# THE HITCHHIKER'S GUIDE TO INTERSTATE MULTIJURISDICTIONAL ESTATE ADMINISTRATION

*R. Shaun Rainey*[*]



* Shareholder in the Estate Planning and Probate section of Cotton, Bledsoe, Tighe & Dawson. J.D., Texas Tech School of Law, 2011; B.A., Rice University, 2008.

## I. INTRODUCTION

**"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."**[1]

1. U.S. CONST. amend. X.

The law of the disposition of property rights upon an individual's death, whether by will or intestacy, has long been reserved to the States.[2] Although aspects of federal transfer taxation create a level of nationwide consistency on certain matters in the administration of decedents' estates, much of the relevant law—such as what constitutes a will, the interpretation of a will, how property is distributed in the absence of a will, or what proof is necessary to empower an individual to effectuate transfers by reason of death—remains squarely within the purview of each state (and territory) of the Union.[3] Given the patchwork of laws amongst the states, and our ever more interconnected world, interstate multijurisdictional estate administration can pose problems for the attorney representing the fiduciary or a beneficiary of an estate that crosses state lines.[4]

### *A. Scope of the Article*

While considerations in the representation of clients with multijurisdictional estate administration issues are often specific to the states at question, the purpose of this Article is to provide a general framework for multijurisdictional estate administration both "outbound" (the Texas domiciliary decedent with assets in another state) and "inbound" (the domiciliary decedent of another state with assets in Texas).[5] Part II of the Article provides thoughts and considerations for issue-spotting estates that require multijurisdictional estate administration.[6] Part III discusses several questions related to the applicability of law in an estate with potential multijurisdictional issues, including domicile and choice of law.[7] Part IV is intended as a primer for, and in no way the definitive work on, estate administration under the Uniform Probate Code (UPC) for outbound interstate multijurisdictional estate administrations.[8] Part V discusses Texas ancillary probate procedures available for the inbound interstate multijurisdictional estate administration.[9] Part VI reviews some ancillary estate administration avoidance techniques (estate planning opportunities).[10] Part VII of the Article discusses ethical considerations related to assisting

2. *Introduction to Wills*, AM. BAR ASS'N, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/intro-wills/ (last visited Nov. 17, 2024) [https://perma.cc/9A47-6RG3].

3. *Id.*

4. Author's original thought (this Article is written specifically on interstate multijurisdictional estate administrations. The author is licensed in Texas and New Mexico and maintains an interstate practice; however, the author does not have an international practice, and such issues are beyond the scope of this Article).

5. Author's original thought.

6. *See* discussion *infra* Part II.

7. *See* discussion *infra* Part III.

8. *See* discussion *infra* Part VI.

9. *See* discussion *infra* Part V.

10. *See* discussion *infra* Part VI.

clients beyond the confines of a jurisdiction in which an attorney is admitted to practice.[11]

## II. INITIAL CONSIDERATIONS FOR INTERSTATE MULTIJURISDICTIONAL ESTATE ADMINISTRATION

An estate may require interstate multijurisdictional estate administration under several factual circumstances.[12] The goal of this portion of the Article is to provide a framework to consider during the initial client interview to begin the representation with the end in mind, namely the final distribution of the estate.[13] Thinking about potential interstate multijurisdictional estate administrations early in the representation will often reduce the length of administration by ensuring that the process can run as efficiently as possible, reducing fees and expenses.[14]

The terms inbound and outbound will be used in this Article to identify two broad categories of considerations attorneys may use when an estate has interstate multijurisdictional estate administration issues.[15] The term outbound is used to mean estate administration considerations for assets beyond the reach of the domiciliary jurisdiction.[16] Outbound estate administration would include representing an estate in which the decedent died a resident and domiciliary of Texas but owned an interest in minerals in New Mexico.[17] The term inbound is used to mean estate administration considerations in the non-domiciliary jurisdiction for assets beyond the reach of the domiciliary jurisdiction.[18] An example of inbound estate administration conquering when the decedent died a resident and domiciliary of Arkansas but owned an interest in real property in Texas, necessitating a Texas ancillary administration for which the attorney has been retained.[19] While the overall structure for both situations are similar, this becomes a particularly useful framework when an attorney representing the personal representative is not licensed in both the inbound and outbound jurisdictions

---

11. *See* discussion *infra* Part VII.
12. *See Introduction to Wills*, *supra* note 2.
13. *See generally Here Are 10 Est. Plan. Questions You Should Always Ask Your Client*, BEYOND COUNS., https://beyondcounsel.io/here-are-10-estate-planning-questions-you-should-always-ask-your-client/ (last visited Oct. 28, 2024) (discussing estate planning questions you should ask your client) [https://perma.cc/HY7N-7FLC].
14. Harriet E. Miers & John A. Holtway, *Real Property, Probate and Trust Law Section Comments on Multi-jurisdictional Practice - Center for Professional Responsibility*, AM. BAR ASS'N (Jan. 23, 2001), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/mjp_comm_srppt2/ [https://perma.cc/J4WN-DRYW].
15. Author's original thought.
16. Author's original hypothetical.
17. *Id.*
18. Author's original thought.
19. Author's original hypothetical.

or has only been retained to assist in one jurisdiction.[20] Given that the author is a domiciliary and resident of Texas, this Article will use the UPC for outbound multijurisdictional estate administration issues, and Texas law for inbound ones.[21]

### *A. Issue Spotting for Multijurisdictional Estate Administration*

What follows are some common factual scenarios that can raise issues of multijurisdictional estate administration.[22]

#### *1. Decedents with Property Outside Their Domiciliary State*

Perhaps the most common example of a multijurisdictional estate administration issue is where the client resides in one state but has property located in another.[23] Situations like this may include a condominium on the shores of Florida, oil and gas interests in the Permian Basin of Texas, or a cabin in the mountains of Colorado.[24] Whatever the purpose or origin of the property interest, outright ownership—even fractional—in real property, is perhaps the biggest driver of interstate multijurisdictional estate administration for reasons discussed in Section III.B.1 below.[25]

#### *2. Decedents with Beneficiaries (or Heirs) Outside the Decedent's Domiciliary State*

Probate attorneys are also often called upon to provide advice related to the beneficiaries or heirs of a decedent who live in another state.[26] For instance, clients with children or parents in another jurisdiction may have questions about how a gift to or from those individuals might affect the estate administration of each generation, or they may simply like to know the process to deal with mom's estate when she passes from this world.[27]

---

20. *See generally* Miers & Holtway, *supra* note 14 (explaining how attorneys might have clients who live in multiple jurisdictions, but the attorney might not be licensed in all the jurisdictions the client lives in).

21. Author's original thought.

22. *Id.*

23. *See* Miers & Holtway, *supra* note 14.

24. Author's original hypothetical.

25. *See* discussion *infra* Section III.B.1.

26. *See* Miers & Holtway, *supra* note 14.

27. *See What Happens if My Estate Includes Properties in Another State*, CROW EST. PLAN. & PROB. (Oct. 1, 2020), https://www.johnwcrow.com/blog/what-happens-if-my-estate-includes-properties-in-another-state/ [https://perma.cc/58MA-AKWN].

#### *3. Decedents with Interstate Moves During Life*

Some decedents moved from one state to another (perhaps several times over).[28] This can have large effects upon the marital property status of certain property subject to administration or even the process for determining the rights of others in the property.[29]

### *B. Interstate Multijurisdictional Estate Administration Considerations*

With these and other potential factual scenarios creating opportunities for interstate multijurisdictional estate administration, the earlier an attorney determines the need (or just advisability) of counsel in any jurisdiction where the attorney is not admitted to practice law, generally, the better the results for the client.[30] For discussion of ethical considerations and limitations to practicing law across state lines for an interstate multijurisdictional estate administration, see Part VII below.[31]

The choice of probate procedure in the domiciliary jurisdiction of the decedent is one example of how speaking to counsel in another state earlier, rather than later, can be important for the client's outcomes and overall objectives in an estate with interstate multijurisdictional estate administration issues.[32] This is true even when an attorney knows they will not have any representation across state lines.[33] Notably, there is a summary procedure under the UPC to locally appoint a personal representative who has already qualified in the domiciliary jurisdiction of the decedent, known as a proof of authority of domiciliary foreign personal representative.[34] However, this procedure is unavailable if the will is probated as a muniment of title, pursuant to Texas law, because no personal representative was appointed in the domiciliary jurisdiction of the decedent.[35] Early discussions with counsel from a UPC state would allow the client and domiciliary counsel to choose whether or not a muniment of title for the Texas portion of the estate is the best option, all things considered.[36]

---

28. *See* Doug Luftman, *Moving Out of State? Time to Review Your Estate Plan*, TRS. & WILLS, https://www.trustandwill.com/learn/are-wills-valid-from-state-to-state/ (last visited Oct. 23, 2024) [https://perma.cc/AE8J-K6NL].

29. *See id.*

30. Author's original thought.

31. *See* discussion *infra* Part VIII.

32. *See* Stephen Bilkis, *Court Considered Whether Ancillary Letters of Administration Should be Issued. Matter of Dillion 2017 NY Slip Op 27388*, N.Y. PROB. & EST. ADMIN. L. BLOG (Nov. 15, 2023), https://www.newyorkprobateestateadministration.com/matter-of-dillon-2017-ny-slip-op-27388/ [https://perma.cc/VH6T-54ND].

33. *Id.*

34. UNIF. PROB. CODE § 4-202 (UNIF. L. COMM'N 2019).

35. TEX. EST. CODE ANN. § 257.051.

36. Author's original thought.

### *C. The Federal Aspects of Estate Administration*

The practice of estate administration has some nationwide aspects, specifically related to issues of transfer taxation.[37] To ensure a decedent has estate planning designed to avoid or eliminate a federal transfer tax burden, or to ensure maximum benefit of the Section 1014 basis adjustment for purposes of capital gains taxes, the practitioner must have the requisite knowledge on both planning and probate practice in federal law as contained in the Internal Revenue Code, enforced by the Internal Revenue Service, and interpreted by the Tax Court.[38] Given the nationwide application of federal taxation, many estate planning techniques are used throughout the country in very similar situations to create similar results.[39] It is undoubtedly the case that a knowledgeable and experienced probate attorney has the tools necessary to understand tax driven decisions in certain estate planning, and therefore, certain aspects of distribution.[40] It is, however, important to remember that the laws of several states can have an effect on a well-reasoned plan.[41] The potential for unknown effects of state law on administration issues should always be in the forefront of the mind of an attorney engaged in interstate multijurisdictional estate administration to avoid unintended and potentially unfortunate results.[42]

### *D. The Probate Exception to Federal Court Jurisdiction*

The Tenth Amendment notwithstanding, there are factual situations in which certain disputes may be rightly heard by a federal court; however, whether such a court may hear probate-related claims is limited by the so-called "probate exception."[43] The probate exception broadly says that federal courts lack subject matter jurisdiction to probate wills or to administer decedents' estates.[44] A brief discussion of the probate exception to the jurisdiction of federal courts can be useful to highlight the importance of state law and state court jurisdiction in matters of decedents' estates.[45] In *Marshall*

---

37. *See* Stephen Haas, *Federal Transfer Taxes – An Overview*, NAT'L JURIS UNIV., https://www.nationalparalegal.edu/FederalTransferTaxes.aspx (last visited Oct. 28, 2024) [https://perma.cc/U32A-LUZ2].

38. 26 U.S.C. § 1014.

39. *See Tools to Minimize or Avoid Estate Taxes*, TEX. TR. L. (Sept. 20, 2023, 9:03 AM), https://www.texastrustlaw.com/tools-to-minimize-or-avoid-estate-taxes/ [https://perma.cc/63R3-AGA8].

40. *See id.*

41. *State-Specific Estate Planning Laws to Keep in Mind*, GUARDIAN LITIG. GRP. (Feb. 21, 2024), https://guardianlit.com/state-specific-estate-planning-laws/ [https://perma.cc/H57Y-R6FY].

42. *Id.*

43. *See* Marshall v. Marshall, 547 U.S. 293, 298–300 (2006).

44. *See id.* at 311–12.

45. *See id.*

*v. Marshall*, the United States Supreme Court reviewed the nature and extent of the probate exception.[46]

Prior to *Marshall*, the limit of federal court jurisdiction was governed by the rule from *Markham v. Allen*.[47] In *Markham*, a decedent who died during World War II left a will that devised property to residents of Germany.[48] Under a then-existing (wartime) law, property belonging to residents of enemy nations belonged to the government through the Enemy Alien Property Custodian.[49] In the probate court, the United States resident heirs at law moved to set aside the will to prevent property from passing to the federal government by reason of the devise to enemy aliens.[50] The custodian brought a federal declaratory judgment action to establish that the portions of the estate devised to the residents of Germany belonged to the government under the Act.[51] The *Markham* Court held that a judicial declaration, as requested by the custodian, merely establishes the custodian's rights in the estate alongside other claims and would "not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[52]

In *Marshall,* the United States Supreme Court clarified the interference language from *Markham*.[53] Vickie Lynn Marshall, more commonly known as Anna Nicole Smith, was the surviving spouse of the decedent but was not provided for under his will.[54] Eventually, Marshall brought a claim for tortious interference with inheritance rights in bankruptcy court, and she was awarded compensatory and punitive damages.[55] The Ninth Circuit reversed, holding that state probate courts were the proper forum for claims regarding tortious interference with a testamentary gift.[56] However, the Supreme Court reversed and clarified that the interference test from *Markham* is simply a statement of "the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*."[57] Because the bankruptcy court's award was in tort and not *in rem* jurisdiction over the same *res*, the federal court was the proper forum.[58] The Supreme Court then provided several bright line applications of

---

46. *Id.* at 298–300.
47. Markham v. Allen, 326 U.S. 490, 494 (1946).
48. *Id.*
49. *Id.* at 492.
50. *Id.*
51. *Id.*
52. *Id.* at 494.
53. Marshall v. Marshall, 547 U.S. 293, 311 (2006).
54. *Id.* at 300.
55. *Id.* at 301; Archer v. Anderson, 556 S.W.3d 228, 239 (Tex. 2018) ("The fundamental question is why tort law should provide a remedy in disregard of the limits of statutory probate law. We think here it should not. The tort of intentional interference with inheritance is not recognized in Texas.").
56. *Marshall*, 547 U.S. at 304.
57. *Id.* at 298.
58. *See id.*

the probate exception that federal courts could not probate or annul a will, administer an estate, or "dispose of property that was in the custody of a state probate court."[59] Therefore, the vast majority of matters related to multijurisdictional estate administration must still be heard in the various state courts involved in each administration.[60]

## III. INTERSTATE MULTIJURISDICTIONAL ESTATE ADMINISTRATION

When an estate raises questions relating to interstate multijurisdictional estate administration, there are several initial considerations for both the outbound and inbound administration.[61]

### *A. Domicile*

Domicile is the cornerstone consideration when managing interstate multijurisdictional estate administration.[62] It is the foremost question in determining the applicability of state law to the interstate multijurisdictional estate administration, affecting everything from venue and jurisdiction to proper procedures, choice of law, and the effect of the language in a testamentary instrument.[63]

Under Texas law, the determination of whether a will is a "foreign will" is based upon the domicile of the decedent at death.[64] Texas Estates Code Section 501.001 states that a foreign will is the will of a testator who was not domiciled in Texas at the time of death.[65] Thus, a will is still considered foreign under Texas law if the decedent was domiciled in Oklahoma at their death, even if the will was drafted and executed in Texas.[66] In Texas, domicile is synonymous with a fixed place of residence.[67] An individual's domicile is where the individual has an actual place of residence and an intention to make that residence their home.[68] Length of residence is not determinative; the salient facts are "the actual fact as to the place of residence and [the]

59. *Id.*

60. *See id.*

61. *See* discussion *supra* Part III (discussing the questions estates consider when dealing with multijurisdictional estate administration).

62. *See* Jules M. Hass, *The Domicile of a Decedent Can Affect Estate Settlement*, N.Y. PROB. L. BLOG (Dec. 20, 2023), https://www.newyorkprobatelawyerblog.com/the-domicile-of-a-decedent-can-affect-estate-settlement/ [https://perma.cc/2U3C-9ANL].

63. *See* discussion *supra* Part III.

64. *See* TEX. EST. CODE ANN. § 501.001.

65. *Id.*

66. *See id.*

67. *Id.* § 33.001(a)(1) (relating to venue); s*ee also* Maddox v. Surber, 677 S.W.2d 226, 227–28 (Tex. App.—Houston [1st Dist.] 1984, no writ).

68. *In re* Graham, 251 S.W.3d 844, 850 (Tex. App.—Austin 2008, orig. proceeding).

decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct."[69]

An individual can only have one domicile or fixed place of residence at a time, even if the person owns several homes where they spend a significant amount of time.[70] Finally, an individual's domicile does not necessarily change when a person moves from one location to another for medical care, including after becoming incapacitated.[71]The effect of the domicile is further discussed in Section IV.A, which relates to the UPC and Section V.A., which similarly relates to the Texas Estates Code.[72]

### *B. Effect of Property Characterization on Applicable Law*

When reviewing matters of interstate multijurisdictional estate administration, another major consideration is the determination of applicable law.[73] Given the variance in state law, this determination is likely to have an effect on the interpretation and implementation of estate administration and distribution.[74]

#### *1. Nature of the Property*

The classification of the applicable property interest as real or personal property is often determined by the applicable state law in the estate administration, thus, affecting the nature of any ancillary proceedings necessary to empower a personal representative to manage and distribute a decedent's estate.[75]

##### *a. Real Property*

The law of the situs controls over real property.[76] Notably, "the Legislature of one state has no power to confer jurisdiction over property situated in another state."[77] This includes whether a foreign will is valid with respect to Texas real property.[78] As an illustration, in *Haga v. Thomas*, the

69. *Id.* (quoting Texas v. Florida, 306 U.S. 398, 425 (1939)).

70. *In re* Estate of Steed, 152 S.W.3d 797, 803 (Tex. App.—Texarkana 2004, pet. denied) ("A person may establish only one domicile, whereas he or she may have several residences.").

71. *See* Thomas v. Price, 534 S.W.2d 730, 733 (Tex. Civ. App.—Waco 1976, no writ).

72. *See* discussion *infra* Sections IV.A., V.A.

73. *See* discussion *infra* Section III.B.1.

74. *See* Jean Folger, *What Is Real Property? Definition and Types of Properties*, INVESTOPEDIA (May 13, 2024), https://www.investopedia.com/terms/r/real-property.asp [https://perma.cc/T63A-6NAE].

75. *Id.*

76. Toledo Soc. for Crippled Children v. Hickok, 152 Tex. 578, 585–86 (1953) (stating Texas courts have "ultimate power over land situated within [this] state."); s*ee also* Haga v. Thomas, 409 S.W.3d 731, 736 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

77. De Tray v. Hardgrove, 52 S.W.2d 239, 240 (Tex. Comm'n App. 1932).

78. *See* Crossland v. Dunham, 140 S.W.2d 1095, 1097 (Tex. 1940).

First District Houston Court of Appeals ruled that Texas held exclusive jurisdiction to construe the effect of Texas law upon the will of the decedent as it relates to the distribution of Texas property.[79] Here the decedent was domiciled in North Carolina, which had no similar law to the Texas statue that automatically revoked testamentary gifts to a former spouse and their descendants upon divorce, meaning that the decedent's former stepson was divested of interest in Texas real property but maintained the North Carolina real property interest.[80]

### *b. Personal Property*

Unlike real property, it is generally the law of the decedent's domicile at death that governs the disposition of personal property wherever it might be located.[81] This includes the right of a domiciliary foreign personal representative (as the term is used in the UPC) to obtain information about and access to personal property across state lines.[82] This includes all manner of personal property, both tangible and intangible.[83]

## *2. Marital Property Characterization*

As it relates to issues of marital property characterization in interstate multijurisdictional estate administration, Texas recognizes the law of the "matrimonial domicile," meaning the disposition at the time the property is acquired determines the rights of the spouses.[84] Logically, this understanding mirrors the legal concept of the inception of title rule.[85] As such, if the funds used to purchase the Texas property were the separate property of the decedent, based upon the law of the matrimonial domicile at the relevant time, then the Texas property will continue to be the separate property of that

79. *Haga*, 409 S.W.3d at 737.

80. *Id.*

81. *See Crossland*, 140 S.W.2d at 1097 ("[T]he law of the actual domicile of a testator is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country."); *see also* Owen v. Younger, 242 S.W.2d 895, 897 (Tex. App.—Amarillo 1951, no writ) ("It is now the well settled doctrine, that the law of the actual domicile . . . is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country.").

82. *See* MONT. CODE ANN. § 72-4-201 (2021).

83. *See id.*

84. Estate of Hanau v. Hanau, 730 S.W.2d 663, 665 (Tex. 1987) (discussed in the context of a will).

85. O'Neil Wysocki, *The Inception of Title Rule*, OWL L. (Apr. 14, 2010), https://www.owlawyers.com/firm-news/2010/april/the-inception-of-title-rule-a-primer/ [https://perma.ccTGH4-9MBH].

spouse.[86] However, if the funds were community property, the Texas property will likewise be community property at death.[87]

For example, if a married couple living in a common law marital property state, like Oklahoma, used funds that were, in accordance with domiciliary law, one-half the separate property of each spouse in a joint account to purchase real property in Texas then the real property would be held merely as tenants in common, with each owning an undivided one-half separate property interest.[88] However, if the married couple lived in a community property state, like New Mexico, when they used funds in a community property account to purchase real property in Texas, then the property is community property.[89]

### *C. Issues of Taxation*

As much as the substantive law of each state has a profound effect on interstate multijurisdictional estate administration, the tax systems in each state can act just as dangerously as a trap for counsel representing a fiduciary or beneficiary in an estate with interstate multijurisdictional estate administration considerations.[90] While an in-depth analysis of each states' taxation regime—both for death taxes and fiduciary income taxation—is beyond the scope of this Article, the potential tax consequences of failing to file a necessary tax return for an interstate multijurisdictional estate administration is an important consideration that is generally included.[91]

#### *1. Estate/Inheritance Tax Considerations*

While the federal estate tax is always a consideration for wealthy clients, state death taxes (both estate and inheritance taxes) present a quagmire for the unwary attorney of an estate with interstate multijurisdictional estate administration issues.[92] Information from the Tax Foundation notes eighteen jurisdictions within the U.S. that impose some form of death tax (twelve

86. Rania Combs, *The Characterization of Property in Texas*, RANIA COMBS L., PLLC (Apr. 16, 2020), https://raniacombslaw.com/resources/the-characterization-of-property-in-texas-2 [https://perma.cc/BA25-XKSA].

87. *Id.*

88. Author's original hypothetical; see MP McQueen, *What Is Marital Property (Common Law vs. Community States)?*, INVESTOPEDIA, https://www.investopedia.com/terms/m/maritalproperty.asp (last updated July 31, 2024) [https://perma.cc/Q4HP-KJTE].

89. *See* McQueen, *supra* note 88.

90. *See* James L. Cunningham Jr., *Trustee Risks & How to Avoid Common Pitfalls*, CUNNINGHAM LEGAL, https://www.cunninghamlegal.com/trustee-risks/ (last visited Oct. 28, 2024) [https://perma.cc/A8RL-FRCQ].

91. *See id.*

92. *See* Jason Neufeld, *Estate Planning When You Live in Two States*, ELDER NEEDS L. PLLC, https://www.elderneedslaw.com/blog/estate-planning-when-you-live-in-two-states (last visited Oct. 22, 2024) [https://perma.cc/3DV3-7VBG].

impose an estate tax, five impose an inheritance tax, and one—Maryland—imposes both estate and inheritance taxes).[93] The vast majority of the states imposing an estate tax have an exemption amount far below the federal estate tax lifetime exemption amount.[94]

### *a. Assets Subject to State Imposition of Estate Tax*

A resident domiciliary decedent's estate is understandably subject to the estate tax.[95] Generally, the estate taxation of a resident decedent's estate is calculated as all real property and tangible personal property located in the state and any intangible personal property wherever located.[96]

For the non-resident decedent, the estate tax is generally imposed upon the non-resident decedent's interest in real property and tangible personal property located in the state.[97]

### *b. Assets Subject to State Imposition of Inheritance Taxes*

With regard to an inheritance tax, similar structural rules generally apply.[98] Typically, the inheritance tax of a gift by a resident decedent is placed upon all real property and tangible personal property located in the state and any intangible personal property wherever located.[99]Generally, the

---

93. *See* Andrey Yushkov*, Estate Inheritance Taxes by State, 2023*, TAX FOUND. (Oct. 10, 2023), https://taxfoundation.org/data/all/state/state-estate-tax-inheritance-tax-2023/ [https://perma.cc/CD6T-EV9L]; s*ee also* Stephen Murphy, *State Death Tax Chart*, AM. COLL. OF TR. & EST. COUNS., (Apr. 7, 2024), https://www.actec.org/resources-for-wealth-planning-professionals/state-death-tax-chart/ [https://perma.cc/5NZR-LTEY].

94. *See* Murphy, *supra* note 93.

95. *See* WASH. REV. CODE ANN. § 83.100.040 (LexisNexis 1981); OR. REV. STAT. ANN. § 118.010 (2023); 35 ILL. COMP. STAT. ANN. 405/5 (LexisNexis 2003); N.Y. TAX L. § 954.

96. *See generally* WASH. REV. CODE ANN. § 83.100.040 (LexisNexis 1981) ("A tax in an amount computed as provided in this section is imposed on *every transfer of property located in Washington*. For the purposes of this section, any *intangible* [*personal*] *property owned by a resident is located in Washington*.") (emphasis added); s*ee also* 35 ILL. COMP. STAT. ANN. 405/5(a)(1) (LexisNexis 2003) ("For the purposes of the Illinois estate tax, in the case of a decedent who was a resident of this State at the time of death, all of the transferred property has a tax situs in this State, including any such property held in trust, except real or tangible personal property physically situated in another state.").

97. *See generally* OR. REV. STAT. ANN. §118.010(2)(b) (2023) ("A tax is imposed upon a transfer of the property of each . . . [n]onresident decedent whose estate includes any interest in: [r]eal property located in Oregon; or [t]angible personal property located in Oregon."); s*ee also* 35 ILL. COMP. STAT. ANN. 405/5(a)(2) (LexisNexis 2003) ("For purposes of the Illinois estate tax, in the case of a decedent who was not a resident of this State at the time of death, the transferred property having a tax situs in this State, including any such property held in trust, is only the real estate and tangible personal property physically situated in this State.").

98. *See* N.J. REV. STAT. § 54:34-1 (2023); 72 PA. CONS. STAT. § 9116(b)(1) (2019); NEB. REV. STAT. ANN. § 77-2001 (West 1982).

99. *See generally* N.J. REV. STAT. § 54:34-1(a) (2004) ("Where real or tangible personal property situated in this State or intangible personal property wherever situated is transferred by will or by the intestate laws of this State from a resident of this State dying seized or possessed thereof."); s*ee also* NEB.

inheritance tax of a gift by a non-resident decedent is limited to real property and tangible personal property located in the state.[100]

### *2. Income Tax Considerations*

In addition to questions of state death taxes for interstate multijurisdictional estate administrations, many states also impose a fiduciary income tax on estates (and trusts).[101] Many of these income tax regimes apply to estates as fiduciary income.[102] For example, New Mexico imposes a fiduciary income tax if the estate comes from a decedent of New Mexico or if the estate has income from (a) a transaction of business in, into, or from New Mexico; (b) property in New Mexico; or (c) compensation in New Mexico.[103]

#### *a. Constitutional Limitations to Imposition of State Income Taxes*

As it relates to fiduciary income taxation of trusts in particular, the United States Supreme Court has indicated it is possible for a state's imposition of an income tax upon a trust to violate the Due Process Clause of the Fourteenth Amendment.[104] It is worth noting that the Court emphasized that it limited the decision to the specific facts of the case for the specific tax years in question.[105] Namely, the North Carolina Department of Revenue attempted to impose a fiduciary income tax upon a trust because several (but not all) of the trust's beneficiaries lived in the state, even though those beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year, and could not count on ever receiving income from the trust.[106] The Supreme Court held the imposition of a fiduciary income tax to be unconstitutional upon these facts

---

REV. STAT. ANN. § 77-2001 (West 1982) ("All property . . . which shall pass by will or by the intestate laws of this state from any person who, at the time of death was a resident of this state . . . .").

100. *See generally* N.J. REV. STAT. § 54:34-1(b) (2004) ("Where real or tangible personal property within this State of a decedent not a resident of this State at the time of his death is transferred by will or intestate law."); s*ee also* NEB. REV. STAT. ANN. § 77-2001 (West 1982) (". . . if the decedent was not a resident, any part of the property within this state . . . shall be subject to tax . . . .").

101. *See* Andrey Yushkov*, State Individual Income Tax Rates and Brackets, 2024*, TAX FOUND. (Feb. 20, 2024), https://taxfoundation.org/data/all/state/state-income-tax-rates-2024/ [https://perma.cc/2JSF-ZE7F].

102. *Id.*

103. *See Fiduciary Income Tax for Trusts and Estates*, TAX'N & REVENUE N.M., https://www.tax.newmexico.gov/all-nm-taxes/2020/10/23/fiduciary-income-tax-for-trusts-and-estates/ (last visited May 17, 2024) [https://perma.cc/73QE-EYSZ].

104. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2222–23 (2019).

105. *Id.*

106. *Id.*

because the state lacked the minimum connection with the object of its tax that the Constitution requires.[107]

The primary point relating to state fiduciary income tax regimes in an interstate multijurisdictional estate administration is that retention of local counsel would be highly advisable to determine unknown tax consequences of certain actions, like distributions, which may have an unintended effect.[108]

## IV. UNIFORM PROBATE CODE BASICS

To generally discuss issues and options when an estate has outbound interstate multijurisdictional administration issues from the standpoint of a Texas practitioner, this Article will use the UPC as the outbound state law for information and discussion.[109] Nineteen jurisdictions have enacted legislation substantially similar to the UPC as promulgated by the Uniform Law Commission.[110] While every state must make deviations from the uniform law necessary for the structure of the court system and idiosyncrasies of practices in the state, this Article uses the language of the UPC.[111]

### *A. Choosing the Court*

Whether filing an ancillary or original probate, it is important to determine the proper court for both venue and subject matter jurisdiction.[112]

#### *1. Venue*

An application initiating administration of an estate should be filed in (1) "the county where the decedent was domiciled at the time of death" or (2) if the decedent was domiciled outside of the state, then any county where the decedent owned property at the time of death.[113] While domicile is not expressly defined in the UPC, it is generally the location where the person held residence with the intent to do so indefinitely.[114] Such a definition leaves flexibility for individuals who die in a hospital or care facility in another county with the full intent to return to their home or other similar

---

107. *Id.*

108. Mike Obel, *Are Trust Distributions Taxable?*, SMARTASSET (July 2, 2024), https://smartasset.com/financial-advisor/are-trust-distributions-taxable [https://perma.cc/WS4J-EGJJ].

109. *See Uniform Probate Code*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/uniform_probate_code (last visited Oct. 23, 2024) [https://perma.cc/EV4X-LJ25].

110. *Id.*

111. *Id.*

112. Lauren Davis Hunt, *Jurisdiction and Venue in Probate Proceedings*, 14 TEX. TECH EST. PLAN. & CMTY. PROP. L.J. 433, 436 (2008).

113. UNIF. PROB. CODE § 3-201 (UNIF. L. COMM'N 2019).

114. *Id.*

circumstances unique to the decedent.[115] Therefore, for an outbound estate administration, ancillary proceedings may be brought in any county where the decedent owned property at the time of death.[116]

### *2. Jurisdiction*

The UPC envisions a court structure in which the court has subject matter jurisdiction over issues related to estate administration as well as protection of minors or incapacitated persons and trusts.[117] However, many states—like Texas—have much more complicated court structures with potentially concurrent jurisdiction and exclusive jurisdiction for various matters in different courts.[118] These are perhaps the provisions of the UPC that are most often amended to apply to the existing court structure within a UPC-adopting state, and therefore, specifics of any particular jurisdiction are beyond the scope of this Article.[119]

## *B. Ancillary Probate*

When a domiciliary decedent dies owning assets in another jurisdiction, the UPC provides three different procedures for a domiciliary foreign personal representative to proceed, depending on the nature of the assets and needs of an ancillary administration.[120] A "foreign personal representative" means a personal representative appointed by another jurisdiction.[121]

### *1. Affidavit for Delivery of Personal Property*

A domiciliary foreign personal representative has the power to receive payment of debts owed to the decedent or to accept delivery of their personal property.[122]

> At any time after the expiration of sixty days from the death of a non-resident decedent, the domiciliary foreign personal representative may

115. *Id.*
116. *Id.*
117. *See id.* § 1-302.
118. *See generally Court Structure of Texas*, TEX. CT. (Sept. 1, 1997), https://www.txcourts.gov/All_Archived_documents/JudicialInformation/pubs/AR97/crtstr97.htm (showing multiple examples of concurrent jurisdiction in Texas courts) [https://perma.cc/H7B5-LHZV].
119. Compare UNIF. PROB. CODE § 1-302 (UNIF. L. COMM'N 2019); with TEX. EST. CODE ANN. § 32.00 (providing an example of the differences between the Uniform Probate Code and state law).
120. *See generally* Allan D. Vestal, *Multiple-State Estates Under The Uniform Probate Code*, 27 WASH. & LEE L. REV. 70, 84–88 (1970) (outlining the consideration of the Uniform Law Commission in establishing procedures for personal representatives).
121. UNIF. PROB. CODE § 1-201 (UNIF. L. COMM'N 2019).
122. *Id.* § 4-201.

> prepare an affidavit stating (a) the date of the death of the non-domiciliary decedent; (b) that no local administration or application is pending in the state; and (c) the domiciliary foreign personal representative is entitled to payment or delivery.[123]

Payment or delivery made in good faith pursuant to the affidavit releases the debtor or person who has possession of the personal property of their obligation as if payment or delivery was made to a locally appointed personal representative.[124] However, payment or delivery pursuant to the affidavit "may not be made if a resident creditor of the nonresident decedent" has informed the debtor or person in possession of property that belongs to the decedent that the debt should not be paid, nor should the property be delivered to the domiciliary foreign personal representative.[125]

*2. Proof of Authority of Domiciliary Foreign Personal Representative*

If no application is pending in the state, a domiciliary foreign personal representative can file authenticated copies of their appointment and bond, if any, with a statement with the court containing the domiciliary foreign personal representative's address in any county where the non-domiciliary decedent owned property.[126] For ease of reference, this Article refers to the necessary documents as a "probate transcript."[127] Upon completion of the filing of the affidavit and the probate transcript, the domiciliary foreign personal representative may exercise all powers of a local personal representative concerning all assets in the state and may maintain actions and proceedings.[128]

*3. Full Ancillary Local Administration*

Lastly, a domiciliary foreign personal representative may initiate a proceeding for local administration in the estate.[129] While more time consuming and costly than either of the preceding options, it may be preferable to have a local administration proceeding in certain files, particularly those with significant debts or where family dynamics or other concerns have already arisen and may follow the estate across jurisdictional

123. *Id.*
124. *Id.* § 4-202.
125. *Id.* § 4-203.
126. *Id.* § 4-204.
127. Author's original thought.
128. UNIF. PROB. CODE § 4-205 (UNIF. L. COMM'N 2019).
129. *See id.* § 4-207 (detailing the powers of personal representatives).

lines.[130] Additionally, it may be the only option available if a personal representative was not appointed in the decedent's domiciliary jurisdiction, like when probating a will as a muniment of title under Texas law.[131] For information related to full ancillary local administrations, see Section IV.C.[132]

#### *4. Other Ancillary Concerns*

In addition to the choice of ancillary proceedings necessary for the domiciliary foreign personal representative of an estate, there are additional considerations as to the powers and liabilities of a domiciliary foreign personal representative.[133]

##### *a. Property Located Outside the County of Probate Filing*

Like at the state level, if a decedent owns real property outside the county in which administration is pending or a proof of authority is filed, a domiciliary foreign personal representative may need to file notice in each county where the decedent owned real property.[134] While such recorded notice may constitute full and complete notice of all proceedings, it is often advisable to prepare domiciliary foreign personal representative distribution deeds to fully evidence transfer of property, particularly in estates in which the final distribution is unclear under the terms of the will, such as formula gifts or class gifts with unascertained members of the class.[135]

##### *b. Jurisdiction Over Domiciliary Foreign Personal Representative*

A domiciliary foreign personal representative who takes action in furtherance of the administration of a decedent's estate submits to the personal jurisdiction of the state's courts in any proceeding related to the estate of the decedent.[136] However, if the affidavit procedure described in Section IV.B is used, the domiciliary foreign personal representative is only

---

130. Kaylee Harmon, Note, *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, 385 (2018).

131. TEX. EST. CODE ANN. § 257.001(2).

132. *See* discussion *supra* Section IV.C.

133. M.K. Woodward, Ernest E. Smith, III, & Gerry W. Beyer, 17 TXPRAC § 433 (2024).

134. *See, e.g.*, N.M. STAT. ANN. § 45-1-404(A) (LexisNexis 1975) (The notice should be recorded with the county clerk and include: (1) the name of the decedent; (2) the title, court and docket number of the pending estate; (3) "a description of the type of administration;" (4) the name, address and title of the domiciliary foreign personal representative; and, (5) "a complete description of the real property situate" in the county of recording).

135. *In re* Estate of Hogen*,* 863 N.W.2d 876, 887 (N.D. 2015) (quoting Richard V. Wellman, Unif. Prob. Code Prac. Manual 316-17 (2d ed.1977)).

136. UNIF. PROB. CODE § 4-301 (UNIF. L. COMM'N 2019).

subject to jurisdiction up to the amount of the money or value of the personal property collected.[137] Note that a foreign personal representative is subject to the jurisdiction of the state to the same extent that the decedent was immediately prior to death.[138]

### *c. Effect of Adjudication*

In any jurisdiction, an adjudication rendered in favor of or against any personal representative of an estate is binding on the local personal representative as if they were a party to the adjudication.[139]

## *C. Local Administration*

The following outline of the estate administration process under the UPC is applicable for an original proceeding or a full ancillary proceeding, as referenced in Section IV.B.3.[140]

### *1. Formal or Informal Proceedings*

The UPC provides for the administration of an estate done through both formal or informal proceedings.[141] Informal proceedings are an efficient manner of administration, assuming that they are available and court intervention is not anticipated; however, they are not available in all circumstances.[142] Informal proceedings are not available in the following situations:

- To determine heirs of an intestate decedent;
- To probate a copy of a lost will;
- To probate a will after the third anniversary of the decedent's death;
- To appoint a personal representative to the exclusion of another person with equal priority;
- To appoint a personal representative without priority;
- To contest the appointment of another personal representative;
- To seek removal of a personal representative; or
- To contest a will.[143]

---

137. *Id.*
138. *Id.* § 4-302.
139. *Id.* § 3-401.
140. *See* discussion *supra* Section IV.B.3.
141. UNIF. PROB. CODE § 3-401 (UNIF. L. COMM'N 2019).
142. *Id.* § 3-304.
143. *Id.*

### *a. Informal Proceedings*

An informal proceeding is a finding that the submitted application is complete and that the "original, duly executed and apparently unrevoked will is in" the possession of the court.[144] However, the Registrar, a court official charged with such duties, may decline an application for informal appointment of a personal representative for any reason.[145] A declination of informal appointment is not a final judgment and does not preclude appointment in formal proceedings.[146]

### *b. Formal Proceedings*

An interested person may bring a formal proceeding regardless of the existence or status of informal proceedings.[147] The filing of a formal proceeding automatically stops any informal action in process and requires that the informally appointed personal representative refrains from exercising any power that is necessary to preserve the estate.[148] Further, the filing of a matter that requires formal proceedings automatically transforms the informal probate to a formal probate.[149]

### *c. Bonds*

In an informal proceeding, an appointed personal representative is not required to provide bond unless: (1) the person is appointed as a special administrator; (2) the will specifically requires bond; or (3) an interested person demands bond pursuant to Section 3-605.[150]

In the context of a formal proceeding, the court may order bond *sua sponte* unless the will specifically relieves the personal representative of the responsibility.[151] Further, an interested person may request bond pursuant to Section 3-605; however, the court may relieve the personal representative of the obligation or lower the amount even when bond is required in the will.[152]

---

144. *See id.* § 3-303(A) (listing the required findings for informal probate of a will); UNIF. PROB. CODE § 3-308(A) (UNIF. L. COMM'N 2019) (listing the required findings for the informal appointment of a personal representative).

145. *Id.* § 3-305.

146. *Id.*

147. *Id.* §§ 3-401, 3-414.

148. *Id.* § 3-401.

149. *Id.*

150. *Id.* § 3-603.

151. *Id.*

152. *Id.* §§ 3-603, 3-604.

### *2. Supervised or Unsupervised Administration*

The default administration is unsupervised unless the will provides otherwise or the court finds a necessity under the circumstances.[153] A court has the authority to order a supervised administration: (1) "if the decedent's will directs supervised administration," unless the district court finds that circumstances "have changed since the execution of the will and that there is no necessity for supervised administration;" (2) "if the decedent's will directs unsupervised administration," only upon a finding that supervised administration "is necessary for protection of persons interested in the estate;" or (3) "in other cases if the [district] court finds that supervised administration is necessary under the circumstances."[154]

In an unsupervised administration, the personal representative can act within the scope of their authority under the UPC and the will without approval for each action by the court.[155] Generally, informal proceedings under the UPC can be analogized to the concept of independent administration under Texas procedures.[156]

### *3. Appointment and Issuance of Letters*

The personal representative is without power, and the administration of an estate is not commenced until letters are issued.[157] Prior to the issuance of letters, the appointed personal representative must accept the appointment by filing any ordered bond and providing a statement of acceptance of the duties of the office.[158] While the personal representative's powers and duties commence upon appointment, they may be related back in time to give legal effect to the action of the appointed personal representative, which occurred prior to the appointment.[159]

### *4. Notices to Heirs and Devisees*

The appointment of a personal representative through informal proceedings may be achieved without prior notice unless it is demanded pursuant to Section 3-204.[160] Still, notice of the appointment as the personal representative must be provided to beneficiaries of the will within ten days

153. *Id.* § 3-502.
154. *Id.*
155. *See id.* §§ 3-704, 3-711.
156. *See* TEX. EST. CODE ANN. § 404.005.
157. UNIF. PROB. CODE § 3-103 (UNIF. L. COMM'N 2019).
158. *Id.* §§ 3-103, 3-601.
159. *Id.* § 3-701.
160. *Id.* §§ 3-306, 3-310.

of the appointment.[161] However, notice of the informal probate is only required within thirty days.[162]

Formal proceedings may not proceed without formal notice.[163] Notice must be sent to the following:

- The surviving spouse;
- The decedent's children and other heirs;
- The devisees under the will, if any;
- A previously appointed personal representative, if any; and
- All unknown interested persons.[164]

Notice is to be affected upon those persons with a known address pursuant to UPC Section 1-401.[165]

### *5. Powers and Duties of the Personal Representative*

A personal representative has broad powers to administer the estate.[166] A personal representative has power over estate property to the extent "that an absolute owner would have, in trust however, for the benefit of creditors whose claims have been allowed and others interested in the estate."[167] Unless a personal representative operates in a supervised administration, they may exercise their powers "without notice, hearing or order of court."[168]

Broadly speaking, the personal representative has the specific duty to settle and distribute the estate in accordance with the will.[169] The personal representative should make distributions "as expeditiously and efficiently as is consistent with the best interests of the estate."[170] Generally, the personal representative is also subject to the same standards of care as a trustee.[171] These standards of care include the duties of loyalty and impartiality to the estate beneficiaries.[172]

The UPC also imposes a fiduciary duty upon a personal representative to administer the estate for the benefit of *both creditors and beneficiaries*.[173]

---

161. *Id.* §§ 3-310, 3-705.
162. *Id.* § 3-306.
163. *Id.* § 3-403.
164. *Id.* § 3-403.
165. *Id.*
166. *Id.* § 3-710.
167. N.M. STAT. ANN. § 45-3-711 (West 2018).
168. *Id.*
169. UNIF. PROB. CODE § 3-703 (UNIF. L. COMM'N 2019).
170. MICH. COMP. L. ANN. § 700.3703 (West 2010).
171. UNIF. PROB. CODE § 3-703 (UNIF. L. COMM'N 2019).
172. *Id.*
173. *See id.* § 3-711 (discussing that a personal representative has full power over estate property, subject to his trust to use and apply the property "for the *benefit of the creditors and others interested in the estate*.") (emphasis added).

### *6. Inventory*

A personal representative has an obligation to prepare an inventory of the decedent's date of death property within three months of their appointment.[174] The inventory must list each piece of property and its estimated value on the date of death—with reasonable detail.[175] A personal representative is not required to file the inventory with the court and generally should not for the preservation of confidentiality in most cases.[176] However, a personal representative must provide a copy of the inventory to interested persons upon request.[177]

### *7. Notice to Creditors*

The UPC provides for two types of notices to creditors, required and permissive.[178]

#### *a. Required Notice*

A personal representative has a duty to give written notice to any known creditor or any creditor who is reasonably ascertainable by mail or other delivery.[179] The notice to known creditors must be provided within three months of appointment.[180] The notice shall (a) instruct the creditor to present its claim within two months of the later of (i) the mailing of the notice, or (ii) the publication of a general notice to creditors, if made; and (b) inform the creditor that failure to present the claim within the stated time periods bars the claim.[181]

#### *b. Permissive Notice*

A personal representative may publish notice to other creditors.[182] The publication must appear once a week for two successive weeks in a newspaper of general circulation in the relevant county.[183] The publication must (1) announce the appointment; (2) list the address of the personal representative; (3) provide the name of the decedent; and (4) notify the estate's creditors to present their claims within two months after the date of

174. *Id.* § 3-706.
175. *Id.*
176. *Id.* § 3-706.
177. *Id.*
178. *Id.* § 3–801.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

the first publication of the notice or be forever barred.[184] It is the practice and recommendation of the author that all personal representatives publish the notice pursuant to Section 3-801, even if there are believed to be no creditors to bar any potential claimants as noted below.[185]

### *8. Creditor Claims and Limitations*

#### *a. Presenting a Claim*

A creditor may present a claim using three different methods.[186] For the first two methods of presentment, the statement must include the creditor's name and address; the amount claimed; the basis of the claim; if the claim is not yet due, the date on which the claim is due; if the claim is contingent or unliquidated, the nature of the uncertainty; and if the claim is secured, a description of the security.[187] To present a claim: (1) the creditor may mail or otherwise deliver the claim to a personal representative;[188] (2) the creditor may file the claim with the court where the matter is pending,[189] presentment is effective upon receipt by the PR or filing with the court;[190]and (3) The creditor may simply sue in an appropriate court with jurisdiction over a personal representative.[191]

#### *b. Limitations*

All claims must be presented within one year of the decedent's death, whether or not an administration of the decedent's estate has commenced or the creditor knows about the decedent's death.[192] There is no tolling period for claims against a decedent.[193] However, the notices discussed in Section IV.B.7 above shorten the one-year statute of limitations to within two months of the notice.[194]

#### *c. Dealing with the Personal Representative*

Third parties who deal with the personal representative in good faith are protected from liability that may arise from the personal representative's own

184. *See id.*
185. Author's original thought.
186. *See* UNIF. PROB. CODE § 3-804(1-3) (UNIF. L. COMM'N 2019).
187. *Id.* § 3-804(1).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* § 3-803.
193. *Id.*
194. *Id.* § 3-803.

breaches of fiduciary duty or some defect in the judicial process that provided the personal representative with authority beyond what might have been proper.[195]

### *9. Distribution*

A personal representative's most fundamental duty is to distribute the estate in accordance with the decedent's will "as expeditiously and efficiently as is consistent with the best interests of the estate."[196] Unless a personal representative is under a supervised administration, they may proceed without court order.[197] However, if a personal representative needs guidance, they may invoke the jurisdiction of a district court to resolve any question regarding the estate or its distribution.[198] Absent language in the will, the UPC contains the following logistical structure for distributions.[199]

#### *a. In-Kind Distribution*

A personal representative distributes estate property in-kind absent some administrative necessity dictating otherwise.[200]

#### *b. Attributable Income*

In a jurisdiction that has adopted the Uniform Principal and Income Act (UPIA), net income attributable to property that is the subject of a specific bequest is to be distributed to the recipient of that property; otherwise, the personal representative distributes the net income among all the beneficiaries, except those that received outright pecuniary bequests based on the beneficiary's proportionate share of the estate.[201]

#### *c. Interest*

Recipients of pecuniary gifts are entitled to receive interest at the legal rate, beginning one year after the date of appointment.[202]

---

195. *Id.* § 3-714.
196. *Id.* § 3-703.
197. *Id.* § 3-704.
198. *Id.* §§ 3-703, 3-704.
199. *See id.* §§ 3-904–90a.
200. *Id.* § 3-906.
201. UNIF. PRINCIPLE & INCOME ACT §§ 201–202 (UNIF. L. COMM'N 2008).
202. UNIF. PROB. CODE § 3-904 (UNIF. L. COMM'N 2019).

### *d. Residue*

A personal representative may distribute the residual estate in "any equitable manner."[203]

### *e. Proposal of Distribution*

A personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to it.[204] Distributees lose their right to object to the distribution on the basis of the kind to be distributed or the value of the assets to be received if they fail to object in writing within thirty days of receiving the proposal.[205] A personal representative may also recover an asset improperly distributed to a beneficiary.[206]

## *10. Closing*

The UPC requires a personal representative to close the estate.[207] A personal representative may choose between a formal proceeding or filing a sworn statement with the court.[208] Generally, the choice between these two options will be predicated upon the cooperativeness of the beneficiaries throughout the process of administration.[209]

### *a. Formal Proceedings*

A personal representative has the right, at any time, to petition the court for an order of complete settlement of the estate.[210] The petition may request the court, among other things, to consider and approve a personal representative's final account and distribution, and to adjudicate the final settlement and distribution of the estate.[211] The court's order may include a discharge of a "personal representative from further claim or demand of any interested person."[212]

---

203. *Id.* § 3-906.
204. *Id.* § 3-906(b).
205. *Id.*
206. *See id.* §§ 3-908–909.
207. *See id.* §§ 3-1001–1003.
208. *See id.* § 3-1003.
209. *See id.*
210. *See id.* § 3-1001(a) (requiring notice to all interested persons, including heirs and devisees); *see also* § 3-1002(A) (discussing the context of an informal probate, where heirs might be omitted).
211. *Id.* §§ 3-1001–1002.
212. *Id.* § 3-1001(a).

### *b. Sworn Statement*

A personal representative also may close the estate by filing a sworn statement with the court.[213] The sworn statement may not be filed any "earlier than six months after the date" the personal representative was first appointed.[214] Unlike formal closing proceedings, the closing statement does not discharge a personal representative.[215] In fact, a personal representative continues to have authority to administer the estate for a one-year period after filing the closing statement.[216] Potential claimants also have six months after the date of filing the closing statement to bring breach-of-fiduciary-duty claims against a personal representative.[217]

### *c. Reopening the Estate*

An estate may be reopened if property is discovered after the estate is closed.[218]

For a more in-depth look at ancillary probate issues from Texas to another interstate jurisdiction (including U.S. territories and the District of Columbia), see *Ancillary Probate in Every State*, written by Shelli A. Harveson and updated by Megan E. McIntyre and published in the Bonus Materials for the Intermediate Estate Planning and Probate Course in 2023 sponsored by TexasBarCLE.[219]

## V. TEXAS ANCILLARY ADMINISTRATION

On the flip side of the coin, Texas can also be the inbound jurisdiction for interstate multijurisdictional estate administration when a decedent domiciled in another jurisdiction dies owning a property interest in Texas.[220] Therefore, we next turn to the basic options for a Texas ancillary administration under the Texas Estates Code.[221]

---

213. *Id.* § 3-1003.
214. *Id.* § 3-1003(a).
215. *Id.* §§ 3-1002–1003.
216. *Id.* § 3-1003 cmt.
217. *Id.* § 3-1005 cmt.
218. *Id.* § 3-1008.
219. *See* Shelli A. Harveson, *Ancillary Probate in Every State*, INTERMEDIATE EST. PLAN. & PROB. (2023).
220. TEX. EST. CODE ANN. § 501.001.
221. *See generally* §§ 501.001–.008 (explaining the process of ancillary probate of a foreign will).

### *A. Choosing the Court*

When choosing to use a procedure that requires filing an ancillary probate in a court proceeding, it is important to determine the proper court, both in terms of venue and subject matter jurisdiction.[222]

#### *1. Venue*

The Estates Code "provides mandatory venue for the probate of wills and administration of estates."[223] Venue for estate administration in Texas will be in the county of domicile or fixed place of residence for a Texas domiciliary.[224] However, if the "decedent . . . did not have a domicile or fixed place of residence in" Texas and died in the state, venue is "in the county in which: the decedent's principal estate was located at the time of the decedent's death; or [in the county where] the decedent died."[225] However, "[i]f the decedent did not have a domicile or fixed place of residence in" Texas and died outside of the state, then venue is "in any county . . . in which the decedent's nearest of kin reside; or, if there are no next of kin [in Texas], in the county in which the decedent's principal estate was located at the time of the decedent's death."[226]

#### *2. Jurisdiction*

The Estates Code provisions related to venue for probate proceedings, like the probate of wills and administration of estates, are mandatory venue provisions.[227] Thus, with regard to probate proceedings, the general venue provisions in the Texas Civil Practice and Remedies Code do not apply.[228] In order not to run afoul of jurisdictional concerns, it is important to determine if the county of proper venue has a statutory probate court, a county court at law, or only a constitutional county court.[229]

"In a county in which there is a statutory probate court, the statutory probate court has [original and] exclusive jurisdiction of all probate

---

222. Author's original thought.

223. *In re* Graham, 251 S.W.3d 844, 847 (Tex. App.—Austin 2008, no pet.); *see* Jennifer C. Vermillion, *Governing Law of Probate, Jurisdiction, and Proceedings (TX)*, LEXISNEXIS PRAC. GUIDANCE (2024) ("[T]he Texas Estates Code . . . became effective on September 1, 2015, replacing the Texas Probate Code.").

224. TEX. EST. CODE ANN. § 33.001(a)(1).

225. *Id.* § 33.001(a)(2)(A).

226. *Id.* § 33.001(a)(2)(B).

227. *Graham*, 251 S.W.3d at 847.

228. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0161 ("An action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute.").

229. TEX. EST. CODE ANN. §§ 32.001–.007 (explaining which court has jurisdiction over probate proceedings).

proceedings, regardless of whether [a matter is] contested or uncontested."[230] "A statutory probate court is a court created by statute and designated as a statutory probate court under Chapter 25, Government Code."[231]

Unless otherwise provided by the organic statute creating the court or in a county with a statutory probate court, a statutory county court (county court at law) has concurrent original jurisdiction over all causes and proceedings prescribed by law for constitutional county courts, including probate jurisdiction.[232] There is a specific organic statute that creates each statutory court.[233] While there are general jurisdiction provisions for statutory county courts in Texas Government Code Section 25.0003, to the extent there is a specific provision for a particular court that conflicts, the county-specific provision controls.[234]

"In a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, the county court has original jurisdiction of probate proceedings."[235] One should always check with the particular court in a county in which a county court at law and constitutional county court have concurrent jurisdiction because the courts may have a general practice or more formal agreement as to the filing of cases.[236] For example, in Midland County, Texas, uncontested probates and determination of heirships are generally filed and heard in the constitutional county court but contested matters may be originally filed in the county court at law.[237]

### *B. Determination of Heirship*

There is no procedure specifically created for the foreign domiciliary who dies intestate owning a property interest in Texas.[238] While personal property is subject to the administration and laws of the domiciliary jurisdiction, Texas law governs the intestate succession of real property

230. *Id.* § 32.005(a); TEX. GOV'T CODE ANN. § 25.0003(e).

231. TEX. EST. CODE ANN. § 1002.008(b).

232. TEX. GOV'T CODE ANN. § 25.0003(d); TEX. EST. CODE ANN. § 32.002(b).

233. *See* TEX. GOV'T CODE ANN. § 25(c).

234. *Id.* § 25.0001(a).

235. TEX. EST. CODE ANN. § 32.002(a).

236. Author's original thought.

237. *Probate Court*, MIDLAND CNTY. TEX., https://www.co.midland.tx.us/167/Probate-Court (last visited Nov. 11, 2024) [https://perma.cc/L3JU-MEJ8].

238. Ellen Wied, *Underwriting Q&A: Is an Ancillary Probate Proceeding Necessary in the State Where the Property is Located (TX, FL, NM, AZ) when there is a foreign (out of state or another country) probate or administration?*, FIRST NAT'L TITLE INS. CO. (Apr. 20, 2020), https://fnti.com/underwriting-qa-is-an-ancillary-probate-proceeding-necessary-in-the-state-where-the-property-is-located-tx-fl-nm-az-when-there-is-a-foreign-out-of-state-or-another-country-probate-or-administ/ [https://perma.cc/3LQ8-QPDA].

within its borders.[239] See Section III.B above for a more detailed discussion.[240]

Therefore, to effectuate a legal transfer of a real property interest held by a foreign domiciliary who dies intestate in another jurisdiction, a determination of heirship proceeding, pursuant to Subchapter A, Chapter 202 of the Texas Estates Code is necessary.[241] A determination of heirship may also be necessary in Texas, even if the decedent died testate, when a will has been probated in Texas or elsewhere but Texas property is omitted from the will.[242] If necessary the court may grant a local administration if four years has not elapsed since the decedent's death.[243]

### *C. Probate of Foreign Wills*

When a foreign domiciliary dies testate and that will is sufficiently drafted to transfer real property located in the state of Texas, then Texas law provides three mechanisms for the ancillary probate of a foreign will.[244] A foreign will is the "written will of a testator who was not domiciled in this state at the time of the testator's death [, and such] may be admitted to probate . . . if the will would affect any property in this state."[245] The methods listed below are in order from least complex to most complex.[246]

#### *1. Recording of Probate Transcript*

The least complex procedure available is recording an authenticated copy of a foreign will, along with a copy of the order by which the will was admitted to probate into the deed records of the county or counties in which the non-domiciliary decedent owned real property interests.[247] This procedure effectively operates as a muniment of title, allowing the will to serve as the title transfer evidence of public record.[248] To be properly authenticated, the probate transcript must:

---

239. *Situs*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/situs (last visited Oct. 23, 2024) [https://perma.cc/7KFF-4HEG].

240. *See* discussion *supra* Section III.B.

241. *See* TEX. EST. CODE ANN. § 202.002 ("A court may conduct a proceeding to declare heirship when: (1) a person dies intestate owning or entitled to property in this state and there has been no administration in this state of the person's estate . . . .").

242. *Id.* § 202.002(2).

243. *Id.* § 202.006.

244. *Ancillary Probate in Texas*, KREIG, https://kreiglaw.com/texas-probate-guide/ancillary-probate/ancillary-probate-in-texas/ (last visited Oct. 23, 2024) [https://perma.cc/WN4E-2REN].

245. *See* TEX. EST. CODE ANN. § 501.001.

246. *See* discussion *infra* Sections IV.C.1–3.

247. *See generally* TEX. EST. CODE ANN. § 503(A) ("Requirements for Recording Foreign Testamentary Instrument.").

248. *Id.*

> (1) be attested by and with the original signature of the court clerk or other official who has custody of the will or who is in charge of probate records;
> (2) include a certificate with the original signature of the judge or presiding magistrate of the court stating that the attestation is in the proper form; and
> (3) have the court seal affixed, if a court seal exists.[249]

By recording the probate transcript pursuant to Section 503.001 in the county where the non-domiciliary decedent owned real property, the recordings "take effect and are valid as a deed of conveyance of all property in this state covered by the instrument; and have the same effect as a recorded deed or other conveyance of land beginning at the time the instrument is delivered to the clerk to be recorded."[250]

Note, however, that a will that is unclear as to the distribution of assets—specifically, wills that contain formula clauses for tax planning purposes, if the domiciliary jurisdiction attempted to make certain distributions of Texas property in settlement of claims, or rights and protections under domiciliary marital property law—may raise questions concerning the proper legal title to real property requiring further action or another ancillary procedure.[251]

### *2. Texas Ancillary Probate*

The second available method is a "true" ancillary probate pursuant to Chapter 501 of the Texas Estates Code.[252] This may be the most useful option when some matter requires the appointment of a local personal representative like the sale of property or to confirm title when the will leaves ambiguity in the takers of the real property in Texas for some reason.[253]

The ancillary probate proceedings require an application, together with authenticated copies of the probate transcript from the foreign jurisdiction, to be filed in a county with probate jurisdiction in a Texas county in which the non-domiciliary decedent owned an interest.[254] The first step following the filing is to prove the will under Section 501.002; it matters whether or not the will was originally admitted in the decedent's jurisdiction of domicile.[255]

---

249. *Id.* § 501.002(c).
250. *Id.* § 503.051(1)–(2).
251. *Id.*
252. *Id.* § 501.002.
253. Author's original thought.
254. TEX. EST. CODE ANN. § 501.002.
255. *Id.*

*a. Foreign Will Originally Probated in Domiciliary Jurisdiction*

If the foreign will was originally admitted to probate in the domiciliary jurisdiction of the decedent, then the prove-up is limited to filing an application with the properly authenticated probate transcript, and "it is the ministerial duty of the court clerk to record the will and the evidence of the will's probate or other establishment in the judge's probate docket."[256] Further, no notice is required in this instance.[257]

*b. Foreign Will Originally Probated in Non-Domiciliary Jurisdiction*

However, if the decedent's will was originally probated in a jurisdiction other than the domiciliary jurisdiction of the decedent, there are additional steps.[258] The application must contain (i) all the information required for the original probate of a Texas will and (ii) the names and addresses of each devisee under the will and each person who would be an intestate heir.[259] Citation must also be served upon each of these persons.[260] Once served, the interested individuals can contest the will in the same manner as if the decedent had been domiciled in Texas.[261] If no contest is filed, the clerk shall record the will and other documents in the judge's probate docket.[262] Upon recording in the probate docket, the will is deemed probated.[263]

If ancillary letters testamentary are required, then the court may enter an order directing that the letters be issued upon a showing that the executor named in the will is qualified as the executor in the foreign jurisdiction and is not disqualified to serve in Texas.[264] Even if more than four years have elapsed since the date of the non-domiciliary decedent's death and the application for letters testamentary, the court may issue ancillary letters testamentary to the foreign executor if the executor proves that they continue to serve as executor in the jurisdiction in which the will was previously admitted to probate.[265]

Further, "a foreign executor is not required to give bond if" the will waives the bond requirement.[266] However, if the foreign will is silent or

256. *Id.* § 501.004.
257. *Id.* § 501.003.
258. *Id.* § 501.002(b).
259. *Id*.
260. *Id.*
261. *Id.* §§ 501.004(b); 504.002.
262. *Id.* §§ 501.004(b); 504.003(a).
263. *Id.* § 501.005.
264. *Id.* § 501.006.
265. *Id.* § 501.006(a)(3).
266. *Id*. § 505.051(a).

requires a bond, the bond provisions regarding domestic representatives shall apply.[267]

One question unanswered by Chapter 501 is whether or not an ancillary executor may serve as an independent or dependent executor.[268] Therefore, whether the will contains language sufficient to provide for independent administration must be analyzed under the same legal framework as the will of a domiciliary decedent under Texas law.[269]

### *3. Original Probate of Foreign Will*

Lastly, a foreign or domestic will may be probated in the same manner in accordance with Chapter 502.[270] A foreign will may be originally probated in Texas even if it has already been probated elsewhere.[271] One difference would be that the proponent of the foreign will in Texas may rely upon an authenticated copy of the will, unless ordered by the court to produce the original.[272] Interestingly, Chapter 502 requires that the foreign will be valid under the Texas laws, including the necessary formalities and solemnities.[273] If the foreign will has not been admitted in the decedent's domiciliary jurisdiction, then the court can require that the proponent secure probate of the will in the testator's domicile by delaying a ruling until that time.[274] Whether or not a foreign will has been admitted to probate in the decedent's domiciliary jurisdiction is not determinative on the Texas court in an action under Chapter 502.[275]

## VI. PROBATE AVOIDANCE OPPORTUNITIES (ESTATE PLANNING, SHH!)

The axiom that "the best defense is a good offense" has been attributed to many sources; however, the principles underlying the saying are useful in the avoidance of interstate multijurisdictional estate administration.[276] A little planning can go a long way.[277]

---

267. *Id.* § 505.051(b).
268. Author's original thought.
269. TEX. EST. CODE ANN. § 257.151.
270. *Id.* § 502.001.
271. *Id.* § 502.001(b).
272. *Id.* § 502.002(c).
273. *Id.* § 502.001(a)(2).
274. *Id.* § 502.001(c).
275. *Id.* § 502.001.
276. Elaine M. Bucher, *The Best Defense is a Good Offense*, PROQUEST (Mar. 2013), https://www.proquest.com/docview/1518023495?parentSessionId=Op6R5zC2F%2FWsyEpAXXUJLcJnJpo1ulnPBlJMszwi3Rc%3D&sourcetype=Trade%20Journals [https://perma.cc/G7X6-YJNH].
277. Author's original thought.

### *A. Changing Ownership*

One method of avoiding the need for ancillary probate is to change the ownership of real property during the lifetime of the non-domiciliary client.[278]

#### *1. Revocable Trusts*

The use of a revocable trust, funded with assets from at least the non-domiciliary jurisdiction of a client, can avoid the necessity of ancillary estate administration.[279] As discussed above in Sections IV and V, ancillary estate administration may be expensive and cumbersome.[280] Additionally,

> while a revocable trust will not generally avoid the imposition of inheritance taxes in the jurisdiction in which the real property is located, by placing real estate and other assets held outside the state of domicile in a revocable trust, the settlor minimizes the risk that more than one state will attempt to treat the settlor as a domiciliary and, therefore, seek to impose multiple inheritance taxes upon all of the settlor's assets.[281]

#### *2. Other Inter Vivos Transfer*

Further, an inter vivos transfer from the non-domiciliary client to another individual, or trust, will prevent the necessity for ancillary estate administration and connected retitling of assets upon the death of the non-domiciliary client.[282] This could be gratuitous or a sale for consideration depending on the needs and desires of the client.[283]

### *B. Changing Nature of Assets*

The importance of the distinction in property characterization as discussed in Section III.B above is the opportunity to eliminate the necessity

---

278. *Ancillary Probate: When Is It Used, Where It Occurs, and How to Avoid It*, WILSON L. GRP., LLC, https://wilsonlawgroup.com/ancillary-probate-when-is-it-used-where-it-occurs-and-how-to-voidit/ (last visited Oct. 20, 2024) [https://perma.cc/GA8R-57R4].

279. *Id.*

280. *See* discussion *supra* Parts IV, V.

281. Thomas M. Featherston, Jr., *Wills and Revocable Trusts – What's Best for the Client?*, Intermediate Estate Planning, Guardianship & Elder L. Conf. The Univ. of Tex. L. Sch., 1, 1–4 (2011).

282. *See generally* Steven D. Lerner, Comment, *The Need For Reform In Multistate Estate Administration*, 55 TEX. L. REV. 303, 313 (1977).

283. *See* Arielle M. Prangner, *Just A Will Won't Cut It: Planning for The Transfer of Non-Probate Assets At Death*, 14 EST. PLAN. & COMTY. PROP. J. 55, 98 (2008).

of ancillary probate, even if it does not eliminate the interstate multijurisdictional estate administration concerns entirely.[284]

### *1. Making Real Property Interests into Personal Property*

While not always the most advantageous decision for purposes of taxation (both income and capital gains) or marital property law, it is also possible to avoid ancillary estate administration by converting a real property interest into personal property.[285] With the creation of a legal entity, such as a limited partnership or limited liability company, any real property interests placed inside the entity are then owned by the entity thus created and funded, and the non-domiciliary client holds a personal property interest in the entity.[286] This effective change in the nature of the assets can avoid any need for ancillary probate if the non-domiciliary client holds no legal interest in record title at their death.[287]

### *2. Changing the Nature of the Ownership*

While it is possible in Texas for two or more persons who jointly hold an interest in property (other than community property) to agree in writing that their real property interest shall transfer to the surviving joint owner, it has historically been rare.[288] This rarity may be almost entirely explained by the fact that the creation of a joint tenancy with rights of survivorship precludes holding the property in the community estate and, therefore, may not be advantageous for other reasons.[289] However, a deed may be sufficient as an agreement in writing for property that is not community property if it is signed by all tenants.[290]

Also, under a community property survivorship agreement, spouses can agree in writing that their community property and rights shall pass to the surviving spouse.[291]

---

284. *See* discussion *supra* Section III.B; author's original thought.

285. *See The Impact of Texas Probate Laws on Out-of-State Assets*, THE HATCHETT L. FIRM (Feb. 8, 2024), https://hatchettlegalteam.com/the-impact-of-texas-probate-laws-on-out-of-state-assets/ [https://perma.cc/653L-8K3J].

286. *Id.*

287. *Id.*

288. *See* TEXAS EST. CODE ANN. § 111.001.

289. *See* James Chen, *What Are Joint Tenants With Right of Survivorship (JTWROS)?*, INVESTOPEDIA (Apr. 21, 2024), https://www.investopedia.com/terms/j/jtwros.asp [https://perma.cc/V2EV-F2QS].

290. *See* Wagenschein v. Ehlinger, 581 S.W.3d 851, 856–57 (Tex. App.—Corpus Christi 2019, pet. denied).

291. TEX. EST. CODE ANN. § 112.051.

### *C. Non-Testamentary Transfers*

As it relates to real property interests and the avoidance of interstate multijurisdictional estate administration issues, there are tools available in some jurisdictions to provide for a non-testamentary transfer of the interest that will avoid the need for ancillary probate.[292]

#### *1. Transfer on Death Deeds*

One method of non-probate transfer of real property interests is through a transfer on death deed (TODD) or a similar instrument, as authorized by the jurisdiction in which the real property lies.[293] Presently, twenty-one jurisdictions have enacted the Uniform Law Commission's Real Property Transfer on Death Act (RPTODA).[294] As allowed under the laws of these jurisdictions, a non-testamentary transfer can be accomplished by the recording of a TODD that states the beneficiary of the property at the death of the owner.[295] These instruments are revocable during the life of the owner.[296] They also have no effect upon the rights or interests of the owner during their lifetime.[297] Further, the property passes to the beneficiary upon the death of the owner.[298]

#### *2. Lady Bird Deeds*

Another long standing technique to avoid the necessity of probate is the use of an enhanced life estate deed, or a Lady Bird deed.[299] Although often used in the context of benefits planning, it can also be an effective probate avoidance technique.[300] For an enhanced life estate deed, the owner executes a revocable deed naming one or more persons to receive the real property when the owner dies.[301] Because the owner does not actually transfer any

---

292. *See* Joshua Reinertson, *Ancillary Probates*, REED LONGYEAR (Mar. 29, 2022), https://reedlongyearlaw.com/blog/ancillary-probates/ [https://perma.cc/AUP6-5USU].

293. *See Underwriting Manual: Transfer on Death Deeds*, STEWART, https://www.virtualunderwriter.com/en/underwriting-manuals/2022-3/19-34-transfer-on-death-deeds-.html (last visited Oct. 17, 2024) [https://perma.cc/2APL-APKM].

294. *Real Property Transfer on Death Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a4be2b9b-5129-448a-a761-a5503b37d884 (last visited Oct. 20, 2024) (listing states that have enacted the Real Property Transfer on Death Act) [https://perma.cc/GKA5-UKXQ].

295. *See* URPTODA § 5 (UNIF. L. COMM'N 2009); *see also* TEX. EST. CODE ANN. § 114.102(2).

296. URPTODA § 6 (UNIF. L. COMM'N 2009).

297. *Id.* § 12.

298. *Id.* § 13.

299. *What is a Lady Bird Deed?*, TEX. STATE L. LIBR. (July 23, 2024), https://www.sll.texas.gov/faqs/what-is-a-lady-bird-deed/ [https://perma.cc/Y4UJ-H3FU].

300. *Id.*

301. *Id.*

interest when the deed is signed, the owner remains the full owner of the real property and is not a life tenant.[302] Upon the death of the owner, full title vests in the named beneficiaries, provided the owner did not amend or revoke the deed.[303] The concept of vesting subject to divestment under a Lady Bird deed was upheld in a recent case.[304]

## VII. ETHICAL CONSIDERATIONS IN MULTIJURISDICTIONAL ESTATE ADMINISTRATIONS

Any time that a practice approaches the border of another state, incoming or outgoing, the opportunities to run afoul of the limits of bar admissions become a serious consideration.[305] Often, failure to respect the territorial limits of the practice of law can lead to unforeseen legal consequences to the client, which can further mean the potential for liability or disciplinary issues for the attorney.[306] This Part discusses, in broad terms, the potential ethical considerations in interstate multijurisdictional estate administrations.[307]

For the purposes of this Article, we examine the language of the American Bar Association's Model Rules of Professional Conduct (MRPC).[308] All fifty states, the District of Columbia, and several territories have used the MRPC to craft local rules with relevant omissions and additions by each jurisdiction.[309]

### *A. Practice of Law by Non-Admitted Attorneys*

MRPC 5.5 is the rule on the unauthorized practice of law and multijurisdictional practice of law.[310] Specifically, Rule 5.5 states "[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."[311]

---

302. *Id.*

303. Rania Combs, *What is a Lady Bird Deed?*, RANIA COMBS L., PLLC (Oct. 15, 2020), https://raniacombslaw.com/resources/what-is-a-lady-bird-deed [https://perma.cc/ZU5N-3BVE].

304. *See In re* Estate of Turner*,* No. 06-17-00071-CV, 2017 WL 6062655, at *3 (Tex. App.—Texarkana Dec. 8, 2017, pet. denied) (mem. op.).

305. *Real Property, Probate, and Trust Law Section Comments on Multijurisdictional Practice-Center for Professional Responsibility*, AM. BAR ASS'N (Jan. 23, 2001), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/mjp_comm_srppt2/ [https://perma.cc/W7NA-ZGN2].

306. *Id.*

307. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (discussing the ethical rules lawyers are bound to follow).

308. *Id.*

309. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/C7ZB-Z7CC].

310. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 1983).

311. *Id.* at r. 5.5(a).

Further, Comment [1] expounds that a "lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice."[312] However, Comment [2] notes that "[t]he definition of the practice of law is established by law and varies" from jurisdiction to jurisdiction.[313]

### *1. Texas Definition of the Practice of Law*

In Texas, the practice of law means:

> the 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.[314]

However, subsection (b) makes clear that the definition is not exclusive, nor does it deprive the Texas Supreme Court of its power and authority to determine whether other services or acts, not expressly listed, also constitute the practice of law.[315] "The practice of law embraces, in general, all advice to clients and all action taken for them in matters connected with the law."[316]

Further, as it relates to estate planning, and by extension estate administration, Texas courts have held the preparation of wills, trusts, and related areas of the law with special reverence.[317] "Because a will secures legal rights and involves the giving of advice requiring the use of legal skill or knowledge, the preparation of a will involves the practice of law."[318]

Additionally, agreeing not to appear before a tribunal may not be enough to insulate an attorney from discipline or liability.[319] The mere

---

312. *Id.* at r. 5.5 cmt. 1.

313. *Id.* at r. 5.5 cmt. 2.

314. TEX. GOV'T CODE ANN. § 81.101(a); TEX. PENAL CODE ANN. § 38.123 (stating that the unauthorized practice of law is a criminal offense).

315. *Id.* § 81.101(b).

316. Crain v. Unauthorized Prac. of L. Comm. of Sup. Ct. of Tex., 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (citing Brown v. Unauthorized Prac. of L. Comm., 742 S.W.2d 34, 41 (Tex. App.—Dallas 1987, writ denied)).

317. Palmer v. Unauthorized Prac. of L. Comm. of the State Bar of Tex., 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) ("[t]here is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc.").

318. Fadia v. Unauthorized Prac. of Law Comm., 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992, writ denied) (citing Palmer v. Unauthorized Prac. of L. Comm. of the State Bar of Tex., 438 S.W. 2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); TEX. GOV'T CODE ANN § 81.101.

319. Author's original thought.

drafting or giving advice which touches upon the law of another jurisdiction may be the unauthorized practice of law in and of itself.[320] As noted:

> The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and includes 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.[321]

### *2. Reasoning for Limitation*

"Whatever the definition [of the practice of law], limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[322]

#### *a. Competent Representation*

The primary purpose of unauthorized practice of law statutes is to protect the public from losing or limiting legal rights and remedies due to legal advice or action from incompetent representation.[323] This limitation of unauthorized practice is not limited to those without any legal knowledge or training, but also those without specific knowledge or training in the law of the jurisdiction at issue.[324] Just as legal representation by persons who have not been trained in the law can significantly limit the rights of an individual or entity, so too can action taken by attorneys admitted in another jurisdiction, not because of their lack of skill, but because of their lack of knowledge of the unique aspects of legal practice in that jurisdiction.[325] Therefore, the rendition of competent legal representation, further discussed in Section VII.D below, requires a level of knowledge and skill, the baseline of which is subject to policing by the jurisdiction in question.[326]

---

320. *Id.*

321. Davies v. Unauthorized Prac. Comm. of State Bar of Tex., 431 S.W.2d 590, 593 (Tex. App.—Tyler 1968, writ ref'd n.r.e.).

322. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2024).

323. Brown v. Unauthorized Prac. of L. Comm., 742 S.W. 2d 34, 41-42 (Tex. App.—Dallas 1987, writ denied).

324. *See* TEX. GOV'T CODE ANN. § 81.102.

325. *See* Charles D. Fox IV*, Is Crossing State Lines Ethically Challenging to Estate Planners?*, 33 UNIV. OF MIA. CTR. ON EST. PLAN. Ch. 15 (1999).

326. *See infra* Section VII.D.

#### *b. Ethical Representation*

Aside from the legal competence to handle any matter, there are also ethical considerations to limiting the practice of law to those admitted in each jurisdiction.[327] A locally admitted attorney has met all ethical standards to practice in that jurisdiction and has sworn their oath to follow the constitution, laws, and rules of the jurisdiction.[328] Further, knowledge of the local court or practice customs makes one a more ethical and effective attorney.[329]

### *3. Reasoning as It Relates to Multijurisdictional Practice*

There are many resources on the reasoning of limited allowance of the practice of law by attorneys admitted and in good standing in other jurisdictions.[330] Fundamentally, Model Rule 5.5 of Professional Conduct strikes a balance between protecting the public from incompetent representation while also allowing the public to hire their attorney of choice and potentially minimize costs, thereby allowing multijurisdictional practice in limited circumstances when there is no "unreasonable risk to the interests of [the lawyer's] clients, the public[,] or the courts."[331]

## *B. Multijurisdictional Practice of Law and the Unauthorized Practice of Law*

Relating specifically to the authorization of an attorney licensed to practice in one state to provide services in another state, MRPC 5.5 allows an attorney "admitted in another United States Jurisdiction, and not disbarred or suspended from practice in any jurisdiction" to provide legal services within another jurisdiction in two instances most relevant to estate administration.[332]

### *1. Admittance for Court Appearances*

Pursuant to MRPC 5.5(c), a qualified out-of-state attorney may seek temporary admittance when the representation is:

---

327. Author's original thought.

328. *Oath of Truth: Understanding the Swearing-In Process for Lawyers,* KING L., https://reyabogado.com/us/do-lawyers-swear-to-tell-the-trust/ (last visited Nov. 11, 2024) [https://perma.cc/LZ22-TUDA].

329. *See, e.g.*, E.D. TEX. L.R. ATTY. r. 2.

330. *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 678 (1995).

331. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 5 (AM. BAR ASS'N 2024).

332. *Id.* at r. 5.5(c); *see generally State Implementation of ABA Policies*, AM. BAR ASS'N 1, 1–39 (Oct. 27, 2010), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/recommedations.pdf (for a list of states that have implemented the American Bar Associations Multijurisdictional Practice Policies) [https://perma.cc/N2WU-QZPQ].

> (1) . . . undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> (2) . . . 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; [or]
> (3) . . . 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 and are not services for which the forum requires pro hac vice admission . . .[333]

Comment [6] to MRPC 5.5 notes the lack of any single test to determine whether an attorney's services are "temporary."[334] However, the comment continues stating that the services "may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation."[335]

So long as it is on a temporary basis, Subparagraph (c) allows a non-admitted attorney to represent a client before a tribunal subject to admittance *pro hac vice* before a tribunal outside their jurisdiction of admittance.[336] Therefore, an attorney asked to assist or handle an estate administration that has multijurisdictional issues may provide related services in preparation of an appearance pursuant to this rule.[337] "While this exception is available to allow the lawyer to investigate the matter before seeking admission, the lawyer should not rely on the exception except where necessary. Instead, the lawyer should seek and obtain admission *pro hac vice* at the earliest opportunity."[338]

### *2. Estate Planning or Other Transactional Representation*

Further, pursuant to MRPC 5.5(c)(4), a qualified out-of-state attorney may provide legal services in another jurisdiction without admittance as it relates to transactional work as well.[339] This may occur in situations that are "(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are

---

333. *Id*.
334. *Id.* at cmt. 6.
335. *Id.*
336. *Id.*
337. *See id.*
338. AM. COLL. OF TR. & EST. COUNS., Commentary, *The ACTEC Commentaries on the Model Rules of Professional Conduct* 1, 215 (2023).
339. MODEL RULES OF PRO. CONDUCT r. 5.5(c)(4) (AM. BAR ASS'N. 2024).

reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[340]

*a. Related to Out-of-State Practice*

While MRPC 5.5(c)(4) allows a non-admitted attorney to provide legal services outside of a tribunal, Comment [14] elaborates that it is required "that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted."[341] Comment [14] continues by explaining that a variety of factors can be used to establish the requisite connection between a lawyer's practice in a jurisdiction where they are admitted and the services requested elsewhere, such as: (1) "The lawyer's client may have been previously represented by the lawyer[;]" (2) "[the client] may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted[;]"(3)"[t]he matter, although involving other jurisdictions, may have a significant connection with that jurisdiction [where the attorney is admitted;]" (4) "significant aspects of the lawyer's work might be conducted in [the] jurisdiction [where the attorney is admitted], or a significant aspect of the matter may involve the law of that jurisdiction[;] and (5) "the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform . . . law."[342]

Although the list is not exhaustive, it provides further insight into the purpose of MRPC 5.5, and Comment [14] recognizes the extent to which many areas of the law are based upon federal law.[343] Therefore, services rendered by a qualified Texas attorney or lawyer on issues of implementation of federal estate and gift tax planning, through estate administration, may provide an attorney with an opportunity to counsel on similar issues when assisting with estate administration for clients with out-of-state property.[344]

> In addition, since this exception is based on 'recognized expertise,' a lawyer who chooses to rely on this exception should take steps to [e]nsure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer's expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise.[345]

340. *Id.*
341. *Id.* at cmt. 14.
342. *Id.*
343. *Id.*
344. *See id.*
345. AM. COLL. OF TR. & EST. COUNS., *supra* note 338, at 214.

### *b. Authorized by Federal Law*

An attorney providing legal services regarding estate administration often represents clients in disputes with the Internal Revenue Service.[346] "[A]n attorney . . . may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that [they are] currently qualified as an attorney and [are] authorized to represent the party or parties."[347] In addition, an attorney may practice before the United States Tax Court by complying with its requirements for admission.[348] Notably:

> Pursuant to paragraph (d)(2) of MRPC 5.5, a lawyer who is authorized to practice before the IRS or the Tax Court would be able to practice in any non-admitted jurisdiction adopting MRPC 5.5(d)(2). Moreover, unlike MRPC 5.5(c) there is no requirement that the practice in the non-admitted jurisdiction be on a "temporary basis" . . . . While the text of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which a lawyer can qualify to practice before the Tax Court or the IRS, the lawyer should consider seeking an opinion of the non-admitted jurisdiction's bar counsel.[349]

## *C. Duty to Disclose*

Comment [20] to MRPC 5.5 notes that, in some circumstances, a lawyer practicing law in a jurisdiction in which they are not admitted "may have to inform the client that [they] are not licensed to practice law in that jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction."[350] Reference is subsequently made to MRPC 1.4, wherein an attorney is obligated to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[351]

> Under MRPC 5.5, a lawyer engaged in a multijurisdictional practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted to practice law. Thus, if a lawyer intends to render services in or concerning a jurisdiction in which the lawyer is not admitted to practice law, the lawyer should consider the need to obtain the client's informed consent to do so.[352]

---

346. Author's original thought.
347. 31 C.F.R. §10.3(a) (2011).
348. U.S. TAX CT. R. 200.
349. AM. COLL. OF TR. & EST. COUNS., *supra*, note 338, at 216.
350. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 20 (AM. BAR ASS'N. 2024).
351. *Id.* at r. 1.4, r. 5.5(b).
352. AM. COLL. OF TR. & EST. COUNS., *supra* note 338, at 211.

### *D. Duty of Competence*

After an attorney decides to provide any legal advice or service related to the law of another jurisdiction, the non-admitted attorney has subjected themselves to the rules of the jurisdiction at issue.[353] "Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer remains subject to all other ethical provisions of the MRPC. In particular . . . the lawyer must provide competent representation regarding the laws and rules applicable in the non-admitted jurisdiction."[354] "A[n attorney] who initially lacks the skill or knowledge required to meet the needs of a particular client may overcome that inadequacy through additional research and study."[355] The fundamental bedrock of the unauthorized practice of law is to prevent representation of the public by unqualified individuals.[356] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[357]

An attorney, in determining whether he or she is capable of providing competent representation as it relates to legal knowledge and skill for a matter, may look to the following relevant factors: (1) "[T]he relative complexity and specialized nature of the matter[; (2)] the lawyer's general experience[; (3)] the lawyer's training and experience in the field in question[; (4)] the preparation and study the lawyer is able to give the matter[; (5)] and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."[358]

### *E. Subject to Disciplinary Authority in Both Jurisdictions*

An attorney who has not been admitted into practice in a jurisdiction nevertheless becomes subject to discipline in that jurisdiction when the attorney "provides or offers to provide any legal services in this jurisdiction."[359] This includes attorneys representing clients within the "safe harbor" of MRPC 5.5.[360] In addition to disciplinary action in the jurisdiction where the attorney was not admitted, an attorney may be subject to discipline

353. *Id.*
354. *Id.*
355. *Id.* at 15.
356. *See id.* at 210 (discussing the unauthorized practice of law); *see also* MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N. 2024) ("limiting the practice of law to members of the bar protects the public . . . ").
357. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N. 2024).
358. *Id.* at r. 1.1 cmt. 1.
359. *Id.* at r. 8.5.
360. *See id.* at r. 5.5 cmt. 19.

in the jurisdiction(s) in which they are admitted for the same facts and circumstances.[361]

> This . . . affirms the long-standing . . . principle that a lawyer licensed in a jurisdiction is subject to the disciplinary authority of that jurisdiction no matter where the lawyer's conduct occurred. Thus, if a lawyer engages or attempts to engage in unauthorized practice in a jurisdiction where he or she is not admitted, the jurisdiction where the lawyer is admitted will be able to initiate disciplinary proceedings against the lawyer under MRPC 5.5 (unauthorized practice) and 8.4(a) (violating or attempting to violate a rule oneself or assisting or inducing another to do so).[362]

## VIII. CONCLUSION

With the ever-increasing ease of travel since the foundation of our republic comes an ever-increasing number of estates with interstate multijurisdictional estate administration concerns.[363] Although these considerations, when representing clients with multijurisdictional estate administration issues, are specific to the jurisdictions involved, hopefully this Article has provided a general framework for thinking about multijurisdictional estate administration issues and ways to improve your practice with those clients unwilling to be bound by the imaginary jurisdictional lines of the fifty states.[364]

361. *Id.* at r. 8.5.
362. AM. COLL. OF TR. & EST. COUNS., *supra* note 338, at 210.
363. Author's original thought.
364. *Id.*