Ancillary Probate and Administering a Nonresident's U.S.-Situs Assets

An Adviser's Guide to the U.S. estate administration of nonresident non-citizen who ownes American assets: state-court authority and federal tax clearance; obtaining ancillary letters and the foreign executor's standing; the statutory executor of 26 US Code §2203; Form 706-NA and the Transfer Certificate (Form 5173); the estate tax treaties; and the sequencing of a multi-jurisdiction administration

Consider the following cases: a German industrialist dies domiciled in Munich owning a Miami condominium and a New York brokerage account; a French matriarch dies in Lyon leaving U.S. Treasury holdings and shares of American blue chips in a Paris custody account; a Swiss entrepreneur dies with a Delaware LLC interest and a California vacation home. In each case a foreign court or notary will run the main succession, and in each case somebody must actually collect the American assets: persuade the transfer agent, satisfy the title insurer, get the brokerage to release the account, deed the condominium to the buyer or the heirs. That somebody is usually a foreign executor or heir with no American letters, facing American institutions that will not move without them, or without something else this article explains.

Two separate hurdles stand between a nonresident decedent's U.S. assets and the people entitled to them, and confusing them is the single most common source of delay. The first gate is authority: American institutions and land records recognize representatives appointed or recognized by an American court, so for some assets, above all real estate, the estate needs ancillary letters from the state where the property sits, ordinarily granted on the strength of the domiciliary proceeding abroad. The second gate is tax: the federal estate tax reaches the U.S.-situs assets of nonresident non-citizens above a threshold that has stood at $60,000 for decades, custodians face personal liability if they hand over assets before the tax is resolved, and so they demand the IRS's transfer certificate (Form 5173) before releasing anything, which in turn generally requires a filed Form 706-NA and months of waiting. Authority without tax clearance moves nothing; tax clearance without authority moves nothing; the administration is designed around getting both, in the right order, with the least wasted time.

This article works through the machinery in the order the practitioner meets it: when U.S. proceedings are needed at all and what ancillary probate actually involves; the foreign executor's position, including the statutory-executor rule that imposes U.S. filing duties on whoever holds the assets; the Form 706-NA return and the transfer-certificate process, with the small-estate alternative; the estate tax treaties where they change the numbers or the paperwork; and the sequencing of a multi-country administration, which is where good estates lose a year to avoidable serialization. State law governs probate and varies materially; the examples here draw on the larger jurisdictions, and local counsel in the situs state is assumed throughout.

Short summary. (1) State-court authority (ancillary letters) governs who may act, and federal tax clearance (the Form 5173 transfer certificate, downstream of Form 706-NA) governs when custodians will release.

(2) Not every asset needs a U.S. proceeding: real estate almost always requires ancillary administration in the situs state; financial assets can often be collected by the foreign executor with the transfer certificate, the death certificate, authenticated appointment papers, and the institution's own forms. Ask each custodian for its checklist before opening any proceeding.

(3) Ancillary probate runs on exemplified or authenticated copies of the domiciliary record: the foreign will and the foreign grant, apostilled and translated; states differ on nonresident fiduciaries (Florida restricts nonresident personal representatives to certain relatives; bonds may be required), so the choice of who seeks letters is a planning decision.

(4) The statutory executor of §2203 means there is no hiding: with no court-appointed U.S. executor, every person in actual or constructive possession of U.S. assets (the foreign executor, the heir, even the custodian) is an 'executor' charged with the 706-NA duties.

(5) Form 706-NA is due nine months after death (six-month extension on Form 4768) whenever U.S.-situs assets exceed $60,000; the unified credit is generally $13,000 (exempting that $60,000); expense and debt deductions are pro-rata and require disclosing the worldwide estate; charitable and marital deductions follow their own rules. The transfer certificate follows IRS review (commonly many months), and below the $60,000 threshold an affidavit procedure substitutes.

(6) The treaties change the answer where they apply: the modern domicile-type conventions (Germany, France) re-source assets, grant a pro-rata unified credit and marital relief, and can eliminate the tax on non-real-estate holdings; Canada's income tax treaty grants its own pro-rata credit; treaty positions are disclosed on the return.

(7) Sequencing is the craft: start the 706-NA work at once (it needs worldwide numbers the foreign proceeding also needs), request custodian checklists immediately, open the ancillary proceeding for real estate early; and never let the U.S. tax return wait for the end of the foreign administration, because everything American queues behind it.

Part I. When a U.S. proceeding is needed at all

Begin where experienced counsel begins: with the asset list, not the courthouse. The question is never 'must we probate in America?' in the abstract but 'what does each U.S. asset require before it will move?' And the answers divide cleanly. U.S. real property is the hard case: title passes under the law of the situs state, deeds must be executed by someone the recording system recognizes, and title insurers, the true gatekeepers of American real estate, will not insure a chain of title that runs through an unadmitted foreign will or an unappointed foreign heir. Real estate therefore almost always means an ancillary proceeding in the situs state (or reliance on a non-probate structure created before death: an entity, a trust, a survivorship form of title). Financial assets are the soft case: brokerage accounts, bank deposits, and registered securities are released by institutions, not courts, and many custodians will pay a foreign executor directly (without any U.S. letters) upon their own documentation package: certified death certificate, authenticated and apostilled copies of the foreign appointment (the German “Erbschein” or “Testamentsvollstreckerzeugnis”, the French notarial documents, letters from a Commonwealth grant), translations, the institution's indemnity forms, and, decisively, the IRS transfer certificate discussed in Part IV. Some custodians insist on U.S. letters regardless; a minority are satisfied with less. The first week's work is therefore a canvass: write to every institution, obtain its checklist in writing, and only then decide which proceedings the estate actually needs.

Two more preliminary observations frame everything after. First, the federal tax gate applies regardless of whether any U.S. court is involved: even the custodian happy to pay a foreign executor will hold the assets until the transfer certificate arrives, because §6324 makes the transferee and the custodian personally answerable for unpaid estate tax: the lien follows the property, and institutions know it. Second, the two gates are independent in law but coupled in practice: the ancillary court may want evidence the tax side is in hand, the custodians want both letters (where required) and the certificate, and the closing agent on a real-estate sale wants everything at once. So the adviser runs the tracks in parallel from the start rather than discovering the second gate after clearing the first.

Part II. Ancillary letters of administration

Ancillary administration is a dependent proceeding: the main succession runs at the domicile, and the situs state grants authority limited to local assets, ordinarily on the strength of the domiciliary record. The mechanics are paperwork-intensive but well-trodden. The petitioner assembles the foreign will and the foreign grant or its equivalent in exemplified or duly authenticated form: for civil-law jurisdictions, this means certified copies of the Erbschein, the European Certificate of Succession, or the French acte de notoriété, apostilled under the Hague Apostille Convention and accompanied by certified English translations; for probate jurisdictions, exemplified copies of the will and grant. The petition is filed in the probate court of the county where the property sits; notice runs to interested parties; and the court admits the foreign will to record (or recognizes the intestate succession) and issues ancillary letters, testamentary or of administration, to the personal representative. Where the will was executed abroad in local form, the validity rules discussed elsewhere in this series do the work: most states admit a will valid where executed or at the domicile, and a will already admitted at the domicile is generally entitled to ancillary admission on the exemplified record without relitigating validity.

The state-law variations are where foreign clients are surprised, and three matter most. Who may serve: several states restrict nonresident fiduciaries. Florida, the situs of so much European-owned real estate, permits a nonresident to serve as personal representative only if related to the decedent in specified ways, so the German executor named in the will may be ineligible while the decedent's child is not; other states require a resident agent for service of process, and bond requirements (waivable in the will in some states, not in others) fall harder on nonresidents. What the letters cover: ancillary letters reach the local assets only, and some states offer streamlined alternatives worth checking before filing a full proceeding, among them small-estate procedures, admission of the foreign will to record without administration where only real estate must pass, or summary assignment where value is modest. Who gets what: the ancillary court ordinarily remits the net local estate to the domiciliary representative for distribution under the law of the domicile after local claims, expenses, and taxes are paid, but where the beneficiaries are ascertained and the domicile's needs are clear, direct distribution from the ancillary estate can be authorized and saves a round trip. All of it is county-court practice: local probate counsel in the situs state is not a luxury but the mechanism.

Part III. The foreign executor's position

The foreign executor (the Testamentsvollstrecker, the notaire-supervised heirs, the executor under an English grant) occupies a stranger position in the U.S. system than clients expect, and §2203 defines it. For federal estate tax purposes, 'executor' means the appointed executor or administrator, and if none is appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent, which sweeps in the foreign executor, the surviving spouse, the heirs, and in principle the U.S. custodian itself. The consequence is practical, not academic: the Form 706-NA duties do not wait for anyone to seek U.S. letters. Someone always owes the return, and the foreign representative who assumes the estate is 'being handled abroad' while the American filing deadline runs is the classic malpractice pattern. The statutory executor files the return, requests the transfer certificates, and (a step often missed) obtains a U.S. employer identification number for the estate, which the custodians, the closing agent, and any U.S. income tax filings (the estate is a foreign estate for income tax purposes, filing Form 1040-NR on U.S.-source income during administration) will all require.

Dealing with institutions is its own craft. The custodian's file must be built the way the custodian wants it: death certificate with apostille and translation; the authenticated foreign appointment; a letter of direction executed exactly as the account is titled; the firm's own affidavits and indemnities; U.S. tax forms for the recipients (a W-8BEN for each foreign beneficiary, or the estate's own W-8 for collection to an estate account); and the transfer certificate. Expect the securities intermediary to freeze the account on notice of death and to apply its own escheat-avoidance and compliance clocks. For U.S. real estate, add the closing-side documents, and one tax regime this series treats separately but the administrator must not forget: a sale of U.S. real property by the foreign estate or foreign heirs is a FIRPTA disposition, with withholding at closing credited against the income tax on any gain, and the buyer's side will police it. None of this is intellectually difficult; all of it is unforgiving of missing paper, and the difference between a nine-month and a three-year administration is usually whether the file was built right the first time.

Part IV: Form 706-NA and the transfer certificate

The estate tax return

Form 706-NA is required whenever the date-of-death value of the nonresident non-citizen's U.S.-situated assets, augmented by lifetime adjusted taxable gifts and the old specific exemption, exceeds $60,000. It is due nine months after death; Form 4768 buys an automatic six-month extension of time to file (and executors abroad can request more), though an extension to file is not an extension to pay. The unified credit is generally $13,000 (the amount that exempts $60,000 of taxable estate), a figure unchanged for decades and startling to families accustomed to the multimillion-dollar domestic exclusion; the graduated rates reach 40% quickly. The situs rules determined which assets count: U.S. real estate and tangibles, shares of U.S. corporations wherever held (the Paris custody account does not help), and the exceptions (bank deposits, portfolio debt), as detailed elsewhere in this series; the administration consequence is the return's appetite for information: expense and debt deductions are allowed only pro rata, in the proportion the U.S. estate bears to the worldwide estate, and only if the worldwide estate is disclosed on the return; the charitable deduction (generally limited to U.S. charities or U.S. use) and the marital deduction (requiring a U.S. citizen spouse or a QDOT) follow their own rules rather than the proration. The foreign executor who wants deductions must therefore assemble worldwide values on the American timetable, one more reason the U.S. return cannot wait for the leisurely end of the foreign inventory.

The transfer certificate

The transfer certificate (Form 5173, issued by the IRS's Cincinnati-area estate and gift unit in Florence, Kentucky) is the document that actually opens the accounts. It certifies that the estate tax on the transferred property has been paid or secured, and it exists because custodians and transferees bear personal liability under §6324 for tax on assets they release; institutions therefore require it as a matter of policy, whatever the estate's size and whether or not any U.S. court is involved, though strictly the regulations excuse property administered by an executor or administrator appointed, qualified, and acting within the United States, a point worth raising where ancillary letters have issued. Where a 706-NA is due, the certificate follows the IRS's review of the filed return and payment (a process that takes months, commonly the better part of a year and sometimes more, and that cannot meaningfully be expedited); the practical countermeasures are filing early, filing cleanly (the classic delays are missing appointment documents, missing translations, and unexplained valuation gaps), and requesting certificates for each institution at the outset. Where no return is due because the U.S. estate is at or under $60,000, a transfer certificate can still be obtained through the affidavit procedure (a statement of the U.S. assets, copies of the will and death certificate, and evidence of value), or, with cooperative custodians, the affidavits themselves sometimes suffice. The certificate is issued per decedent covering the listed property; get every custodian's asset into the request the first time, because supplemental requests restart the wait.

Instrument	What it is	What it unlocks
Ancillary letters	Situs-state court appointment on the domiciliary record (exemplified/apostilled foreign will and grant, translations).	Authority to deal with local assets: indispensable for real estate deeds and title insurance; demanded by some custodians.
Foreign grant, authenticated	Erbschein, European Certificate of Succession, acte de notoriété, or Commonwealth grant, apostilled and translated.	The basis for ancillary letters; accepted directly by some custodians for financial assets, with their own forms.
Form 706-NA	The nonresident estate tax return, due 9 months after death (Form 4768 extension) if U.S.-situs assets exceed $60,000.	Starts the tax clearance; pro-rata deductions and any treaty benefits are claimed here.
Transfer certificate (Form 5173)	IRS certification that the estate tax is paid or secured; issued after review of the 706-NA, or on affidavits for sub-$60,000 estates.	The release document custodians require before paying anyone, with or without a U.S. proceeding.
Estate EIN and tax forms	U.S. taxpayer number for the estate; W-8 series for the estate and foreign beneficiaries; Form 1040-NR for administration income.	Account retitling and collection, U.S. withholding compliance, and income tax filings during administration.

Part V. The tax treaties

The United States maintains estate or death-tax conventions with roughly fifteen countries (among them Germany, France, the United Kingdom, Switzerland, the Netherlands, Ireland, Italy, Japan, Denmark, Finland, Austria, Australia, Greece, and South Africa) plus the estate tax provisions of the Canadian income tax treaty, and where a treaty applies it can transform both the tax and the paperwork. The older situs-type conventions (Switzerland among them) mainly assign taxing rights by asset location and relieve double taxation by credit. The modern domicile-type conventions (Germany and France are the ones this practice meets daily) go further: they generally reserve taxation to the country of domicile except for real property and business-establishment assets situated in the other state; they re-source or exempt categories the Code would tax (for a German- or French-domiciled decedent, U.S.-company shares held at death are typically insulated from U.S. tax under the treaty even though the Code sources them to the U.S.); they grant a pro-rata unified credit, the domestic exclusion scaled by the U.S. fraction of the worldwide estate, which for a modest U.S. footprint within a large worldwide estate can still dwarf $13,000; and the German and French instruments add marital relief for transfers to a surviving spouse. Canada's Article XXIX B similarly delivers a pro-rata credit and marital credit through the income tax treaty.

For the administrator, three treaty consequences matter. The return changes: treaty benefits are claimed on the 706-NA with disclosure of the position (and the worldwide-estate numbers a pro-rata credit requires), so the treaty does not remove the filing: a return claiming treaty benefits is still a return, and the transfer certificate still follows it. The answer may change entirely: for the German-domiciled decedent whose only U.S. assets are securities, the treaty may reduce the U.S. tax to zero, but the custodians will still want their transfer certificate, so the estate files to establish the exemption and obtain the release document rather than to pay. And the credits must be choreographed: where both countries tax (the Florida condominium of a German decedent: U.S. situs taxation preserved by the treaty, German worldwide taxation at domicile), the treaty credit runs in a defined direction, the foreign administration needs the U.S. numbers (and vice versa), and the timing rules for claiming the foreign credit at home (Germany's §21 ErbStG mechanics, France's imputation) should be planned before either return is final. The treaty analysis belongs at the start of the administration, not the end: it decides how much tax the sequencing in Part VI is actually securing.

Part VI. Sequencing the multi-jurisdiction administration

The expensive mistake in cross-border administration is serialization: finish the German probate, then think about America; obtain ancillary letters, then discover the tax gate; sell the condominium, then meet FIRPTA at closing. The efficient administration runs three tracks in parallel from the first month. Track one, information: the worldwide inventory is assembled once, early, to both countries' standards: the foreign proceeding needs it, the 706-NA's pro-rata deduction and any treaty credit need it, and every month it slips delays the slowest item in the chain, which is almost always the transfer certificate. Track two, tax: the 706-NA is prepared immediately, extended if necessary on Form 4768, filed as early as the numbers allow, with transfer certificates requested for every custodian's assets in one pass; where the estate is under the threshold, the affidavit route starts just as early. Track three, authority: custodian checklists are gathered in the first weeks; the ancillary proceeding for real estate is opened as soon as the authenticated domiciliary record exists (which is usually long before the foreign administration ends); and the eligibility questions (who can serve in the situs state, what bond is required, whether a resident co-fiduciary is needed) are answered before the petition is drafted, not by amendment after it bounces.

Consider a representative timeline for a German- or French-domiciled estate with a U.S. condominium and a brokerage account. Months one to three: death certificates, apostilles, and translations ordered in bulk; custodian canvass; EIN obtained; worldwide inventory begun; treaty analysis settled. Months three to nine: domiciliary grant issues and is authenticated; ancillary petition filed in the situs state; 706-NA finalized and filed (or extended); transfer certificates requested. Months nine to eighteen: ancillary letters issue; the real estate is managed or marketed (with FIRPTA planned into any sale); the transfer certificate arrives and the accounts are collected to the estate; local claims and expenses are settled. Months twelve to twenty-four: the ancillary estate is closed with remittance or direct distribution, the foreign administration absorbs the U.S. numbers for its own tax credit, and the estate distributes. Estates that run everything in sequence take twice as long; estates that skip the custodian canvass or file a thin 706-NA take longer still, because supplemental IRS correspondence restarts the slowest clock. The table compresses the sequence.

Phase	Tax track (federal)	Authority track (state / custodians)
Months 1–3	EIN; worldwide inventory begun; treaty analysis settled; 706-NA preparation opened; Form 4768 calendared.	Custodian canvass with written checklists; death certificates, apostilles, translations in bulk; situs-state eligibility and bond questions answered.
Months 3–9	706-NA filed (or extended) with treaty positions and pro-rata deduction support; transfer certificates requested for all custodians in one pass.	Domiciliary grant authenticated; ancillary petition filed for real estate; foreign executor's document packages delivered to cooperative custodians.
Months 9–18	IRS review; respond to correspondence promptly; certificate issues.	Ancillary letters issue; property managed or sold (FIRPTA planned); accounts released on certificate + documentation; claims and expenses paid.
Months 12–24	Closing letter matters resolved; U.S. numbers furnished to the foreign administration for its credit (§21 ErbStG, French imputation).	Ancillary estate closed; remittance to domiciliary estate or authorized direct distribution; final accountings.

Part VII — Practice points

1. **Canvass before you petition.** Write to every U.S. custodian for its checklist in the first weeks: many will pay a foreign executor on documents plus the transfer certificate, and the proceeding you skip is the year you save.
2. **Run the tax and authority tracks in parallel.** The transfer certificate is almost always the slowest item; nothing about the foreign administration or the ancillary proceeding excuses starting the 706-NA late.
3. **Assume the statutory-executor duties immediately.** With no U.S. appointee, whoever holds the assets owes the return under §2203. Settle in writing who files, and get the estate's EIN at the start.
4. **Build the worldwide file once, to the strictest standard.** Pro-rata deductions and treaty credits both require worldwide disclosure; one inventory, valued properly, serves the foreign proceeding, the 706-NA, and the credit choreography.
5. **File the 706-NA clean and complete.** Missing appointment papers, translations, and valuation support are the classic transfer-certificate delays; request certificates for every custodian's assets in one pass: supplements restart the clock.
6. **Do the treaty analysis first, not last.** A domicile-type treaty may zero the tax on securities, resize the credit pro rata, or add marital relief; it decides what the administration is securing and belongs on the return with proper disclosure.
7. **Solve situs-state eligibility before drafting the petition.** Nonresident-fiduciary restrictions (Florida's relative rule), resident-agent and bond requirements decide who petitions; the wrong petitioner is a bounced proceeding.
8. **Plan the real estate exit.** Title insurance drives the deed requirements,

FIRPTA withholding meets any sale by the foreign estate or heirs, and the ancillary letters, certificate, and closing should be scheduled as one transaction.

Conclusion

Administering a nonresident's U.S. assets is not conceptually hard; it is procedurally exact. Everything reduces to the two gates and their sequencing: the situs state's authority (ancillary letters on the exemplified domiciliary record, with the eligibility and bond rules checked before filing) and the federal tax clearance (a timely, complete Form 706-NA, treaty positions properly claimed, and the Form 5173 transfer certificate that every custodian will demand whether or not any American court is ever involved). The foreign executor is not a bystander: §2203 makes whoever holds the assets the executor for U.S. tax purposes, with the return, the certificate requests, and the EIN on his or her desk from month one. The estates that close in eighteen months are the ones that canvassed the custodians before petitioning, filed the tax return before the foreign administration finished its leisurely inventory, and treated apostilles, translations, and checklists as the actual work rather than clerical afterthoughts. The estates that close in four years made the same filings: later, thinner, and in sequence. For the planner, every page of this article is also an argument heard at the design stage: the revocable trust, the entity, the beneficiary designation, and the treaty-aware structure that would have let the family skip some of these gates entirely are what the rest of this series is about. But when the client has died with the assets titled as they were, this is the road, and it rewards the adviser who knows every toll on it.

Contact

When a nonresident dies owning U.S. assets, the administration turns on two gates (situs-state authority and federal tax clearance) and on running them in parallel: ancillary letters on the authenticated domiciliary record, the Form 706-NA with its $60,000 threshold and tax treaty positions, the transfer certificate every custodian demands, and the FIRPTA and title mechanics of any real-estate exit. **Ashford International Law PC works with foreign executors, notaries, heirs, and their advisers** to run the U.S. side of cross-border administrations end to end: custodian canvasses and document packages, ancillary probate with local counsel in the situs state, preparation and filing of Form 706-NA with treaty-based positions, transfer-certificate practice, estate EINs and U.S. income tax compliance during administration, and the coordination that feeds the U.S. numbers into the German, French, or other home-country proceeding. We also support the estate's existing U.S. counsel on the international pieces.

The firm is led by attorney **Caroline E. Ashford, PhD, JD**. A JD graduate of Columbia University Law School and an IRS-registered tax preparer, her practice focuses on international estate planning and the cross-border taxation and administration of estates and trusts, including the U.S. administration of nonresidents' estates. Dr. Ashford is also licensed to practice law in Germany and advises in French and German as well as English. We are glad to work alongside the estate's existing advisers and local counsel or to lead the U.S. administration end to end.

Ashford International Law PC

Washington, DC
1717 K St NW, Ste 900
Washington, DC 20006
Tel: +1 (202) 790-2500

Los Angeles
1901 Avenue of the Stars
2nd Floor
Los Angeles, CA 90067
Tel: +1 (310) 985-3504

Munich
Maximilianstraße 13
80539 Munich, Germany
Tel: +49 89 203006104

Email: info@internationalestatelaw.com · Web: internationalestatelaw.com

This article is intended for general educational purposes for U.S. and foreign estate practitioners, fiduciaries, and their clients and does not constitute legal or tax advice, nor does it create an attorney–client relationship. The matters described include ancillary probate and the recognition of foreign wills and grants under state law (including nonresident-fiduciary, bond, and resident-agent rules, which vary by state); the definition of executor under §2203 and the resulting filing duties; Form 706-NA, its $60,000 filing threshold, nine-month due date, extensions on Form 4768, unified credit (generally $13,000), situs rules, and pro-rata deductions; transfer-certificate practice (Form 5173) and the affidavit procedure for estates at or below the filing threshold; transferee and custodian liability under §6324; FIRPTA withholding on dispositions of U.S. real property interests; the U.S. estate and death-tax conventions and the estate tax provisions of the Canadian income tax treaty, including pro-rata unified credits and marital relief and their disclosure requirements; and the interaction with foreign proceedings and foreign tax credits (including §21 ErbStG and the French imputation rules). All of them depend on the specific facts, the states and countries concerned, the decedent's domicile and asset structure, and the law and treaty texts in effect at the relevant time, and they change. IRS processing times vary and are not guaranteed. Nothing here is advice on the law of any particular state or country. Confirm every point with qualified counsel in the situs state and the home country and current law before acting.

#AncillaryProbate #NonresidentEstate #Form706NA #TransferCertificate #Form5173 #ForeignExecutor #USSitusAssets #EstateAdministration #CrossBorderEstates #StatutoryExecutor #Section2203 #Section6324 #FIRPTA #EstateTaxTreaty #GermanyUSTreaty #FranceUSTreaty #ProRataUnifiedCredit #Erbschein #EuropeanCertificateOfSuccession #TitleInsurance #ProbateLitigation #InternationalEstatePlanning