

Ancillary Probate in Delaware

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Status: **Law stated as of 12 Aug 2026** | Jurisdiction: **Delaware**

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A Practice Note summarizing the ancillary estate administration processes in Delaware, often called ancillary probate, for a non-domiciliary (nonresident) decedent. This Practice Note explains the procedures required when a nonresident of Delaware dies owning property in Delaware that does not pass by title or operation of law. It identifies key Delaware laws, including Title 12 of the Delaware Code, and procedures for managing these matters for both testate and intestate estates. This resource describes the different types of ancillary proceedings available, covering situations that require the appointment of a local ancillary personal representative and those that do not, including the process for payment and delivery of personal property to a domiciliary foreign personal representative. This Practice Note also discusses the exercise of power by a foreign personal representative and offers practical insights into managing a nonresident's Delaware real property, helping counsel navigate the state's specific requirements through the Court of Chancery and county Registers of Wills.

If a person not domiciled in Delaware dies owning property in Delaware that does not pass by title or operation of law, an ancillary estate administration process in Delaware may be necessary to administer the decedent's Delaware property.

Ancillary estate administration in Delaware is subject to Delaware law and is generally brought as a secondary proceeding to a primary estate proceeding commenced in the state of the decedent's domicile (see Requirements for Ancillary Proceedings). In most circumstances, there are procedures available to administer the decedent's Delaware property without opening a full ancillary estate administration proceeding.

This Note provides an overview of the various types of estate administration processes available in Delaware when a non-domiciliary (also called a nonresident) decedent dies with real property in Delaware.

Ancillary Estate Administration Purpose and Availability

Ancillary estate administration (also called ancillary probate) is the legal process used to transfer property in Delaware owned by a non-Delaware-domiciled decedent. Ancillary estate administration in Delaware is comprised of more than one type of process, and depending on the circumstances, these processes:

- Are available to the personal representative appointed in the decedent's state of domicile (called a domiciliary foreign personal representative or foreign personal representative when acting in Delaware). Generally, if no personal representative is appointed in the decedent's domicile, a petition would likely need to be filed in the Delaware Court of Chancery to open an original estate administration in the State of Delaware.
- May require the appointment of the foreign personal representative (or another available individual) as a local personal representative appointed to act in Delaware.
- Are also available to any individual with an interest in the non-domiciliary decedent's Delaware property.

This Note discusses the Delaware ancillary estate administration proceedings and alternative processes available for the administration of a non-domiciliary decedent's Delaware estate. It focuses on processes specific to ancillary estate administration. However, many processes used to administer a non-domiciliary decedent's Delaware estate are substantially the same as those used to administer the Delaware estate of a Delaware-domiciled decedent.

For more information on Delaware domiciliary estate proceedings, which may be used for a non-domiciliary decedent when applicable, see [State Q&A, Probate: Delaware](#).

Requirements for Ancillary Proceedings

Ancillary estate administration in Delaware is applicable and generally required when:

- The decedent was not domiciled in Delaware at death. Domicile in Delaware is generally where one has a physical presence at a dwelling place with the intention to make that place a permanent home. A domicile once established remains the legal domicile until a new one is acquired. (See *New York Tr. Co. v. Riley*, 16 A.2d 772, 783 (Del. 1940).) Though domicile and residence are not identical, for this Note, a decedent not domiciled in Delaware at death (a non-domiciliary decedent) is also called a nonresident decedent.
- The decedent owned real or personal property located in Delaware, including credits due from Delaware residents or liens on property in Delaware, subject to probate (assets that do not pass by beneficiary designation, operation of law, or under a revocable or irrevocable trust, referred to as probate assets).
- Delaware action is necessary to administer, transfer, or protect those assets (particularly Delaware real estate).

Ancillary administration:

- Gives a foreign personal representative in Delaware the authority to administer the estate of a nonresident decedent regarding the Delaware assets.
- Is typically secondary to a domiciliary administration in the place of the decedent's domicile and through which the bulk of the decedent's assets are administered.

(12 Del. C. §§ 1307, 1504(b), and 1505.)

Property in Delaware that is not subject to probate (non-probate property), for example property in a revocable or irrevocable trust, controlled by a beneficiary designation, held in joint tenancy with a survivorship right, or that otherwise passes by operation of law, is not subject to Delaware ancillary probate proceedings (12 Del. C. §§ 602, 809, and 1905(e)).

Statutes Applicable to Ancillary Estate Proceedings

Title 12 of the Delaware Code contains the laws regarding ancillary estate administration of a nonresident decedent's estate (sometimes called the local administration of the estate of a nonresident decedent) and the probate processes in Delaware generally. These statutes include:

- 12 Del. C. § 1505, for the definition of persons entitled to letters of administration.
- 12 Del. C. §§ 1561 to 1573, for the rules governing foreign representatives in Delaware, which include, specifically:
 - the definition of local administration and local personal representative (12 Del. C. § 1561(1), (2)); and
 - the governing law for ancillary and local administration of nonresidents (12 Del. C. § 1568).
- Additional statutes throughout Title 12 in Delaware, which cover the general probate process overlap with domiciliary decedent probate in Delaware (12 Del. C. § 1568).

In addition:

- The applicable rules of the Delaware Court of Chancery apply to ancillary estate administration of a nonresident decedent's estate (Del. Ch. Ct. R. 187 to 207).
- The Registers of Wills in each of Delaware's three counties ([New Castle](#), [Kent](#), and [Sussex](#)) also prescribe their own sets of rules and procedures. Delaware statute authorizes the Registers of Wills for each county in Delaware to establish rules, forms, and procedures and adjudicate matters where no statute or court rule is otherwise established (12 Del. C. § 2502). Attorneys should ensure they are abiding by the applicable rules and procedures of the county in which the estate proceedings occur.

Use of Forms in Ancillary Estate Administration Proceedings

Many Delaware counties provide estate administration forms, including those for ancillary estate administration proceedings, free to the public. Counsel generally should use the appropriate estate administration forms provided by the applicable Registers of Wills for the county where the Delaware property is located.

Counsel should check the applicable county Register of Wills websites:

- New Castle County, Register of Wills, [Probate & Non-Probate Forms](#).
- Kent County, [Register of Wills Forms Library](#).
- Sussex County, [Register of Wills Forms](#).

In addition, counsel may contact the Register's office directly to determine the specific forms available for ancillary estate administration proceedings, if any.

Types of Ancillary Proceedings

The ancillary estate administration processes available in Delaware when a nonresident decedent dies with probate assets in Delaware include:

- Payment and Delivery to Domiciliary Foreign Personal Representative Without Formal Local Appointment. If a personal representative was appointed in the state of the decedent's domicile, and the Delaware estate of the nonresident decedent contains only personal property, the personal representative may collect the personal property by this payment and delivery process without opening an ancillary estate administration or appointing a personal representative in Delaware in certain circumstances. (See Payment and Delivery to Domiciliary Foreign Personal Representative Without Appointment (Ancillary Filing Without Administration).)
- Administration of:
 - Intestate Estate with Appointment of Ancillary Personal Representative (see Opening an Intestate Ancillary Estate Administration with Appointment of Ancillary Personal Representative); or
 - Testate Estate with Appointment of Ancillary Personal Representative (see Opening a Testate Ancillary Estate Administration with Appointment of Ancillary Personal Representative).
- Chancery Court Petition for Ancillary Letters on Presumed Decedents (see Chancery Court Petition for Ancillary Letters on Persons Presumed Deceased).

Payment and Delivery to Domiciliary Foreign Personal Representative Without Appointment (Ancillary Filing Without Administration)

Delaware permits the payment of debts and delivery of certain personal property in Delaware to a domiciliary foreign personal representative without local appointment under certain circumstances (12 Del. C. § 1562). This process cannot be used to collect Delaware real property. If the decedent owned Delaware real property, an ancillary estate administration is required to ensure proper transfer of title.

After 60 days from the death of a nonresident decedent, a debtor or custodian of the decedent's personal property, debts, or evidences of obligation (including any debt, stock, or a cause of action belonging to the decedent's estate) may make payment or delivery directly to the domiciliary foreign personal representative on presentation of:

- Proof of the foreign appointment, usually by a verified copy (or regular copy of the verified copy) of the letters in the foreign jurisdiction appointing the personal representative.
- An affidavit by or on behalf of the representative stating:
 - the decedent's date of death;
 - that no local ancillary administration or application therefor is pending in Delaware; and
 - that the foreign personal representative is entitled to payment or delivery of the property.

(12 Del. C. § 1562.)

When these conditions are met and payment or delivery is made in good faith, the payor is discharged to the same extent as if payment had been made to a locally appointed personal representative (12 Del. C. § 1563).

This payment and delivery process cannot be used and an ancillary estate administration is required:

- Once any application or petition for local administration is pending in Delaware or after the Delaware Court of Chancery grants letters of ancillary administration. The authority of a foreign personal representative to act without local appointment exists only absent a Delaware administration. Filing a petition for local administration terminates the foreign representative's authority to collect personal property assets under 12 Del. C. § 1562 (12 Del. C. § 1567).
- If a Delaware resident creditor gives notice objecting to payment or delivery to the foreign personal representative (12 Del. C. § 1564).
- Where administration is otherwise required under Title 12 to administer property located in Delaware, for example, where:
 - probate of a will is sought locally under 12 Del. C. § 1307; or
 - letters of ancillary administration must issue under 12 Del. C. § 1504(b) to administer Delaware-situs property.

In these circumstances, collection and administration of the nonresident decedent's Delaware personal property must proceed through a local personal representative appointed by the Register of Wills, either in an ancillary estate administration or in an original Delaware estate administration, if there was no estate administration proceeding in the nonresident decedent's domicile.

Opening an Intestate Ancillary Estate Administration with Appointment of Ancillary Personal Representative

When a non-domiciliary decedent dies intestate (without a valid will) owning real estate or personal property in Delaware and an original estate administration was opened in the decedent's state of domicile, certain persons may seek appointment as an ancillary personal representative to administer and dispose of those assets (12 Del. C. §§ 1504(b) and 1505). The petition for appointment should be filed in any county in which the decedent owned real or personal property that is subject to probate under Delaware law (12 Del. C. §§ 1504(b) and 1905(a)).

A Register of Wills may grant letters of ancillary administration in the same manner as Delaware-domiciled intestate administrations (see [State Q&A, Probate: Delaware: Opening the Estate](#)). If a personal representative was appointed in the decedent's state of domicile, and that representative seeks to administer the decedent's Delaware property, opening an intestate Delaware ancillary estate administration is not common unless the nonresident decedent owned Delaware real property. The personal representative can recover Delaware personal property assets without opening an ancillary estate administration in Delaware or otherwise being appointed or authorized by the Delaware court to administer that personal property. (See [Payment and Delivery to Domiciliary Foreign Personal Representative Without Appointment \(Ancillary Filing Without Administration\)](#).)

If there was no estate administration opened in the nonresident decedent's state of domicile, a petitioner would need to open a local administration governed by Delaware law, including the appointment, powers, and supervision of the local personal representative (12 Del. C. § 1568).

Petitioning for Ancillary Administration and Appointment for Intestate Estates

As in a Delaware domiciliary intestate estate administration, for an intestate ancillary estate administration, the proposed personal representative must be:

- Qualified to act in Delaware.
- Appointed in the intestate estate administration in the decedent's domicile and have the priority to serve in the Delaware ancillary intestate administration (12 Del. C. § 1565). If no personal representative is appointed in

the decedent's state of domicile, the priority to serve as personal representative in the Delaware estate administration is the same as the order of priority in an intestate Delaware domiciliary administration. If there is a dispute as to priority, the Register of Wills and Court of Chancery retain discretion for appointment of a representative (12 Del. C. § 1505).

For more information on the qualifications to act as personal representative in Delaware and the order of priority for appointment as representative in an intestate administration, see [State Q&A, Probate: Delaware: Question 7](#).

The petitioner must file a petition for ancillary estate administration of a Delaware intestate estate with the Register of Wills. Though this ancillary petition is substantially the same as in an intestate Delaware domiciliary administration, the ancillary petition includes additional information about the estate administration in the nonresident decedent's state or jurisdiction. For more information regarding the contents of a petition to open an estate administration in Delaware, see [State Q&A, Probate: Delaware: Question 5: Petition for Authority to Act as Personal Representative](#).

Certain documents must be filed with the petition for ancillary estate administration in addition to the documents required in an intestate Delaware domiciliary estate administration. If the petitioner in the ancillary administration is:

- The personal representative appointed in the decedent's domiciliary jurisdiction, certified copies of the order appointing that representative and of the letters issued to the representative must be filed with the petition.
- An heir or other fit person seeking appointment as personal representative, an affidavit attesting to the relationship or reason for appointment must be filed with the petition.
- A creditor of the decedent, evidence of a valid claim against the decedent must be filed with the petition.

The Register of Wills requires an out-of-state personal representative to appoint the Register of Wills in that county as the power of attorney to accept service of process related to the estate (12 Del. C. § 1506).

For more information regarding the documents required to be included when filing a Delaware estate administration petition, see [State Q&A, Probate: Delaware: Question 4: Documents Submitted with Initial Filing](#).

Opening a Testate Ancillary Estate Administration with Appointment of Ancillary Personal Representative

Similarly, when a nonresident decedent dies testate (with a valid will) owning real estate or personal property in Delaware, qualified persons may seek appointment as an ancillary personal representative to administer and dispose of those assets by filing a petition for appointment as ancillary personal representative (12 Del. C. §§ 1504(b) and 1505; see [State Q&A, Probate: Delaware: Question 7](#)). The petition for appointment may be filed in any county in which the decedent owned real or personal property that is subject to probate under Delaware law (12 Del. C. §§ 1302 and 1504(b)).

A Register of Wills may grant ancillary letters in the same manner as Delaware-domiciled testate administrations (see [State Q&A, Probate: Delaware: Opening the Estate](#)). As with ancillary intestate administrations, if a personal representative was appointed in the decedent's state of domicile, opening a testate Delaware ancillary estate administration is not common unless the nonresident decedent owned Delaware real property, since the representative can recover Delaware personal property assets without opening an ancillary estate administration in Delaware (see [Payment and Delivery to Domiciliary Foreign Personal Representative Without Appointment \(Ancillary Filing Without Administration\)](#)).

The petition process for opening a testate Delaware ancillary estate generally proceeds in substantially the same manner as a Delaware testate estate administration (see [State Q&A, Probate: Delaware: Opening the Estate](#)). However, there are additional attachments to the petition, including:

- Either:
 - a certified copy of the will admitted to probate in the decedent's domiciliary jurisdiction; or
 - the original will (generally, if no estate administration was opened in the state of decedent's domicile and original probate is required in Delaware) (see [Delaware Administration Without Administration in the Nonresident Decedent's Domicile](#)).
- A certification of probate from the primary jurisdiction (the order of probate).
- If required by the Register and if the petitioner in the ancillary administration is the personal representative appointed in the decedent's domiciliary jurisdiction, certified copies of the order appointing that representative and of the letters issued to the representative. If the petitioner seeking to be appointed as ancillary personal representative in Delaware is:

- an heir or other fit person seeking appointment as personal representative, an affidavit attesting to the relationship or reason for appointment must accompany the petition or a renunciation of a personal representative named in the will if the will gives that other named personal representative priority to serve as personal representative over the petitioner; or
- a creditor of the decedent, evidence of a valid claim against the decedent must accompany the petition.

Delaware Administration Without Administration in the Nonresident Decedent's Domicile

Delaware may accept and probate the original will of a non-domiciliary decedent who died owning property in Delaware but with no domiciliary estate. However, this is not common, and Delaware authority does not provide clarity in this scenario. Best practice would be to open a domiciliary estate to appoint a domiciliary personal representative who can then seek ancillary administration of the non-domiciliary decedent's Delaware estate.

Bond

The proposed ancillary personal representative may also be required to file a bond in the ancillary estate administration, sufficient to protect the Delaware property that is the subject of the administration, before being appointed as representative, similar to an original Delaware estate administration, if required under the will or ordered by the Court of Chancery (12 Del. C. § 1522; see [State Q&A, Probate: Delaware: Question 8](#)).

Grant of Letters of Administration

On the filing of a complete petition and provision of bond, the Register of Wills may grant, for the administration of the non-domiciliary decedent's Delaware estate:

- Letters of ancillary administration with the will annexed where:
 - a testate estate administration was opened in the nonresident decedent's state of domicile and where certified copies of the will and probate are presented to the Delaware court; or
 - no testate administration was opened in the nonresident decedent's state of domicile and where the decedent's will or a copy of the will (if the will is missing) is presented to and proved by the Delaware court.
- (12 Del. C. § 1504(b).)
- Letters of ancillary administration where:

- an intestate estate administration appointing a personal representative was opened in the nonresident decedent's state of domicile and certified copies of domiciliary estate administration are presented to the Delaware court; or
 - no intestate estate administration was opened in the nonresident decedent's state of domicile and the decedent died intestate with Delaware property.
- (12 Del. C. § 1504(b).)
- Letters testamentary, where no estate administration was opened in the nonresident decedent's state of domicile and the decedent died testate with an original will presented to the Delaware court for probate of the decedent's Delaware estate (12 Del. C. § 1502(a); see Delaware Administration Without Administration in the Nonresident Decedent's Domicile).

If petitions for ancillary administration in Delaware were filed in multiple Delaware counties where the nonresident decedent owned Delaware property, the administration that is first lawfully granted extends to all the decedent's estate within Delaware (12 Del. C. § 1504(b)).

Delaware requires an irrevocable power of attorney for service of process when appointing a non-domiciliary personal representative, including an ancillary personal representative, before the representative may act in an ancillary administration (12 Del. C. § 1506).

Ancillary Administration Process for Intestate and Testate Estates

Once appointed, the ancillary administration of a Delaware intestate or testate estate proceeds similarly to the domestic administration of a Delaware decedent's intestate or testate estate, including requirements regarding:

- Notices to heirs, creditors, and other interested persons. Notice is generally not required on the filing of a petition for ancillary estate administration, except in certain cases, as in a Delaware domiciliary estate administration. (See Special Issues Regarding Notice to Creditors and [State Q&A, Probate: Delaware: Question 6](#).)
- Required filings (for example, inventory, appraisal, and accountings) (see Special Issues Regarding Inventory and Sale of Real Property and [State Q&A, Probate: Delaware: Question 13: Accounting](#)).
- Final settlement and distribution (see [State Q&A, Probate: Delaware: Question 15](#)).

Special Issues Regarding Notice to Creditors

In a Delaware ancillary estate administration, Delaware presumes notice of any debts or liens recorded on title for the Delaware real property that is the subject of the

administration (12 Del. C. § 2103). Therefore, these claims do not need to be presented to the personal representative or Register of Wills to preserve the claims against the estate.

The notice to creditors and creditors' claims processes are otherwise similar to these processes in original Delaware estate administration. For more information on the creditors' claim process in Delaware, see [State Q&A, Probate: Delaware: Question 13: Notice to Creditors](#).

Special Issues Regarding Inventory and Sale of Real Property

While not unique to ancillary estate administration, the inventory is important for the transfer of the decedent's Delaware real property, which is the primary purpose for opening an ancillary estate administration (given the expedited process to transfer personal property if a personal representative was appointed in the decedent's state of domicile). The inventory must list:

- All the decedent's Delaware real property interests (the property interests' legal descriptions and addresses).
- The name, address, relationship, and share of the person or persons inheriting the real property interests on the decedent's death (for example, beneficiaries under the will in a testate estate or heirs-at-law in an intestate estate).
- The tax parcel numbers of these real property interests.
- Any title transfers of these property interests after the decedent's date of death.

As an ancillary estate administration generally does not include personal property in Delaware or other property in the state of the decedent's domicile, which are administered in the domiciliary estate administration, assets other than real property are typically not included on the inventory of a Delaware ancillary estate administration.

The personal representative may sell real property either:

- As the will directs the personal representative to sell that real property.
- By order of the Court of Chancery on a petition to use the real estate to pay debts (12 Del. C. § 2701).

Absent affirmative direction in the will to sell the real property (for example, if the will authorizes the sale of the real property but does not direct it) or a petition to return title to the property to the estate for the payment of debts, the beneficiaries may sell the property after the filing of the inventory. In this case, it is likely that some or all the sale proceeds will be held in escrow pending the completion of the Delaware ancillary estate administration. The proceeds of this sale belong to the heirs, are not attributable to the estate, and are excluded from the accounting (absent a will direction to sell or a successful petition to return the real property to the estate).

Ancillary Probate in Delaware

For more information on:

- Real property in the Delaware estate, including the power to sell the property, see [State Q&A, Probate: Delaware: Question 12: Real Property in the Delaware Estate](#).
- The inventory, generally, see [State Q&A, Probate: Delaware: Question 12: Estate Inventory](#).

Closing the Ancillary Estate Administration

In Delaware, the process of closing the ancillary estate administration is similar to that for closing a domiciliary estate administration.

With ancillary administration focused on the real estate in Delaware, there are unlikely to be significant new assets or expenses to include on an accounting. An accounting can be filed if the personal representative wants to be released from any liability for administration of the estate. If only real property is listed on the inventory, the Register of Wills may not require an accounting. If the real property is being sold to pay debts of the estate, then an accounting is required. However, the process and forms for an accounting are the same for ancillary proceedings as they are for domiciliary estate administration in Delaware, provided that, in ancillary estates, the accounting includes only the Delaware assets under the ancillary estate administration and does not include any assets associated with the estate administration in the decedent's domiciliary (or other) jurisdiction.

Unless letters testamentary or of administration were issued on the decedent's estate in the decedent's state of domicile, the personal representative of the ancillary estate must file with the Register of Wills, within 18 months of the grant of ancillary letters in Delaware, either:

- Proof that all death taxes, together with any interest or penalties, due to the decedent's domiciliary state were paid or secured.
- Confirmation that none of these taxes, interest, or penalties are due.

(12 Del. C. § 2352.)

For more information regarding closing an estate administration in Delaware, including information on the final account and discharge of the personal representative, see [State Q&A, Probate: Delaware: Question 15](#) and [Question 16](#).

Chancery Court Petition for Ancillary Letters on Persons Presumed Deceased

In certain circumstances, where a death certificate may not be available for a non-domiciliary person who is presumed dead under the laws of their domicile, the Court of Chancery may review the matter. When any other state, territory, or possession of the US, or any foreign country, grants letters of administration or letters testamentary to administer the estate of a domiciliary of that location who is presumed to be dead, that personal representative may petition the Court of Chancery, accompanied by a complete exemplification of the record of the grant of those letters, for the grant of ancillary letters testamentary or of administration on the Delaware estate of the presumed decedent.

The court, if satisfied that the person proposed in the petition would be a fit person to whom letters might be issued, must publish notice of the estate administration under 12 Del. C. § 1702, which includes:

- The fact of the petition.
- Notice that on a day certain, which must be at least two weeks after the last appearance of the publication, the Court of Chancery will hear evidence concerning the alleged absence of the presumed decedent and the circumstances and duration of the absence.

(12 Del. C. § 1703.)

Once appointed, the administration of the Delaware estate of the presumed-dead intestate or testate decedent proceeds in the same manner as the ancillary administration of a non-domiciliary decedent's intestate or testate estate in Delaware.

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