supreme Court to take original jurisdiction of a claim for deprivation of property without due process under Fourteenth Amendment). Intentions to change domicile need to be made very clear, and such changes need to be planned very carefully.

v. Uniform Probate Code. Under the Uniform Probate Code, the first state with proceedings decides domicile where there is a claim of more than one jurisdiction which is the domicile; other states (with similar rules) are to stay proceedings and be bound by the first court's determination. UPC § 3-202 (1990). However, if the other state does not have the UPC and enters judgment on domicile before the court in the first started proceeding does, is that judgment entitled to full faith and credit? See *Riley v. New York Trust Co.*, 315 U. S. 343 (1942) (determination of domicile not entitled to full faith and credit as to persons not parties to the determination).

b. **Situs of Property**. Property is located somewhere for purposes of the law to apply to it and the jurisdiction to deal with it and its passage at death. It is easier to determine the situs of real estate than of personal property over which more than one state may exercise authority. The authority of a personal representative appointed in one state (including in the domiciliary state) does not cross that state's lines into another state, unless the other state allows it to. This often leads to a need to institute separate proceedings where property has its situs.

i. Real Estate. Real estate is located in the state the property is in, and the law of that state governs its transfer, including at death. The state where the property is located will apply the decedent's will. If there is no valid will, the law of the state in which the real estate is located will govern its intestate descent and distribution. Thus, a separate proceeding will be needed in each state where there is real property which is part of the probate estate. See *Allen v. Amoco Production Co.*, 833 P.2d 1199 (N.M. Ct. App. 1992).

(1) Inconsistent Results. Separate proceedings can lead to inconsistent results. See *In re Est. of Jones*, 858 P.2d 983 (Ut. 1993) (California court's distribution of California real property in an ancillary proceeding is final judgment and *res judicata* and entitled to full faith and credit, where the California judgment was not appealed, even though the California court may have misapplied the Utah pretermitted child rule as to the will of a Utah domiciliary, as the rule was later determined on an appeal pending in the Utah domiciliary proceeding).

(2) Avoiding Multiple Proceedings. Living trusts, partnerships, and limited liability companies are often used to hold real estate outside the state of domicile in order to prevent the need for multiple proceedings; but sometimes it may be best to avoid using these vehicles if the domiciliary state has a death tax in excess either of the federal credit for state death taxes (IRC § 2011 for 2004 and earlier) or of the effect of the deduction for such taxes (IRC § 2058 after 2004).

ii. Personal Property. Personal property will generally be treated as subject to probate administration in the state of domicile, but it could be administered in another jurisdiction, particularly where there is no domiciliary administration pending. See *In re Toler's Est.*, 325 S.W.2d 755 (Mo. 1959). Where an item of tangible property is located in another state,

proceedings might be needed in that other state to obtain possession of it by the domiciliary personal representative. Also, creditors from another jurisdiction may go to the nondomiciliary jurisdiction where personal property is located and start proceedings there to obtain the property. For example, where the decedent was in an accident, the availability of liability indemnity coverage is a sufficient estate to allow creditors (*i.e.*, the injured plaintiff) to commence a nondomiciliary proceeding. See *In re Bedard Est.*, 657 A.2d 167 (Vt. 1993).

(1) Simplified Collection Under UPC. Under the Uniform Probate Code, 60 days after the decedent's death, an affidavit by the domiciliary personal representative or by the personal representative from any other nondomiciliary jurisdiction, is sufficient to allow collection of debts owed decedent (these are personal property; bank accounts, for example, are debts owed by the bank) and to allow receiving possession of other personal property in a state with the UPC or a similar rule. UPC § 4-201.

(2) Local Creditor Rights. If such a foreign state personal representative shows up, a local creditor of the decedent can give notice to local debtors (*e.g.*, the bank) not to pay the foreign personal representative. UPC § 4-203. Once there is a local proceeding, the authority of the foreign personal representative is terminated in favor of the local proceeding. UPC § 4-206.

(3) Collection by Comity. Some states allow a foreign personal representative without proceedings to collect assets in the local jurisdiction and give a valid discharge to the debtor if the debtor is willing and no local creditors are prejudiced. This is pursuant to principles of comity. See *Swan v. Bill*, 59 A.2d 346 (N.H. 1948).

iii. Other Rules Apply. Other law may apply to a particular asset and affect its situs or its passage or administration or taxation at death. For example, the law of the state of a corporation's or other organization's organization or operation may affect interests in the stock or ownership interests under transfer restrictions or buy-sell options or agreements, or may affect rights to indemnity from the organization; bearer bonds may be affected by the law of the state in which they are physically located; automobiles may be affected by the law of the state of title and registration; divorce decrees affecting passage at death may be governed by the law of some other state; wrongful death claims may, under the law of some states, belong to the estate and have a situs in the state of tortious conduct; warranty claims on repairs to real estate, may be personal property; guardianship appointments under wills may be affected by the law of the state where the minor (or sometimes a disabled adult child or spouse) resides; water shares may be treated as personal property in some states, real property in others; digital assets may be subject to agreements with an agreement choosing another state's law; and so on. Given the variety of rules of various states which could apply as to a particular right or asset, for purposes of instituting ancillary proceedings, that right or asset may be treated as having a sufficient situs in more than one state other than the domiciliary state.

iv. Native American Tribes. Other probate regimes may apply to decedents who are members of American Indian tribes. Tribal probate codes may apply to property on or connected with an Indian Reservation. See, *e.g.*, Ute Indian Probate Code (Title VI of the Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation) Section 6-1-1 *et seq*. As to Indian Trust property held or controlled by the Federal Bureau of Indian Affairs, there is a separate probate process independent of state and tribal processes. 25 USC § 2206; UCA § 9-9-208. If a tribe wants its probate code to apply to such federally controlled property, there is a process to submit the code for federal approval. 25 USC § 2205. Many tribes, such as the Ute Tribe described above, have not used this process. The potential applicability of state, federal, and tribal codes can lead to complex interactions, and to complex choice of law issues, among these provisions.

c. **Community Property**. The community property states are Washington, California, Nevada, Idaho, Arizona, New Mexico, Texas, Louisiana, Wisconsin, and (if elected into by the spouses) Alaska and Tennessee. Essentially, the community property states grant an actual property interest (not just an inchoate expectancy) as community property between spouses domiciled in that state in property acquired in that state with earnings from services of either spouse, and property traceable to it, or, more to the point, property not traceable to separate property (there is a presumption in favor of community property). Inheritances, gifts, and property held prior to marriage are generally separate property. Community property and separate property may be real or personal and held in various tenancies without changing its character as separate or community. A particular asset may be part community and part separate. The need to trace assets to their sources to distinguish the separate and community property components of the asset can add complexity to an estate's administration. Creditors' rights to separate or community property are different and this can affect its administration. Community property and separate property have different features, and these features vary somewhat from community property state to community property state. For example, in some such states, income from separate property is community property, and in others it remains separate.

Also, some community property jurisdictions use a concept of quasi-community property to protect a spouse with respect to noncommunity property brought into the jurisdiction which would otherwise have been community property if acquired in a community property jurisdiction; in some such states (such as Arizona) the concept applies only on divorce or death while other such states (such as Idaho and Washington) allow a spouse to recover quasi-community property transferred without consent.

Tennessee, while not a true community property state, has a community property trust statute designed to allow even nondomicillary spouses to create community property during marriage with the control of it determined by the trust provisions. Tenn. Code Ann. § 35-17-105 (2010). This law was enacted to create tax loophole for obtaining a double step up in basis at the death of the first spouse to die. Alaska also allows such tax loophole community property trusts for nondomicillaries. Alaska Stat. § 34.77.030(a) (2010). The effectiveness of such loophole trusts is subject to some doubt based on *Comn'r v. Harmon*, 323 U.S. 44 (1944) which held,

under assignment of income principles, that elective community property (there under a former Oklahoma law) is not effective for income tax purposes. The contrary argument is that "Section 1014(b)(6) does not require that the assignment of property between spouses be effective for income tax purposes. Rather, section 1014(b)(6) simply requires that, to receive a double step-up in basis for marital property, the property must be classified as community property 'under the community property laws of any State.' …. [C]ommunity property regimes that permit individuals to elect into such treatment should be effective for purposes of section 1014(b)(6), even if such elections constitute ineffective assignments of income." J. Paul Singleton, Yes, Virginia, Tax Loopholes Still Exist: An Examination of the Tennessee Community Property Trust Act of 2010, 42 U. Memphis L. Rev. 369, 384-385.

i. Different Passage. However, the most important factors affecting its administration are that an attempt by one spouse to pass more than his or her share of community property along with his or her share of separate property may be voided by the surviving spouse, and that the intestate share relating to separate property and to community property will be different. Separate property passes in schemes similar to those used in common law jurisdictions and includes provisions for a surviving spouse; the community property share of the decedent may pass under a separate scheme, for example, to children, but not to the surviving spouse, unless there are no children (in Texas, however, the spouse takes the community share where all children are also children of the surviving spouse (Tex Prob. Code Ann. § 45)).

ii. Different Control. In some community property states, the surviving spouse will control the community property to protect creditors who may look to community property. The personal representative may have a more limited function in such states.

iii. Tax Effects. Also, there are estate and income tax consequences to community property different from those applicable to joint or common ownership in common law property jurisdictions. For example, both halves of community property receive a stepped-up basis at the death of the first spouse to die (IRC § 1014(b)(6)); in a common law joint tenancy, only the decedent's half receives the step-up.

iv. Determination. Thus, it is important to determine if property in a community property jurisdiction is community property or quasi-community property, and it is also important to determine if property now outside such a jurisdiction is traceable to community property. As a true property interest, community property does not cease to exist when it crosses a state line. *Quintana v. Ordono*, 195 So.2d 577 (Fla. Dist. Ct. App. 1967); also, some states use a theory of resulting trust or confidential relation constructive trust to accomplish this, and other states (such as Colorado and Utah) do so by statute. See generally the Utah Uniform Disposition of Community Property Rights at Death Act, UCA §§ 75-2b-101 *et seq.* As with other property interests, community property may be affected by marital agreements, including agreements to transform the character of the interest from community to separate, or vice versa.

2. **Ancillary Proceedings**. The type of proceeding used outside the state of domicile will depend on two major factors: the law of the other jurisdiction and the sort of proceedings, or lack of proceedings, brought in the state of domicile. The policies driving these rules are to maintain control over real property titles and transfers (see *Miller Est. v. Miller*, 768 P.2d 373 (Okla. Ct. App. 1988) and to protect local creditors and taxing authorities with respect to local assets (see *In re Nolan's Est.*, 108 P.2d 391, 395 (Ariz. 1940)).

a. **Personal Representative Appointed in Domicile**. Where a personal representative has already been appointed in the state of domicile, the ancillary proceedings may take the following forms to the extent allowable under the law of the other state:

i. Simplified Collection Under UPC. As described above, in states with the UPC or a similar rule, the personal representative may by use of an affidavit, collect debts, such as obtaining bank account balances, and receive possession of personal property in the other jurisdiction, unless a local creditor or a local proceeding puts an end to the simplified collection process. UPC § 4-201. Delivery is not mandatory, but if made, the debtor obtains a discharge. UPC § 4-202. The local court would have quasi-in-rem jurisdiction to the extent of the funds collected. Official General Comment to UPC Article IV. UPC § 4-301. See also UPC § 4-302 on "long arm" jurisdiction over the foreign personal representative "to the same extent that his decedent was subject to jurisdiction immediately prior to death."

ii. Simplified Use of Powers Under UPC. The domiciliary personal representative may be able to use a simplified process to be recognized as the personal representative in the other state with authority to deal with all real and personal property there. UPC § 4-204 allows for filing of authenticated copies of appointment and any official bond; the result is that the other state personal representative may exercise all powers of a local personal representative. UPC § 4-205. This would include the right to discharge debts, protect creditors, bring suit, etc. UPC § 3-715. See also UPC § 4-206 on right to rely on foreign personal representative even though local proceedings may later be instituted. The local court would have jurisdiction over such a personal representative under UPC § 4-301 and normal jurisdictional rules over actions done in the state. See also UPC § 4-302 long arm jurisdiction.

iii. Regular Appointment Priority. The domiciliary personal representative may need to apply for separate appointment under the normal rules of the other state. It may be entitled to priority in some states, including UPC states. UPC § 3-203. The local court would have jurisdiction over the personal representative appointed by it. UPC § 3-602. See also UPC § 4-302 long arm jurisdiction. Such an appointment may be a formal or informal appointment proceeding and need not involve a testacy proceeding, such as where there is an earlier probated will. See UPC §§ 3-307 et seq. and 3-414.

iv. Nondomiciliary Personal Representative. Someone else, such as a family member or creditor, may file for appointment to administer the property located in the other jurisdiction. Under the UPC § 3-611(b), however, unless the will directs otherwise, the

domiciliary personal representative may obtain removal of the ancillary personal representative in order to have the domiciliary personal representative or its nominee appointed. The applicant may seek to probate a will affecting such property or may seek a determination of intestacy and a determination of who is an heir of the decedent under the law of the state of domicile as to personal property and under the law of the local state as to real property.

(1) Long Arm Jurisdiction. Also, the ancillary personal representative may seek to have the local court assert jurisdiction over the domiciliary personal representative pursuant to long arm jurisdiction. UPC § 4-302 provides that foreign personal representatives are subject to jurisdiction to the same extent that the decedent was prior to death. For example, this would allow jurisdiction over the personal representative a deceased nonresident motorist who was involved in an auto accident in the state; however, the broad wording goes well beyond a nonresident motorist statute. UPC § 4-303 provides for service of process, including by mail.

(2) Independence. Under common law rules, the ancillary state's personal representative operates independently of the domiciliary state's personal representative and is not the agent of or in privity with the domiciliary personal representative.

(3) Relation of Proceedings Under UPC. Under the UPC, however, a unity theory prevails. A judgment against the other state's personal representative will bind the personal representative in the domiciliary state. UPC § 4-401. Also, as described further below, claims in one proceeding may be effective as to all property. UPC § 3-815.

b. **No Personal Representative Appointed in Domicile**. In some cases, no personal representative will have been appointed in the state of domicile. This could occur where someone races to the courthouse in the other jurisdiction and files a proceeding before the proceeding in the domicile state is filed, where a proceeding has been brought to probate a will or determine heirs in the state of domicile but no appointment is made because there are no assets in that state requiring administration (perhaps the assets are held in a living trust), or where no proceeding at all has been brought in the state of domicile due to lack of assets requiring administration, the failure to initiate appointment proceedings within the time limitations required by the law of the state of domicile, or some other reason, but there are assets (often late discovered real estate interests) located in another jurisdiction. The options here include:

i. Nondomiciliary Appointment. Obtain an appointment of a personal representative in the other state to administer the assets either in light of a probated will or determination of heirs made without an appointment of a personal representative in the state of domicile and recognized in the other state, or absent such a domiciliary probate or determination, in light of a probate of the will or a determination of heirs made in the other state in connection with the appointment. A personal representative may be appointed in another (probably non-UPC) state with a longer appointment time bar period, even if the time for an appointment in the state of domicile has expired.

ii. No Appointment Possible. If an appointment is time barred in both the state of domicile and the other state, an administration will not be possible, but property titles may still be cleared by obtaining recognition in the other state of an earlier order probating a will (without appointment) if one exists or by obtaining a determination of heirs in the state of domicile which can be recognized in the other state, or by the court in the other state applying the intestacy rules of the state of domicile as to personal property or of the local jurisdiction as to real estate. In either event, there will be a judicial determination of who inherited the property as a basis for further transfers of title. (In a late proceeding, the escheat and unclaimed property rules of the other state may be implicated.)

c. **Some Creditor Effects of Ancillary Proceedings**. In addition to providing a process to clear title and pass property interests to the decedent's beneficiaries or heirs, ancillary proceedings will have an effect on the rights of creditors.

i. All Creditors May File Claims. Ancillary proceedings may be started by a creditor to keep local assets available to satisfy its claims. Under the UPC, as we have seen, a local proceeding will terminate the authority of a personal representative appointed in another jurisdiction (usually, but not necessarily, the state of domicile) to collect debts and other personal property in that state by affidavit. On the other hand, as is generally the case during life, all nonexempt assets of a decedent, wherever located, are subject to all claims against the decedent regardless of where the creditor is located. See UPC § 3-815. Thus, any creditor may file claims in the ancillary proceeding.

ii. Bar Date of Nonclaims Period. However, where due process is served in providing notice to creditors (see *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988); *In re Est. of Anderson*, 821 P.2d 1169 (Ut. 1991) (reasonably ascertainable creditors entitled to actual notice of three-month bar)), the failure of a creditor to file a claim before the applicable bar date in the state in which the proceedings are being conducted, will generally result in that creditor's not having access to those assets.

iii. Separate Effect of Bar Dates. Even if a creditor's claim is barred in one jurisdiction, the bar may not apply in another jurisdiction. See *Owens v. Saville Est.*, 409 S.W.2d 660 (Mo. 1966). Thus, under common law rules, the bar in domiciliary proceedings does not bar claims in ancillary proceedings made within the time allowed in the ancillary jurisdiction. *Wilson v. Hartford Fire Insur. Co.*, 164 F. 817 (8th Cir. 1908); *Coffey v. Durand*, 167 S.W.2d 684 (Tenn. App. 1940).

iv. Effect of Domiciliary Bar Date Under UPC. On the other hand, under the UPC, the domiciliary bar date may also bar any claim in ancillary proceedings; if a matter is barred in the domiciliary jurisdiction prior to the first publication to creditors in another state's ancillary proceeding, the claim will be barred in that state, as well. If, however, advertisement for claims occurs in an ancillary proceeding before the domiciliary nonclaims or bar date has run, the creditor may file its claim before the local bar date. UPC § 3-803(b). Some other states apply

a similar rule. See *In re Laschkewitsch Est.*, 507 N.W.2d 65 (N.D. 1993) (creditor with notice of domiciliary proceeding could not make a claim in an ancillary proceeding after the bar date in the domiciliary proceeding).

v. Coordination of Claims Under UPC. Under UPC 3-815, all properly-raised claims in any administration, whether domiciliary or ancillary, will subject to those claims all assets of the decedent wherever located or administered. Each administration marshals assets to pay locally-filed claims and turns the excess over to the domiciliary personal representative to pay any further claims. However, any personal representative must be aware of the claims in the other proceedings to be responsible for them. *Uniform Law Comment to UPC* § 3-815. This coordination does not apply to non-UPC states which follow the common law independence of administration rule.

vi. No Proceeding. Without proceedings, an appointment of a personal representative, and adequate notice to creditors, creditors' claims may possibly be asserted against the assets, in the hands of beneficiaries or others, for a longer period until ultimately barred under other applicable rules. See UPC §§ 3-901, 3-1005, and 3-1006. If there is no administration of an estate, successors take subject to all charges incident to administration, including claims of creditors and of spouse and children for allowances and of others as the result of abatement, retainer, advancement, and redemption. UCA § 75-3-901. Ultimately such claims are ordinarily barred three years after death. See UCA § 75-3-1006. Creditors of decedent need to seek an appointment of a personal representative (UCA § 75-3-104) within the three years (with some exceptions) of decedent's death allowed for appointment. UCA 75-3-107. Such an appointment and the issuance of letters is necessary for an administration in which claims may be presented. UCA § 75-3-103. The personal representative then asserts claims against successors to recover assets. Without an administration, a successor will not likely have clear title for at least these three years.

vii. Priority of Claims. Under the law of some states, the priority of creditors' claims will be determined under the law of the state in which the proceedings are conducted, including through application of that state's homestead, exempt property, and family allowance rules. However, under the UPC, the priority is set by the law of the state of domicile. UPC § 3-815. This means there is no doubling up of the special family benefits, and the property from any jurisdiction may be used to provide the benefits.

viii. Judgment in One Proceeding. Successfully pursuing a claim to judgment against a personal representative in one state's proceedings may not be given effect against the personal representative in another state's proceedings, because such personal representatives generally operate independently and are not in privity. *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947). However, under the UPC, a judgment against a decedent's personal representative in another state may bind the personal representative in the state with the UPC, as well. UPC §§ 3-806(c) and 4-401. However, it takes more than just filing a claim in another proceeding with no further action taken on it, to avoid filing the claim in the local proceeding as

having been established or adjudicated in the other proceeding. *In re Est. of Larsen*, 750 P.2d 604 (Ut. 1988).

ix. Claim Denial in One Proceeding. Similarly, where a claim is denied in one proceeding, say in the state of domicile, it is not necessarily also denied in other ancillary proceedings. See *Wilson Est. v. Nat'l Bank of Commerce*, 364 So.2d 1117, 1122 (Miss. 1978). The collateral estoppel and similar claim preclusion rules of a state will be relevant, and in many states may prevent a creditor having a second bite of the apple. (On collateral estoppel and issue preclusion as aspects of the doctrine of res judicata, see generally *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873 (Ut. 1983); *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731 (Ut. 1995); see also *Pepper v. Zions First National Bank, N.A.*, 801 P.2d 144 (Ut. 1990) (the same corporation as executor and as the distributee trustee are separate fiduciaries, and estate closing order does not collaterally estopp a claim against trustee for failure to claim against itself for mismanagement of the estate). Also, under UPC § 4-401, an adjudication in favor of the personal representative in one proceeding is binding on other personal representatives in other jurisdiction, as well. Presumably, this will be sufficient to stop a purported but denied creditor from another attempt to assert its claim elsewhere.

d. **Tax Responsibilities in Ancillary Proceedings**. The allocation of responsibility for filing returns and paying taxes with respect to a decedent's state and federal death tax obligations may become a problem where there are two or more independent proceedings with different persons named as personal representative, particularly since the failure to fulfill the responsibility can lead to personal liability to the government against such personal representatives. 31 USC § 3713(b). The personal representative may also be liable to the beneficiaries for interest and penalties incurred. *Harper v. Harper*, 491 So.2d 189 (Miss. 1986); UPC § 3-916(c)(3).

i. Filing Responsibility of Personal Representative. There are separate definitions as to the persons responsible for filing decedent's tax returns.

(1) Estate Tax. An executor responsible for filing and paying estate taxes means any person appointed in the United States as executor or administrator, and if there is no such appointment, anyone who has actual or constructive possession of property of decedent. IRC §§ 2002 and 2203. This may include decedent's agents or representatives, custodians of decedent's assets in the U. S. (*e.g.*, safe deposit companies and warehouse companies), brokers holding securities as collateral, and U. S. debtors of decedent. Regs. §§ 20.2002-1 and 20.2203-1. Possession through fraud, or possession denied but shown to exist by other evidence is sufficient. *Huddleston v. U.S.*, 100 TC 17 (1993), *Allen v. U.S.*, TC Memo 1999-385 (1999). Also, being a successor by joint tenancy is sufficient. *Est. of Guida*, 69 TC 811 (1978).

Each of the statutory executors also has the filing obligation for the estate tax. If one of them is unable to make a complete return as to all property in the gross estate, each

is required to give all information available to it as to all of decedent's property, including a full description of the property and the persons with legal or equitable interests in it. IRC § 6018(b); Regs. § 20.6018-2. Every person with an interest in the property must on notice from the Service, make a return as to that portion of the gross estate. IRC § 6018(b); Regs. § 20.6018-2.

(2) Other Tax Obligations. In addition to estate tax obligations, the personal representatives in the ancillary proceedings will have other tax responsibilities, as well. The decedent's federal income tax return is required to be filed by the "executor, administrator, or other person charged with the property of such decedent." IRC § 6012(b)(1). Also, the executor of the will or administrator of the estate must file any unfiled gift tax returns of the decedent. Regs. § 25.6019-1(g). The regulation is silent about the situation where there is an ancillary probate; presumably the duty would be with the domiciliary personal representative. Similar state tax filing duties may exist, as well. Under these differently-worded provisions, appointed personal representatives will be responsible for filing the decedent's income or gift tax returns and paying the taxes. IRC § 6012(b)(1); Regs. § 25.6019-1(g). An ancillary personal representative has filing responsibility for the income received by it and the deductions attributable to that income; the domiciliary personal representative, however, reports all income of the entire estate. Regs. § 1.6012-3(a)(3).

(3) Fiduciary Capacity. These persons are responsible in a fiduciary capacity for the various taxes, and it is clear that an appointed personal representative meets all the definitions for such responsibility.

(4) State Tax. Tax obligations in various states depends on state law. Utah requires fiduciaries to file returns when the fiduciary has a federal obligation to file. UCA § 59-10-504. In Utah, a "resident estate or trust" is taxable under UCA § 59-10-201 and these terms are defined at UCA § 59-10-103(1)(r) to mean the same as under the trust portion of the probate code at UCA § 75-7-103(1)(i). This probate code provision includes estates of Utah domiciliaries, or trusts or portions of them consisting of property passing under a will of a Utah domiciliary, or a trust administered in Utah. For Utah domiciled decedents and property passing under their wills, the resident estate rules seem clear, if broad. The probate code, however, does not specifically define trust administration for either tax or administrative purposes.

Administration drives the tax on a trust, but what this means is not obvious. Thus, a look at the probate code provisions governing the applicable state law provides a basis for analysis on an analogous basis. The law to apply to the trust and the taxability of the trust are not necessarily the same, so the analysis is by analogy only. The state law provision rules are in UCA §§ 75-7-107(2), (3), (4)(a) and (b), and (7) and 108. Those rules are discussed further at 2.f. below.

However, using those rules as a guide, a trust would seem to be taxable in Utah if assets passed into it from a Utah domiciliary under his or her will, or if the trust is administered in Utah. Whether the trust administered in Utah appears to be a function of what the trust itself says about administration. If the trust specifies Utah, then Utah it is, if any administration is here. If

the trust specifies some other state for administration, that appears to govern if the trustee is there and any administration occurs there. UCA § 75-7-107(2), (4)(a) and (b), and (7). If the trust is silent, then it should be treated as administered in Utah only if a major part of the administration is here. UCA §§ 75-7-107(3) and 108(1).

Utah also requires non- resident estates or trusts to pay taxes in certain circumstances. State Tax Com'n Rule R865-9I-20. The fiduciary of any nonresident estate or trust having income derived from Utah sources must make and file a corresponding return for state income tax purposes. Does the analysis above based on the use of a probate definition of resident trust for tax purposes mean that income from intangibles (e.g., securities) that are held by such a nonresident trust is not derived from a Utah source and thus is not taxable in Utah even if there otherwise would be constitutional nexus for such taxation (e.g., a trustee in Utah)? This would be an issue for a trust which did not fully distribute income to beneficiaries.

ii. Personal Liability of Personal Representative. Personal representatives also have the potential to become personally liable for taxes not paid. Under 31 USC § 3713(a)(1)(B) and (b), any fiduciary (*i.e.*, a person with possession or control of assets of the debtor charged with applying it to the payment of debts to creditors in their priorities as they may appear; note that this is not necessarily the same as a statutory executor under IRC § 2203) may be liable for distributions or payments made on debts (including estate distribution to beneficiaries) without priority over the debts, including taxes, owed to the United States as to which the personal representative has sufficient facts to put it on inquiry; this includes income tax, gift tax, estate tax, or any obligation owed to the United States (such as Veteran benefit over payments, see *U. S. v. Boots*, 675 F. Supp. 550 (E.D. Mo. 1987)).

(1) Solvency. It applies where the estate is insolvent or becomes insolvent. Solvency is tested only as to the assets in the hands of the particular personal representative, but rights to obtain contribution from others, such as nonprobate recipients of property, and presumably other personal representatives, may be included as assets. See PLR 8843011; *Schwartz v. Comm'r*, 560 F.2d 311 (8th Cir. 1977)

(2) Priority Level. Funeral and administrative expenses and family allowance have priority over such claims in an insolvent estate. *Martin v. Dennett*, 626 P.2d 473 (Ut. 1981); *Schwartz v. Comm'r, supra*.

(3) Discharge Procedures. There are procedures to obtain a discharge on payment. See IRC §§ 2204 (estate tax), 6905 (gift and income taxes).

iii. State Tax Liability. The liability for state taxes is governed by state law. In Utah, the fiduciary is required to pay the taxes on the income taxable to the estate or trust. Liability for payment of the tax attaches to the executor or administrator up to his discharge. If the executor or administrator failed to file a return as required by law or failed to exercise due

diligence in determining and satisfying the tax liability, the liability is not extinguished until the return is filed and paid. State Tax Com'n Rule R865-9I-20.

iv. Transferee Liability. There can be transferee liability as well for state and federal taxes.

(1) Federal. Transferee liability applies with respect to various federal taxes. With respect to federal estate taxes, the transferee of the property takes subject to the estate tax lien whether the property is probate or nonprobate property. There is a key distinction as to nonprobate property (under IRC §§ 2034 to 2042), however, for lien and for personal liability purposes. For nonprobate property (such as trusts), special lien shifting rules may apply to subject other assets of the transferee to the lien while divesting the lien on the transferred property. Also, as to a recipient of nonprobate property, such a transferee (who is treated as a transferee even if the personal representative never had possession) becomes personally liable for the tax to the extent of the value of the property at the decedent's death. IRC § 6324. Other complex lien and liability provisions apply as well as to income tax and various forms of federal taxation. Among other things, transferee liability may be triggered by state fraudulent conveyance law. See generally IRC § 6901; Regs. § 301.6901-1(b). For example, with respect to estate tax, fraudulent conveyance and probate or trust transferee liability rules can create transferee liability (but without special lien shifting) even if the property is not included under IRC §§ 2034-2042. See *Gumm v. Com'r,* 93 TC 544 (1989), *aff'd* 1991 US App LEXIS 11372 (9th Cir. 1987, unpublished); *Ewart v. Com'r*, 85 TC 544 (1985), *aff'd* 814 F.2d 321 (6th Cir. 1987); *Frost v. Com'r*, TC Memo 1993-94.

(2) State. In Utah, liability for the income tax follows the estate itself. If by reason of the distribution of the estate and the discharge of the executor or administrator, it appears that collection of tax cannot be made from the executor or administrator, each legatee or distributee must account for his proportionate share of the tax due and unpaid to the extent of the distributive share received by him or her. State Tax Com'n Rule R865-9I-20. This can apply to a trust as well since the obligation to file follows the obligation under IRC § 6012(b) which provides that "If an individual is deceased, the [income tax] return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent." UCA § 59-10-504. Other states will have their own rules on transferee liability.

v. Obtaining Assets. A personal representative in one proceeding (*e.g.*, in the state of domicile) may need to obtain assets from a personal representative in another proceeding in order to pay taxes, and to do so may be required to bring a claim in the other proceeding. For example, the domiciliary state may tax personal property which is located in another state and subject to independent administration there.

vi. Tax Allocation. Tax allocation among beneficiaries, where not allocated by will, is provided by federal law under the Internal Revenue Code ("IRC") as to federal taxes

only for life insurance proceeds, powers of appointment, transfers with retained life estates, and qualified terminal interest property ("QTIP") elections. IRC §§ 2206, 2207, 2207A, 2207B; these provisions also provide the personal representative the right to recover the taxes from the beneficiary receiving the asset. Other than for these specific items, taxes are allocated by state law.

(1) Inconsistent State Law. Without a direction in a will, most states apportion taxes to the beneficiary receiving assets, whether testamentary or nontestamentary (generally allowing the spouse the benefit of the marital deduction and charities the benefit of the charitable deduction), and also provide for the personal representative to seek recovery of the tax from recipients of the property. See UPC § 3-916(d)(1). Indeed, the personal representative is duty bound to seek recovery of such taxes. See *Morgan Guaranty Trust Co. of N.Y. v. Huntington*, 179 A.2d 604, 608 (Conn. 1962). Under the UPC, this need not occur until three months after final determination of tax or a reasonable time after that. UPC § 3-916(g). Other states follow the common law allocation to the residue of the probate estate. The result could be that more than one personal representative seeks recovery from beneficiaries of nontestamentary assets subject to death taxes, or the personal representatives make inconsistent allocations of the burden of the taxes on beneficiaries.

(2) Different Ways to Resolve Inconsistency. Where there is a conflict or inconsistency, two federal courts of appeal have held that the allocation under the law of the state of domicile controls rather than the law of the state of the property's situs in order to avoid the situation where some recipients are required to contribute toward payment of the estate tax while others are not. *Ennis v. Mazza*, 475 F.2d 385 (D.C. Cir. 1973); *Doetsch v. Doetsch*, 312 F.2d 323 (7th Cir. 1963). On the other hand, where there were inconsistent orders from two states, each applying its own law to the burden of tax allocation, a U. S. District Court has applied a "last in time" rule and applied the decision in the last such case. *First Tenn. Bank N.A. v. Smith*, 56 AFTR 2d 85-6515 (D.C. Tenn. 1983).

e. **Ultimate Distribution in Ancillary Proceeding.** If at the conclusion of the ancillary process there are assets remaining after the payment of debts, taxes, and expenses, generally the excess would be distributed to the domiciliary personal representative, if there is one, but may be distributed directly by the ancillary personal representative. See *Miller Est. v. Miller*, 768 P.2d 373 (Okla. Ct. App. 1988); Am. Jur. Executors § 1091 (2006). UPC § 3-816 provides a similar rule of distribution to the domiciliary personal representative but allows direct distribution where the law of the other state determines who is entitled (*e.g.*, by terms of the will, or as to real estate by intestacy), the domiciliary personal representative doesn't exist or can't be found, or the court orders otherwise under UPC § 3-1001 or incident to closing the estate.

f. **Applicable Law**. The law to apply to an estate or to a trust of a decedent is subject to the choice of law rules of affected states. In Utah, some of the choice of law issues have been dealt with in the probate code.

i. Probate Estate Rules. Under UCA § 75-1-301 the territorial application of the Utah probate code is described. Unless otherwise provided, the probate code applies: to the affairs of estates of decedents, missing persons, and persons to be protected domiciled in Utah; the property of nonresidents located in Utah or coming into the control of a fiduciary subject to the laws of this state; incapacitated persons or minors in Utah; survivorship and related accounts in this state; and trusts subject to administration in this state (more on this just below).

ii. Trust Rules. In addition to the foregoing, the trust code portion of the probate code has provisions dealing with the law to apply to trust validity, construction, and administration.

(1) Under the governing state law provisions, which specify the law to apply for validity, construction, and administration, a trust is administered in Utah if the instrument says it is and any of its administration occurs in Utah (UCA § 75-7-107(2),(4)(a), and (7)), or if the instrument does not specify Utah administration as described in subsection (4)(a) (presumably because it is silent), if the trustee conducts a major portion of its administration in Utah (UCA § 75-7-107(4)(b) and (7) which appears to be applicable both before and after 2003). If the instrument specifies administration in some other jurisdiction, the "unless otherwise designated" provision of subsection (7) should prevent the trust from being treated as administered in Utah, at least if part of the administration occurs in the other jurisdiction (see UCA § 75-7-108(1)). But section 75-7-107 goes on to say that for trusts created after 2003, if the instrument does not have a state law provision, the validity, construction, and administration of the trust is under Utah law if the trust is administered in Utah. UCA § 75-7-107(3).

(2) If the trust has a state law provision specifying some other state law, there is some guidance as to the "principal place of administration" under UCA § 75-7-108(1) which provides that a provision designating the principal place of administration is valid and controlling if the trustee's principal place of business or residence is in the designated jurisdiction and all or part of the administration occurs there. This appears intended to create a minimum standard under UCA § 75-7-107 (4)(b), and (7) where another jurisdiction is designated.

(3) Note that for a trust created after 2003 without a state law provision the quantum of administration under UCA § 75-7-107(3) is just "administered in this state," i.e., Utah for purposes of having Utah law apply to validity, construction, and administration; unlike UCA § 75-7-108(1) relating to a trust provision designating another state as the place of principal administration, UCA § 75-7-107(3) does not say "all or part" of the administration, and unlike UCA § 75-7-107(4)(b) relating to instruments without a state law provision specifying Utah, it also does not say "a major portion" of administration. This leaves some room for debate about the quantum needed for trusts created after 2003; will all, any, or a major part be required? The rule of UCA § 75-7-107 (4)(b) should nevertheless solve this problem because where the trust is silent, administration is in Utah if a major part of the administration is in Utah and this is consistent with UCA § 75-7-107(3). This UCA § 75-7-

107(3) provision also says it applies "for all trusts created after 2003," not just trusts created under Utah law; this provision apparently is intended to apply to a trust created in another state under that state's law but without a state law selection provision.

(4) Restatement (Second) of Conflict of Laws (1971) describes the law to apply to trust and estate administration. Under that Restatement § 316, "The duties of an executor or administrator with regard to the conduct of the administration are usually determined by the local law of the state of appointment." Under § 272 (1971), "The administration of an inter vivos trust of interests in movables is governed as to matters which can be controlled by the terms of the trust (a) by the local law of the state designated by the settlor to govern the administration of the trust, or (b) if there is no such designation, by the local law of the state to which the administration of the trust is most substantially related." Further, under Restatement § 279, "The administration of a trust of an interest in land is determined by the law that would be applied by the courts of the situs as long as the land remains subject to the trust."

3. **Foreign Country Proceedings.** The issues involved in ancillary proceedings among the states can be complex, but if a decedent owns property in a foreign country, the issues will exacerbate considerably. Without going into detail, some of the concerns which make such a situation more difficult include: in some countries, there are restrictions on the ability of noncitizens to own certain types of property interests, particularly land; countries outside the English common law tradition generally do not recognize trusts; judgments by a court in one country are not entitled to full faith and credit in another country, and may be recognized only if the other country is willing to grant comity to the judgment of the first country; the situs of personal property assets is more rigid, subject to conflicting rules, which are not deferential to administration in the country of domicile, in order to protect local creditors and taxing authorities and to enforce currency transfer and similar restrictions; there may be treaties which affect tax obligations and other matters; the validity of wills may be subject to quite different standards; some countries have forced share rules for certain descendants, as well as for spouses; the domiciliary personal representative may not qualify to act in another country as a legal matter and may not be able to act effectively in another country as a practical matter due to distance, language, or culture. These issues sometimes mean that there will be two different wills for the decedent governed by two very different bodies of law and subject to very different forms of administration and procedures. Taxes owed in one jurisdiction may or may not be collectable in another jurisdiction; collectability may be based on treaties or comity, but often absent a treaty, tax obligations are not collectable in foreign jurisdictions. See, *e.g.*, Article XXVI A of the Convention Between The United States Of America And Canada With Respect To Taxes On Income And On Capital, (known as the Canada- United States Income Tax Convention, TIAS No. 11087; 1469 UNTS 189) signed September 26, 1980 and entered into force on August 16, 1984 (treaty section provides for each jurisdiction to collect all taxes, including income, estate, and gift taxes, of the other jurisdiction using the collecting jurisdiction's internal tax collection processes); this treaty changed, as to the United States, the rule of *U.S. v. Harden*, 63 D.T.C. 1276, SCR 366 (1963) (policy of Canada against collecting foreign taxes). The similar United States rule about foreign taxes not covered by treaty is reflected in such cases as *Moore v.*

Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 19 (1930); *U.S. v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996).