SPECIAL INSTRUCTION 91—ANCILLARY PROBATE (AP) OR RECORDING (RW) OF WILLS PREVIOUSLY PROBATED ELSEWHERE

The will of a decedent who was not domiciled in Texas at the time of death may be admitted to probate in Texas pursuant to Estates Code, Chapters 501 and 502, if the will affects property in Texas, including litigation here. Estates Code, Sections 501.001(1) and 502.001(a)(1). If administration is necessary and the will has been probated in another state or a foreign country, it may be admitted to ancillary probate in Texas. *See* Estates Code, Chapter 501 (Ancillary Probate of Foreign Will). Original probate is also available in certain circumstances. *See* Estates Code, Chapter 502 (Original Probate of Foreign Will), and the discussion in Special Instruction 15—Jurisdiction and Venue.

If no administration is necessary and the only concern is to have the Texas real property records reflect the ownership of bequeathed real estate, a simple procedure for recording a will that has been probated in another state or a foreign country can be used. *See* Estates Code, Chapter 503 (Recording of Foreign Testamentary Instrument).

Informative coverage of considerations and procedures involving foreign wills is contained in "Administration of the Estate with Cross Border Issues" by R. Glenn Davis, 2014 Advanced Estate Planning and Probate Course, State Bar of Texas.

Ancillary Probate

The will of a decedent who was not domiciled in Texas at the time of death that would affect any real or personal property in Texas may be admitted to ancillary probate at any time on proof that it was probated or otherwise established in another state or a foreign country. Estates Code, Section 501.001. The general four-year limit does not apply to a foreign will. Estates Code, Section 256.003. The procedure for ancillary probate depends on whether the will was probated in the jurisdiction in which decedent was domiciled at time of death or in another jurisdiction. Ancillary probate of a will probated in a nondomiciliary jurisdiction is beyond the scope of this System.

If the will was admitted to probate in decedent's domiciliary jurisdiction, the application need only indicate that Texas probate is requested on the basis of the authenticated copy of the foreign probate proceedings, and no citation or notice is required. Estates Code, Sections 501.002(a) and 501.003(a). The application must include a copy of the foreign will and the order admitting it to probate, attested and certified as required by Estates Code, Section 501.002(c).

The clerk must record in the judge's probate docket, without the necessity of a court order, the foreign will and evidence of its probate. Estates Code, Section 501.004(a), (c). When the foreign will has been filed and recorded in the probate docket, it is considered to be admitted to probate and has the same effect as if the original will had been admitted to probate by a Texas court. Estates Code, Section 501.005.

When dealing with foreign estates or beneficiaries, U.S. banks, brokers, and life insurance companies may insist on an apostille or acknowledgment before a U.S. consular official before distributing nonprobate assets to named beneficiaries. Either an apostille or acknowledgment before a U.S. consular official is also sufficient when authenticating a will or order from another country. It is permissible, and simpler, however, to use a local notary. Whenever a will, order, or other document is in a foreign language, attach sworn translations of the document and each notarial certificate or stamp. *Cf.* Civil Practice & Remedies Code, Section 121.001; Property Code, Section 11.002. More cumbersome procedures will be necessary in a contest, where the rules of evidence may be strictly enforced. See "Administration of the Estate with Cross Border Issues" by R. Glenn Davis, 2014 Advanced Estate Planning and Probate Course, State Bar of Texas, at 9 ("Probate of Wills Written in a Foreign Language").

An executor named in a foreign will admitted to ancillary probate in Texas is entitled to ancillary letters testamentary on proof that the executor has qualified in the foreign jurisdiction and is not disqualified from serving in Texas (Estates Code, Section 501.006(a)(1), (2)) and that there is a necessity for administration in Texas. If the will is admitted to ancillary probate in Texas after the fourth anniversary of decedent's death, proof must also be made that the executor continues to serve as executor in the foreign jurisdiction. Estates Code, Section 501.006(a)(3). A court order directing

issuance of ancillary letters testamentary to the executor is to be entered when that proof is made. Estates Code, Section 501.006(b). This System calls for attaching to the application for ancillary letters an authenticated copy of the letters testamentary from the original jurisdiction to prove the executor's qualification. Other facts may be established by affidavit. Local practice may require a hearing. The Estates Code does not.

If the will does not appoint the executor as an independent executor but the foreign jurisdiction allowed the personal representative to serve independently, the Texas court generally will also allow an independent administration. If the foreign jurisdiction does not allow independent administration but independence is warranted, the appropriate procedure would be to obtain consent of all the distributees pursuant to Estates Code, Sections 401.002 and 401.004 through 401.006.

The Code is unclear, but this System assumes that on issuance of ancillary letters testamentary to the executor the usual requirements and exceptions apply for an oath, bond, inventory, and notice to beneficiaries and creditors.

Following ancillary probate under Estates Code, Section 501.002, a foreign personal representative need not apply for letters testamentary under Estates Code, Section 501.006, to prosecute a wrongful death or survival action. Civil Practice & Remedies Code, Sections 71.012 and 71.022. If ancillary letters are not sought, the relevant forms, letters, and procedures in the System must be altered accordingly.

Procedures for ancillary administration begin at Item 44 of the Checkplan.

Recording in Deed Records

A copy of a will that conveys or disposes of Texas real estate and that has been probated in another state or a foreign country, together with a copy of the order admitting it to probate in the foreign jurisdiction, may be filed in the deed records in any Texas county in which the real estate is located. Estates Code, Section 503.001(a). Certified copies are inadequate. Instead, both the will and the order should be authenticated according to Estates Code, Section 501.002(c). Estates Code, Section 503.001(b). The original signatures required by Section 501.002(c) are not required, however, for this recordation procedure. Estates Code, Section 503.002. The recorded documents function as a conveyance and as notice of title. Estates Code, Sections 503.051 through 503.052.

Review "Ancillary Probate," above, for considerations in authenticating and, if necessary, translating the will and order.

If the recorded will gives the executor the power to sell property located in Texas, no court order is needed to authorize a sale and conveyance by the executor, although any specific directions in the will concerning the sale of estate property must be followed unless annulled or suspended by court order. Estates Code, Section 505.052.

Procedures for recording the will in the deed records are at Item 45 of the Checkplan.