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The deceased, a resident of Illinois, was killed in an automobile accident while driving in Cherry County, Nebraska. The family in the other car involved were residents of California; all were injured. The deceased's insurer was an Illinois corporation doing business in Nebraska with offices in Lancaster County. The deceased's estate was administered in his domicile, Cook County, Illinois. Subsequently the injured party made application for appointment of an administrator in Lancaster County, Nebraska. An administrator was appointed, but later dismissed on the objections of the deceased's heir and the insurance company.

The court was confronted with the question of whether the automobile indemnity insurance policy of the deceased non-resident motorist constituted sufficient assets to support ancillary administration in Nebraska. The court held there was sufficient estate to support administration.[1] The case is of first impression in Nebraska, but the issue has been before several other courts, which, have come to widely differing results on the same, or very similar facts.

In order to have an ancillary administrator appointed in this situation one must generally allege that he is a creditor of the non-resident deceased motorist who has an estate or assets located in the state.[2] In deciding whether the local courts have jurisdiction to appoint an administrator the courts have not had difficulty deciding that an injured party alleging a cause of action

[1] In re Kresovich, 168 Neb. 673, 97 N.W.2d 239 (1959).

[2] ATKINSON, WILLS, § 107 (2d ed. 1953); 1 CURTIS, BANCROFTS PROBATE PRACTICE §§ 3, 4 (2d ed. 1950).

for negligence is a creditor.[3] More troublesome is whether the liability insurance is an asset of the estate sufficient to support administration. A few courts have been unable to say that such insurance constitutes an asset of the estate where there is no judgment against the insured,[4] but most courts have held otherwise.[5] In granting the administration, the problem giving courts the most difficulty is the situs of the asset. Some courts say the asset is located where the insurance company resides, does business,[6] or is amenable to service.[7] Other courts say the asset is where the insured died,[8] or is domiciled.[9]

In considering the reasons for any particular holding, on the one side, there is the important policy of giving the injured party a cause of action. In some situations, if ancillary administration was not granted, the claimant would have no remedy. This is especially true if the domiciliary administrator had previously been released,[10] or if a state has not specifically provided, in its long arm statute, for jurisdiction over the deceased non-resident motorist's administrator.[11]

[3] In re Gordon's Estate, 300 Mass. 95, 14 N.E.2d 105 (1938); Furst v. Brady, 203 Ill. 425, 31 N.E.2d 606 (1940); Wheat v. Fidelity & Casualty Co. of New York, 128 Colo. 236, 261 P.2d 493 (1953); In re Klipple's Estate, 101 So.2d 924 (Fla. 1958).

[4] In re Estate of Rogers, 164 Kan. 492, 190 P.2d 857 (1948); In re Roche's Estate, 16 N.J. 579, 109 A.2d 655 (1954).

[5] Miller v. Stiff, 62 N.M. 383, 310 P.2d 1039 (1957); Robinson v. Dana's Estate, 87 N.H. 114, 174 Atl. 772 (1934); In re Gordon's Estate, *supra* note 3.

[6] Liberty v. Kinney, 242 Iowa 656, 47 N.W.2d 835 (1951); Furst v. Brady, *supra* note 3; Miller v. Stiff, *supra* note 5; In re Klipple's Estate, *supra* note 3.

[7] Kimbell v. Smith, 64 N.M. 374, 328 P.2d 942 (1958); Miller v. Stiff, *supra* note 5.

[8] In re Vilas' Estate, 166 Ore. 115, 110 P.2d 940 (1941); In re Reardon, 203 Okla. 54, 219 P.2d 998 (1950); Feil v. Dice, 135 F. Supp. 851 (S.D. Idaho 1955); In re Wilcox's Estate, 60 Ohio Op. 232, 137 N.E.2d 301 (1955).

[9] Wheat v. Fidelity & Casualty Co. of New York, *supra* note 3; In re Estate of Rogers, *supra* note 4.

[10] Where claimant is not specifically given jurisdiction by statute there are rules at common law that an administrator is immune from suit outside the state of his appointment. See generally 56 COLUM. L. REV. 915 (1956); and courts have generally refused to give effect to a judgment rendered in another state against a domestic administrator, see 57 MICH. L. REV. 406 (1959).

[11] Fazio v. American Automobile Insurance Co., 136 F. Supp. 184 (W.D. La. 1955); State ex rel Sullivan v. Cross, 314 S.W.2d 889 (Mo. 1958).

Aside from policy, there are some important practical considerations why a claimant may favor ancillary administration rather than bring an action against the domicilary administrator: (1) to avoid the result in *Knoop v. Anderson*[12] (where the statute was held unconstitutional); (2) to avoid the constitutional problem of whether a judgment against the foreign administrator will be given full faith and credit;[13] (3) to avoid the conflict of laws problem as to which state's law will apply;[14] (4) to avoid a constitutional problem whether it is equal protection of the law where a different procedure applies to filing claims against a local administrator, as opposed to bringing an action against a foreign administrator.[15]

There are also policy reasons as to why ancillary administration should not be granted. It is possible that the free granting of ancillary administration will cause a hardship on the insurer, who may have to defend several suits in different locations resulting from the same accident. It can also lead to conflict between various courts for jurisdiction. For example, if the insurance is considered an estate where the company does business

All states have statutes giving jurisdiction over non-resident motorists. Nebraska's statute gives express jurisdiction over the foreign administrator, NEB. REV. STAT. § 25-530 (Reissue 1956). Twenty-two other states have similar provisions. The constitutionality of these provisions has been questioned, Knoop v. Anderson, 71 F. Supp. 832 (N.D. Iowa 1947); Brooks v. National Bank of Topeka, 152 F. Supp. 36 (W.D. Mo. 1957), *rev'd*, 251 F.2d 37 (8th Cir. 1958). The courts have nearly always upheld the provisions, Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950); See generally, 32 NEB. L. REV. 448 (1954).

12 71 F.Supp. 832 (N.D. Iowa 1947).

13 The effect of a judgment received in a direct action against the foreign administrator outside the forum state has not been determined. See generally, Brooks v. National Bank of Topeka, *supra* note 11, indicating that a judgment rendered against a foreign administrator may not have to be given full faith and credit by the other state. However, if the statute is constitutional, a judgment rendered under it should be given full faith and credit, U.S. CONST. art. IV, § 1; see note 44 IOWA L. REV. 402 at 406 (1959); 57 MICH. L. REV. 406 (1959).

14 Compare Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953), note 68 HARV. L. REV. 1260 (1955), with Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1953), *cert. denied* 293 U.S. 597 (1934); RESTATEMENT CONF. OF LAWS § 390.

15 U.S. CONST. art. IV, § 1; see Rehn v. Bingaman, 151 Neb. 198, 36 N.W.2d 856 (1949), to the effect that a claim must be filed with the local administrator. Compare NEB. REV. STAT. § 25-207 (Reissue 1956).

an administrator may be appointed in several different states to recover the same assets.[16] Free appointment of administrators may cause duplication of administration, be inefficient, expensive, and wasteful by having two or more administrators where one will do.[17]

The method adopted to gain jurisdiction of the deceased's estate is, as yet, full of pitfalls and shortcoming. Even in states that allow application of the doctrine the claimant may fail where the deceased has no insurance, the injuries exceed the insurance coverage,[18] the insurance company is not doing business in the state,[19] or the driver died in a place other than where the accident occurred.[20]

Aside from the practical considerations, it appears that in some cases the granting of ancillary administration may have given the injured party a cause of action where he otherwise would have had none. On the other hand, when the legislature provides adequate methods of gaining jurisdiction of the domicilary administrator there is no reason to appoint an ancillary administration.[21]

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[16] In re Estate of Rogers, 164 Kan. 492, 190 P.2d 857 (1948).

[17] McDOWELL, FOREIGN PERSONAL REPRESENTATIVES, § 5 (1957).

[18] *Supra* note 10.

[19] It is not certain whether the insurance company must be doing business in the state. Apparently it was necessary in the principal case, and at least one court has refused administration where the company is not doing business in the state, In re Kipple's Estate, *supra* note 3; but where a state statute authorized the claimant to proceed directly against the insurance company, jurisdiction was upheld even though the company was not authorized to do business in the state, Pugh v. Oklahoma Farm Bureau Mutual Ins. Co., 159 F. Supp. 155 (E.D. La. 1958).

[20] Compare these two Illinois cases, Furst v. Brady, *supra* note 3; Shirley's Estate v. Shirley, 334 Ill. App. 590, 80 N.E.2d 99 (1948).

[21] It may be noted that the Iowa case that upheld appointment of the ancillary administration, Liberty v. Kinney, *supra* note 6, came up after the *Knoop* case, *supra* note 11, was decided which struck down the provision in the long arm statute covering administrators. Iowa has now codified the decision in the *Liberty* case, IOWA CODE § 321:512 (1954). This was upheld, and followed, In re Faglin's Estate, 246 Iowa 496, 66 N.W.2d 920 (1954).