ANCILLARY PROBATE: "THERE'S NO PLACE LIKE HOME"

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Abstract

Most legal practitioners are roughly familiar with at least the concept of probate. However, because estate and probate laws are almost exclusively a creature of state law, ancillary probates are a reality many clients and probate attorneys will face. If a decedent held assets across state lines, the chances of an ancillary probate proceeding are exponentially increased.

But is this secondary or additional proceeding the probate attorney's responsibility? Should we care if additional proceedings will be required beyond our state of practice? How can we ethically participate in those proceedings—or should we? What law applies? These, among many other questions, arise in ancillary proceeding considerations.

With our ever-increasing population and cross-border travel, asset ownership, and business relations, ancillary probates will only increase in

frequency. But as law licensure in the United States is also a near-exclusive subject of state law, practitioners must consider other state laws and their impacts on the probate process while not crossing the ethical lines of practicing in a jurisdiction without authorization or licensure.

Through this Essay we will explore numerous aspects of ancillary proceedings, including the following: determining if an ancillary probate is necessary; what steps should be considered in the original probate that may impact later, ancillary probates; the general framework provided by the Uniform Probate Code; some state-specific examples; cost considerations for clients; ethical considerations for practitioners; and other subjects. It is our hope that this Essay acts as a primer in preparing you and your practice for the reality of an ancillary-probate crossing your desk.

I. INTRODUCTION

Death . . . I know, that's a rough start to the Essay, huh? It's a tough topic, but we all go to see our Lord and Savior (or deity, or lack thereof) at some point.

Any practitioner providing estate planning services is generally familiar with the basics—wills, trusts, etc. However, complications arise when you cross your state line. Texans are known to do things the "Texas way," but turns out most states prefer to do things differently than their neighbors and have their own "state way."[1] The same holds true for the method in which each state handles the passing of property and assets at death.[2] Due to the individual state's control of probate and estates, each state law may differ from every other state.[3]

One author of this paper grew up in the Texas Panhandle—the diamond-in-the-rough of Pampa, Texas. It was a short drive to Oklahoma, Kansas, and New Mexico, so it was common for agricultural producers to have land or assets outside of the Lone Star State.[4] For many producers, it is typical to own assets across state lines.[5] While most attorneys—hopefully all attorneys—know that a process called "probate" is potentially necessary to transfer property from one generation to the next upon a person's passing, that single probate may or may not address all of the decedent's assets.[6] We could endlessly delve into the intricacies of an estate plan

1. Garrett Couts, *Ancillary Probate: 'Anci-what-now?'*, PROGRESSIVE CATTLE MAG. (May 24, 2022), https://www.agproud.com/articles/55215-ancillary-probate-anci-what-now [https://perma.cc/58WV-C7NQ].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

and how you can prepare for, or avoid, probate. Indeed, non-probate transfers could be an independent topic for discussion, which we will not be tackling today.

In short, if the decedent had assets outside of their home state, such as cattle grazing in a neighboring state even temporarily, you may need to consider the potential that probate may be necessary not only in that decedent's home state but other states as well.

II. Probate v. Ancillary Probate

A. Probate Generally

1. Probate Jurisdiction

Probate and estates law is almost entirely a creature of state law, which means that probate processes vary greatly across the nation.[7] Although there are many uniform laws which have been adopted, there remain numerous distinctions between the states on how they address decedent's estates and assets. For example, Texas has "retained a vestige" of old English law in its descent and distribution statutes which distinguishes between the descent of real property and the distribution of personal property.[8] Because each state has nearly complete control over its probate processes, you will find in practice that many states have a number of similarities, but also many differences.[9] We could provide numerous examples of distinctions, but for today, the most relevant is likely the types of probate offered in each state.

2. Probate Types

Within each state, you will find that there are multiple types of probate processes to pursue, and the decision between one type of proceeding over another could turn on the most minute of details regarding either the decedent, your client (the applicant), or the decedent's assets which will be part of the estate.[10] For

7. *E.g.*, *compare* Tex. Est. Code Ann. § 503.001 (West 2023), *with* Cal. Prob. Code §§ 12510(a), 12521 (West 2024).

8. Tex. Est. Code Ann. § 201.002; *see also* Gerry W. Beyer, Texas Estate Planning Statutes with Commentary 158 (2019-2021 ed. 2019).

9. Couts, *supra* note 1.

10. *E.g.*, Tex. Est. Code Ann. § 257.001 (authorizing the probate of a will as a muniment of title only when the court "(1) is satisfied that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate; or (2) finds for another reason that there is no necessity for administration of the estate"); *id.* § 205.001 (providing for the distribution of the estate of a decedent who dies intestate without the appointment of a personal representative, but only if numerous qualifications and criteria are satisfied).

example, Texas, at one time, had at least seventeen possible probate and administration methods.[11] Most states have some form of independent and dependent administration (unsupervised and supervised, respectively) and there are numerous other common probate and probate alternatives. However, these options of course vary greatly from state to state. As an example, the primary types of probate and administration in Texas include the following, or some variation of the following, as well as some forms of non-probate transfers or probate alternatives.

i. Independent Administration

An independent administration is the typical "bread-and-butter" probate of a will in Texas. At a minimum, it requires a hearing before the court, the appointment of the executor named in the will (unless contested by someone else or denied appointment by the court), and the filing of an inventory, appraisement, and list of claims (or an affidavit in lieu of inventory, appraisement, and list of claims) with the court.[12] The independent executor acts independently of the court's oversight, hence "independent administration," and generally does not need court approval to deal with the estate assets.[13] The independent executor has numerous duties beyond the inventory, including filings, notices to creditors, notices to the heirs or devisees/legatees of the estate, and notices to governmental agencies.[14] Ultimately, the executor is responsible for the preservation, protection, and collection of the estate assets, the settlement of any valid debts, compliance with the legal obligations of the independent executor's position, and final distribution of the estate assets.[15] Luckily, in Texas, unless there is a contest among the parties or a large number of creditors or amount of debt to deal with, most independent administrations are not as costly as the public believes.

ii. Dependent Administration

A dependent administration in Texas is similar to an independent administration, except that the executor generally must obtain a court order to act regarding any of the estate assets and for each transaction.[16] This means that if the

11. Emily K. Daniel, *Until the Cows Come Home: Ancillary Probate Reform Is Needed Across the Country to Better Serve Farmers and Ranchers*, 9 TEX. A&M J. PROP. L. 347, 366 (2023) (citing William D. Pargaman, *The Story of the Texas Estates Code*, 6 EST. PLAN. & CMTY. PROP. L. J. 323, 332 (2014)).

12. TEX. EST. CODE ANN. §§ 401.002, 309.051–.053.

13. *Id.* §§ 402.001–.002.

14. *E.g.*, *id.* §§ 401.002–405.001, 309.001–.151.

15. *E.g.*, *id.* §§ 402.053–405.012, 309.001–.151.

16. *Id.* §§ 351.051–.054.

executor wishes to do something with the estate or its assets, they usually must ask the court for permission.[17]

This method is useful under specific circumstances and may occur under one (or more) of the following circumstances:

- When a will expressly prohibits independent administration;[18]
- When no will exists or can be found (in which case the executor is an "administrator");[19]
- The will did not empower the named executor to act independently;[20]
- The court finds a need for an administration of an intestate estate;[21] or
- When the assets of the estate require special court oversight (think unique assets or assets located in foreign lands, etc.) or the applicant wants the court's assistance and oversight in administering the estate and assets.[22]

Additionally, a bond is typically required of the executor/administrator.[23]

iii. Small Estates Affidavit

A small estates affidavit in Texas is not a true probate because it is used when no will exists or can be found.[24] A signed and sworn affidavit is filed for court

17. *Id.* § 351.051 (listing specific actions a personal representative may take only with court approval).

18. *Id.* § 401.001(b) ("Any person capable of making a will may provide in the person's will that no independent administration of his or her estate may be allowed. In such case the person's estate, if administered, shall be administered and settled under the direction of the probate court as other estates are required to be settled and not as an independent administration.").

19. *Id.* § 301.052.

20. *Id.* § 401.002 (authorizing independent administration when the will named an executor but did not provide such executor with the power to act independently, if all distributees agree in writing to the granting of such independent authority).

21. *Id.* § 301.052(a)(9) ("An application for letters of administration when no will is alleged to exist must state . . . that a necessity exists for administration of the decedent's estate and an allegation of the facts that show that necessity . . . .").

22. *See id.* §§ 501.001–502.002.

23. *Id.* § 305.101.

24. *Id.* § 205.001.

review.[25] If approved, it passes the assets to the heirs.[26] However, while this is an efficient method of transferring property, it is unavailable if any of the following are true: a valid will exists; the assets' value, excluding homestead and exempt property, exceeds $75,000; or more than 30 days have elapsed since the date of the decedent's death.[27] Also, the only real property which may be passed by this affidavit is the homestead property of the decedent.[28] Not all states have a similar process, and those that do have varying thresholds and qualifications.[29]

iv. Muniment of Title

Muniment of title probates (also known as "express probate") are not common among the states.[30] Very few states provide for muniment of title processes, which may have significant impacts upon attempted ancillary probates.[31]

In Texas, probating a will as a muniment of title requires no administration, which, again, may have significant impacts upon attempted ancillary probates.[32] Once the court approves the will, the entire transaction is complete.[33] The will is considered a transfer of title to the property, including real estate, to the individuals listed in the will.[34] Although the statutory language does not expressly limit the effect of the procedure to only real property, practically speaking, this is only effective for real property and may not be a realistic option for personal property (for example, bank accounts, cash, etc.).[35] Many third-parties, such as banks, will

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25. *Id.* §§ 205.001–.002.

26. *Id.* §§ 205.001, 205.006. *But see id.* § 205.008 ("This chapter does not affect the disposition of property under a will or other testamentary document. . . . Except as provided by Section 205.006, this chapter does not transfer title to real property.").

27. *Id.* § 205.001.

28. *Id.* §§ 205.008(b), 205.006.

29. *E.g.*, CAL. PROB. CODE § 13100 (West 2024) ("Excluding the property described in Section 13050, if the gross value of the decedent's real and personal property in this state does not exceed [$166,250], as adjusted periodically in accordance with Section 890, and if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property . . . .").

30. Matthew A. Bourque, *What Is a Muniment of Title in Texas?*, RMO PROB. LITIG. (July 9, 2024, 8:53 PM), https://rmolawyers.com/what-is-a-muniment-of-title-in-texas/#:~:text=Texas%20is%20the%20only%20state%20in%20the%20country,and%20assets%20to%20avoid%20the%20formal%20probate%20process [https://perma.cc/U62T-76Z9].

31. *Id.*

32. TEX. EST. CODE ANN. § 257.101.

33. *Id.*

34. *Id.* § 257.102.

35. *See id.*

refuse to distribute personal-property assets, such as funds, without letters testamentary or letters of administration and will cite to the "record of title" language in the statute to argue that personal property is beyond the scope of a muniment.[36] The language expressly included many, if not all, types of estate property and assets, but you will likely find many, but not all, third-parties unwilling to bend their internal processes and procedures (generally requiring letters).[37]

However, this method is unavailable if there are unsecured debts (not secured by real property) or other reasons an administration is required (for example, someone needs to oversee specific requirements of the will, such as a right-of-first refusal, etc.).[38] Commonly, credit-card debt causes this option to be eliminated. It is also a good practice to record a certified copy of the will and the order admitting the will to probate as a muniment of title in the county records of each county in which the real property is located, as the applicable county or parish may not provide probate and real-property records in the same index.[39]

v. Temporary Administration

Temporary administration in Texas is used to appoint a temporary administrator of an estate to address some exigent circumstance or emergency.[40] The court can limit the powers of the temporary administrator, who is generally required to file a bond.[41] Such appointments are limited to a maximum of 180 days, unless the appointment is subsequently made permanent.[42]

36. *See id.* ("A person who is entitled to property under the provisions of a will admitted to probate as a muniment of title is entitled to deal with and treat the property in the same manner as if the *record of title* to the property was vested in the person's name." (emphasis added)).

37. *See id.* ("An order admitting a will to probate as a muniment of title constitutes *sufficient legal authority for each person who owes money to the testator's estate, has custody of property, acts as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with the estate*, to pay or transfer without administration the applicable asset without liability to a person described in the will as entitled to receive the asset." (emphasis added)).

38. *Id.* § 257.001.

39. *See* TEX. LOC. GOV'T CODE ANN. § 193.002(a) (West 2023) ("A county clerk or clerk of a county court who does not maintain records on microfilm as provided by Chapter 204 and rules adopted under that chapter may divide the instruments received for filing, registering, or recording into the seven classes provided by Section 193.008(b) and may consolidate records in the manner provided by Section 193.008(d).").

40. *See* TEX. EST. CODE ANN. § 452.001.

41. *Id.* §§ 452.001–.004(b).

42. *Id.* §§ 452.003(2), 452.008.

vi. Heirship and Intestacy

Intestacy means, "the state or condition of a person's having died without a valid will."[43] In this instance, the decedent's property passes to their "heirs" as determined by law.[44] Depending upon their family tree and history, their property will pass to their legal relatives.[45] In most instances, two court proceedings are necessary—an heirship (to legally determine who the decedent's heirs are) and the estate administration (to collect the assets, pay any valid debts, and distribute the property as the law requires).[46] In this instance, the heirs generally have little or no power to determine who inherits what.[47] The law decides for them, based upon their relation to the decedent.[48] That, among many other reasons, is why having a will is important. Heirship and probate proceedings for intestate estates typically result in either a dependent administration (by default) or an independent administration (if all heirs consent).[49]

vii. Affidavits of Heirship

A Texas affidavit of heirship is not a probate. It is a signed and sworn statement regarding the family history of the decedent.[50] It is recorded in the records of the county in which real property (generally land) is located.[51] It facilitates the transfer of title to real property without the need to probate a will.[52] It is a cost-effective way of transferring title when no will or other instrument has been filed, recorded, or probated with the county clerk (county records) or court.[53]

However, an affidavit of heirship should not be used when a valid will exists or when the will leaves the property in different proportions or to different persons

43. *Intestacy*, BLACK'S LAW DICTIONARY (9th ed. 2009).

44. *E.g.*, TEX. EST. CODE ANN. § 22.015 ("'Heir' means a person who is entitled under the statutes of descent and distribution to a part of the estate of a decedent who dies intestate. The term includes the decedent's surviving spouse."); *id.* §§ 201.001–.003.

45. *Id.* §§ 201.001–.003.

46. *See id.* §§ 202.001, 201.101–.103.

47. *See id.* §§ 201.001–.003.

48. *Id.*

49. *See id.* § 401.003.

50. *Id.* § 203.001.

51. *Id.*

52. *Id.*

53. *See* Earl Carl Inst. for Legal & Soc. Just., *How to Draft an Affidavit of Heirship*, TEXASLAWHELP.ORG (Dec. 30, 2022), https://texaslawhelp.org/article/how-to-draft-an-affidavit-of-heirship#:~:text=An%20affidavit%20of%20heirship%20must%20be%20filed%20with,and%20%244%20for%20each%20additional%20page%20is%20common [https://perma.cc/BLM5-NPX8].

than the intestacy laws would.[54] Generally, an affidavit of heirship should only be used to evidence the transfer of land under the intestacy laws.[55] So, if a decedent left a will which would leave the property to different persons than those receiving it under the intestacy laws, an affidavit should not be used.[56] Affidavits of heirship should sit in the county records unchallenged for five years before they are considered evidence of title.[57] Most third parties (oil companies, banks, etc.) will accept them prior to this five-year period, but if heirs intend to sell the property, this could cause title conveyance issues.[58]

vii. Non-probate Assets

Many assets can pass outside of probate if the decedent plans ahead. Some examples include: (1) pay-on-death bank accounts, (2) joint accounts with rights-of-survivorship, (3) designated beneficiaries of a life insurance policy, (4) and real property passed by life-estate deeds or transfer-on-death deeds (with some legal exceptions for a "claw-back" to pay creditors, etc.).[59] The key is that most of these assets allow the owner to list beneficiaries who receive the assets under contract law, not probate law.[60] Trusts, other than those established by will (which are called "testamentary trusts") are also generally non-probate assets, but come with their own cost-benefit considerations.[61]

54. *See* TEX. EST. CODE ANN. § 203.001(d) ("An affidavit of facts concerning the identity of a decedent's heirs does not affect the rights of an omitted heir or creditor of the decedent as otherwise provided by law.").

55. *See* Earl Carl Inst. for Legal & Soc. Just., *supra* note 53.

56. *See id.*

57. TEX. EST. CODE ANN. § 203.001(a)(2).

58. *E.g.*, TEX. PROP. CODE ANN. app. Title Examination Standard 11.70 cmt. (West 2023) ("Tex. Estates Code § 203.001 provides that, subject to rebuttal, a statement of facts concerning family history shall be received as prima facie evidence in any proceeding to declare heirship or suit involving title if contained in a document legally executed and acknowledged or sworn to and if the document has been of record five years in the county where the land is located or the county where the decedent had his domicile or residence at the time of his death. *Recent affidavits are also commonly accepted*." (emphasis added)).

59. *E.g.*, TEX. EST. CODE ANN. § 111.052 (Validity of Certain Non-testamentary Instruments and Provisions); *id.* §§ 114.001–.152 (Transfer on Death Deeds); *id.* § 113.151 (Establishment of Right of Survivorship in Joint Account; Ownership on Death of Party); *id.* § 113.152 (Ownership of P.O.D. Account on Death of Party).

60. *See* Daniel, *supra* note 11, at 380–83.

61. *Id.* at 381.

B. Ancillary Probate Generally

1. What Is Ancillary Probate?

Generally, "ancillary probate" is "the judicial process by which a non-resident decedent's property located in this state is administered in parallel with original probate at the decedent's domicile."[62] Although this definition could vary from state-to-state, all ancillary probates are generally related to a probate proceeding occurring in an additional state or states beyond the decedent's domicile state.[63]

2. Jurisdiction

If each state can exercise jurisdiction over a decedent's property located in that state at the time of death, do ancillary probates have to occur every time there are assets in multiple states? No, for two reasons. First, the decedent may have utilized non-probate transfers and asset planning to enable the out-of-state assets to pass automatically upon death or through brief administrative processes under contract law rather than probate and estates law.[64] Those assets would not require a probate or ancillary probate.[65] Second, even if interstate probate proceedings are required, many states have separate or distinct probate processes to address situations in which they are not the first state to be administering the decedent's estate.[66]

3. Types of Ancillary Probate

Although there are many special considerations when confronted with an ancillary probate, the most pressing is very similar to a standard probate. Ancillary probates are almost exclusively a creature of state law.[67] Ancillary probates differ

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62. *Id.* at 355 (quoting Lorraine N. Anastasio & Gayle B. Wilhelm, *A Guide to Ancillary Probate in Connecticut*, 2 CONN. PROB. L. J. 173, 173 (1987)).

63. *See id.* at 358.

64. *See Nonprobate Transfer*, LEGAL INFO. INST., CORNELL L. SCH. (July 2020), https://www.law.cornell.edu/wex/nonprobate_transfer#:~:text=Nonprobate%20transfers%20offer%20a%20number,increased%20privacy%20under%20nonprobate%20transfers [https://perma.cc/GTQ6-7M92].

65. *Id.*

66. *E.g.*, TEX. EST. CODE ANN. §§ 501.001–.008 (West 2023) (Ancillary Probate of Foreign Will); *id.* §§ 503.001–.003, 503.051–.052 (Recording of Foreign Testamentary Instrument); 755 ILL. COMP. STAT. ANN. 5/7-1 (West 2024).

67. *Compare* TEX. EST. CODE ANN. § 503.001, *with* CAL. PROB. CODE §§ 12510(a), 12521 (West 2024).

widely from state to state and essentially do not exist at all in some states.[68] Some states have simple ancillary probate processes, such as recording certified copies of the original probate in the public records of the counties or jurisdictions in which the decedent's property is located.[69] Other states have more complex requirements, such as formally filing a probate proceeding that incorporates the original probate.[70]

C. How Does One Affect the Other?

It is important for you, and your clients seeking the original probate, to know if the decedent has assets outside of the state. You will need to determine the ancillary probate processes of the additional states and, in some cases, hire a licensed attorney in each additional state.[71] Additionally, knowing there are assets outside of the state may influence what type of probate should be sought in the original state. For example, in Texas, some probates include the appointment of an executor or administrator—essentially a court-appointed person with the authority to represent and responsibility for the estate—and other types do not, such as a muniment of title.[72] Many ancillary probates require an executor or administrator to sign or file something with either a court or in the public records, and many request letters testamentary or letters of administration.[73] If the original probate was a muniment of title, there are no executors or letters testamentary, which may prevent you from utilizing ancillary probate options in another state.[74] So, if the decedent had assets outside of the home state you should consult with your clients to plan the probate accordingly. Additionally, if you are providing an estate plan for a client who has assets outside of the home state, you might avoid an ancillary probate or prepare the client (or their heirs) for an ancillary probate in the future. Either way, planning ahead always pays off.

68. *See* Daniel, *supra* note 11, at 380–83.

69. *E.g.*, TEX. EST. CODE ANN. § 503.001.

70. *See* Daniel, *supra* note 11, at 360–65.

71. *See id.* at 373.

72. *Compare* TEX. EST. CODE ANN. §§ 401.001–405.012 (Texas Independent Administration), *and* TEX. EST. CODE ANN. §§ 351.051–.054 (Texas Dependent Administration Powers and Limitations), *with* TEX. EST. CODE ANN. §§ 257.001–.152 (Texas Muniment of Title Probate Proceeding).

73. *E.g.*, *id.* §§ 501.001–.008 (Ancillary Probate of Foreign Will); CAL. PROB. CODE §§ 12510(a), 12521 (West 2024); 755 ILL. COMP. STAT. ANN. 5/7-1 to -2 (West 2024).

74. *See* Daniel, *supra* note 11, at 375–76.

III. Special Considerations

There are numerous, nearly innumerable, considerations when beginning down the probate road. We certainly cannot discuss them all in this Essay, but here are a few examples.

A. Cost Variations

Accurately estimating the cost of probate proceedings across the entire nation is essentially impossible. Probate is both state and case specific, as are the costs. However, there are three general schemes under which probate matters are billed: (1) hourly, (2) as a percentage of the estate's asset value, or (3) flat fees. There can also be combinations of these schemes.[75]

1. Hourly

Hourly fees vary on the state and local level.[76] Additionally, fees for different practice areas have great variance.[77] An attorney may charge hourly fees of one amount for general transactions but charge a different rate for wills and estates, or probates specifically.[78] Estimating fees across the nation's diverse legal markets would be quite the challenge. For example, in Texas, the median hourly rate (irrespective of practice area) as determined by the State Bar of Texas is $291 per hour.[79] Other sources have placed the median hourly rate at $313.[80] These rates may seem affordable in some regions but onerous in others.

2. Percentage of Estate—Asset Value

If pursuing a probate based upon a percentage fee, costs can easily reach 3 to 7% or more of the estate's total value.[81] The process for calculating these percentages can vary greatly from state to state. For example, in California, the fees for probate administration are based upon the gross value of the estate and are

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75. *See* Clio Themis Sols. Inc., Legal Trends Report 52–54 (2022), https://www.clio.com/wp-content/uploads/2022/09/2022-Legal-Trends-Report-16-02-23.pdf [https://perma.cc/5DHZ-KSLM].

76. *See id.* at 70–71.

77. *Id.* at 72.

78. *Id.*

79. St. Bar of Tex., 2019 Income and Hourly Rates 2 (2020), https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=56637 [https://perma.cc/4PH9-D9HE].

80. Clio Themis Sols. Inc., *supra* note 75, at 70.

81. Barclay Palmer, *Avoiding Unnecessary Probate Costs*, Investopedia (Dec. 23, 2022), https://www.investopedia.com/articles/04/121304.asp [https://perma.cc/962L-EK84].

statutorily set.[82] The fees begin on a sliding scale for "ordinary services," but the California Probate Code also addresses "extraordinary services" and compensation as required by the terms of the will.[83] For ordinary services, the attorney shall receive the following percentages of the estate's value: 4% on the first $100,000; 3% on the next $100,000; 2% on the next $800,000; 1% on the next $9 million; and 0.5% on the next $15 million.[84] For all amounts above $25 million, the attorney shall receive a reasonable amount as determined by the court.[85]

The estate's value includes, "the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property."[86] If the decedent's will includes provisions for the compensation of the attorney, compensation is capped at the amounts stated in the will unless the attorney is "relieved" from the provision by the court.[87] Agreements between the personal representative and their attorney for higher compensation than that provided by statute or by the will are void.[88]

Notice that this calculation includes land values without regard to the liens or other encumbrances or obligations against those lands.[89] For agricultural families, this could drastically increase the cost of a probate proceeding.[90] We all know that many agricultural operations are "dirt rich" and "money poor," but according to this fee calculation, they could all be quite "rich" and subject to significant fees to administer an estate and get those family lands squared away after a family member's passing.[91]

3. Flat Fees

Every once-in-a-while, you may discover a practitioner offering probate services for flat fee amounts. This is likely more common for simplistic proceedings or those which are not true probates—i.e., Texas muniment of title, affidavit of heirship, etc. The reasons these are rare are similar to the reasons that

82. CAL. PROB. CODE § 10810 (West 2024).
83. *Id.* §§ 10811–12.
84. *Id.* § 10810.
85. *Id.*
86. *Id.*
87. *Id.* § 10812(a)–(b).
88. *Id.* § 10813.
89. *See id.* § 10810(b).
90. *See* Daniel, *supra* note 11, at 366.
91. *See Farm Sector Income & Finances: Assets, Debt, and Wealth*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (Feb. 7, 2024), https://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/assets-debt-and-wealth/ [https://perma.cc/N6V5-5Z5W].

probate costs are difficult to estimate; the numerous types of probate processes and particular circumstances of each case create a varying degree of difficulty and complexity that is challenging to estimate into a flat-fee schedule.[92]

B. Property Characterization—Community v. Separate

How personal property is characterized, community or separate, can be determinative in how it is ultimately distributed.[93] Some states require certain bequests of property to a surviving spouse, while others only provide for surviving spouses through the consent of the decedent (via will) or through the intestacy laws (descent and distribution statutes).[94] Either way, the threshold question of how a particular asset is classified has immense ramifications on property distribution and taxation.[95] After that determination, you must next determine what jurisdiction controls the asset—the decedent's domicile state or the state in which the asset is located? If those states would treat the asset differently, the question becomes all the more important.

C. Personal Property

While most ancillary probates involve real estate, it is also possible that personal property located in another state may require an ancillary probate. Examples include personal property that is titled, registered, or subject to some kind of government registration or oversight within the non-domicile state.[96]

1. Jurisdiction and Applicable Law—Law of Domicile

Generally, personal property is subject to the jurisdiction, probate law, and distribution schemes of the state in which the decedent was domiciled at the time of death.[97] However, titled property or property subject to government registration

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92. *See* Daniel, *supra* note 11, at 380–82.

93. *Compare* TEX. EST. CODE ANN. § 201.002 (West 2024) (Separate Estate of an Intestate), *with* TEX. EST. CODE ANN. § 201.003 (Community Estate of an Intestate).

94. *See, e.g.*, *id.* §§ 201.002–.003.

95. *See* Daniel, *supra* note 11, at 368.

96. *See, e.g.*, *Buying or Selling a Vehicle,* TEX. DEP'T OF MOTOR VEHICLES (June 9, 2024, 12:35 PM), https://www.txdmv.gov/motorists/buying-or-selling-a-vehicle [https://perma.cc/EK5C-S2PC]; *FAQs*, TEX. DEP'T OF MOTOR VEHICLES (June 22, 2024, 7:51 PM), https://www.txdmv.gov/faqs?find=probate&field_faq_category_target_id=All [https://perma.cc/JT8J-H7TF].

97. Daniel, *supra* note 11, at 358 (citing Kaylee Harmon, *Estate Law – Balancing the Competing Interests of Efficiency, Finality, and Freedom of Disposition in Ancillary Administration Proceedings: Lon V. Smith Foundation v. Devon Energy Corp., 2017 WY 121, 403 P.3d 997 (Wyo. 2017)*, 18 WYO. L. REV. 379, 384 (2018)).

or oversight might be subject to ancillary probate in the state of registration.[98] This could be for legal or jurisdictional reasons, or for purely administerial reasons. For example, the Texas Department of Motor Vehicles may not recognize letters testamentary or other authority from a foreign (out-of-state) court.[99]

This could also include the decedent's ownership interest in farming entities, such as corporations, LLCs, partnerships, etc. Although the interests may pass under the domiciliary state's laws, the authority of the state in which the entity operates or was incorporated or otherwise formed (i.e., the Secretary of State or equivalent authority) may require the filing of some documentation regarding the transfer of ownership.[100] Such documentation may or may not require ancillary probate.[101] While you may have legal authority to force the state actor to recognize your foreign-issued probate, the cost of doing so could eclipse the costs of the ancillary probate itself.[102] Therefore, for practical reasons, you may find yourself pursuing an ancillary probate that, from a purely legal analysis, was never necessary.

2. Protected or "Judgment-Proof" Property

In addition to distribution and ancillary probate concerns, which state has jurisdiction over the personal property can be of vital importance when there are claims pending against the estate. If the personal property is subject to the jurisdiction of a state that provides for protection of those assets, it could be an asset sanctuary for the estate.[103] For example, Texas has robust, and frankly strange, protections regarding certain personal property.[104] So long as numerous value caps and other requirements are satisfied, the following personal property may be exempt from garnishment, attachment, execution, or other seizure:

1. home furnishings, including family heirlooms;
2. provisions for consumption;
3. farming or ranching vehicles and implements;
4. tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;

98. *Id.* at 356.
99. *See, e.g.*, *FAQs*, *supra* note 96.
100. Daniel, *supra* note 11, at 355–56.
101. *Id.*
102. *See id.* at 358.
103. *See, e.g.*, TEX. PROP. CODE ANN. §§ 42.001–.002 (West 2023) (listing personal property exemptions).
104. *See id.*

5. wearing apparel;

6. jewelry not to exceed 25[%] of the aggregate limitations prescribed by Section 42.001(a);

7. two firearms;

8. athletic and sporting equipment, including bicycles;

9. a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

10. the following animals and forage on hand for their consumption:
(A) two horses, mules, or donkeys and a saddle, blanket, and bridle for each;
(B) 12 head of cattle;
(C) 60 head of other types of livestock; and
(D) 120 fowl; and

11. household pets.[105]

D. Real Property—Law of the Situs

Similar to personal property, you may find that the multi-state acreage of agricultural clients subjects them and their estates to ancillary probate needs in each state.[106] In fact, this fate is more certain with real property than personal property.[107] The United States applies the law of the "situs" when determining the jurisdiction with authority over real property.[108] This means that although a decedent lived in State A and had the majority of their assets in State A, State B, where the decedent owned a real-property interest, would have authority regarding the passage of title for that real-property interest.[109] Again, as we all know, the majority of agricultural operations are dirt rich and money poor.[110] "Farm real estate assets—land and its attachments—are forecast to be $3.61 trillion, representing 84[%] of total farm sector assets in 2024."[111]

Additionally, many operations have farms and acreage spanning multiple states, meaning that the situs approach requires ancillary probate in many

105. *Id.* § 42.002.
106. Daniel, *supra* note 11, at 358.
107. *Id.* at 356.
108. *Id.* at 357.
109. *See id.* at 357–58.
110. *See Farm Sector Income & Finances: Assets, Debt, and Wealth, supra* note 91.
111. *Id.*

circumstances for agricultural families.[112] Even further, because title to real property tends to be subject to recording or other documentary processes on a localized (often county, parish, or other regional authority) basis, you may find that not only will you need to do an ancillary probate in one county, but you may then need to seek further documentation in each county in which the decedent held real property.[113] At first glance, you might think this situs approach is a headache that could be avoided, but the alternative would be that lands located within one state would be subject to proceedings held in an entirely different state, much like personal property.[114] It's no secret that the United States can be boundlessly unified and yet still have separate, and very independent, state ideologies and laws.[115] So, for now, situs is the burden we must bear for the sake of some state sovereignty.[116]

E. FSA Rules and Regulations

The same situs issues that generally demand ancillary probate for real property also tend to obligate ancillary probate to satisfy the USDA Farm Service Agency (FSA), whether you are dealing with real-property title, personal property rights to FSA payments, etc.[117] The administerial and bureaucratic overtures of the FSA are even more geographically restrictive than state lines.[118] Generally, much like the localized recordation of title documents, FSA offices operate on a regional or local basis.[119] This means that your foreign probate documentation may not be accepted, and even if you perform an ancillary probate in one county or state, you may be required to perform additional acts in the local jurisdiction where the applicable FSA office(s) operates.

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112. Daniel, *supra* note 11, at 357–58.

113. *See, e.g.*, TEX. EST. CODE ANN. §§ 452.003, 452.008, 503.001 (West 2023).

114. *See* Daniel, *supra* note 11, at 358–59.

115. Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 588 (1987).

116. *Id.* at 632.

117. *See* FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., GUIDANCE FOR HEIRS' PROPERTY OPERATORS TO PARTICIPATE IN FARM SERVICE AGENCY (FSA) PROGRAMS (2022), https://www.farmers.gov/sites/default/files/2022-12/farmersgov-guidance-heirs-fsa-programs-12-15-2022.pdf [https://perma.cc/EWR7-6FL7].

118. *See Structure and Organization*, FARM SERV. AGENCY, U.S. DEP'T OF AGRIC. (June 14, 2024, 9:06 PM), https://www.fsa.usda.gov/about-fsa/structure-and-organization/index [https://perma.cc/BKT6-845S] ("Implementation of farm policy through FSA programs is the responsibility of state and field offices based in counties and U.S. territories."); *see also Service Center Locator*, U.S. DEP'T OF AGRIC. (June 9, 2024, 12:38 PM), https://offices.sc.egov.usda.gov/locator/app [https://perma.cc/6JS4-KN7E].

119. *Structure and Organization*, *supra* note 118.

F. Unauthorized Practice of Law and Local Counsel

It is always important to remember that providing ancillary probate services across state lines may be considered "the practice of law" in that particular jurisdiction. We are all aware that the practice of law is subject to licensure in, and regulation by, the individual states, therefore the definition of what constitutes the practice of law varies.[120] For example, in Texas, the practice of law means the following:

> [T]he preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[121]
>
> The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.[122]

The State Bar of Texas is a mandatory bar association, and membership is required to practice law in the State of Texas.[123] Violations in Texas, depending upon the circumstances, are a Third-degree Felony or a Class-A Misdemeanor.[124] You may be thinking, "well, it's just this one time" or, "it's just this one, small [ancillary probate] thing." While there are numerous nuances to temporarily practicing law beyond your licensed jurisdiction, this author would warn you to tread lightly, cautiously, or better yet not at all.[125]

The Comment on Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) from the American Bar Association provides some insight into the potential interpretation of this "temporary" practice beyond your licensure.[126] Germane portions of the Comment read as follows:

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120. *See, e.g.*, TEX. GOV'T CODE ANN. § 81.101 (West 2023).
121. *Id.* § 81.101(a).
122. *Id.* § 81.101(b).
123. *Id.* § 81.102.
124. TEX. PEN. CODE ANN. § 38.123(c)–(d) (West 2023).
125. *See, e.g.*, MODEL CODE OF PRO. CONDUCT r. 5.5 cmt. (AM. BAR ASS'N 2019).
126. *Id.*

> [5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here. . . .
>
> [8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client. . . .
>
> [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.
>
> [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. . . .
>
> [18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. . . .
>
> [20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be

> required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).[127]

Germane portions of Model Rule 5.5 read as follows:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> >
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> > (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> >
> > (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
> >
> > (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
> >
> > (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
>
> (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal

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127. *Id.*

> services through an office or other systematic and continuous presence in this jurisdiction that:
>
> > (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
> >
> > (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.[128]

So, while "temporarily" stepping over the jurisdictional line from one state to the next may (or may not) be allowed, the safest, and likely most prudent, options are to either (1) hire local counsel, or (2) if your ancillary probate practice will require frequent or continuous legal practice in the state, to seek licensure.

Additionally, while the expense of local counsel may add to the already increased costs of the overall probate (exacerbated by the need for the ancillary proceedings or process), they very well may earn their burden by providing you with not only safeguards against the unlicensed practice of law, but also with expertise of the applicable law and process, local courts or rules, and other strategic benefits.

G. Ancillary Probate Is Generally Avoidable

While ancillary probate is manageable, it is also generally avoidable if the decedent plans ahead, and you implement those strategies when providing estate plans. There are tools and strategies available to potentially eliminate the need for an ancillary probate, saving your client's heirs time, expense, and headaches.

Here are a few, non-exhaustive, examples: use of entities—although you may still need ancillary probate, it is far less likely or common; use of non-probate transfers[129]; and advances and intervivos transfers.[130] Although each of these has its own time, expense, and complexity considerations, they do provide options for the potential avoidance of ancillary probate issues, expenses, and burdens for loved ones later on.

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128. *Id.* at r. 5.5.
129. Daniel, *supra* note 11, at 383.
130. *Id.* at 382.

IV. UNIFORM PROBATE CODE

A. The Uniform Probate Code Generally

There have been attempts to create uniformity among the states regarding probate law, including ancillary proceedings.[131] These efforts have primarily been driven by the Uniform Probate Code (UPC) promulgated by the Uniform Law Commission.[132] The goal of the UPC was to "simplify and clarify inheritance laws and related matters, to give effect to the intent of the decedent, and to provide versatility and efficiency in distributing the decedent's estate."[133]

Article III of the UPC covers the probate and administrative process and includes provisions that affect non-residents.[134] The provisions of Article III related to the local appointment of personal representatives for non-residents are the following:

> 3-201 (venue), 3-202 (resolution of conflicting claims regarding domicile), 3-203 (priority as personal representative of representative previously appointed at domicile), 3-307(a) (30 days delay required before appointment of a local representative for a non-resident), 3-803(a) (claims barred by non-claim at domicile before local administration commenced are barred locally) and 3-815 (duty of personal representative in regard to claims where estate is being administered in more than one state).[135]

Article IV covers ancillary probate and the process of adopting a personal representative.[136]

B. UPC Quirks

Like many uniform laws or codes, the UPC was not intended as a template for a complete probate code, but was instead a framework which allows for the adopting states to "fill in the gaps" where necessary.[137] So, even if a state has adopted the UPC, particularly Articles III and IV, they would still need to enact

131. *Id.* at 359–60.

132. *See 2019 Probate Code*, UNIF. L. COMM'N (June 17, 2024, 7:24 PM), https://www.uniformlaws.org/committees/community-home?communitykey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3 [https://perma.cc/F4QQ-2NCB].

133. Dale F. Gardiner & Michael A. Neider, *Article II and III of the Uniform Probate Code as Enacted in Utah*, 2 BYU L. REV. 425, 425 (1976); UNIF. PROB. CODE § 1-102(b) (UNIF. L. COMM'N 2019).

134. *See* UNIF. PROB. CODE art. III (UNIF. L. COMM'N 2019).

135. *Id.* art. IV general cmt.

136. *See id.* art. IV.

137. Daniel, *supra* note 11, at 361.

their own state-specific provisions in order for the UPC to function.[138] Specifically for ancillary probates, the UPC Articles III and IV "are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible."[139] The goal was to allow for "as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances."[140] So, if you are thinking, "that doesn't exactly make things 'uniform,'" you are correct. Not to mention that less than one-half of the nation has adopted the UPC, and not a single state or territory has adopted the UPC's 2019 Amendment (as of June 2024).[141]

C. UPC States

The following states and territories have adopted the UPC in whole or in part:

1. Alaska (2010 Revision);
2. Arizona (2010 Revision);
3. Colorado (2008 Original, 2010 Revision);
4. Hawaii (2010 Revision);
5. Idaho (2010 Revision);
6. Maine (2008 Original, 2010 Revision);
7. Massachusetts (2010 Revision);
8. Michigan (2010 Revision);
9. Minnesota (2010 Revision);
10. Montana (2010 Revision);
11. Nebraska (2010 Revision);
12. New Jersey (2010 Revision);
13. New Mexico (2008 Original, 2010 Revision);
14. North Dakota (2008 Original, 2010 Revision);
15. Pennsylvania (2010 Revision);

138. *Id*.
139. UNIF. PROB. CODE art. IV general cmt. (UNIF. L. COMM'N 2019).
140. *Id.* art. III general cmt.
141. *2019 Probate Code: Map*, UNIF. L. COMM'N (June 17, 2024, 7:24 PM), https://www.uniformlaws.org/committees/community-home?communitykey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3 [https://perma.cc/F4QQ-2NCB].

16. South Carolina (2010 Revision);

17. South Dakota (2010 Revision);

18. U.S. Virgin Islands (2008 Original); and

19. Utah (2008 Original, 2010 Revision).[142]

D. UPC Ancillary Probate Process

Under the UPC's ancillary probate process, the non-resident's representative acquires the power to administer their estate within the non-domiciliary state by either: (1) affidavit, (2) appointment proceedings as provided in Article III which are then considered "local administration," or (3) a general application for probate under Article III (a full-fledged probate).[143] Additionally, the representative is subject to the priority hierarchy applicable to probate applicants.[144] Generally, ancillary administrations are subject to jurisdiction of the courts within the state, and its processes are subject to the terms of Article III like other probate proceedings, except for any provisions of Article III or Article IV specifically applicable to ancillary proceedings.[145]

1. Affidavit

The UPC provides a foreign personal representative with limited authority to be exercised without the need for any formal appointment by a court.[146] Under Section 4-201, a foreign personal representative has the power to receive payments of debts owed to the decedent and to accept property belonging to the decedent.[147] "The foreign personal representative provides an affidavit indicating the date of death of the non-resident decedent, that no local administration has been commenced, and that the foreign personal representative is entitled to payment or delivery."[148] Once 60 days after the death of the decedent has passed, payment under this provision can be made.[149] If the payment is made in good faith, it serves as a discharge of the debtor.[150] Section 4-203 protects the decedent's local creditors

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142. *2019 Probate Code: Enactment History*, UNIF. L. COMM'N (June 17, 2024, 7:24 PM), https://www.uniformlaws.org/committees/community-home?communitykey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3 [https://perma.cc/F4QQ-2NCB].

143. UNIF. PROB. CODE §§ 4-101(1)–(2), 4-201, 4-205 (UNIF. L. COMM'N 2019).

144. *Id*. § 3-203.

145. *Id*. §§ 4-207, 4-301.

146. *Id*. § 4-201.

147. *Id*.

148. *Id.* art. IV general cmt.

149. *Id.*

150. *Id*. § 4-202, art. IV general cmt.

by notifying local debtors of claims the creditors have against the estate.[151] Such notification then prevents payment under this provision.[152] However, this approach is only available if no administration or application is pending in the state.[153]

2. Appointment Proceedings

Alternatively, if the foreign personal representative requires more authority than is provided by the affidavit approach under Sections 4-204 through 4-206, they may file authenticated copies of their appointment and bond, if applicable, from the original jurisdiction.[154] After filing, and without order of the court, the foreign personal representative has the same power of a personal representative appointed by the local court.[155] This includes all of the powers of a personal representative in an unsupervised administration under Article III of the UPC.[156] Similar to the affidavit approach, this option is only available if no administration or application is pending in the state.[157]

3. Full-fledged Probate

Finally, the personal representative can also file for a full-fledged probate pursuant to the standard terms of Article III and any specific terms related to non-resident decedents or foreign personal representatives.[158]

4. Section 3-203

A foreign personal representative is subject to the same priority hierarchy applicable to probates generally.[159] This means that their power may be limited, or they may be removed from their position or prevented from obtaining the position at all, based upon where they fall in the priority hierarchy established by statute.[160]

151. *Id*. § 4-203, art. IV general cmt.
152. *Id.*
153. *Id*. § 4-206.
154. *Id*. § 4-204.
155. *Id*. § 4-205, art. IV general cmt.
156. *Id.*
157. *Id*. § 4-206.
158. *See id.* § 4-207.
159. *Id*.
160. *See id*. § 3-203.

V. State-Specific Ancillary Probate

A. Administrative—Adoption of Foreign Probate

Although not UPC states, some states will accept the probate proceedings of another state without the need to pursue any judicial proceedings within their jurisdiction.[161] Other states require some form of judicial determination before the will or estate representative are granted authority under state law.[162] Still, others have a combination or selection of many options. For example, in Texas a non-domiciliary decedent's estate can be recognized for ancillary probate purposes by three different means.[163]

1. Recording of Certified Copies

First, without any judicial proceeding or filing, certified copies of a will that has been admitted to probate in another state or foreign nation and the related judgment, order, or decree establishing the foreign probate may be recorded in the county records of any county in the State of Texas.[164] Such a recording is:

> (1) prima facie evidence that the instrument has been admitted to probate according to the laws of the state or country in which it was allegedly admitted to probate; and
>
> (2) sufficient to authorize the instrument and the judgment, order, or decree to be recorded in the deed records in the proper county or counties in this state.[165]
>
> Moreover, the recording has the same effect as a deed or other instrument of conveyance regarding all property in Texas covered by the instrument and establishes formal notice for title purposes.[166]

2. Application but No Judicial Order or Decree

Second, the will, after being admitted to probate "or otherwise established" in any state of the United States or a foreign nation, may be submitted for probate

161. *E.g.*, Tex. Est. Code Ann. § 503.001 (West 2023).

162. *E.g.*, Cal. Prob. Code §§ 12510(a), 12521 (West 2024); 755 Ill. Comp. Stat. Ann. 5/7-1 to -2 (West 2024).

163. Tex. Est. Code Ann. §§ 503.001–.003, 503.051–.052 (Recording of Foreign Testamentary Instrument); *id.* §§ 501.001–.008 (Ancillary Probate of Foreign Will); *id.* §§ 502.001–.002 (Original Probate of a Foreign Will).

164. *Id.* § 503.001(a).

165. *Id.* § 503.001(b).

166. *Id.* §§ 503.051–.052.

through an application.[167] If the will, prior to probate, and application meet the statutory requirements, it is the "ministerial duty" of the county clerk to record the will and evidence of its probate in the judge's probate docket.[168] No hearing or other judicial determination is required and no court order is necessary.[169] Such a will is considered admitted to probate in the State of Texas and "has the same effect for all purposes as if the original will had been admitted to probate by order of a court of [Texas,]" including the effect of transferring or authorizing the transfer of real property in Texas.[170] Additionally, with a few other requirements, the non-domiciliary representative can obtain letters testamentary.[171] This process is similar to the appointment proceedings process under UPC sections 4-204 to 4-206.[172]

3. Original Probate of a Foreign Will

Finally, it is also possible to pursue an original probate of foreign will in Texas.[173]

B. Judicial—Some Judicial Proceeding Required

Other jurisdictions, although not quite as lenient, do provide for ancillary probate once threshold judicial proceedings are accomplished.[174] In California, although the probate proceedings of a foreign state will be recognized, the representative still must file an application and pursue a judicial process.[175] However, if the nondomiciliary decedent's will was admitted in another state, a California court "shall" admit the will and "may not" permit any contest or revocation of the probate, unless one or more of the following are proven:

> (a) The determination in the sister state is not based on a finding that at the time of death the decedent was domiciled in the sister state.
>
> (b) One or more interested parties were not given notice and an opportunity for contest in the proceedings in the sister state.

167. *Id.* §§ 501.001–.002.
168. *Id.* § 501.004.
169. *Id*.
170. *Id*. §§ 501.005, 501.007.
171. *Id*. § 501.006.
172. *See* UNIF. PROB. CODE §§ 4-204 to -06 (UNIF. L. COMM'N 2019).
173. TEX. EST. CODE ANN. §§ 502.001–.002.
174. *E.g.*, CAL. PROB. CODE §§ 12510(a), 12521 (West 2024); 755 ILL. COMP. STAT. ANN. 5/7-1 to -2 (West 2024).
175. CAL. PROB. CODE §§ 12510(a), 12521.

(c) The determination in the sister state is not final.[176]

The State of Illinois has a similar process to California.[177] Foreign wills may be admitted to probate, but they must pursue the same processes as domestic wills, with the exception of the manner of proof.[178]

VI. Conclusion

The long and short of it is that when the next probate matter hits your desk, make sure to check for any out-of-state assets. You might have more of an adventure than you anticipated, but an adventure it could be.

176. *Id.* § 12522.
177. *See* 755 ILL. COMP. STAT. ANN. 5/7-1.
178. *Id.* 5/7-2.