NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Trusts & Estates Law Section Annual Meeting
Estate Planning Across Borders: A Guide for the Perplexed
January 16, 2019 | New York Hilton Midtown, New York City

Name:____
(please print)

I certify that I was present for the entire presentation of this program

Signature:____Date:_______________

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

Estate Planning Across Borders: A Guide for the Perplexed

Trusts & Estates Law Section

January 16, 2019

New York Hilton Midtown

New York, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
www.nysba.org/TrustsMaterialsAM2019

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **Trusts & Estates Law Section Annual Meeting Program**
Date/s: January 16, 2019 Location: New York, NY

Evaluation:

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **3.0 New York CLE credit hours**

Credit Category:
3.0 Areas of Professional Practice

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via recording or webcast should refer to www.nycourts.gov/attorneys/cle regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

Trusts and Estates Law Section

Estate Planning Across Borders: A Guide for the Perplexed

Wednesday, January 16, 2019 | 9:00 a.m.

New York Hilton Midtown | Ballroom East, Third Floor

3.0 Credits

3.0 Areas of Professional Practice

This program is transitional and is suitable for all attorneys including those newly admitted.

Reception & Lunch

12:00 p.m. | Ballroom East Foyer, Third Floor

Agenda

9:00 a.m. – 9:10 a.m. **Welcoming Remarks**

Natalia Murphy, Esq. | Section Chair

Carl A. Merino, Esq. | Program Chair

9:10 a.m. – 10:00 a.m. **Introduction to International Estate Planning**

Domestic estate planners are increasingly encountering "international" fact patterns: a U.S. client may come to you for advice on the tax implications of a gift from a foreign relative or trust; a U.S. citizen living abroad or holding foreign assets may need advice on tax and reporting issues; a U.S. citizen client may be about to marry a citizen or resident of another country; or a non-U.S. client may need assistance with planned gifts and restructuring investments before moving to the U.S. This portion of the program will introduce attendees to basic concepts and frequently encountered fact patterns in international estate planning, including the impact of the Tax Cuts and Jobs Act of 2017 on common planning scenarios.

Speaker:
G. Warren Whitaker, Esq.
Day Pitney LLP
New York, NY

(1.0 Credit in Areas of Professional Practice)

10:00 a.m. – 10:50 a.m. **Till Death (or Divorce) Do Us Part: Planning for a Noncitizen Spouse**

The international scenario most frequently encountered by practitioners is the noncitizen or nonresident spouse. Different income, gift and estate tax rules come into play when either or both spouses is a non-U.S. person. Among other things, the unlimited marital deduction for outright bequests and gifts is available only if the recipient spouse is a U.S. citizen; the income tax exclusion for property transfers between spouses is available only if the recipient spouse is a U.S. citizen or resident; and a U.S. citizen or resident cannot file a joint return with a nonresident alien unless the nonresident spouse elects to be taxed as a U.S. resident.

This portion of the program will walk through common planning scenarios (and traps for the unwary) for noncitizen and mixed nationality couples, including the use of qualified domestic trusts and property separation issues.

Speakers:
Megan R. Worrell, Esq.
Duane Morris LLP
New York, NY

Rashad Wareh, Esq.
Kozusko Harris Duncan
New York, NY

(1.0 Credit in Areas of Professional Practice)

10:50 a.m. – 11:05 a.m. **Break**

11:05 a.m. - 12:00 p.m. **Whose Law is it Anyway?**

As taxpayers become increasingly mobile, their assets may become as far-flung as the countries they've visited. Practitioners frequently have to contend with estates scattered across multiple jurisdictions. This not only requires coordination with tax and probate counsel in other countries, but often raises questions about which law governs, particularly when it comes to intangible property. This portion of the program will focus on cross-border estate administration and choice of law issues that can arise where multiple countries have jurisdiction over portions of a decedent's estate. Among other issues that will be addressed are the use of choice of law provisions in wills and trusts, whether clients should have separate wills for different jurisdictions where they own property and when New York courts will apply the laws of another jurisdiction.

Speakers:
Michael W. Galligan, Esq.
Phillips Nizer LLP
New York, NY

Sean R. Weissbart, Esq.
Morris & McVeigh LLP
New York, NY

(1.0 Credit in Areas of Professional Practice)

12:00 p.m. – 12:45 p.m. **Cocktail Reception**
East Ballroom Foyer

12:45 p.m. – 2:00 p.m. **Luncheon**
Ballroom East

6:00 p.m. – 8:00 p.m. **Off-Site Reception** (Pre-Registration Required)
The Century Association, 7W 43rd street, NYC

The Trusts and Estates Law Section gratefully acknowledges the support of our off-site reception sponsors:

BERKSHIRE HATHAWAY HomeServices

DOYLE

SECTION CHAIR
Natalia Murphy, Esq. | Citi Private Bank | New York, NY

PROGRAM CHAIR
Carl A. Merino, Esq. | Day Pitney LLP | New York, NY

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Trusts and Estates Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Trusts and Estates Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name ______________________________

Address ______________________________

____

City ____________ State ____ Zip ____________

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name ______________________________

Address ______________________________

City ____________ State ____ Zip ____________

Office phone (______) ______________________

Home phone (______) ______________________

Fax number (______) ______________________

E-mail address ______________________________

Date of birth ______ /______ /______

Law school ______________________________

Graduation date __________

States and dates of admission to Bar: ______________

Please return this application to:

MEMBER RESOURCE CENTER,

New York State Bar Association, One Elk Street, Albany NY 12207

Phone 800.582.2452/518.463.3200 • FAX 518.463.5993

E-mail mrc@nysba.org • www.nysba.org

Join a Trusts and Estates Law Section Committee(s)

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Charitable Planning (TRUS1100)
___ Continuing Legal Education (TRUS1020)
___ Diversity (TRUS2800)
___ Elderly and Disabled (TRUS1700)
___ Estate and Trust Administration (TRUS1400)
___ Estate Litigation (TRUS1200)
___ Estate Planning (TRUS1300)
___ International Estate Planning (TRUS1600)
___ Legislation and Governmental Relations (TRUS1030)
___ Life Insurance and Employee Benefits (TRUS1800)
___ Membership and Law Students (TRUS1040)
___ Multi-State Practice (TRUS2400)
___ Newsletter and Publications (TRUS1900)
___ New York Uniform Trust Code (TRUS2900)
___ Practice and Ethics (TRUS2100)
___ Surrogates Court (TRUS2200)
___ Taxation (TRUS2300)
___ Technology in Practice (TRUS2500)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state.
Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60
ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP	
Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60
OTHER	
Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

Introduction to International Estate Planning

G. Warren Whitaker, Esq.
Day Pitney LLP | New York, NY

INTRODUCTION TO INTERNATIONAL ESTATE PLANNING

G. Warren Whitaker

New York State Bar Association
Trusts and Estates Law Section
January 16, 2019

DAY PITNEY LLP

I. US AND NON-US PERSONS

DAY PITNEY LLP

Who is a US Person?

- An individual is a US person if he or she is either a US citizen (including those with dual citizenship), regardless of residence, or a US resident, regardless of citizenship.
- Different rules apply for purposes of determining whether an individual is a US resident for income tax purposes than for purposes of establishing residence status for estate, gift and generation-skipping transfer tax purposes.

Who is a US Person?

- US Resident for Income Tax Purposes
  - A green card holder (lawful permanent resident)
  - A person who satisfies the "substantial presence" test:
    - 183 days present in the US on a "weighted" basis, taking into account all days present during the current calendar year, 1/3 of the days present during the immediately preceding calendar year and 1/6 of the days present during the second preceding calendar year.
    - This averages out to approximately 122 days per year
  - Certain exceptions:
    - Student visas, diplomatic visas, international orgs. (UN)
    - Closer connection test
    - Treaty "tie-breaker" rules

Who is a US Person?

- US Resident for Income Tax Purposes (cont.)
  - Code-based exceptions to the substantial presence test:
    - The normal day-counting rules are suspended for students, teachers, trainees, professional athletes and certain diplomatic staff, as well as for individuals who intended to leave the US, but who were unable to do so because of a *non-preexisting* medical condition.
    - An individual who otherwise is a resident under the substantial presence test but who is present in the US for less than 183 days during a calendar year can still claim nonresident status by filing IRS Form 8840 ("Closer Connection Exception Statement for Aliens") establishing that he or she maintains a tax home in another country and has a closer connection to that country than to the US.

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Who is a US Person?

- US Resident for Income Tax Purposes (cont.)
  - Treaty tie-breaker rules:
    - An individual who is present in the US for 183 days or more during a calendar year may still be able to determine his or her income tax liability as a nonresident alien if he or she is a dual resident of the US and a treaty country and is eligible to claim residence of the other treaty country under the “tie-breaker” provision in the treaty.
    - These provisions generally look to the location of the individual’s permanent home or center of vital interests, where he or she maintains an habitual abode, and then citizenship. If these tests are conclusive, the matter goes to the competent authorities.
    - *Planning Point:* This can be an important fallback when a client overstays his or her day-count.
    - ***Caution:*** A green card holder who tie breaks under a treaty is committing an expatriating act if he or she is a long-term resident.

Who is a US Person?

- US Resident for Estate and Gift Tax Purposes
  - A person whose primary residence or “domicile” is in the United States. An individual is a US domiciliary if he or she lives in the United States and has no definite present intent to leave, as shown by the surrounding facts and circumstances.
  - There is no equivalent to the substantial presence test.
  - An individual can become a US resident for income tax purposes under the substantial presence test without becoming a resident for estate and gift tax purposes if he or she does not intend to remain indefinitely.
  - Applying for a green card is a strong factor suggesting an intent to remain, but a person can change their mind.

Who is a US Person?

- US Resident for Estate and Gift Tax Purposes (cont.)
  - An individual's domicile may be modified by an estate or gift tax treaty. Typically, these provisions provide more bright-line rules for when an individual from another country is considered to be domiciled in the US or in the other treaty country.
  - Examples:
    - US-France Treaty provides that an individual domiciled in both countries, but a citizen of only one, is deemed domiciled only in the country of citizenship if he or she was domiciled less than 5 years in the other country during the 7-year period prior to death or transfer.
    - US-UK Treaty provides that UK national domiciled in both countries shall be deemed to be domiciled in the UK if he or she had not been resident in the US for federal income tax purposes in 7 or more of the 10 taxable years ending with the year in which the transfer occurs. There is a reciprocal rule for the treatment of a US national.

Taxation of US Persons: Overview

- Income Taxes:
  - US citizens and residents are subject to US income taxation on their worldwide income.
- Estate and Gift Taxes:
  - US citizens and residents are subject to gift, estate and generation-skipping transfer taxation on their worldwide assets, but with an $11.4 million lifetime exemption (2019 figure).
- GST Tax:
  - Bequests and completed gifts by US persons to persons beyond G2 or trusts that benefit such persons are subject to GST tax (unless settlor applies a portion of his or her lifetime exemption).

US Citizen Who Resides Abroad

- Same US taxation for income and estate tax purposes as for US citizen residing in the US.
  - ***Planning Point:*** Some states, including New York, may impose income tax on the basis of domicile, but New York has a special safe harbor for eligible individuals who live abroad.
- US citizens living abroad may exclude the first $105,900 of foreign earned income from US income taxation. This amount (for 2019) is indexed for inflation.
- Foreign tax credits may be available for foreign income and estate taxes paid.
  - The US generally does not allow a credit for foreign gift taxes, some treaties do provide for such a credit.
  - There is no credit for foreign wealth taxes.

Reporting of Foreign Assets and Trusts

- Form 3520:
  - Creation, loans, distributions from foreign trust
  - Gifts, bequests from foreign persons exceeding $100,000 in a calendar year
- FBAR: FinCEN Form 114:
  - Ownership or Signature power over foreign financial accounts
- Form 8938:
  - Statement of Specified Foreign Financial Assets
- Form 5471:
  - Controlled Foreign Corporations
- Form 8621:
  - Passive Foreign Investment Companies

II. INCOME, GIFT AND ESTATE TAXATION OF NON-US PERSONS

DAY PITNEY LLP

Taxation of Non-US Persons: Overview

- Income Taxes:
  - Non-US persons are subject to US income tax only on their US source income and income that is effectively connected with the conduct of a trade or business in the US.
- Estate and Gift Taxes:
  - Non-US persons are subject to estate tax only on US situs assets (with a lifetime exemption of only $60,000) and gift tax only on gifts of real or tangible personal property situated in the US.

Income Taxation of Non-US Individuals

- Nonresident alien individuals are subject to federal income tax on the following types of income:
  - Fixed, Determinable, Annual, or Periodical (FDAP) income (generally US source dividends, interest, rents, royalties and other portfolio income, as well as certain types of services income), which is subject to 30% withholding at the source on a gross basis with no offsetting deductions. Sections 871(a) and 1441 of the US Internal Revenue Code of 1986, as amended (the "Code").
  - Income effectively connected with a US trade or business ("effectively connected income" or "ECI"), taxed at graduated rates of up to 37%. ECI from a qualified trade or business potentially may be eligible for the 20% pass-through deduction. Section 871(b).
  - State income tax regimes vary, but most states tax nonresidents (if at all) only on income from sources within the state.

Income Taxation of Non-US Individuals

- Exceptions for Nonresident Aliens: Reduced rates or outright exemptions apply to certain types of income:
  - "Portfolio interest" from most types of corporate and government bonds (and even loans from natural persons in registered form) are exempt from federal income tax under Section 871(h).
  - Bank deposit interest is similarly exempt under Section 871(i).
  - Taxes on interest, dividends and royalties reduced under treaties.
  - ECI not attributable to a "permanent establishment" in the US may be similarly excluded under a treaty.
  - The 3.8% Medicare tax on net investment income of high income earners does not apply to nonresident aliens.
  - Capital gains (other than from the sale of certain US real property and partnership interests) generally are exempt from federal income tax.

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Income Taxation of Non-US Individuals

- Capital gains – traps for the unwary:
  - *183 Day Rule.* A nonresident present in the US for 183 days or more during a taxable year (e.g., an individual present on a student, diplomatic or other visa that suspends the normal day-counting rules or a dual resident who files as a nonresident pursuant to a “tie breaker” provision in a tax treaty) is subject to federal income tax on gains from the sale of personal property (other than inventory) if his or her “tax home” (generally, his or her place of business) is in the US.
  - *US Real Property.* Gains from the sale of US real property, <u>including interests in certain domestic or foreign partnerships or domestic corporations that own US real property</u>, are taxable as ECI under the Foreign Investment in Real Property Tax Act (“FIRPTA”). However, gains from the sale of personal use or investment property may be eligible for 20% long-term capital gain rates.

Estate and Gift Taxation of Non-US Persons

- Estates of Non-US Decedents:
  - *US Situs Assets.* Noncitizen nondomiciliaries are subject to estate tax only with respect to assets situated in the US ("US situs assets"). The situs rules may be modified by an applicable treaty.
  - *Increased treaty exemption under TCJA.* TCJA only increased the lifetime exemption for US decedents. However, domiciliaries of treaty jurisdictions may be entitled to a prorated share of the increased exemption for US decedents based on the ratio of US situs assets to worldwide assets. For example, if 20% of an eligible decedent's worldwide estate is comprised of US situs assets, the prorated exemption is $2,280,000 in 2019.
  - The unlimited marital deduction is available, but only if the surviving spouse is a US citizen or the property is left to a QDOT.

Estate and Gift Taxation

- Gift Taxation of Non-US Persons:
  - Noncitizen nondomiciliaries are subject to gift tax only with respect to gifts of real and tangible personal property situated in the US. Gifts of intangible property are not subject to gift tax. For instance, there would be no gift tax on a gift of stock in a US corporation even though the same stock could be subject to estate tax if held at death.
  - There is a $15,000 annual exclusion for 2019 ($155,000 for a noncitizen spouse) for gifts of present interests. These thresholds are indexed for inflation. There is no lifetime exemption, but an unlimited marital deduction is available for gifts to a US citizen spouse.
  - ***Planning Point:*** Gifts of cash (possibly including checks) may be subject to gift tax if the cash is in the US at the time of transfer. Any gifts of cash by a non-US person to a US person, including a US trust, should always be made from a non-US account of the donor (ideally to a non-US account of the donee).

GST Taxes and Gifts to Trusts

- Gifts by Non-US Persons: Completed gifts by a non-US person of non-US situs property are not subject to gift or GST tax in the US.
  - ***Planning Point:*** This is a major reason for large gifts of non-US situs property from a non-US person to be made to a Dynasty Trust for US persons, rather than outright.
  - ***Caution:*** If a non-US person settles a trust with US situs assets and retains any strings that could pull the assets back into his or her estate, even if the trust later disposes of all of its US situs assets and replaces them with non-US assets, such assets may still be "tainted" and potentially subject to estate tax under Section 2104(b).

Stock in US Corporations

- Income tax:
  - Dividends paid to a non-US person are subject to withholding at a 30% rate. The rate may be reduced by an applicable treaty.
  - Capital gains from the sale or redemption of stock in a US corporation generally are not taxable to a non-US person unless the corporation is a US real property holding corporation.
- Estate and gift tax:
  - Stock in a US corporation generally is a US situs asset subject to estate tax in the US unless taxing rights are assigned to the decedent's country of domicile under an applicable treaty.
  - Gifts of stock in a US corporation, including shares of a co-op, are not taxable because gifts of intangible property by non-US persons are not subject to gift tax.

Debt from US Issuers

- Interest on debts of US obligors is potentially subject to the 30% withholding tax on FDAP, but interest on most obligations issued after July 18, 1984 is excludable from income in the hands of a non-US person under the "portfolio interest" exception in Code Section 871(h).
  - The exception does not apply to contingent interest or interest paid to someone who owns 10% or more of the voting stock of a corporate issuer or 10% of the capital or profits of a partnership.
  - Interest on bank deposits, including CDs, is also exempt.
- Debts of US issuers generally are US situs assets, but they are not includable in the estate of a non-US decedent who was eligible for the portfolio interest or bank deposit exception with respect to the interest payments per Section 2105(g). Debt obligations generally are not subject to gift tax because they are intangible property.

Partnership Interests

- The earnings of partnerships (including most US limited liability companies) flow up to the owners for income tax purposes.
  - This can trigger federal and state income tax liabilities and return filing obligations for non-US partners and withholding obligations for the partnership.
  - Additionally, under new Sections 864(c)(8) and 1446(f), gains from the disposition of a partnership (US or foreign) may be taxable as effectively connected income and proceeds subject to 10% withholding if a sale by the partnership of its underlying assets for fair market value would give rise to effectively connected gain or loss.

Partnership Interests (cont.)

- Uncertain situs rules:
  - Interests in a foreign partnership arguably are not subject to estate tax in the hands of a non-US decedent, but the law is not settled. There is a risk that the IRS could take an "aggregate" or "look-through" approach and look to the situs of the underlying assets.
  - Gifts of interests in a domestic or foreign partnership generally should be respected as gifts of intangible property.
  - Foreign blocker structures: Some investment funds offer parallel vehicles for US and non-US investors, with US investors going in through a domestic pass-through vehicle to avoid double taxation and the non-US investors purchasing interests in a foreign blocker structure to shield themselves from direct income or estate tax exposure.

US Real Property

- Gains from the sale of real property situated in the US are taxed as ECI under FIRPTA (Section 897). Property held for more than one year as investment property may be eligible for long-term capital gain rates.
- A purchaser buying US real property from a non-US seller generally must withhold 15% of the gross proceeds under Section 1445. However, if this amount exceeds the tax due, the buyer and seller may apply for a withholding certificate from the IRS. Otherwise, the seller can apply for a refund on his or her tax return.
- Rental income is taxed as FDAP at a 30% rate, but a non-US owner can make a “net rent” election under Section 871(d) to treat the rent as ECI. A higher marginal rate may apply, but the owner could deduct property taxes and other expenses against the rental income.

US Real Property (cont.)

- US real property is includable in the estate of a non-US decedent and subject to gift tax if the owner gifts the property while still alive.
- A US corporation whose assets consist primarily of interests in US real property (taking into account worldwide real property and business assets) is considered US real property for purposes of FIRPTA. A non-US person who sells stock in such a corporation is taxable on the gain and the proceeds may be subject to withholding.
  - A US real property holding corporation is a US situs asset, but shares could be gifted by a non-US person without triggering gift tax. Even co-op shares would appear to be respected as intangible property for gift tax purposes.
  - Gifts of an interest in a partnership (domestic or foreign) that holds US real property generally should be treated as a nontaxable gift of intangible property.

US Real Property (cont.)

- *Blocker structures:* A foreign blocker could be used to shield the owner from direct US tax exposure.
  - TCJA reduced corporate tax rates to 21% (not including applicable taxes which may be imposed at the state level), so blocker corporations are more tax-efficient than they used to be.
  - In order to avoid double taxation, the foreign blocker should set up a separate corporate subsidiary (US or non-US) for each acquisition. Gains from the sale of the property will be taxable to the corporation, but the subsidiary could then be liquidated to repatriate earnings without triggering a second level of tax.

US Real Property (cont.)

- *US trusts:* A US irrevocable trust in a state with asset protection laws (Delaware, South Dakota, New Hampshire, Nevada, etc.) may be the most tax-efficient way to structure an investment in US real property without exposing the non-US settlor to income or estate tax exposure.
  - The US trust would be eligible for long-term capital gain rates and this would be more tax-efficient for US beneficiaries.
  - If the non-US settlor wishes to use the property, he or she should be prepared to pay fair market rent (although his or her spouse could be a beneficiary).
  - There would be no FIRPTA withholding in the case of a US trust.

Mutual Funds

- Nonresidents generally are not taxed on capital gain distributions from US mutual funds, but are taxed at the 30% rate for FDAP (unless reduced by a treaty) on dividend distributions.
- As with stock in other US corporations, shares in a US mutual fund are US situs assets subject to estate tax in the estate of a non-US decedent. However, the shares may be gifted by a non-US person without triggering gift tax.
  - There used to be a "look-through" rule that treated mutual fund shares as non-US situs assets to the extent the fund held non-US situs assets, but this provision expired at the end of 2011.

Other Situs Rules: Traps for the Unwary

- Life insurance proceeds paid by a US insurer on the life of a non-US person is not US situs property. *However, the value of a policy owned by a non-US person on the life of another person is US situs property if issued by a US insurer.*
- Bank accounts (checking, savings, time deposits and CDs) maintained with US banks are not US situs property, *but cash deposits with US brokers, money market accounts with US mutual funds and cash in US safe deposit boxes are considered US situs assets.*

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Treaty Relief

- Tax treaties may alter the tax treatment of certain assets:
  - Interest, dividends and royalties often are eligible for reduced withholding rates for eligible residents of a treaty jurisdiction.
  - Business profits also may be excluded if the taxpayer does not have a permanent establishment in the source country.
  - Estate tax treaties may change the situs of certain assets, granting the source country exclusive taxing rights over intangible property (for example, stock in a US corporation).
  - Other treaties may increase a non-US decedent's exemption.
  - Most income tax treaties do not offer any relief for income and gains from real property (including real property holding corporations) and most estate tax treaties grant primary taxing rights to the country in which real property is located.

III. FOREIGN TRUSTS

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Foreign Trusts

- A trust is a foreign trust unless it satisfies <u>both</u> of the following tests:
  - A United States court can exercise primary supervision over the administration of the trust (the "court" test); and
  - One or more US persons have the power to control all substantial decisions of the trust (the "control" test).
- This definition makes it easier to determine whether a trust is US or foreign. It also is heavily tilted towards foreign status.
- Even if the trustee is a US person and the trust is administered in the US, control or veto power by a non-US person of one substantial decision (i.e. removal of the trustee) causes the trust to become a foreign trust under the control test.

Foreign Trusts Settled by US Persons

- If the settlor or the trustee of a trust retains a power or interest that is specified in the grantor trust rules, the trust will be a grantor trust for income tax purposes and all trust income will be taxed to the settlor (or the person who transferred assets to the trust), regardless of whether the income is accumulated in the trust or distributed to another beneficiary.
- Under Code Section 679, if the trust is a foreign trust and any US person may benefit from the trust, then the trust will automatically become a grantor trust with respect to the US settlor or transferor.
  - *The trust will be presumed to have US beneficiaries unless, by its terms, no US persons may benefit from trust income and principal.*

Foreign Trusts Settled by US Persons (cont.)

- If a US person transfers appreciated property to a foreign nongrantor trust, the US transferor will recognize gains on any appreciated assets contributed to the trust under Section 684.
  - *No offsetting losses are taken into account.*
- When a foreign grantor trust settled by a US person becomes a nongrantor trust, the US grantor is deemed to make a transfer at that time for purposes of Section 684. *This includes conversions to foreign nongrantor trust status by reason of the grantor's death.*
  - This is one of the few situations under the Code where a US person's death can affirmatively trigger an income tax liability.
  - This also is one of the many reasons why it is generally preferable for US persons to take measures to ensure that any dynasty trusts they establish qualify as US trusts for tax purposes.

Foreign Asset Protection Trusts

- If a US person makes an irrevocable gift to a New York trust of which the settlor is a discretionary beneficiary, trust assets can still be reached by the settlor's creditors who arise in the future under the "self-settled trust" rules of New York and most other US states, even if the trust has an independent trustee.
  - The presumptive ability of the settlor's creditors to reach the assets will cause the trust assets of such a discretionary trust to be included in the settlor's estate.

Foreign Asset Protection Trusts (cont.)

- Certain offshore jurisdictions (such as the Cayman Islands, the Bahamas, Jersey, the Cook Islands and Bermuda) do not allow creditors to reach such a trust, and thus offer creditor protection.
- Because the settlor's creditors do not have the same ability to reach trust assets as in other jurisdictions, it is possible to include the settlor among the discretionary beneficiaries without pulling the assets into the settlor's estate for estate tax purposes.
- *Note: A pattern of distributions to the settlor can still result in creditors reaching the trust and in estate tax inclusion.*

Foreign Asset Protection Trusts (cont.)

- Certain states, such as Delaware, South Dakota, New Hampshire, Nevada and Alaska, now offer asset protection advantages that are not available in other US jurisdictions for settlors (US and foreign) who wish to remain discretionary beneficiaries.

Foreign Asset Protection Trusts (cont.)

- A foreign asset protection trust created by a US person will always be a grantor trust if it can have any US beneficiary, so there is no income tax advantage.
- For estate tax purposes, a US person funding a foreign irrevocable asset protection trust needs to decide whether he or she wishes to make a completed gift upfront.
  - A completed gift will be taxable to the extent that, together with all any taxable gifts made by the settlor, it exceeds his or her lifetime exemption (and the annual exclusion if it applies).
  - Paying gift tax (using up one's lifetime exemption) upfront may be worthwhile to a donor who expects the value of the gifted assets to appreciate over time.
- *Reporting:* Creation and distributions from foreign grantor and nongrantor trusts are reportable on IRS Form 3520.

Foreign Asset Protection Trusts (cont.)

- *Estate tax inclusion:* Even if a trust is irrevocable, certain retained strings (such as a right to trust income or assets or control over their beneficial enjoyment) can pull trusts assets back into the settlor's estate.
- *Grantor trust rules:* These retained strings, and certain administrative powers, can also cause the grantor to be taxed on the income of the trust after the transfer under the "grantor trust" rules. A trust may be structured as a grantor trust (but without any strings that could pull the assets into the grantor's estate) so that the grantor can pay the taxes on trust income and maximize the amount passing to his or her heirs.
- *Reporting:* Creation and distributions from both grantor and nongrantor trusts are reportable on IRS Form 3520.

Taxation of Foreign Grantor and Nongrantor Trusts

- *Grantor trusts:* A foreign grantor trust, like a US grantor trust, is ignored for income tax purposes – i.e., the income flows up to the grantor. As discussed in subsequent slides, a foreign grantor trust settled by a foreign grantor can offer many tax advantages for US beneficiaries.
- *Nongrantor trusts:* A foreign nongrantor trust generally is taxed in the same manner as a nonresident alien on US source income and ECI, but would not be taxed on foreign source income and capital gains (other than from the sale of US real estate). However, distributions will carry out income (including foreign source income and capital gains) to US beneficiaries.

Foreign Grantor Trusts Settled by Non-US Persons

- The benefit of structuring a foreign trust to qualify as a grantor trust is that the trust's income will flow up to the non-US grantor during his or her lifetime for US tax purposes instead of accumulating within the trust where it could later be taxed at punitive rates when it is distributed to a US beneficiary.
- As long as the trust's income is from foreign sources, it will not be taxable by the US to the foreign grantor.
- Distributions from a foreign grantor trust to US beneficiaries are reportable on Form 3520, but generally will not be taxable.
- There will be no attribution of ownership of any PFICs or CFCs owned by the grantor trust to US beneficiaries during the foreign grantor's lifetime.

Foreign Grantor Trusts Settled by Non-US Persons (cont.)

- In order for a trust settled by a non-US person to qualify as a grantor trust it must either
  1. be revocable by the grantor, <u>or</u>
  2. limit distributions of income and principal to the grantor and/or the grantor's spouse during the grantor's lifetime.
- The tax basis of the trust's assets may be stepped up to fair market value at the grantor's death if the grantor reserves certain powers in the trust agreement:
  1. The trust income must be payable during the grantor's lifetime to or on the order of the grantor, <u>and</u>
  2. The grantor must reserve the right at all times before death to revoke the trust or make changes in beneficial enjoyment through the exercise of a power to alter, amend or terminate the trust.

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Foreign Grantor Trusts Settled by Non-US Persons (cont.)

- On the grantor's death, the trust will become a foreign nongrantor trust, at which point the trustee may want to domesticate the trust or decant to a new US trust for the benefit of any US beneficiaries in order to avoid the accumulation distribution rules on future earnings.
  - This requires careful planning ahead of time to avoid phantom income inclusions if the trust holds interests in foreign companies (for example, an estate tax "blocker" foreign corporation to hold US situs assets).

What If Your US Client Is a Beneficiary of a Foreign Non-Grantor Trust?

- Distributions of "distributable net income" (DNI) by a foreign nongrantor trust are taxable to US beneficiaries.
  - DNI includes not only income that is taxable to the foreign trust, but also foreign source income and capital gains (which would not be included in the DNI of a US trust).
  - Most items comprising DNI preserve their character if distributed in the year earned (or in the first 65 days of the following year if the trust makes a timely election).
  - DNI that is not distributed accumulates within a foreign nongrantor trust as "undistributed net income" (UNI).
  - The US beneficiary must report the distribution on Form 3520 (and any taxable items on his or her tax return).

What If Your US Client Is a Beneficiary of a Foreign Non-Grantor Trust?

- UNI is fully subject to US income tax when it is eventually distributed to a US beneficiary, and has the following additional negative consequences:
  - All capital gains realized by the trust in prior years are part of the trust's DNI and are carried out to the beneficiary, but at ordinary income rates (currently up to 37%).
  - An interest charge is imposed on the tax due by the beneficiary on the accumulated income per annum from the date the income was originally earned by the trust.
  - Income may be taxed at the beneficiary's highest marginal rate for the year in which it was earned under the "throwback" rule.

Foreign Nongrantor Trusts: Constructive Distributions and Intermediaries

- Uncompensated use of property (such as a house) owned by a foreign nongrantor trust by a US beneficiary is considered a constructive distribution and can carry out DNI or UNI (as the case may be).
- Use of Intermediaries:
  - When property is transferred to a US person by another person (the intermediary) who has received property from a foreign nongrantor trust, the US person will be treated as having received the property directly from the foreign trust if the intermediary received the property from the foreign trust pursuant to a plan one of the principal purposes of which was the avoidance of US tax.
  - Presumption rules apply for transfers to a US person within a two year window before or after the distribution from the foreign nongrantor trust.

IV. FOREIGN CORPORATIONS OWNED BY US PERSONS

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US Ownership of Foreign Corporations

- A corporation is a US corporation if it is organized or created in the US under the laws of the US or any US state. All other corporations are foreign corporations for tax purposes.
- Foreign corporations and anti-deferral rules:
  - US shareholders of foreign corporations generally are taxed only on distributions in the same manner as shareholders of US corporations. However, foreign anti-deferral rules can override the general rule and cause US owners to be taxed on phantom income (or at more punitive rates than would otherwise apply to the same income):
    - The controlled foreign corporation ("CFC") rules applicable to certain closely held foreign corporations; and
    - The passive foreign investment company ("PFIC") rules applicable to foreign investment companies (including most foreign mutual funds).

CFC Rules: CFC and US Shareholder Status

- A foreign corporation is a CFC if it is owned more than 50% (in value or voting control) by “United States shareholders.”
  - United States shareholders are US persons who own (directly, indirectly or constructively) at least 10% of a foreign corporation by vote or voting control.
  - If a foreign corporation is a CFC, United States shareholders could be taxed on the CFC’s income even if it is not distributed.

CFC Rules: Phantom Income Inclusions

- If the corporation is a CFC during any part of the taxable year, each US person who is a US shareholder on the last day of the CFC's taxable year may be taxed on his or her pro rata share of the CFC's "subpart F" income under Section 951(a) and "global intangible low-taxed income" ("GILTI") under Section 951A.
  - Subpart F income includes most passive investment income and certain types of related party sales and services income, with carve-outs for de minimis amounts and "high-taxed" income.
  - GILTI, a new regime introduced by TCJA, picks up most other types of income earned by the CFC. Under the GILTI regime, a US shareholder of one or more CFCs is taxed on the excess of (1) the CFCs' modified gross income (excluding certain items) over (2) a benchmark return of 10% of the CFCs' adjusted bases in depreciable tangible property placed in service (with certain adjustments for interest income and expense).

CFC Rules: Phantom Income Inclusions

- The GILTI regime eliminated a longstanding distinction under the CFC rules between operating income of a bona fide business overseas (which until now was not picked up under these rules) and passive income.
- This will not have a significant impact on a typical foreign blocker structure that holds mostly marketable securities, as such income would already have been subject to the subpart F regime. However, trusts that hold stock in closely held operating companies could be impacted.

PFIC Rules

- Generally, a foreign corporation is classified as a PFIC under Section 1297 if it meets either an income test or an asset test:
  - A foreign corporation is a PFIC under the income test if 75% or more of its gross income is passive income (dividends, interest, royalties, rents and the like).
  - A foreign corporation is a PFIC under the asset test if at least 50% of the average percentage of assets held by the corporation during the tax year is comprised of assets that produce passive income or are held for the production of passive income.
- *Most foreign mutual funds would be considered PFICs.*

PFIC Rules (cont.)

- Unless certain elections are made, gains from the disposition of a PFIC are taxed at ordinary income rates and potentially subject to an additional interest charge.
  - A taxpayer can make an election (or elect) to treat the PFIC as a Qualified Electing Fund, in which case items of income and gain would flow up to the shareholder (preserving their character and stepping up the basis).
    - However, this election is not an option if the fund itself is not able and willing to provide the necessary information for the US shareholder to satisfy his or her reporting obligations. Most foreign funds are not set up to support the reporting required to make this election and keep it in force.
  - A US owner can also make a mark-to-market election if the PFIC is publicly traded, but this is not always a desirable option.

Indirect Ownership of CFCs and PFICs

- Indirect Ownership of a PFIC or CFC:
  - US beneficiaries of a foreign nongrantor trust that directly or indirectly owns stock of a PFIC can be taxed on phantom income when the trust sells its interest in the PFIC or receives certain distributions from the PFIC.
  - Similarly, US beneficiaries who satisfy the 10% ownership threshold for US shareholder status (including by way of attribution) may be subject to phantom income inclusion under the CFC rules with respect to the passive income of a foreign PIC owned by a foreign nongrantor trust of which they are beneficiaries.
  - *There is no attribution of ownership of a CFC or PFIC from a grantor trust to the beneficiaries because the grantor is considered the tax owner of the underlying assets.*

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V. EXPATRIATION

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Expatriation Taxes – Overview

- Certain US citizens and long-term residents who expatriate on or after June 17, 2008 are "Covered Expatriates" and are subject to two special tax regimes:
  - A mark-to-market exit tax imposed under Section 877A on any "covered expatriate" to the extent that unrealized appreciation exceeds certain thresholds ($725,000 in 2019).
  - A succession tax imposed under Section 2801 on US persons who receive gifts or bequests from a covered expatriate. The tax is imposed at the highest applicable rate for estate and gift tax (40%), but without the lifetime exemption amount currently available to US citizens and residents.

Who Is a Covered Expatriate?

- A person who renounces US citizenship on or after June 17, 2008.
- A person who gives up a US green card or otherwise ceases to be a lawful permanent resident on or after June 17, 2008 after holding the green card for at least 8 of the past 15 calendar years.
  - *Note: Filing a US tax return as a nonresident under a treaty tie-break provision can trigger an accidental expatriation with the attendant exit tax (and succession tax on future gifts and bequests to US persons).*
- The person must also meet one of the three tests covered on the next slide.

Who Is a Covered Expatriate? (cont.)

- Any one of the following will cause an expatriating US citizen or long-term resident to become a Covered Expatriate:
  - His or her average net income tax liability for the prior five years exceeds $168,000 (for expatriations occurring in 2019, amount adjusted for inflation), *after taking into account any credits for foreign taxes paid*.
  - His or her net worth exceeds $2 million (including certain interests in trusts).
  - He or she fails to certify on IRS Form 8854 under penalty of perjury that he or she has complied with all Federal tax obligations for the previous five years.

Exceptions to Covered Expatriate Status

- Exceptions to Covered Expatriate Status:
  - Dual citizens from birth who have not resided in the US for more than 10 of the past 15 years;
  - Persons who expatriate before age 18 ½.
- Individuals who expatriated prior to June 17, 2008:
  - The former law, which included a 10-year period of special taxation on US income and assets after expatriation and a limit of 30 days per year that the expatriate could remain in the US, is repealed for those who expatriate on or after June 17, 2008 but remains in force for those who expatriated before then.

Exit Taxes Payable

- Capital gains tax on all appreciation in the value of a covered expatriate's worldwide assets as of the day of expatriation:
  - The first $725,000 of appreciation is exempt from the exit tax. For purposes of determining the gain, only appreciation after the covered expatriate's residency starting date is taken into account for assets already owned when he or she first became a US resident.
  - The tax may be deferred on any asset until that asset is sold, or until the death of the covered expatriate, by agreement with the IRS. However, the taxpayer is required to provide adequate security.

Section 2801 Tax

- A succession tax is imposed under Section 2801 on all US persons who receive gifts or bequests from a Covered Expatriate.
- The tax is imposed at the highest applicable rate for estate and gift tax (40%), but without the lifetime exemption amount currently available to US citizens and residents.
- The annual exclusion of $15,000 applies to gifts.
- Distributions from foreign trusts created by a Covered Expatriate are taxed when received by a US person.
- Gifts or bequests by a Covered Expatriate to a US trust are taxed in the same way as gifts to individuals.
- In any year when the Covered Expatriate returns to be treated as a US resident, the tax does not apply.

Special Rules (IRS Notice 2009-85)

- Specified tax deferred accounts:
  - IRAs and certain other statutory tax-deferred accounts are not subject to the exit tax per se, but instead are treated as if the balance was distributed to the covered expatriate the day prior to expatriation.
  - This generally will result in an ordinary income inclusion in the case of a traditional IRA or other account where contributions were made on a pre-tax basis.
  - There is no 10% penalty for early distributions.

Special Rules (IRS Notice 2009-85) (cont.)

- Other Deferred Compensation Plans:
  - Other deferred compensation plans generally are taxable at present value or, if the plan sponsor or administrator agrees to undertake certain withholding and reporting obligations, subject to a 30% withholding tax on subsequent distributions to the Covered Expatriate.
- Interests in Trusts:
  - Beneficial interests in nongrantor trusts generally are not subject to the exit tax, but subsequent distributions to the Covered Expatriate are subject to a 30% withholding tax.
  - Assets that are includable in a Covered Expatriate's estate (including assets held in a grantor trust) generally are subject to the exit tax.

The Reed Amendment

- Provides that US citizens who give up their citizenship with tax avoidance as a motivation (as determined by the Attorney General) will be put on the list of “undesirables” who are not permitted back in the United States under any circumstances.

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U.S. Tax Planning for Non-U.S. Persons, Assets and Trusts - An Introductory Outline

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U.S. Tax Planning for Non-U.S. Persons, Assets and Trusts - An Introductory Outline

2019 Edition

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Estate planning for non-U.S. persons differs from domestic planning, not only in the specific rules that apply but also in the mental outlook that the planner must bring to the process. To put it simply, in planning for a U.S. person we begin with the assumption that all income and assets are subject to U.S. income, estate and gift taxes, and we then hunt for exceptions (aka "loopholes") that will shelter some income and assets from these taxes, e.g., municipal bond interest, charitable deductions, the estate tax marital deduction. Non-U.S. persons, on the other hand, start out in an environment in which no U.S. income or estate taxes are payable , and the planner's job is to keep an eye out for pitfalls (U.S. residence, U.S. source income and U.S. situs assets) that may create such taxes.

The following is an outline of the rules that apply in estate and tax planning for non-U.S. persons and trusts. It is not intended to be the exhaustive word on the subject — volumes are required for that task — but it is meant to serve as a general guide to the subject.

I. BASIC RULES

The following are the basic rules of international estate planning:

- U.S. persons are subject to U.S. income taxation on their worldwide income. (Internal Revenue Code [IRC] §§ 1, 61).
- Individuals who are U.S. persons are also subject to estate, gift and generation-skipping transfer taxes on their worldwide assets. (IRC §§ 2001, 2031-2046, 2601)
- Non-U.S. persons are subject to U.S. income tax only on their U.S. source income, including income that is effectively connected with a U.S. trade or business.
- Individuals who are non-U.S. persons are subject to estate, gift and generation-skipping transfer taxes only on U.S. situs assets.

These rules are elaborated on in the following sections of this outline.

[1] The authors would like to thank Carl Merino for his contributions to this edition of the outline.

II. WHO IS A U.S. PERSON?

A. **Individuals, Corporations and Trusts.** The term "U.S. person" includes U.S. individuals as well as domestic corporations and U.S. trusts. (IRC § 7701(a)(30))

B. **When Is an Individual a U.S. Person?** An individual is a U.S. person if he or she is either:

- A U.S. citizen, regardless of residence, and including a dual citizen of the United States and one or more other countries; or

- A U.S. resident, regardless of citizenship.

C. **Who Is a U.S. Resident?**

1. ***Income Tax Resident:*** A resident for income tax purposes is:

(a) A green card holder (or other lawful permanent resident). (IRC § 7701(b)(1)(A)) There are special rules for the first and last year of lawful residence. For the first year, if the individual was not a resident in the prior calendar year, the individual is treated as a resident only for the portion of the year starting when the residence began, i.e., when he or she was first physically present in the United States with a green card. (IRC § 7701(B)(2)(A)) For the last year of residence, if an individual turns in his or her green card and leaves the United States, is not a U.S. resident in the following year, and has a closer connection to another tax jurisdiction, he or she will be a U.S. income tax resident for only the portion of the year that he or she was a cardholder. (IRC § 7701(B)(2)(B)) (As for departing residents, however, there are special rules for long-term residents, discussed infra.)

(b) Under the "substantial presence" test, a person is a U.S. resident for a given calendar year if he or she either (i)is present in the United States for 183 days or more in that year; or (ii) is present in the United States for at least 31 days of that year, and the total of the days present in the United States during the current tax year, plus one-third of the days present in the previous year, plus one-sixth of the days present in the second previous year, equals 183 days on a weighted basis. (A person who is never in the United States for more than 121 days per year will never exceed this figure.) (IRC § 7701 (b)(3)(A))

Exceptions:

(a) A full-time student, teacher or trainee visa (for a limited time); a person holding a diplomatic visa; or an employee of an international organization is not a U.S. resident, regardless of the number of days spent in the United States. (IRC § 7701 (b)(5)(A) and (B))

(b) A person who is present in the United States for fewer than 183 days in the calendar year, but whose three-year weighted total is greater than 183 days, can avoid U.S. resident status by filing with the Internal Revenue Service (IRS) and demonstrating that he or she has a tax home in and a "closer connection" to a foreign country. (IRC § 7701(b)(3)(B))

(c) Treaties with some countries contain "tie breaker" provisions to resolve the issue of residence for a person who would otherwise be treated as a resident of both of the treaty countries.

2. ***Estate and Gift Tax Resident:*** A U.S. resident for estate and gift tax purposes is a person whose primary residence, or domicile, is in the United States. This means that the person lives in the United States and has no definite present intent to leave, as shown by the surrounding facts and circumstances. (Treas. Reg. § 20.0-1(b)(1); Treas. Reg. § 25.2501-(1)(b))

   Because a "bright line" test applies for income tax purposes and a "facts and circumstances" test applies for estate and gift tax purposes, it is possible for an individual to be a U.S. resident for purposes of one tax and not for the other.

D. What Constitutes a Domestic Corporation? A corporation that is organized or created in the United States. (IRC § 7701(a)(3)) It does not matter where the directors reside or meet, or where the corporation's assets are located.

E. What Constitutes a Domestic Trust? Under IRC §§ 7701(a)(30)(E) and (31)(B), *every* trust is a foreign trust unless both of the following are true:

1. A U.S. court can exercise *primary* supervision over the administration of the trust; and

2. One or more U.S. persons have the power to control *all* substantial decisions of the trust.

   Under Treas. Reg. § 301.7701-7, the "United States" refers only to the 50 states and the District of Columbia. A safe harbor is created whereby a trust is a domestic trust if it is administered exclusively in the United States, has no provision directing administration outside the United States and has no automatic change of situs clause (except in case of foreign invasion or widespread confiscation of assets in the United States). If a person other than a trustee (such as a protector) has the power to control substantial decisions, that person's powers will be counted for purposes of the control test. Powers exercisable by a grantor or a beneficiary, such as a power to revoke or a power of appointment, will also be considered in determining substantial control.

   The Treasury regulations provide a nonexclusive list of "substantial decisions," which include:

   - Whether and when to distribute income or corpus
   - The amount of any distribution
   - The selection of a beneficiary
   - The power to make investment decisions (However, if a U.S. person [trustee, protector, etc.] appoints a foreign investment advisor and can remove that advisor, the appointment of the foreign advisor will not make the trust foreign.)

- Whether a receipt is allocable to income or principal

- Whether to terminate the trust

- Whether to compromise, arbitrate or abandon claims of the trust

- Whether to sue on behalf of the trust or to defend suits against the trust

- Whether to remove, add or name a successor to a trustee; provided, however, that the power solely to name a successor will not be considered a substantial decision if it is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa)

If a vacancy occurs through the death or sudden resignation of a trustee that would shift control of a substantial decision out of the hands of U.S. trustees, the trust has 12 months to reassert U.S. control by either a change of fiduciaries or a change of residence of a fiduciary. If such a change is made within 12 months, the trust will be treated as having remained a U.S. trust; if no such change is made, the trust will have become a foreign trust on the date the vacancy occurred.

This definition is heavily tilted toward a conclusion that a trust is foreign. For instance, if a New York resident creates a testamentary trust for his or her New York resident children by his or her will probated in New York, with a New York bank and an Irish cousin as trustees, and if principal distributions to the children can be made only by majority vote of the trustees, the trust is a foreign trust since substantial decisions are not controlled by the U.S. fiduciary.

III. TAXATION OF NON-U.S. PERSONS

Persons who are neither U.S. citizens nor U.S. residents (nonresident aliens, or NRAs) are subject to U.S. taxes as follows:

A. Income Tax: NRAs are subject to U.S. income tax only on U.S. source income, generally at a 30 percent withholding rate. (IRC § 871(a)(1))

U.S. Source Income for Income Tax Purposes (IRC § 871(a)):

- Dividends from U.S. corporations (including U.S. mutual funds), but not the proceeds of the sale of most U.S. securities.

- Rent from U.S. real property, and capital gains on the sale of U.S. real property or real property holding companies. (Foreign Investment in Real Property Tax Act of 1980 [FIRPTA], IRC § 891)

- Interest on debts of U.S. obligors. However, interest on most publicly traded bonds issued after July 18, 1984 (and private debts in registered form), constitutes "portfolio interest" and therefore qualifies for the portfolio exemption and is not taxed as U.S. source income. (IRC § 871(h))

- Salaries paid by U.S. and non-U.S. entities for services performed by the recipient in the United States.

- U.S. royalties.

Income Effectively Connected With a U.S. Trade or Business (IRC § 871(b)):

NRAs are also subject to income tax at the same graduated rates as U.S. persons on their income earned in connection with the conduct of a trade or business in the United States. (IRC § 871(b)) A foreign partner of a U.S. or foreign partnership that itself is engaged in a U.S. trade or business will be deemed to be so engaged through the partnership and will be subject to federal and possibly state return filing obligations. The partnership may be subject to withholding obligations with respect to U.S. source earnings allocated to its foreign partners. Further, the disposition of an interest in a partnership by a non-U.S. person may be taxable under IRC § 864(c)(8) and subject to withholding under IRC § 1446(f) if the partnership is engaged in a U.S. trade or business.

Interest on U.S. bank accounts, including time deposits and certificates of deposit, is not U.S. source income.

Income tax treaties between the United States and other countries can alter these rules, particularly the withholding rate.

B. Estate Tax: Estates of NRAs are subject to U.S. estate tax only on U.S. situs assets. The tax is assessed at the same rates as for U.S. citizens, up to 40 percent, but with only a $60,000 exemption (as opposed to the 2019 exemption of $11.4 million for a U.S. person). (IRC § 2106 (b)) Worldwide debts and administration expenses may be deducted, but only in the proportion that the U.S. assets bear to the decedent's worldwide assets. (Nonrecourse debts are allocated to the properties they secure, but most commercial lenders prefer a choice of remedies in the event of default, including imposition of personal liability against the borrower, so most third-party loans will be considered recourse debts for this purpose.) The unlimited marital deduction is available; however, if the surviving spouse is not a U.S. citizen, only property left to a qualified domestic trust will qualify (see Section VIII (B) below). The charitable deduction is available only for bequests to U.S. charities, with the exception of trusts that are required to use the funds within the United States.

U.S. Situs Assets for Estate Tax Purposes (the following is a partial list):

- Real property situated in the United States, including houses and condominiums. (Treas. Reg. §§ 20.2104-1(a)(2); 20.21051(a)(2))

- Tangible personal property situated in the United States, such as jewelry, antiques, artworks and cars, unless the items are in transit or on loan for an exhibition at a museum. (Treas. Reg. §§ 20.2104-1(a)(2); 20.21051(a)(2))

- Shares of stock of U.S. corporations, including shares of a U.S. cooperative corporation representing a co-op apartment. (IRC § 2104(a)) Shares of non-U.S. corporations are not U.S. situs property. The location of the certificate and the custody account are immaterial. Mutual funds (including money market funds) organized in corporate form are U.S. situs property if incorporated in the United States. (IRC § 2104(a)) If the fund is structured as a grantor trust, the situs of the fund generally depends on the situs of the underlying assets of the fund.

- The situs rules are less clear for partnerships, which are not addressed in the Internal Revenue Code or Treasury regulations. Some older authorities suggest one would look to the underlying assets or where the partnership conducts its business (if any), while other authorities suggest one might look to where the partnership is organized. Therefore, one may generally assume that interests in limited or general partnerships that either do business in the United States or own assets in the United States will probably be considered U.S. situs assets.

- Cash deposits with U.S. brokers, money market accounts with U.S. mutual funds and cash in U.S. safe deposit boxes are U.S. situs property. (IRC § 2104(c))

- Debts of U.S. obligors are U.S. situs property. Once again, however, publicly traded bonds and registered private debt issued after July 18, 1984, qualify as "portfolio debt" and therefore are not subject to U.S. estate taxation if owned by an NRA decedent, provided that the decedent was also an NRA for income tax purposes. (IRC § 2105(b)(3))

- Life insurance proceeds paid by a U.S. insurer on the life of a non-U.S. person are not U.S. situs property. However, the cash surrender value of life insurance owned by a non-U.S. person on the life of another person is U.S. situs property if issued by a U.S. insurer. (Treas. Reg. § 20.2105-1(g))

Bank accounts maintained with U.S. banks are not U.S. situs property; this includes checking and savings accounts, time deposits, and certificates of deposit. (IRC § 2104(c))

Again, treaties with various countries can alter these rules, particularly as to whether U.S. stocks owned by a citizen and resident of another country will be taxed by the United States.

Basis Step-Up at Death (IRC § 1014):

Under IRC § 1014(a), the basis of property acquired by bequest, devise or inheritance or by the decedent's estate from the decedent is stepped up or down to fair market value at the time of death.

- Non-U.S. situs property held by an NRA at death is eligible for a basis step-up (or step-down) under this provision even though it is not subject to estate tax. (Rev. Rul. 84-139)

- Property that is otherwise includable in the decedent's taxable estate (for example, U.S. situs assets held in a trust settled by an NRA with certain "retained strings") is eligible for a basis adjustment at death even if such property does not pass by bequest, devise or inheritance. (IRC § 1014(b)(9)

- Property transferred in trust that is not otherwise includable in the decedent's taxable estate (for example, non-U.S. situs assets held in a trust settled by an NRA) is eligible for a basis adjustment at death only if certain delineated powers are retained by the decedent during his or her lifetime. (IRC § 1014(b)(2)-(3).)

C. Gift Tax: NRAs are subject to gift tax only on gifts of U.S. situs real property and tangible personal property. The annual exclusion of $15,000 for gifts of a present interest may apply; however, the $60,000 credit afforded to NRAs for estate tax purposes may not be applied to gifts. Gifts of shares of stock of U.S. corporations are not subject to U.S. gift tax. However, gifts of cash (possibly including checks) that take place within the United States may be subject to gift tax; therefore, any gifts of cash by a non-U.S. person to a U.S. person should be made outside the United States. (IRC §§ 2501(a)(3); 2511(b))

D. Reporting of Gifts by NRAs to U.S. Persons: Any U.S. person who receives "large gifts" (more than $100,000) from a non-U.S. individual during any calendar year must file a report describing these gifts with his or her income tax return the following April 15. (IRC § 6039F; Form 3520) (No tax is due unless the gifts are of U.S. situs property (or the donor is a covered expatriate, discussed infra).)

The term "gifts" includes bequests from estates of non-U.S. individuals. (IRC § 6039F(b)) Qualified medical or educational payments under IRC § 2503(e) are not considered to be gifts and are not subject to reporting.

In determining whether a U.S. person has received gifts during the taxable year from a particular foreign donor in excess of $100,000, the U.S. donee must aggregate gifts from foreign persons that he or she knows or has reason to know are related, within the meaning of IRC § 643(i)(2)(B). For instance, if an NRA mother and father each give their U.S. son $60,000, the gifts are aggregated, the $100,000 reporting threshold is exceeded and the son must report both gifts. Once the $100,000 threshold has been met, the donee must separately identify each gift in excess of $5,000.

A U.S. person is required to report the receipt of purported gifts from foreign corporations and foreign partnerships as well if the aggregate amount of purported gifts from all such entities exceeds $10,000 in any year. (This threshold is indexed for inflation and is presently $16,076.) The use of the word "purported" gives an indication that the IRS may recharacterize those "gifts" from entities as taxable income to the U.S. recipient. (IRC § 672(f)(4))

The form used to report gifts from foreign persons (Form 3520) asks for a brief description of the property received as a gift; whether the foreign donor is an individual, corporation, partnership or estate; and whether the foreign donor was acting as a nominee or intermediary for another person. The form does not ask for the identity of a foreign individual donor, although the IRS could request this information.

While there is no tax on non-U.S. situs gifts from foreign persons, the penalty for failure to report the gifts is severe. If a gift is not reported on Form 3520, the tax consequences of the receipt of the gift shall be determined by the IRS. (IRC § 6039F(c)(1)(A)) In addition, the recipient is subject to a penalty equal to the greater of $10,000 and 5 percent of the value of the gift for each month in which the gift is not reported, not to exceed 25 percent. (IRC § 6039F(c)(1)(B)) The penalties can be waived if the failure to file was due to reasonable cause and not willful neglect. Ignorance of the law is not reasonable cause.

E. **Generation-Skipping Transfer Taxes:** A transfer by an NRA will be subject to generation-skipping transfer (GST) tax only if it is also subject to U.S. estate or gift tax, which will be the case only if it consists of U.S. situs property. (Treas. Reg. § 26.2663-2)

F. **Treaties:** Income and estate tax treaties with individual countries may alter some of these rules, particularly as to determination of residence, source of income, situs of assets and income tax withholding rates. Some treaties also give foreign residents a greater estate tax credit amount than $60,000, such as a share of the full U.S. unified credit equal to the proportion of assets located in the United States. Some treaties also give a marital deduction for bequests to a noncitizen spouse, up to a limit. Some treaties exempt shares of U.S. corporations held by residents of other countries from estate tax. The United States generally enters into treaties with countries that have significant taxes of their own to help avoid double taxation. Therefore, if a treaty allows an NRA to reduce his or her U.S. tax liability, there will usually be an offsetting tax in the NRA's country of residence.

The United States never enters into a treaty that exempts U.S. citizens from worldwide income, estate, gift or generation-skipping taxation.

At present, the United States has estate tax treaties with the following countries:

Australia	France	Norway
Austria	Germany	South Africa
Canada (Third Protocol to Income Tax Convention)	Greece	Sweden*
Denmark	Ireland	Switzerland
Finland	Italy	The Netherlands
	Japan	United Kingdom

The estate tax treaties with the United Kingdom, France, Germany, Austria, Denmark and Sweden* are based on the unified system concept and in consequence cover taxes on gifts and generation-skipping transfers, as well as estate taxes.

The United States also has gift tax treaties with Australia and Japan.

*The estate tax treaty with Sweden is no longer in effect following the repeal of Sweden's inheritance tax in 2004.

IV. FOREIGN TRUSTS CREATED BY NRAs

A. Foreign Grantor Trusts

A foreign trust is generally not subject to U.S. income tax, except for withholding tax on any U.S. source income. However, distributions from the foreign trust to a U.S. person will carry out taxable income to that person, with adverse tax treatment of accumulated income, unless the trust qualifies as a "grantor trust" under U.S. tax law. (IRC §§ 671-677) With a grantor trust, the person who funded the trust (the grantor), is treated as the owner of the income, even if distributions are made to someone else. Therefore, a U.S. beneficiary of a foreign trust will greatly prefer that the trust be a grantor trust with an NRA individual as grantor.

Under the law in effect as of August 20, 1996, NRAs generally cannot be grantors of trusts except under limited circumstances. (IRC § 672(f)(1)) If an NRA sets up a trust for the benefit of a U.S. person, the U.S. person will be taxed on the income received unless a grantor trust exception applies.

There are three relevant *exceptions* to the law, which permit the NRA to be the income tax grantor:

1. The grantor has the full power to revoke the trust without the consent of any person, or with the consent of a related or subordinate person who is subservient to the grantor. (IRC § 672(f)(2)(A)(i)) (Upon the grantor's incapacity, his or her guardian or another person must possess the power to revoke in order for the trust to continue to qualify as a grantor trust.)

2. The grantor and/or the grantor's spouse are the sole beneficiaries of the trust during the life of the grantor. In this case, the grantor and/or the grantor's spouse could receive distributions from the trust and, from time to time, make gifts to the U.S. relative. The U.S. person would then have to report the receipt of the gifts if the gifts met the applicable threshold, but they would not be taxable. (IRC § 672(f)(2)(A)(ii))

3. The trust was created on or before September 19, 1995, but only as to funds already in the trust as of that date (which must be separately accounted for) and only if the trust was a grantor trust pursuant to either IRC § 676 (concerning the grantor's power to revoke) or IRC § 677 (concerning the grantor's retained possibility of receiving income), but excluding IRC § 677(a)(3) (income may be used to pay premiums on insurance policies on the grantor's life).

Once the NRA grantor dies, the foreign trust that previously qualified as a grantor trust under one of the exceptions will no longer be a grantor trust, and all income accrued after the grantor's death and distributed to the U.S. beneficiary will be taxed to him or her.

B. Foreign Nongrantor Trusts: Accumulations

The greatest disadvantage of a foreign nongrantor trust is the treatment of income that is accumulated in the trust and then distributed to a U.S. person in a subsequent year.

If a foreign trust falls into one of the above exceptions and so is a grantor trust, there is no accumulated income issue; any income accumulated in the trust may be added to the principal and distributed later without U.S. tax consequences.

If a foreign trust with U.S. beneficiaries does not fall within one of the exceptions and so is not a grantor trust, and if it distributes the current year's income (including capital gains) to a U.S. beneficiary in the same calendar year, the income is taxed to the beneficiary and the income retains its character as ordinary income or capital gains. For foreign trusts, realized capital gains are included in distributable net income (DNI).

Any distribution from a discretionary nongrantor trust to a beneficiary carries out with it DNI to the extent that the trust has income. It makes no difference that the trustee characterizes the distribution as one of corpus or of capital gains. (U.S. tax law differs from the tax law of the United Kingdom in this respect.) If two beneficiaries receive distributions from the trust in the same calendar year, each is treated as receiving a proportionate share of the trust's DNI for that year. After all current income of the trust has been carried out to the beneficiaries, further distributions are treated as distributions of corpus and are not taxed (assuming the trust has no accumulated income from prior years).

If a foreign trust accumulates income, the trust pays no U.S. income tax on that income (other than withholding tax on U.S. source income paid to the trust or income effectively connected with a U.S. trade or business) and there is no U.S. income tax currently payable by any potential beneficiary on that income. However, the trust is building up undistributed net income (UNI), which will have negative tax consequences if it is distributed to a U.S. beneficiary in a future year.

When a foreign trust has UNI from prior years and it distributes an amount not exceeding the greater of the current year's DNI or fiduciary accounting income to the beneficiaries (including U.S. beneficiaries), the U.S. beneficiaries are taxed only on their share of the DNI. For foreign trusts (unlike domestic trusts), DNI includes realized capital gains, and the capital gains retain their character and are taxed at the lower capital gains rate (currently 20 percent).

When a foreign trust with UNI pays out to the beneficiaries in a calendar year an amount in excess of both the current year's DNI and the current year's fiduciary accounting income, UNI is carried out to the beneficiaries. UNI paid to U.S. beneficiaries is fully subject to U.S. income tax and has the following additional negative consequences:

1. All capital gains realized by the trust in prior years that constituted part of the trust's DNI are now ordinary income, taxed at rates up to 37 percent.

2. An interest charge is imposed on the tax due by the beneficiary on the UNI from the date the income was originally earned by the trust. From 1996 forward, the interest charge is pegged to the rate applicable to underpayment of tax and is compounded daily.

3. Finally, the "throwback" rules apply, so the income may be taxed at the beneficiary's tax bracket for the years in which income was accumulated.

C. Use of Intermediaries

Because it is difficult for a foreign trust to qualify as a grantor trust, and because distributions of UNI from a foreign nongrantor trust to a U.S. beneficiary have such negative tax consequences, trustees will look for ways to "cleanse" accumulated income in a trust. One idea that has occurred to some is to distribute the accumulated income to a foreign intermediary (either an individual, corporation or another trust), which can then later pay it to the U.S. beneficiary in the guise of current income, principal distribution or a gift.

To address this, Treas. Reg. § 1.643(h)-1) sets out the circumstances in which such intermediaries will be disregarded and the treatment of structures that employ intermediaries. Essentially, when property is transferred to a U.S. person by another person (the intermediary) who has received property from a foreign trust, the U.S. person will be treated as having received the property directly from the foreign trust if the intermediary received the property from the foreign trust pursuant to a plan in which one of the principal purposes was the avoidance of U.S. tax. Such a principal plan of avoidance will be deemed to exist if:

1. The intermediary is "related" to the grantor of the foreign trust or has a relationship to the grantor that establishes a reasonable basis for concluding that the grantor of the foreign trust would make a gratuitous transfer to the U.S. person;

2. The U.S. person receives from the intermediary, within the period beginning 24 months before and ending 24 months after the intermediary's receipt of property from the foreign trust, either the property the intermediary received from the foreign trust, proceeds from such property or property in substitution for such property; or

3. The U.S. person cannot establish that the intermediary acted independently, had a reason for making gratuitous transfers to the U.S. person and was not the agent of the U.S. person, and the U.S. person properly reported the gift.

If the intermediary can be viewed as an agent *of the foreign trust*, a distribution will be deemed to take place from the foreign trust to the U.S. beneficiary at the time the intermediary makes the distribution to the U.S. beneficiary. If the intermediary can be viewed as an agent *of the U.S. beneficiary*, a distribution will be deemed to have been made to the U.S. beneficiary when the foreign trust makes the distribution to the intermediary.

Trustees of foreign trusts often want to make distributions to U.S. beneficiaries out of trusts with substantial UNI. If a foreign trust with UNI distributes to a non-U.S. person or a distinguishable foreign trust distributes all of the trust's UNI, the original trust becomes "cleansed" and can make a large principal distribution to a U.S. beneficiary in the next calendar year without carrying out accumulated income. The question remains of what to do with the "tainted" funds if they are added to a new trust; they can remain with the offshore beneficiaries or trusts or go to charities, but it will be difficult for those funds to find their way to the U.S. beneficiaries without running afoul of the intermediary rules.

D. Loans From Foreign Trusts

Under IRC § 643(i), if a non-U.S. settlor creates a nongrantor offshore trust that then loans cash or marketable securities to a U.S. beneficiary or settlor or to a U.S. relative of the trust settlor, the loan will be treated as a distribution to the person receiving it and will be taxed accordingly, even if the loan is later repaid.

In Notice 97-34, the Treasury carved out an exception to this rule. This exception permits a foreign trust to lend money to a U.S. beneficiary without having it treated as a distribution if it is a "qualified obligation." An obligation is a qualified obligation only if it meets the following requirements:

1. The obligation is set forth in a written agreement;

2. The term of the obligation does not exceed five years;

3. All payments on the obligation are denominated in U.S. dollars;

4. The yield to maturity of the obligation is not less than 100 percent and not greater than 130 percent of the applicable federal rate (IRC § 1274(d)) for the day on which the obligation is issued;

5. The U.S. borrower extends the period for assessment by the IRS of any income tax attributable to the loan and any consequential income tax changes for each year that the obligation is outstanding, to a date not earlier than three years after the maturity date of the obligation; and

6. The U.S. obligor reports the status of the obligation, including principal and interest payments, on Form 3520 for each year that the obligation is outstanding.

A loan cannot be rolled over at the end of five years, and a new loan from the trust to the same U.S. beneficiary raises the issue of whether it constitutes a rollover.

E. Uncompensated Use of Trust Property

Under Section 643(i), uncompensated use of trust property by a U.S. beneficiary of a foreign nongrantor trust is treated as a constructive distribution to the beneficiary to the extent of the fair rental value of the beneficiary's use of the property. If there is DNI or UNI in the trust, the deemed distribution can carry out taxable income. However, if the trust's only asset is residential property used by the beneficiary and the property is not rented out, there may not be any income to carry out, in which case the constructive distribution would be reportable by the U.S. beneficiary but not taxable.

F. Reporting Distributions From Foreign Trusts

Any U.S. person who receives any distribution from a foreign trust after August 20, 1996, including a constructive distribution as noted above, must report that distribution to the IRS on Form 3520.

The U.S. person must report the name of the trust and the amount of the distribution received from the trust during the taxable year, and indicate how such distribution is characterized, even if it is claimed that the distribution is not taxable because it came from a grantor trust or from a trust that had no income, or for some other reason.

Reporting is required under IRC § 6048(c) only if the U.S. person knows or has reason to know that the trust is a foreign trust.

If the distribution is not reported, the U.S. recipient may be subject to a penalty of the greater of $10,000 and 35 percent of the gross amount of the distribution. (IRC § 6677(a))

Any distribution from a foreign trust, whether from income or corpus, to a U.S. beneficiary may be treated as an accumulation distribution includible in the gross income of the U.S. beneficiary if adequate records are not provided to determine the proper treatment of the distribution (even if the trust would have qualified for grantor trust treatment). (IRC § 6048(c)(2))

The U.S. beneficiary will not be required to treat the entire distribution as an accumulation distribution if the beneficiary obtains from the foreign trustee either a Foreign Grantor Trust Beneficiary Statement or a Foreign Nongrantor Trust Beneficiary Statement with respect to the distribution, which will provide full information about the trust. If a U.S. beneficiary cannot obtain such a beneficiary statement from the trustee, the U.S. beneficiary may still avoid treating the entire amount as an accumulation distribution if the U.S. beneficiary provides information regarding actual distributions from the trust for the prior three years. Under this "default treatment," the U.S. beneficiary will be allowed to treat a portion of the distribution as a distribution of ordinary income based on the average of distributions from the prior three years, with only the excess amount of the distribution treated as an accumulation distribution (and therefore subject to the interest charge of IRC § 668). (See generally IRS Notice 97-34, Form 3520.)

V. PLANNING FOR NON-U.S. PERSONS

A. NRAs Generally: Reducing U.S. Taxes

The three cardinal rules for NRAs who wish to minimize U.S. taxes are:

1. Minimize contacts with the United States to avoid becoming U.S. residents for income or estate tax purposes.

2. Minimize U.S. situs assets to avoid estate taxation. Typically, this means holding U.S. real estate, tangibles located in the United States and shares of stock of U.S. corporations through non-U.S. corporations (or entities that can elect to be treated as non-U.S. corporations). This step offers no protection from income taxes on U.S. source income; the income is still payable to a non-U.S. entity and thus subject to income tax withholding. Also, the transfer of U.S. real estate to the non-U.S. corporation may have income tax consequences. (In some cases, an irrevocable trust may be structured to serve as an effective estate tax blocker.)

3. Minimize taxable U.S. source income to avoid U.S. income taxation. Increase bond interest income and decrease stock dividend and rental income.

The creation of an offshore revocable trust by an NRA to hold assets will not in itself reduce taxes payable by the NRA. U.S. source income paid to the trust will still be subject to U.S. withholding tax. Also, if the grantor has a retained interest in the trust (such as the power to revoke), it will not shield U.S. assets from U.S. estate tax. A foreign trust can own the shares of a foreign corporation that in turn holds financial assets, in which case the corporation (provided it is appropriately administered) will shield U.S. stocks from U.S. estate tax.

However, the trust offers substantial nontax benefits: the retention of the wealth for future generations, with discretionary income and principal payments, which is not available in most civil law jurisdictions; protection from foreign taxes; protection from creditors; protection from nationalization and political risks; and protection from forced heirship and marital claims. The trust may also save estate and GST taxes for future generations.

A properly structured and administered irrevocable trust in an appropriate jurisdiction can also protect the U.S. assets from U.S. estate tax.

It is important to confirm with foreign counsel that holding assets through an offshore trust or corporation will not create tax complications in the NRA's home jurisdiction.

B. Estate, Gift and GST Taxes

As previously noted, transfers by an NRA to a U.S. beneficiary (including a U.S. trust) may be subject to reporting, but they are not subject to U.S. estate, gift or GST taxes except on assets that have U.S. situs. This is a significant benefit that should always be taken full advantage of when planning for NRAs.

C. Foreign Trust Planning

As noted, there are still great advantages to having an NRA create a multigenerational trust for the benefit of U.S. persons because the trust assets will not be subject to estate, gift or GST taxes. Moreover, there are strong reasons for the NRA to create a foreign grantor trust for the U.S. beneficiary in order to avoid U.S. income taxes during the life of the NRA.

An NRA can create a long-term trust for U.S. beneficiaries (which can be a foreign or U.S. trust) and escape all transfer taxes for the life of the trust on assets that remain in the trust. Because a longer term results in a longer avoidance of transfer taxes, the trust should be created in a jurisdiction that has a long perpetuities period.

For estate and gift tax purposes, it does not matter whether the trust is a U.S. trust or a foreign trust. However, for income tax purposes, if the trust is a domestic trust it will be subject to U.S. income taxes unless it is treated as a grantor trust with an NRA grantor. If the trust is a foreign nongrantor trust but the beneficiaries are in the United States and receive distributions, they will be subject to U.S. income tax on the distributions to them, with interest on the tax attributable to prior years' UNI and additional reporting requirements (as described above). Therefore, if the trust cannot be structured to qualify as a grantor trust, and if it is expected that all beneficiaries will remain in the United States for the long term, there may be no disadvantage to the trust being in the United States, and it may actually be preferable in some cases.

In light of the foregoing, a good strategy for an NRA grantor who wants to benefit a U.S. beneficiary through an offshore trust would be the following:

1. Make the trust revocable by the grantor or, if it is irrevocable, make the grantor (and/or the grantor's spouse) the sole trust beneficiaries during their lives. They can receive trust distributions and make gifts to the U.S. beneficiary as needed. The U.S.

beneficiary must report the gifts if they exceed $100,000, but no income or gift tax is due.

Alternatively, the trust could be fully revocable by the grantor, making it a grantor trust, and could then make payments directly to a U.S. beneficiary without being subject to U.S. income tax. In this case, the beneficiary would be required to report receipt of any trust distributions identify the trust and appoint a U.S. agent or else have the foreign trustee represent to the IRS that it will allow access the trust's books and records to prove that it is in fact a grantor trust. The grantor may not want this for privacy purposes. (Alternatively, the grantor could partially revoke the trust on certain assets and then make a gift of those assets to the U.S. beneficiary.)

2. After the death of the grantor and the grantor's spouse, the trust should continue for the U.S. beneficiary and descendants for the longest term permissible, possibly with a limited power of appointment granted to the beneficiaries at each generational level. For income tax purposes, the following options are available:

   (a) Pay all current income (including capital gains) to the U.S. beneficiary, who then pays U.S. income tax on the income, thus avoiding any accumulations problem. This, however, increases the assets that are distributed to the U.S. beneficiary and will ultimately be subject to estate tax on the beneficiary's death, particularly if there are high realized capital gains that must be distributed. Paying all income annually to a U.S. trust avoids this.

   (b) Move the trust situs to the United States. If this is done, all income will be taxed currently, but income can be accumulated without resulting in an interest charge and realized gains can be accumulated without being converted to ordinary income when later distributed.

   (c) If the U.S. beneficiary is not a U.S. citizen and expects to leave the United States in the future, or is a citizen who expects to expatriate and so will no longer be subject to U.S. income tax, the trustee should leave the trust offshore, accumulate the trust income free of U.S. income tax and make a qualified loan to the beneficiary if necessary. Once the beneficiary leaves the United States, the trust can pay out current and accumulated income without U.S. income tax. (However, this may not be the case if the beneficiary is a covered expatriate, as discussed below.)

   (d) Invest the trust assets in annuity or variable life insurance products. Investments in policies that are qualified for tax purposes can build up income and avoid the interest charge on accumulations. In addition, if non-modified endowment contract life insurance policies are used, distributions can be made to the beneficiaries without U.S. income tax up to the amount of the premiums.

Underlying Entities: During the grantor's lifetime, the trust should hold assets through one or more underlying offshore corporations to avoid U.S. estate tax. (Many other countries also levy death taxes on their domestic securities if held outright by foreign individuals but recognize a foreign corporation as a shield against such taxes; therefore, an underlying corporation may be advisable even if the assets are not U.S. situs assets.)

However, after the death of the NRA grantor, if the trust has U.S. beneficiaries, the underlying corporation may become a controlled foreign corporation (CFC) or a passive foreign investment company (PFIC), with negative tax consequences for the U.S.

beneficiaries. To avoid this problem, after the grantor's death, the corporation should elect to be disregarded for U.S. tax purposes and possibly liquidated outright. Under the U.S. "Check the Box" regulations (Treas. Reg. §§ 301.7701-1, 301.7701-2 and 301.7701-3), it is possible to simply elect for most foreign corporations to be treated as a pass-through for U.S. tax purposes. However, not all foreign corporations are eligible to make this election, so it is important when setting up the structure to choose an entity type that has not been designated as a "per se" corporation by the IRS. (Treas. Reg. § 301.7701-2(b)(8)) Additionally, this election must not be made during the grantor's lifetime if the corporation holds U.S. situs assets, since the pass-through treatment will apply for estate tax purposes as well and could eliminate the estate tax shelter for U.S. assets that the foreign corporation is intended to provide.

Note: An election postmortem may result in some phantom income inclusions for the U.S. beneficiaries due to changes in the rules governing CFCs introduced by the Tax Cuts and Jobs Act of 2017 (TCJA). However, the phantom income inclusion can usually be minimized with proper planning and in most cases will result in a much lower overall tax liability than the estate tax inclusion that could result from a pre-mortem election.

D. Non-U.S. Person Who Is Moving to the United States

If a non-U.S. person (the "pre-immigrant") is planning to become a U.S. resident in the near future, he or she should consider taking the following steps (in coordination with a tax advisor in his or her current country of residence) before becoming a U.S. resident for income or estate tax purposes:

1. **Make Gifts to Non-U.S. Persons:** The pre-immigrant should make irrevocable gifts to non-U.S. persons either outright or in the form of a trust that is for a closed class of beneficiaries, none of whom are U.S. person and is not permitted to be amended to have any U.S. beneficiaries. In addition, the pre-immigrant should not retain any other powers or interests that would otherwise cause the trust to be considered to be a grantor trust after he or she becomes a U.S. person. This will avoid U.S. income taxes on future income earned by the gifted assets and will also avoid later gift and estate taxes on the transfer of those assets.

2. **Make Gifts to U.S. Persons:** The pre-immigrant should make irrevocable gifts to U.S. persons and to long-term trusts for U.S. beneficiaries. Although the pre-immigrant can use either a U.S. or a foreign trust, a U.S. trust may be preferable if the U.S. beneficiaries anticipate receiving distributions. These gifts in trust will avoid later gift, estate and GST taxes.

   A foreign trust with any permissible U.S. beneficiaries that is created or funded by the pre-immigrant will be a grantor trust if the pre-immigrant becomes a U.S. person within five years after creating it, and so will not avoid U.S. income taxes on the income that the gifts generate.

3. **Create Irrevocable Discretionary Trusts:** The pre-immigrant should consider transferring a portion of his or her assets to an irrevocable discretionary trust of which the pre-immigrant and other family members are permissible discretionary beneficiaries. If the transfer is properly structured and administered in a jurisdiction (either U.S. or foreign) which protects such a trust from the claims of creditors, the assets should not be subject to U.S. estate tax on the pre-immigrant's death. Note that it often will be preferable to structure the trust as a U.S. trust for tax purposes (in which case it will have to be administered in the U.S.). The reason for this is that

when a foreign grantor trust with a U.S. grantor becomes a foreign nongrantor trust (for example, upon the grantor's death), gain may be recognized if there are appreciated assets in the trust. (IRC § 684) This outcome may be avoided by setting up the trust in the U.S. (or later domesticating the trust if it is already a foreign trust).

The trust will become a grantor trust for U.S. income tax purposes and its income will be subject to U.S. income tax.

4. **Sell Appreciated Assets:** The pre-immigrant should not own appreciated assets when he or she becomes a U.S. resident or citizen, since the United States will tax the entire capital gain on the later sale of the asset, regardless of when it was bought or acquired. The pre-immigrant should sell appreciated marketable securities before entering the United States and reinvest the proceeds. The pre-immigrant should also sell or otherwise dispose of appreciated residences and closely held securities, possibly to other family members.

5. **Dispose of Interests in Foreign Corporations:** The pre-immigrant should try to dispose of all interests in foreign corporations that are closely held by U.S. persons or that have primarily passive income, or should consider filing entity classification elections to treat such corporations as pass-through entities (if they are not per se corporations) and possibly step up the inside basis of the underlying assets.

6. **Make Gifts Between Married Couples:** If a married pre-immigrant couple become U.S. residents but not U.S. citizens, any gifts made between them in excess of $155,000 per year (2019 figure) will be subject to gift tax. Therefore, any gifts that will be made between the spouses should be made before they enter the United States with non-U.S. assets.

7. **Invest in Annuity or Life Insurance Policy:** The pre-immigrant can purchase a U.S.-compliant commercial annuity or life insurance policy and will not be subject to U.S. income tax on the earnings. If the pre-immigrant stays in the United States for a number of years without withdrawing any funds from the annuity and then leaves the United States, the funds invested in the annuity will never be subject to U.S. income tax and will not be considered a U.S. situs asset subject to estate tax if it is only on the (now non-U.S.) holder's life. A life insurance policy that is a non-modified endowment contract can provide funds while the pre-immigrant is a U.S. resident, without payment of U.S. income tax.

VI. INTERNATIONAL ESTATE PLANNING FOR U.S. PERSONS

A. Basic Rule

As previously noted, the general rule is that U.S. persons are subject to income taxation on their worldwide income, and individuals who are U.S. persons are also subject to gift and estate taxation on their worldwide assets. The fact that the assets are located offshore or the income is paid offshore does not make a difference.

B. U.S. Citizen Who Resides Abroad

U.S. citizens who are not U.S. residents are taxed on their worldwide income and assets for income and estate tax purposes in the same way as if they resided in the United States. The only significant advantage is that U.S. citizens residing abroad may exclude the first $105,900 (for 2019) of foreign earned income from U.S. income taxation. (IRC § 911(b))

In addition, treaties with various countries often provide relief from double taxation, as do foreign tax credits that are generally available for both income and estate taxes paid to other countries, subject to certain limitations. (IRC §§ 901, 2104)

The United States generally does not allow a credit to U.S. persons for gift taxes paid to foreign jurisdictions. However, at least three treaties (with France, Germany and the United Kingdom) do provide for such a credit.

C. U.S. Person Who Creates Foreign Trusts

What are the advantages and consequences for a U.S. person in creating an offshore trust for the benefit of him- or herself and his or her family in a non-U.S. jurisdiction?

1. **Income tax:** As a general rule, a foreign trust, like any other non-U.S. person, pays no U.S. income tax except for withholding tax on U.S. source income. However, the grantor trust rules prevent this result in most cases where the settlor is a U.S. person. (IRC §§ 671-679) If the U.S. settlor or the trustee of the trust retains a power or interest that is specified in those rules, the trust will be a grantor trust for income tax purposes and all trust income will be taxed to the settlor (or the person who transferred assets to the trust), regardless of whether the income is accumulated in the trust or distributed to another beneficiary. Among the provisions that will cause the trust to be a grantor trust: if either the grantor or the grantor's spouse is a permissible beneficiary of the trust (IRC § 677) or if the trust permits any U.S. person to be a beneficiary. (IRC § 679) Therefore, unless a U.S. settlor is willing to eliminate him- or herself, his or her spouse, and all other U.S. persons as permissible beneficiaries of the trust, as well as give up any power to control or direct the trust asset, the trust will be a grantor trust and all income will be taxed to the settlor.

   When the settlor dies, the trust will become a foreign grantor trust. If the trust has been drafted so that the trust assets are not includible in the settlor's estate, then any appreciated assets held in the trust will be deemed to have been sold immediately prior to the settlor's death, causing the settlor to recognize gain (but not loss) on the deemed sale. (IRC § 684)

2. **Estate, Gift and GST Taxes:** U.S. persons are fully subject to gift and estate taxes on their worldwide gifts and assets, including completed gifts to foreign trusts. A foreign trust created by a U.S. settlor is fully subject to GST tax.

   In making a transfer to a trust, whether foreign or domestic, the settlor must choose one of the following options:

   (a) Make a completed gift to the trust. This will result in gift tax (or the application of the settlor's unified credit and annual exclusion for gift taxes). However, the trust assets, including future appreciation and income, will not be includible in the settlor's estate at death. To make the gift complete, the trust may not be revocable (alone or with the consent of another person), the settlor cannot have power as trustee or otherwise to control beneficial enjoyment, and the settlor may not have a reversionary interest or retain a testamentary power of appointment (including a limited power) over the trust. As previously noted, the cost of making a completed gift is potential gain recognition at the settlor's death (or sooner if the trust becomes a foreign nongrantor trust during the grantor's lifetime).

(b) Make an incomplete gift to the trust. In this case, no gift tax will be payable and no credits need to be used up. However, the assets will be fully subject to U.S. estate taxation at the settlor's death. On the other hand, if the assets are includible in the settlor's estate (or otherwise eligible for a basis step-up under IRC § 1014(a)), then no gain will be recognized on the appreciated assets if the trust becomes a foreign nongrantor trust by reason of the settlor's death. (Treas. Reg. § 1.684-3(c)) To make the gift incomplete, the settlor must retain some power or control over the trust assets, such as making the trust revocable (alone or with the consent of another person) or retaining a testamentary power of appointment over the trust.

For settlors who want to make a completed gift, one option is available in some foreign jurisdictions and a limited number of U.S. jurisdictions: the settlor may remain as one of the permissible beneficiaries of a sprinkle trust. Under the laws of most U.S. states, creditors can reach such a "self-settled" trust and, therefore, the transfer to the trust is not complete for U.S. gift tax purposes and is subject to U.S. estate tax at the settlor's death. But in certain offshore jurisdictions (such as the Bahamas, the Cayman Islands, Jersey, Guernsey, the Cook Islands and others) and certain U.S. jurisdictions (Alaska, Delaware, Nevada, New Hampshire, South Dakota, Wyoming and a few others), the fact that a settlor is a discretionary beneficiary of a trust prevents creditors from reaching the trust, and therefore a gift to the trust can be a completed gift, even though the settlor can receive distributions in case of emergency.

3. **Reporting:** The creation of a foreign trust and the transfer of assets to a foreign trust by a U.S. person, must be reported to the IRS annually on Form 3520 by the U.S. settlor. If the trust is a grantor trust, the settlor and foreign trust also have annual information reporting on Form 3520 and 3520-A respectively. The penalties for failure to report are significant: up to the greater of $10,000 or 35 percent of the amount transferred to the trust (IRC §§ 6048; 677(a)) and up to 5 percent of the portion of the trust treated as owned by the U.S. settlor under the grantor trust rules. The settlor of the trust is encouraged (but not required) to appoint a U.S. person as "agent" for the trust, with the responsibility to supply the IRS with information about the trust. If no agent is appointed, the foreign trustee is required to represent to the IRS that it will provide access to the trust's books and records, on request and if necessary, to determine the tax consequences of the distribution.

4. **FBAR and Other Filings:** A U.S. citizen or resident is permitted to own assets and maintain bank and securities accounts abroad. However, all such accounts are subject to U.S. income, gift and estate taxes in the same way as U.S. assets. In addition, for financial accounts that exceed $10,000 in the aggregate the U.S. person who has a financial interest or signature power over the account must check the appropriate box on Schedule B of Form 1040 (interest in or signature power over a foreign account) and must file electronically with the Treasury FinCEN Form 114, often referred to as the "FBAR" or Foreign Bank Account Report, disclosing the offshore accounts. Failure to comply with all filing requirements may result in significant penalties, even if all taxes have been paid. Entities that are created or organized in the United States, such as trusts, corporations, partnerships and limited liability companies (including single-member limited liability companies that are

otherwise disregarded for most federal tax purposes), must also file an FBAR if they maintain foreign accounts.

In addition, Form 8938, which is filed with the taxpayer's U.S. income tax return, also requires reporting of a wide range of foreign assets. Foreign real estate owned directly (not through a corporation or trust) is not required to be reported, although all income on foreign real estate and the gift or ownership at death of foreign real estate must be reported.

5. **Asset Protection:** A foreign trust may afford asset protection advantages. If a U.S. person makes an irrevocable gift to a U.S. trust of which the settlor and his family are discretionary beneficiaries, with an independent trustee, the trust can still be reached by subsequent creditors of the grantor under the self-settled trust rules of most U.S. states. As previously noted, Alaska, Delaware, South Dakota, Wyoming, Nevada, New Hampshire and a few other states have enacted legislation overturning this rule as to trusts that are sited in those states; whether a trust created in one of those states will be defeated by a creditor from another state under the "full faith and credit" doctrine of the U.S. Constitution remains to be tested. However, the laws of the Cayman Islands, the Bahamas, Bermuda, the Cook Islands and some other offshore jurisdictions provide that if the settlor gives up the power to revoke or withdraw funds from such a trust, its assets cannot be reached by creditors whose claims arose after the transfer of assets to the trust. Moreover, creditors whose claims arose prior to the transfer of assets to the trust have a limited period (two years in the Bahamas, six years in the Cayman Islands) within which to bring their claim against the trust in the jurisdiction in which it is set up. Therefore, offshore asset protection trusts have become a popular vehicle for U.S. persons who are concerned about future claims.

   Normally, a transfer to an asset protection trust is structured as an incomplete gift for U.S. gift tax purposes by prohibiting distributions to persons other than the grantor without the grantor's consent and by giving the grantor a testamentary power of appointment. Therefore, the transfer to the asset protection trust generates no gift tax, but the trust assets are includible in the grantor's estate at death. As previously noted, it is possible to structure the transfer to the asset protection trust as a completed gift, for which gift tax may be due, and then have the trust excluded from the grantor's gross estate at death, even though the grantor has remained a permissible beneficiary during his or her life. This is possible because creditors cannot reach such a trust in an asset protection jurisdiction (as they can if the trust is governed by the laws of most U.S. states). However, if the trust is settled in a non-U.S. jurisdiction, the asset protection and estate tax exclusion come at the cost of potential gain recognition when the trust becomes a foreign nongrantor trust on the settlor's death. The settlor may want to consider a U.S. asset protection jurisdiction in order to avoid potential gain recognition at death (and ongoing foreign asset reporting obligations).

D. U.S. Person Who Wishes to Benefit Non-U.S. Persons

If a U.S. person makes gifts to a non-U.S. person, either outright or to an offshore trust, the U.S. donor is still subject to U.S. gift tax in the same manner as with gifts to U.S. persons. However, after the transfer is made to a foreign individual, future income and appreciation of the assets are not subject to U.S. income, estate or gift taxation, except as to U.S. source income and U.S. situs assets. A transfer to a foreign trust solely for foreign beneficiaries is also free of future U.S. income, estate and gift taxes, provided the U.S. donor does not retain any strings, such as a power to recover the assets or to control their distribution, that either could make the trust a grantor trust for U.S. income tax purposes or could bring the assets back into the estate of the U.S. person for estate tax purposes. However, such a trust will remain subject to U.S. GST tax.

As previously noted, if a U.S. person creates or transfers funds to a foreign trust, the trust is a grantor trust during any year that the trust may have a U.S. person as a beneficiary. (IRC § 679) Therefore, the trust agreement should provide that no U.S. citizen or resident may be a beneficiary. The U.S. person also should be careful to avoid transferring appreciated property to the trust so as to avoid forced gain recognition. (IRC § 684)

E. U.S. Person Who Owns Interests in Non-U.S. Corporations

The general rule is that U.S. shareholders of non-U.S. corporations are taxed only on distributions in the same manner as shareholders of U.S. C corporations. However, there are several important exceptions that ensnare many U.S. shareholders of foreign corporations in the U.S. tax net. It should be noted that in each case attribution rules among U.S. family members are applied in determining ownership.

Passive Foreign Investment Company (PFIC): Whether a foreign corporation constitutes a PFIC is determined by a passive income and assets test, but the shares can be publicly held. (IRC § 1296) A foreign corporation is a PFIC if either (i) 75 percent or more of its gross income is passive income or (ii) 50 percent or more of the average value of its assets are held for the production of passive income. Under this definition, most foreign mutual funds would be considered PFICs. The U.S. shareholder may elect to include in current income the pro rata share of ordinary income and capital gains of a PFIC. (This is a "qualified electing fund," or QEF, election.) If such an election is not made, then on the sale of the shares of the PFIC, the U.S. shareholder will recognize ordinary income on the gain, plus an interest charge under IRC § 1291. In order to make and maintain a QEF election, the U.S. shareholder must report certain financial information regarding the PFIC, which the offshore fund managers may not be willing to provide.

Controlled Foreign Corporation (CFC): A CFC is generally a foreign corporation owned more than 50 percent (in value or voting control) by "U.S. shareholders," who are defined as U.S. persons who hold at least 10 percent of the corporation's stock by voting control or value. (IRC § 957) (Prior to the TCJA, a U.S. person had to own voting stock in order to be considered a U.S. shareholder.) Unlike PFICs, CFCs are not limited to companies with primarily passive income.

Subpart F Income and GILTI Inclusions: If the corporation is a CFC during any part of the taxable year, each U.S. person who is a U.S. shareholder on the last day of the CFC's taxable year may be taxed on his or her pro rata share of the CFC's "subpart F" income under IRC §951(a) and "global intangible low-taxed income" (GILTI) under IRC §951A.

Subpart F income includes the following:

- Insurance income (as defined under IRC § 953).

- The foreign base company income (as determined under IRC § 954), which includes most types of passive investment income, as well as certain types of related party sales and services income (with carve-outs for de minimis amounts and "high taxed" income).

- Income derived from illegal international boycotts.

- Illegal bribes, kickbacks or other payments that would be unlawful under the Foreign Corrupt Practices Act of 1977.

- The income of such corporation derived from any foreign country that the United States does not recognize, or with which the United States has severed diplomatic relations or which repeatedly provides support for acts of international terrorism.

GILTI, a new regime introduced by the TCJA, picks up most other types of income earned by the CFC. Under the GILTI regime, a U.S. shareholder of one or more CFCs is taxed on his or her share of the excess of (1) the CFCs' modified gross income (excluding certain items) over (2) a benchmark return of 10 percent of the CFCs' adjusted bases in depreciable tangible property placed in service (with certain adjustments for interest income and expense).

- The GILTI regime eliminated a long-standing distinction under the CFC rules between operating income of a bona fide business overseas (which until now was not picked up under these rules) and passive income.

- This will not have a significant impact on a typical foreign blocker structure that holds mostly marketable securities, as such income would already have been subject to the subpart F regime. However, trusts that hold stock in closely held operating companies could be impacted.

Elimination of 30-Day Rule: Until the TCJA went into effect, a foreign corporation had to be a CFC for at least 30 consecutive days in order for the CFC rules to apply. However, this 30-day rule was repealed by the TCJA. Now, even a day of CFC status can expose U.S. shareholders to phantom income inclusions, albeit on a fractional basis. As previously noted, this can present complications with the unwind of a foreign blocker structure after the death of a non-U.S. settlor.

VII. U.S. CITIZEN OR RESIDENT WHO EXPATRIATES

The United States revised its tax laws, effective June 17, 2008, covering U.S. citizens who on or after that date renounce their citizenship and persons who on or after that date renounce their green card after holding it for part or all of at least eight of the prior 15 years. For expatriations on or after June 17, 2008, the laws impose a capital gains tax on all appreciation in the value of a covered expatriate's worldwide assets as of the day of expatriation. (IRC § 877A) They also provide that gifts and bequests from a covered expatriate to a U.S. person are subject to a new transfer tax. (IRC § 2801)

Many provisions of the prior law no longer apply. These include the 10-year alternative regime of U.S. income, gift and estate taxation of a broad list of U.S. source income and U.S. situs assets, and the provision that an expatriate who spends 30 or more days in the United States in any of the 10 years following expatriation will be taxed as a U.S. person on his or her worldwide income and assets for that year.

To be a "covered expatriate" subject to the new law, the renouncing person must also meet one of the following three tests in IRC § 877 (a)(2):

(A) his or her average net income tax liability for the prior five years exceeds $168,000 (amount for individuals who expatriate in 2019, indexed each year for inflation);

(B) his or her net worth exceeds $2 million (including interests in trusts); or

(C) he or she fails to certify under penalty of perjury that he or she has complied with all federal tax obligations for the previous five years. (In other words, even if the expatriate does not meet the income tax or net worth tests, he or she must certify compliance with U.S. tax laws for the past five years or else be subject to the new taxes.)

There are exceptions for the following persons, provided they can make the certification as to tax compliance for the previous five years:

(i) persons who were dual citizens of the United States and another country from birth, are tax residents of that country at the date of expatriation and have not been U.S. income tax residents for more than 10 of the past 15 years; and
(ii) persons who expatriate before age 18½ and have not been U.S. income tax residents for more than 10 years.

Computation of Tax: To compute the tax, the expatriate determines what would have been the capital gains tax if he or she had sold all his or her worldwide assets for their fair market value the day before he or she expatriated. Losses are taken into account, but the "wash sale" rules, which provide that a loss is not recognized in the case of a sale and purchase within 30 days (IRC § 1091), do not apply.

The first $725,000 of net appreciation (2019 figure, indexed annually for inflation) is exempt from the tax. In addition, the covered expatriate may elect to defer the tax on any asset until that asset is sold or until the death of the covered expatriate, if sooner. A satisfactory security arrangement such as posting a bond must be reached with the IRS in the case of any such deferral.

For a person who moved into the United States and is now leaving and renouncing citizenship or a green card, the cost basis of assets that he or she owned on the date he or she first became a U.S. resident is their fair market value on that date for purposes of the expatriation tax.

Deferred compensation items and tax-deferred retirement accounts are not subject to the immediate expatriation tax but are subject to their own special rules, which generally amount to a withholding tax of 30 percent on distributions to the covered expatriate. 401(k) plans and IRAs are generally deemed to have distributed their assets to the covered expatriate immediately prior to expatriation, resulting in ordinary income inclusion (unless the plan is a Roth 401(k) or Roth IRA) but no early distribution penalty.

Beneficial Interests in Trusts: Grantor trusts of which the covered expatriate is treated as the owner under the grantor trust rules and that are included in the grantor's estate are subject to the mark-to-market tax. For nongrantor trusts (both domestic and foreign) of which the covered expatriate was a beneficiary immediately before expatriation, there is a withholding requirement on the trustee of 30 percent on the "taxable portion" of all distributions to the covered expatriate. The taxable portion of a distribution is the portion that would have been includible in gross income if the expatriate were still a U.S. person. In addition, if a nongrantor trust distributes appreciated assets to a covered expatriate beneficiary, the trust is taxed by the United States on the gain.

New Transfer Tax: IRC § 2801 imposes a special transfer tax on all covered gifts and bequests from a covered expatriate (made during the rest of his or her life after expatriation and at death) to a U.S. citizen or resident. The U.S. recipient is liable for payment of the tax, at a rate equal to the highest estate tax rate under IRC § 2001 or, if higher, the highest gift tax rate under IRC § 2502(a) (currently, both are 40 percent). The amount of the annual gift tax exclusion under IRC § 2503(b) (currently $15,000) is exempt, and gifts and bequests that are subject to U.S. estate tax, or that pass to a surviving spouse or a charity, are not covered gifts. (If the spouse is not a U.S. citizen, the bequests must pass to a qualified domestic trust and gifts will qualify for the exception up to only $155,000 per year, 2019 figure, indexed for inflation.) The tax is payable by the recipient.

Covered gifts or bequests to U.S. trusts are taxed in the same manner as gifts to U.S. persons. If covered gifts or bequests are made to a foreign trust, then distributions of income or principal from that trust to a U.S. person are taxed as covered gifts to that person.

VIII. NONCITIZEN SPOUSE

A. Qualified Domestic Trust

A U.S. person is entitled to a 100 percent estate tax marital deduction for assets left to his or her surviving spouse if the spouse is a U.S. citizen. This applies also to an NRA who leaves U.S. situs assets to the surviving U.S. citizen spouse. However, in either case, if the surviving spouse is not a U.S. citizen, the estate tax marital deduction is not available unless the assets pass to a qualified domestic trust (QDT). (IRC § 2056 (d)(2)(A))

To qualify, a QDT must meet the following requirements:

1. The trust must pay all income to the surviving spouse for life.

2. The trust may not permit principal distributions to anyone other than the surviving spouse during his or her life. Any principal distributions to the surviving spouse (except distributions for hardship) will be subject to estate tax at the time of distribution at the top bracket of the deceased spouse's estate. The remaining principal in the trust on the death of the second spouse will also be subject to estate tax on the estate of the first spouse.

3. The trust must have at least one U.S. trustee, and the U.S. trustee or trustees must have the power to withhold estate tax on any such distribution.

4. For trusts of more than $2 million, there must be either a U.S. institutional trustee (a U.S. bank or U.S. branch of a foreign bank) or the posting of a bond or letter of credit in an amount equal to 65 percent of the initial value of the trust assets. In

determining whether the trust has more than $2 million in assets, and also in determining the amount of the bond or letter of credit, there is an exclusion for up to $600,000 of real property (not, apparently, cooperative apartments) constituting one or two residences and their contents used by the surviving spouse. (Treas. Reg. § 20.2056A-2(d)(1)(iv))

5. For trusts of $2 million or less, if more than 65 percent of the trust assets constitute offshore real property, there must be either a U.S. institutional trustee or the posting of a bond or letter of credit in an amount equal to 65 percent of the initial value of the trust assets. (Proposed Treas. Reg. § 1.015-5(d))

No partial marital deduction election may be made over a QDT.

Assets owned jointly with a noncitizen spouse are fully includible in the estate of the first spouse to die, except to the extent that the surviving spouse can prove contribution to the property.

Outright bequests to a noncitizen spouse will qualify for the marital deduction without the need for a QDT if the surviving spouse becomes a U.S. citizen before the decedent's estate tax return is filed. If the surviving spouse becomes a U.S. citizen at any time after the return is filed, the QDT can be terminated and all assets paid outright to the surviving spouse, but any principal distributions that were made to the spouse prior to becoming a citizen will be taxed.

B. Gifts to Noncitizen Spouse

A U.S. person or an NRA may make unlimited gifts to his or her U.S. citizen spouse without gift tax consequences. However, if the donee spouse is a non-U.S. citizen (regardless of whether or not the donee spouse is a U.S. citizen or resident), the donor spouse may give up to only $155,000 (2019 amount) per year to the donee spouse without gift tax consequences . These annual gifts must be either outright or in a trust that qualifies them as gifts of a present interest. They must also be in a form that would qualify for the marital deduction if the spouse were a U.S. person. Any gifts in excess of this amount will be subject to gift tax, although the unified credit is available if the donor spouse is a U.S. citizen or resident. (IRC § 2523(i)(2))

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G. Warren Whitaker advises high net worth individuals and multinational families with complex domestic and international estate planning and related income tax, corporate and personal financial planning. Clients seek his experience with sophisticated international transactions, trust and estate, family office, and trust services and fiduciary compliance issues. Warren is a prolific writer and international speaker. He has been published or cited in respected news sources, such as The New York Times. Warren served as the U.S. chair of the Society of Trusts and Estates Practitioners (STEP) and as chair of the Trusts and Estates Section of the NYSBA, and is a fellow of the American College of Trusts and Estates Counsel (ACTEC).

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Dina Kapur Sanna has over 20 years of experience in advising U.S. and non-U.S. taxpayers on wealth management structures which accommodate multi-jurisdictional tax and legal considerations. Her practice involves foreign trusts, pre-immigration and expatriation planning, planning for the purchase of U.S. property by non-U.S. persons and compliance with tax and reporting obligations for those with overseas interests in foreign accounts, corporations and trusts. Dina is a frequent speaker at estate planning seminars and has written numerous published articles. She is an ACTEC Fellow and a member of its International Estate Planning Committee, as well as an Academician of The International Academy of Estate and Trust Law.

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Till Death (Or Divorce) Do Us Part: Planning for a Noncitizen Spouse

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Till Death (or Divorce) Do Us Part: Planning for a Noncitizen Spouse

New York State Bar Association

January 16, 2019

NYSBA

Multinational Relationships Affect US Planning

- Mobile couples often must consider multi-state & multi-country laws
- International marital property regimes
- Foreign property and inheritance laws
- Potential religious laws (Sharia & Hindu Undivided Family)

US Income Tax Issues for Noncitizen Spouses

- Will the non-citizen spouse be a US tax resident for income tax purposes?
  - Substantial Presence & Green Card Tests
  - General tax rules applicable to non-residents
  - FIRPTA
- Joint returns and other filing issues

Transfer Tax Issues for Noncitizen Spouses

- Will the noncitizen spouse be a US domiciliary for estate tax purposes?
  - Focus on subjective intent
  - Presumption of domicile for green card holders
- What assets are subject to transfer tax for non-domiciled persons?
  - Gift: Tangible Personal Property and Real Estate
  - Estate: U.S. “Situs” Assets

Transfer Tax Exemptions

- Estate tax exemptions are different for non-domiciled persons
- No estate tax marital deduction for non-citizen spouses EVEN if such spouse is domiciled unless a QDT is used
- Annual exclusion gift OF $15,000 (2018 amount) available regardless of domicile
- Annual exclusion for gifts to non-citizen spouses increased to $152,000 (2018 amount)
- Consider treaty options that may change the tax exemptions available

Special Gift Tax Considerations

- Gift splitting not permitted if one spouse is not domiciled
- Community property issues may arise
- Consider giving non-US property to non-domiciled noncitizen spouses

Qualified Domestic Trusts

- Become a US citizen before estate tax return due
- QDT pros/cons:
  - Provides estate tax deferral
  - Receive net income and hardship distributions without estate tax charge
  - Estate tax applies at rates applicable at first spouse's death
  - Estate tax applies to appreciation also

QDT - Requirements

- Ordinary Trust (Treas. Reg. 301.7701-4(a)
- "Maintained under the laws of" of a particular state (as opposed to governed by the laws of a particular state)
- U.S. Trustee – individual with a U.S> tax home or a U.S. corp (Treas. Reg. 20.2056A-2(c))
- QDT Tax withholding required (I.R.C. 2056(a)(1))
- Assets over $2 Million? Different requirements apply
- Timely election, which is irrevocable (Treas. Reg. 20.2056A-3(a))

QDT Flexibility

- Decedent spouse does not need to be a U.S. person (I.R.C. 2106(a)(3))
- The QDT does not need to be created under U.S. law or taxable as a domestic U.S. trust
- QDT assets don't always need to meet the marital deduction requirements if assets transferred by the surviving spouse (Treas. Reg. 20.2056A-4(b))
- QDT reformation
- Can the surviving spouse use portability for QDT assets?

QDT Value Matters

- QDT assets (in aggregate if multiple QDTs exist) over $2 million require either a bank trustee, bond or letter of credit
- QDT assets equal to or less than $2 million cannot hold more than 35% of the fair market value of trust assets (determined annually on the last day of trust's taxable year) in non-U.S. real estate
- In calculating the $2M, you may exclude up to $600,000 of value attributable to real property (and furniture) used by the surviving spouse as a personal residence
  - No rental of residence
  - Sale and reinvestment in a new personal residence permitted

Joint Ownership with Noncitizen Spouses

- For estate tax purposes:
  - The tracing rule (I.R.C. 2040(a)) applies to property held as JTROS or TBE with a noncitizen spouse
  - Default presumption is that the decedent was the sole contributor, thus causing (potentially) the entire value of the joint property to be included in the decedent's estate
- For gift tax purposes:
  - Titling assets jointly with a noncitizen spouse may cause a lifetime gift
  - Personal property – upon creation of the joint tenancy generally
  - Financial accounts – upon withdrawal by noncontributing spouse
  - Real estate – upon termination of the joint tenancy if the noncontributing spouse receives proceeds

Marital Considerations

- Acceptance of pre and post-nuptial agreements
- Assets in multiple jurisdictions
- Transfers incident to a divorce rules are different for noncitizen (ex) spouses

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Whose Law Is It Anyway?

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PHILLIPS **NIZER** LLP

PRESENTATION FOR
THE TRUSTS AND ESTATES SECTION
OF THE NEW YORK STATE BAR ASSOCIATION

January 16, 2019
Michael W. Galligan
Partner, Phillips Nizer LLP
And
Sean Weissbart
Counsel, Morris & McVeigh LLP

PHILLIPS **NIZER** LLP

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PHILLIPS **NIZER** LLP

I

A WORLD OF MANY LAWS

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PHILLIPS **NIZER** LLP

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- SEPARATE PROPERTY (IN MAJORITY OF U.S. JURISDICTIONS)
- FREEDOM OF TESTATION (SUBJECT TO SOME PROTECTION FOR SURVIVING SPOUSE)
- LIMITED LIABILITY FOR DECEDENT DEBTS
- FLEXIBLE OPTIONS FOR TRUSTS
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- TESTAMENTARY FREEDOM VS. MANDATORY INHERITANCE
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- LIMITED LIABILITY VS. UNLIMITED LIABILITY
- ESTATE ADMINISTRATION VS. SUCCESSION
- "FUTURE ESTATES" VS. OWNERSHIP
- TRUSTS VS. NO TRUSTS

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THE INTERNATIONAL CONTEXT

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- ISRAEL
- MOST OF LATIN AMERICA (CENTRAL & SOUTH)
- PHILIPPINES**
- CHINA
- TAIWAN
- SOUTH AFRICA
- USA: ARIZONA, CALIFORNIA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS, WASHINGTON, WISCONSIN

* For Belgium, Sweden, Switzerland, U.S. citizen spouse must have resided there at time of marriage or acquisition of property. For Denmark, male spouse must have resided in Denmark at time of marriage.

** Only if at least one spouse is Philippine citizen.

THE INTERNATIONAL CONTEXT

SEPARATE PROPERTY REGIMES

- AUSTRIA
- AUSTRALIA
- CANADA*
- FINLAND
- GERMANY*
- INDIA
- IRELAND
- ISLAMIC COUNTRIES
- JAPAN
- KOREA
- NEW ZEALAND*
- UKRAINE
- UNITED KINGDOM
- USA: MAJORITY OF STATES

* Subject to possible adjustments on death of first spouse.

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THE INTERNATIONAL CONTEXT

CHOICE OF LAW FOR MARITAL REGIMES

- JURISDICTION WHERE MARRIAGE WAS CELEBRATED
- JURISDICTION OF FIRST HABITUAL RESIDENCE
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- JURISDICTION OF RESIDENCE OF SPOUSES WHEN THE PROPERTY WAS ACQUIRED
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- LATIN AMERICA (CENTRAL & SOUTH)
- JAPAN
- PHILIPPINES
- KOREA
- TAIWAN
- USA: LOUISIANA
- ISLAMIC COUNTRIES
- INDIA (ISLAMIC)

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THE INTERNATIONAL CONTEXT

TESTAMENTARY FREEDOM JURISDICTIONS;*

- AUSTRALIA
- CANADA (INCLUDING QUEBEC)
- CHINA
- INDIA (NON-ISLAMIC)
- ISRAEL
- NEW ZEALAND
- SOUTH AFRICA
- UNITED KINGDOM
- USA: 49 STATES

* May include protections for surviving spouses.

THE INTERNATIONAL CONTEXT

POST-DEATH TREATMENT OF WILLS

- MOST COMMON LAW JURISDICTIONS OUTSIDE THE USA AS WELL AS CHINA PERMIT POST-DEATH WILL MODIFICATIONS ON A LIMITED BASIS
- SOME COMMON LAW JURISDICTIONS ALLOW VARIATIONS TO WILLS BY BENEFICIARIES THAT ARE MORE LIBERAL THAN U.S. RENUNCIATION/ DISCLAIMER PROCEDURES
- IRELAND PROTECTS SPOUSES AND PERMITS CHILDREN (ADULTS AS WELL AS MINORS) TO MAKE APPLICATIONS FOR EQUITABLE ADJUSTMENT

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THE INTERNATIONAL CONTEXT

F. DISCORDANCE ABOUT THE LIABILITY OF HEIRS FOR DECEDENT DEBTS

- MOST CIVIL LAW JURISDICTIONS THAT HAVE MANDATORY INHERITANCE RULES ALSO PROVIDE THAT, ABSENT AN EXPRESS DECLARATION TO THE CONTRARY, HEIRS ASSUME THE DEBTS OF THEIR DECEDENT, EVEN IF THE DEBTS EXCEED THE VALUE OF THE INHERITANCE.
- MOST COMMON LAW JURISDICTIONS LIMIT LIABILITY OF HEIRS AND DECEDENT'S DEBTS TO DECEDENT'S ASSETS AT TIME OF DEATH (SUBJECT TO FRAUDULENT CONVEYANCE RULES).

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THE INTERNATIONAL CONTEXT

G. DISCORDANCE BETWEEN COMMON LAW ADMINISTRATION AND CIVIL LAW SUCCESSION

- IN MANY CIVIL LAW COUNTRIES, SUCH AS FRANCE, ITALY AND SPAIN, HEIRS SUCCEED TO THEIR DECEDENT'S PROPERTY AT DEATH WITHOUT THE INTERVENTION OF ANY COURT.
- IN SOME CIVIL LAW COUNTRIES, SUCH AS GERMANY AND SWITZERLAND, ASSISTANCE OF A COURT AUTHORITY MAY BE REQUIRED BUT THE ROLE OF AN EXECUTOR, IF ANY, IS VERY CIRCUMSCRIBED.
- IN COMMON LAW COUNTRIES, WILLS MUST BE SUBMITTED TO COURT FOR PROBATE, EXECUTOR TAKES TITLE TO PROPERTY AND, IN MOST CASES, TESTAMENTARY HEIRS TAKE TITLE ONLY UPON DISTRIBUTION.

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THE INTERNATIONAL CONTEXT

H. DISCORDANCE BETWEEN COMMON LAW FUTURE ESTATES AND CIVIL LAW "BARE" OWNERSHIP

- UNDER THE COMMON LAW, A LEGAL LIFE ESTATE IS A FORM OF OWNERSHIP ALTHOUGH THE LIFE TENANT HAS CERTAIN RESPONSIBILITIES TO THIS REMAINDER PERSONS FOR MAINTENANCE OF THE PROPERTY;
- UNDER THE CIVIL LAW, USUFRUCT CARRIES CERTAIN RIGHTS TO INCOME AND PROFITS OF THE PROPERTY BUT DOES NOT CONSTITUTE OWNERSHIP INTEREST AND MAY REQUIRE A HIGHER LEVEL OF CARE TO PROTECT THE RIGHTS OF THE "BARE" OWNERS.

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THE INTERNATIONAL CONTEXT

I. DISCORDANCE BETWEEN U.S. CHOICE OF LAW AND NON-U.S. CHOICE OF LAW FOR INHERITANCE AND RELATED MATTERS

- NATIONALITY FOR ALL PROPERTY: JAPAN, TAIWAN
- RESIDENCE FOR ALL PROPERTY: MOST COUNTRIES OF THE EUROPEAN UNION AND SWITZERLAND
- DOMICILE FOR ALL PROPERTY: CHILE, UNITED ARAB EMIRATES
- SITUS FOR IMMOVEABLE PROPERTY AND DOMICILE/RESIDENCE FOR MOVEABLES: CANADA, COSTA RICA, ISRAEL, RUSSIA, SOUTH AFRICA
- SITUS FOR REAL PROPERTY AND DOMICILE FOR PERSONAL PROPERTY: AUSTRALIA, CANADA, IRELAND, NEW ZEALAND, UNITED KINGDOM, UNITED STATES
- SITUS FOR REAL PROPERTY AND SHARES OF COMPANY AND DOMICILE FOR OTHER MOVEABLES: CHINA, UKRAINE
- SITUS FOR REAL PROPERTY AND NATIONALITY FOR ALL OTHER PROPERTY: MONACO

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THE INTERNATIONAL CONTEXT

DISCORDANCE BETWEEN U.S. CHOICE OF LAW AND NON-U.S. CHOICE OF LAW

NEW DEVELOPMENT AS OF AUGUST 2015:

- EU DIRECTIVE MAKES THE LAW OF A DECENDENT'S HABITUAL RESIDENCE AT DEATH THE GOVERNING LAW RE SUCCESSION ISSUES (WITH RENVOI).
- EU DIRECTIVE ESTABLISHES THE RIGHT TO CHOOSE THE LAW OF ONE'S NATIONALITY TO GOVERN ONE'S ENTIRE ESTATE (REAL AND PERSONAL PROPERTY) AND MOST RELATED ISSUES (NO RENVOI).

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THE INTERNATIONAL CONTEXT

J. DISCORDANCE ABOUT TRUSTS

- TRUSTS PROVIDED FOR IN ARGENTINA, AUSTRALIA, CANADA, CHINA, COSTA RICA, INDIA, IRELAND, ISRAEL, JAPAN, KOREA, LICHTENSTEIN, NEW ZEALAND, PANAMA, SOUTH AFRICA, UNITED KINGDOM, USA
- TRUSTS NOT PROVIDED FOR IN MOST CONTINENTAL EUROPEAN AND MOST OTHER LATIN AMERICAN COUNTRIES

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TRUSTS RECOGNIZED UNDER THE HAGUE CONVENTION IN THESE CIVIL LAW COUNTRIES

- CYPRUS
- ITALY
- LIECHTENSTEIN
- LUXEMBOURG
- MALTA
- MONACO
- NETHERLANDS
- PANAMA
- SAN MARINO
- SWITZERLAND

II

CHOICE AND CONFLICTS OF LAW FOR DECEDENTS' ESTATES IN NEW YORK

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A. DETERMINATION OF APPLICABLE LAW FOR REAL PROPERTY (NY EPTL SECTION 3-5.1(b)(1))

1. AREAS OF LAW AFFECTED:
   a. FORMAL VALIDITY.
   b. INTRINSIC VALIDITY (SUBSTANTIVE RULES DETERMINING "THE LEGALITY OF A TESTAMENTARY DISPOSITION, INCLUDING THE GENERAL CAPACITY OF THE TESTATOR").
   c. EFFECT ("LEGAL CONSEQUENCES ATTRIBUTED TO A VALID TESTAMENTARY DISPOSITION").

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   d. INTERPRETATION ("DETERMINING THE MEANING OF LANGUAGE EMPLOYED BY TESTATOR WHERE INTENTION IS NOT OTHERWISE ASCERTAINABLE.")
   e. REVOCATION OR ALTERATION OF A TESTAMENTARY DISPOSITION OF PROPERTY.
   f. MANNER IN WHICH PROPERTY DESCENDS WHEN NOT DISPOSED OF BY WILL.

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2. NEW YORK LAW DEFERS, FOR ALL THE ABOVEMENTIONED ISSUES, TO THE LAW (NOT LIMITED TO LOCAL LAW) WHERE THE REAL PROPERTY IS SITUATED.
3. DETERMINATION OF WHETHER A MORTGAGE OR LIEN LEASEHOLD OR ESTATE RELATED TO LAND IS DETERMINED BY LOCAL LAW OF THE JURISDICTION WHERE LAND IS SITUATED.

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B. DETERMINATION OF APPLICABLE LAW FOR PERSONAL PROPERTY (NY EPTL SECTION 3-5.1(c))

1. FORMAL VALIDITY:
   a. LOCAL LAW OF NEW YORK
   b. LOCAL LAW IN WHICH THE WILL WAS EXECUTED AT THAT TIME
   c. LOCAL LAW OF DOMICILE, EITHER AT TIME OF EXECUTION OR AT DEATH.

2. INTERPRETATION (EPTL SECTION 3-5.1(e): LOCAL LAW OF DOMICILE AT TIME WILL WAS EXECUTED.

3. REVOCATION OR ALTERATION OF DISPOSITION BY SUBSEQUENT TESTAMENTARY INSTRUMENT OR BY PHYSICAL ACT IS DETERMINED BY LAW (NOT JUST LOCAL LAW) OF DOMICILE AT TIME OF SUBSEQUENT INSTRUMENT OR PERFORMANCE OF PHYSICAL ACT (EPTL SECTION 3-5.1(f)).

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4. FOLLOWING ISSUES ARE DETERMINED BY LAW (NOT LIMITED TO LOCAL LAW) OF DOMICILE AT TIME OF TESTATOR'S DEATH (EPTL SECTION 3-5.1(b)(2)).
   a) INTRINSIC VALIDITY
   b) EFFECT
   c) MANNER IN WHICH PROPERTY DEVOLVES WHEN NOT DISPOSED OF BY WILL.

SEE HOFFMAN-GLASSER REPORT (1966):

THE "EFFECTS…OF DISPOSITIONS OF REAL PROPERTY…SHOULD BE GOVERNED BY THE LAW OF THE SITUS OF THE PROPERTY (INCLUDING ITS CONFLICTS OF LAWS).

THE "EFFECT…OF A TESTAMENTARY DISPOSITION OF PERSONALTY…SHOULD BE GOVERNED BY THE LAW OF THE TESTATOR'S LAST DOMICILE (INCLUDING ITS CONFLICTS OF LAWS)."

5. ASSUMING THAT EPTL SECTION 3-5.1 EMBRACES A "WHOLE-LAW" APPROACH, IT SEEMS THAT A NY COURT SHOULD ACCEPT A "RENVOI" TO LAW OF USA/NEW YORK CHOSEN BY TESTATOR, PURSUANT TO THE EUROPEAN SUCCESSION REGULATION OR SIMILAR NON-U.S. CHOICE OF LAW OPTION, AT LEAST AS TO ISSUES OF THE INTRINSIC VALIDITY AND EFFECT OF TESTAMENTARY DISPOSITIONS.

6. LIMITATION OF RECOGNITION BY NEW YORK OF FOREIGN LAW REGARDING THE VALIDITY AND EFFECT OF A TESTAMENTARY DISPOSITION THE VALIDITY AND EFFECT OF LIFETIME TRANSFERS OF NEW YORK PROPERTY BY PERSONS NOT DOMICILED IN NEW YORK IS GOVERNED SOLELY BY LOCAL LAW OF NEW YORK. THEREFORE, THESE TRANSFERS CANNOT BE SET ASIDE UNDER OTHERWISE APPLICABLE FORCED HEIRSHIP RULES.*

* In re Meyer, 62 A.D.3d 133 (1st Dept. 2009).

C. ALTERNATIVE FOR EXPRESS CHOICE OF NEW YORK LAW FOR NEW YORK PROPERTY BY TESTATOR WHO IS NOT NEW YORK DOMICILIARY IN TESTATOR'S WILL UNDER NY EPTL SECTION 3-5.1(h)

1. FORMAL VALIDITY OF WILL:
   a) LOCAL LAW OF NEW YORK
   b) LOCAL LAW IN WHICH THE WILL WAS EXECUTED AT THAT TIME
   c) LOCAL LAW OF DOMICILE, EITHER AT TIME OF EXECUTION OR DEATH.

2. ELECTION TO HAVE NEW YORK LOCAL LAW APPLY TO ALL NEW YORK PROPERTY WITH REGARD TO:
   a) INTRINSIC VALIDITY
   b) EFFECT
   c) INTERPRETATION
   d) REVOCATION OR ALTERATION.
3. REGULAR CHOICE-OF-LAW RULES APPLY TO MANNER IN WHICH PROPERTY DEVOLVES WHEN NOT DISPOSED OF BY WILL.

4. NEW YORK PROPERTY CAN INCLUDE:
   a) NEW YORK REAL PROPERTY.
   b) TANGIBLE PERSONAL PROPERTY LOCATED IN NEW YORK.
   c) BANK AND INVESTMENT ACCOUNTS WITH NEW YORK FINANCIAL INSTITUTIONS.
   d) STOCK OF NEW YORK CORPORATIONS.
   e) INTERESTS IN AT LEAST MANY NEW YORK PARTNERSHIPS AND LIMITED LIABILITY COMPANIES.*

* See also EPTL Section 7-1.10 (Provision by non-domiciliary creator for New York law to apply to trust).

D. LAW APPLICABLE TO ANCILLARY PROBATE (NY SCPA SECTION 1602)

1. "A WRITTEN WILL WHICH…MAY OPERATE UPON ANY PROPERTY IN THIS STATE SHALL BE ADMITTED TO PROBATE [IN NEW YORK] UPON PROOF THAT IT HAS BEEN ADMITTED TO PROBATE AT THE TESTATOR'S DOMICILE OR HAS BEEN ESTABLISHED IN ACCORDANCE WITH THE LAW OF SUCH JURISDICTION…"

2. "A WILL SO ADMITTED TO PROBATE…IS SUFFICIENT TO OPERATE ON ANY PROPERTY WITHIN THE TERMS OF THE WILL, SUBJECT TO ANY LIMITATIONS UPON ITS OPERATION OR ANY PROPERTY WITHIN THE TERMS OF THE WILL, SUBJECT TO ANY LIMITATIONS UPON ITS OPERATION IMPOSED BY THE LAW OF THE TESTATOR'S DOMICILE IN RESPECT OF LEGAL CAPACITY."
3. "RIGHTS GRANTED BY THE LAW OF THE DOMICILE TO TAKE AGAINST THE WILL ARE NOT AFFECTED BY THIS SECTION."

4. ARGUABLY LAST SENTENCE OF SCPA SECTION 1602 APPLIES ONLY TO SPOUSAL RIGHTS BECAUSE NY SPOUSAL RIGHT OF ELECTION IS NOT AVAILABLE TO SPOUSE OF FOREIGN DECEDENT WHO HAS NOT MADE AN EPTL SECTION 5-1.1(h) ELECTION OF NEW YORK LAW FOR NEW YORK PROPERTY (<u>SEE</u> EPTL SECTIONS 5-1.1(d)(7) AND 5-1.1A(c)(6)).

5. NOTE SCPA SECTION 1613, WHICH PROVIDES THAT THE LAW AND PROCEDURE OF NEW YORK RELATING GENERALLY TO ADMINISTRATION AND TO FIDUCIARIES SHALL GENERALLY APPLY TO ANCILLARY ADMINISTRATION AND ANCILLARY FIDUCIARIES.

III
SCENARIOS

A. FORMAL VALIDITY OF A NON-NEW YORK WILL FOR WHICH NEW YORK ORIGINAL PROBATE IS REQUESTED.

SCENARIO: DECEASED SPANISH CITIZEN AND DOMICILIARY MADE OUT A NOTARIAL WILL IN SPAIN. THE WILL NOMINATES AN EXECUTOR. MOST OF THE DECEDENT'S ASSETS ARE LOCATED IN NEW YORK AND THE EXECUTOR SUBMITS THE WILL TO PROBATE IN NEW YORK.

BACKGROUND: NOTARIAL WILL IS CONSIDERED AN “AUTHENTIC ACT” UNDER MANY CIVIL LAW SYSTEMS. THE WILL CANNOT BE REMOVED FROM THE PHYSICAL CONTROL OF THE NOTARY. GENERALLY, THE POWER OF EXECUTORS ARE WEAKER UNDER CIVIL LAW.

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QUESTION ONE:

IS THE WILL FORMALLY VALID FOR PURPOSES OF SEEKING ADMISSION TO PROBATE IN NEW YORK?

THE WILL IS FORMALLY VALID IN NEW YORK BECAUSE THE WILL WAS FORMALLY VALID UNDER THE LAW OF SPAIN, THE COUNTRY WHERE IT WAS EXECUTED.

QUESTION TWO:

WHAT WILL BE THE POWERS OF THE EXECUTOR?

THE EXECUTOR SHOULD HAVE ALL THE POWER OF AN EXECUTOR UNDER NEW YORK LAW.

A. FORMAL VALIDITY OF A NEW YORK WILL FOR WHICH RECOGNITION IN FRANCE IS REQUESTED.

SCENARIO: DECEASED U.S. CITIZEN AND NEW YORK DOMICILIARY EXECUTED A VALID NEW YORK WILL NOMINATING AN EXECUTOR. THE DECEDENT HELD SUBSTANTIAL ASSETS LOCATED IN FRANCE AND THE EXECUTOR SEEKS RECOGNITION FOR THE WILL IN FRANCE.

BACKGROUND: FRANCE IS A PARTY TO THE 1961 HAGUE CONVENTION ON THE CONFLICTS OF LAWS RELATING TO FORMS OF TESTAMENTARY DISPOSITIONS, WHICH TREATS A WILL AS VALID AS REGARDS FORM IF IT COMPLIES WITH THE INTERNAL LAW, AMONG OTHER OPTIONS, OF THE PLACE WHERE IT WAS MADE, THE NATIONALITY, HABITUAL RESIDENCE OR DOMICILE OF THE TESTATOR.

QUESTION ONE:

IS THE WILL FORMALLY VALID FOR PURPOSES OF SEEKING RECOGNITION IN FRANCE?

THE WILL IS FORMALLY VALID ON FOUR DIFFERENT GROUNDS OF THE HAGUE CONVENTION. THE CONVENTION DOES NOT IMPOSE A CONDITION OF RECIPROCITY IN ORDER TO APPLY TO U.S. WILLS.

QUESTION TWO:

WHAT WILL BE THE POWERS OF THE EXECUTOR?

MOVEABLE PROPERTY: THE EXECUTOR SHOULD GENERALLY HAVE THE POWER CONFERRED BY NEW YORK LAW.

IMMOVEABLE PROPERTY: IN LIGHT OF RENVOI TO FRENCH LAW, BECAUSE NEW YORK APPLIES THE LAW OF THE SITUS OF REAL PROPERTY, THE EXECUTOR'S AUTHORITY OVER FRENCH REAL PROPERTY MAY BE LIMITED AND EFFECTIVE AUTHORITY EXERCISED BY THE RESERVED HEIRS IF THERE ARE ANY OR THE RESIDUARY ("UNIVERSAL") LEGATEE.

NOTE THAT IF THE DECEDENT HAD MADE A CHOICE OF NEW YORK LAW PURSUANT TO THE EUSR, THE EXECUTOR SHOULD HAVE HAD AUTHORITY OVER FRENCH REAL PROPERTY.

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C. INTRINSIC VALIDITY OF A WILL OF NON-NEW YORK PERSON TO DISPOSE OF NEW YORK PROPERTY

SCENARIO: MALAWI CITIZEN/DOMICILIARY HAS REAL PROPERTY AND INVESTMENT ACCOUNTS IN NEW YORK. MCD EXECUTES A WILL WHILE MARRIED TO FIRST SPOUSE. AFTER FIRST SPOUSE PASSES AWAY, MCD REMARRIES BUT FAILS TO EXECUTE A NEW WILL BEFORE MCD'S OWN DEATH.

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CON'T

BACKGROUND: UNDER MALAWI LAW, THE WILL IS INTRINSICALLY INVALID BECAUSE THE WILL WAS NOT EXECUTED AFTER THE SECOND MARRIAGE;

QUESTION ONE: WOULD THE WILL BE VALID IN NEW YORK TO OPERATE ON THE INVESTMENT ACCOUNT?

NEW YORK LOOKS TO THE LAW OF THE DOMICILE OF THE DECEDENT AND SO THE WILL WOULD BE INEFFECTIVE TO GOVERN THE PERSONAL PROPERTY.

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QUESTION TWO:

WOULD THE WILL BE VALID IN NEW YORK TO OPERATE ON THE REAL PROPERTY?

NEW YORK LOOKS TO THE LAW OF THE SITUS OF REAL PROPERTY AND SO THE WILL SHOULD BE EFFECTIVE TO GOVERN THE DISPOSITION OF NEW YORK REAL PROPERTY.

D. EFFECT OF AN UNINTENTIONAL DISCLAIMER OF A JURISDICTIONALLY – SPECIFIC WILL

SCENARIO: ITALIAN RESIDENT EXECUTED A WILL IN 1990'S DISPOSING OF NEW YORK BANK ACCOUNTS. A DECADE LATER, ITALIAN RESIDENT EXECUTED AN ITALIAN WILL REVOKING ALL PRIOR WILLS, AFTER MISTAKENLY TELLING ITALIAN NOTARY THAT NEW YORK PROPERTY HAD BEEN TRANSFERRED TO A TRUST.

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CON'T

BACKGROUND: UNDER THE COMMON LAW DOCTRINE OF MISTAKE, EVIDENCE OF A MISTAKE CAN ONLY BE CONSIDERED IF THERE IS AN INTRINSIC INCONSISTENCY OR AMBIGUITY IN THE WILL.

- BUT CIVIL LAW SYSTEMS GENERALLY DO NOT HAVE "FOUR CORNERS" DOCTRINE OR RULES LIMITING PAROL EVIDENCE.

QUESTION:

CAN THE PROBATE OF THE NEW YORK WILL BE SAVED?

- SINCE DECEDENT WAS DOMICILED IN ITALY, NEW YORK COURT SHOULD BE ABLE TO LOOK TO THE LAW OF ITALY AND CONSIDER EVIDENCE THAT REVOCATION OF NEW YORK WILL BY ITALIAN WILL WAS A MISTAKE AND PROBATE THE NEW YORK WILL.

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E. EFFECT OF DISPOSITIONS OF NON-US PROPERTY BY US CITIZEN NY DOMICILIARY

SCENARIO: US CITIZEN/NEW YORK DOMICILIARY ("USND") WAS SURVIVED BY CHILDREN; DECEDENT OWNED REAL PROPERTY AND INVESTMENT ACCOUNT IN PARIS AND LEFT ENTIRE ESTATE TO US CHARITIES IN A WILL EXECUTED AFTER AUGUST 17, 2015.

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BACKGROUND; FRANCE, ABSENT AN EUSR ELECTION OF LAW OF DECEDENT'S NATIONALITY, APPLIES THE LAW OF A DECEDENT'S HABITUAL RESIDENCE, INCLUDING THE CHOICE OF LAW RULES OF THAT JURISDICTION.

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CON'T

QUESTION ONE: WOULD THE WILL BE EFFECTIVE TO BEQUEATH THE INVESTMENT ACCOUNT TO THE CHARITY?

- DISPOSITION IS EFFECTIVE BECAUSE IT IS VALID UNDER NEW YORK LAW, THE LAW OF THE DECEDENT'S HABITUAL RESIDENCE.

QUESTION TWO:

WOULD THE WILL BE EFFECTIVE TO BEQUEATH THE REAL PROPERTY TO THE CHARITY?

FRENCH LAW UNDER THE CHOICE OF LAW RULES OF NEW YORK, THE LAW OF THE SITUS OF REAL PROPERTY APPLIES. THEREFORE, THE LAW OF FRANCE WILL APPLY AND THE CHILDREN WOULD HAVE A CLAIM TO A MAJOR PORTION OF THE REAL PROPERTY.

CON'T

NOTE THAT IF THE USND HAD MADE AN ELECTION OF US (NEW YORK) LAW TO APPLY UNDER THE EUSR, THE SUBSTANTIVE LAW OF NEW YORK WOULD APPLY TO THE DISPOSITION OF THE REAL ESTATE AND THE DISPOSITION TO THE CHARITY SHOULD BE EFFECTIVE.

F. EFFECT OF DISPOSITION OF NEW YORK PROPERTY UNDER VALID WILL BY A NON-NEW YORK DOMICILIARY

SCENARIO: SPANISH CITIZEN/DOMICILIARY OWNED REAL PROPERTY AND INVESTMENT ACCOUNTS IN NEW YORK IN DECEDENT'S OWN NAME. SCD WAS SURVIVED BY SPOUSE AND CHILDREN. DECEDENT EXECUTED A WILL GOVERNING US ASSETS AND LEFT ALL THE PROPERTY TO A DISCRETIONARY TRUST FOR THE BENEFIT OF VARIOUS FAMILY MEMBERS BUT FAILED TO MAKE AN ELECTION OF NEW YORK LAW TO APPLY TO THE NEW YORK PROPERTY.

BACKGROUND: SPAIN IS A COMMUNITY PROPERTY JURISDICTION. ALSO, CHILDREN UNDER SPANISH LAW ARE ENTITLED TO SHARE IN THE ESTATE OF THEIR PARENT AND MANDATORY SHARES CANNOT BE SATISFIED BY DISPOSITIONS IN TRUSTS, WHICH ARE UNKNOWN UNDER SPANISH LAW.

CON'T

QUESTION ONE: WOULD THE WILL BE EFFECTIVE IN NEW YORK TO OPERATE ON THE INVESTMENT ACCOUNT?

NEW YORK GENERALLY LOOKS TO THE LAW OF THE RESIDENCE OF A MARRIED COUPLE AT THE TIME OF THE ACQUISITION OF PROPERTY TO DETERMINE WHAT MATRIMONIAL PROPERTY REGIME APPLIES. IN ADDITION, NEW YORK HAS ADOPTED THE UNIFORM ACT ON DISPOSITION OF COMMUNITY PROPERTY. THUS, IF THE NEW YORK ASSETS WERE ACQUIRED AT THE TIME WHEN THE COUPLE WERE RESIDENT IN SPAIN, IT IS LIKELY THAT HALF THE NEW YORK ASSETS BELONG TO THE SURVIVING SPOUSE.

CON'T

NEW YORK GENERALLY LOOKS TO THE LAW OF A DECEDENT'S DOMICILE AT THE TIME OF DEATH TO DETERMINE IF A DISPOSITION OF NEW YORK PERSONAL PROPERTY IS EFFECTIVE, AND SO THE CHILDREN COULD ASSERT THEIR RIGHTS TO INHERIT A SUBSTANTIAL PORTION THE DECEDENT'S SHARE OF THE INVESTMENT ACCOUNT.

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CON'T

QUESTION TWO: WILL THE WILL BE EFFECTIVE IN NEW YORK TO OPERATE ON THE NEW YOUR REAL PROPERTY?

THE SAME CONSIDERATIONS ABOUT THE MATRIMONIAL PROPERTY REGIME IN EFFECT IN THE JURISDICTION OF MARITAL RESIDENCE WHEN THE PROPERTY WAS ACQUIRED SHOULD APPLY.

NEW YORK GENERALLY LOOKS TO THE LAW OF THE SITUS OF REAL PROPERTY TO GOVERN THE DISPOSITION OF REAL PROPERTY. SINCE THE DISPOSITION TO THE TRUST DOES NOT VIOLATE NEW YORK LAW, THE DISPOSITION SHOULD BE VALID.

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CON'T

NOTE THAT IF SCD HAD ELECTED NEW YORK LAW TO GOVERN THE DISPOSITION OF NEW YORK PROPERTY UNDER EPTL SECTION 3-5.1(h), THE SURVIVING SPOUSE COULD EXERCISE A SPOUSAL RIGHT OF ELECTION AND CLAIM ONE-THIRD OF THE PROPERTY BUT BOTH DISPOSITIONS IN FAVOR OF THE TRUST WOULD OTHERWISE BE VALID.

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G. EFFECT OF DISPOSITION OF NEW YORK PROPERTY UNDER VALID FOREIGN WILL BY A U.S. CITIZEN DOMICILED ABROAD

SCENARIO: U.S. CITIZEN/GERMAN DOMICILIARY HAD REAL PROPERTY AND INVESTMENT ACCOUNTS IN NEW YORK. DECEDENT, WHO WAS SURVIVED BY CHILDREN, EXECUTED A WILL GOVERNING ALL ASSETS AND LEFT ALL OF HIS WORLDWIDE PROPERTY TO A CHARITABLE ORGANIZATION. DECEDENT MADE AN ELECTION OF U.S./NEW YORK LAW TO APPLY TO HIS SUCCESSION. THE WILL IS "OPENED" BY THE DECEDENTS' COURT IN GERMANY.

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BACKGROUND: GERMANY PROVIDES FOR CLAIMS BY SURVIVING CHILDREN TO A MANDATORY SHARE OF A SUCCESSION. GERMANY IS SUBJECT TO THE PROVISIONS OF THE EUROPEAN SUCCESSION REGULATION.

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QUESTION ONE: SHOULD THE WILL BE EFFECTIVE IN NEW YORK TO OPERATE ON THE INVESTMENT ACCOUNT?

GERMANY AS WELL AS NEW YORK SHOULD RECOGNIZE THE RIGHT OF THE DECEDENT TO LEAVE THE INVESTMENT ACCOUNT TO THE CHARITY BECAUSE CHILDREN DO NOT HAVE A FORCED SHARE OF A PARENT'S ESTATE UNDER NEW YORK LAW.

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QUESTION TWO: WOULD THE WILL BE EFFECTIVE IN NEW YORK TO OPERATE ON THE NEW YORK REAL PROPERTY?

THE ANSWER MAY SEEM SELF-EVIDENT AS YES. BUT THE WILL WOULD HAVE TO BE SUBMITTED TO NEW YORK FOR ANCILLARY PROBATE. CONSIDER THE PROVISIONS OF SCPA SECTION 1602, WHICH SEEMS TO PRESERVE THE INHERITANCE RIGHTS CONFERRED BY THE LAW OF A NON-DOMICILIARY DECEDENT'S DOMICILE. PERHAPS IT WOULD HAVE BEEN MORE PRUDENT FOR THE DECEDENT TO HAVE EXECUTED A SEPARATE NEW YORK WILL WITH AN EXPRESS ELECTION OF NEW YORK LAW UNDER EPTL SECTION 3-5.1(H).

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H. BEING AN HEIR OF A FOREIGN ESTATE

SCENARIO: US PERSON IS NAMED THE UNIVERSAL LEGATEE UNDER THE TESTAMENT OF A U.S. CITIZEN WHO DIED A FRENCH RESIDENT AND EXECUTED THE TESTAMENT AFTER AUGUST 16, 2015. THE DECEDENT WAS LIABLE ON A GUARANTEE FOR A LOAN TO HIS BUSINESS ON WHICH THE BUSINESS DEFAULTED JUST BEFORE HIS DEATH.

BACKGROUND:

UNDER FRENCH LAW, THE U.S. LEGATEE IS DEEMED TO STAND IN THE SHOES OF THE DECEDENT ONCE THE UNIVERSAL LEGATEE “ACCEPTS” THE LEGACY, AND WILL BECOME PERSONALLY LIABLE FOR THE GUARANTEE.

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CON'T

- WHAT ARE THE LEGATEE'S OPTIONS?
  - ACCEPT THE INHERITANCE AND THE UNLIMITED LIABILITY OF THE DECEASED GUARANTOR;
  - RENOUNCE THE INHERITANCE COMPLETELY (PARTIAL RENUNICIATION NOT GENERALLY AN OPTION)
  - MAKE AN ELECTION TO ACCEPT THE INHERITANCE "SUBJECT TO NET ASSETS" THROUGH A COURT FILING, WHICH INITIATES A COURT – SUPERVISED PROCEDURE THAT RESEMBLES IN MANY WAYS A COMMON LAW ESTATE ADMINISTRATION.

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CON'T

IF THE DECEDENT HAD MADE A VALID ELECTION OF U.S. LAW IN THE DECEDENT'S WILL AND THE DECEDENT WAS MOST CLOSELY CONNECTED TO NEW YORK AMONG ALL THE POSSIBLE U.S. JURISDICTIONS,

THE LIABILITY OF THE DECEDENT SHOULD BE LIMITED TO THE NET ASSETS OF THE ESTATE;

ALSO, THE LEGATEE SHOULD ALSO BE ABLE TO MAKE A PARTIAL DISCLAIMER OF THE LEGACY.

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I. SERVING AS EXECUTOR OF A FOREIGN ESTATE

SCENARIO: U.S. PERSON IS NAMED THE EXECUTOR UNDER THE FRENCH TESTAMENT OF A U.S. CITIZEN WHO DIED A NEW YORK RESIDENT.

BACKGROUND:

FRENCH LAW GENERALLY LIMITS THE AUTHORITY OF AN EXECUTOR UNLESS THE WILL IS VERY SPECIFIC AND DETAILED IN CONFERRING POWERS ON THE EXECUTOR.

- ABSENT AN ELECTION OF U.S. LAW, THE HEIRS OF LAW WOULD BE “SEIZED” WITH FRENCH ASSETS UNLESS THE WILL EXPRESSLY CONVEYED FIDUCIARY POWERS ON THE EXECUTOR WITH REGARD TO THE FRENCH REAL ESTATE.

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- WITH AN ELECTION OF U.S. LAW, THE U.S. EXECUTOR SHOULD HAVE AUTHORITY TO ADMINISTER THE FRENCH REAL ESTATE, SUBJECT POSSIBLY TO THE ISSUANCE BY A FRENCH COURT OF AN ORDER CONFERRING “POSSESSION” OF THE ASSETS ON THE EXECUTOR.

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J. POST-DEATH INHERITANCE ADJUSTMENTS

SCENARIO: UK NATIONAL DOMICILIARY DIES OWNING NEW REAL PROPERTY THROUGH A NEW YORK LLC, SURVIVED BY THREE CHILDREN. THE DECEDENT DID NOT MAKE AN ELECTION OF NEW YORK LAW AND LEFT THE LLC, IN AN ENGLISH WILL, IN EQUAL SHARES, TO THE CHILDREN.

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BACKGROUND

ENGLISH LAW ALLOWS THE HEIRS OR BENEFIARIES OF AN ESTATE TO VARY THE SHARES OR ALLOTMENTS AMONG THE HEIRS OR BENEFICIARIES WITHIN A PERIOD OF TWO YEARS AFTER THE DECEDENT'S DATE OF DEATH. CIVIL LAW COUNTRIES THAT VIEW A DECEDENT'S HEIRS AS A "COMMUNITY OF HEIRS" MAY ALSO ALLOW A SIMILAR VARIATION OF BENEFICIAL INTERESTS BEFORE THE FORMAL "PARTITION OF THE COMMUNITY."

CONSEQUENCES: U.S. GIFT TAX RULES (WHICH INCLUDE THE RULES FOR QUALIFIED DISCLAIMERS) TREAT ANY DISPOSITIONS THAT ARE NOT FOR FULL AND ADEQUATE CONSIDERATION AS GIFTS, EXCEPT FOR RENUNCIATIONS THAT FALL WITHIN THE NARROW SCOPE OF IRC SECTION 2518. SOME EXCHANGES OF PROPERTY INTERESTS MIGHT BE GENERALLY TAX FREE IF PROPERTIES ARE ELIGIBLE FOR DEATH-RELATED BASIS ADJUSTMENTS BUT THEY MAY STILL BE NEEDED TO BE REPORTED AS SALE TRANSACTIONS FOR U.S. INCOME TAX PURPOSES.

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K. U.S. TRUSTS HOLDING FOREIGN REAL ESTATE

SCENARIO: DECEDENT LEAVES THE BULK OF ESTATE TO TRUSTS WITH CURRENT INCOME BENEFICIARIES AND REMAINDER BENEFICIARIES BUT THE “ESTATE” INCLUDES REAL PROPERTY LOCATED IN A CIVIL LAW JURISDICTION THAT DOES NOT ADHERE TO THE HAGUE CONVENTION ON TRUSTS.

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BACKGROUND

CIVIL LAW COUNTRIES SUCH AS SPAIN OR FRANCE THAT DO NOT RECOGNIZE TRUSTS AS INSTITUTIONS IN THEIR DOMESTIC LAW AND DO NOT ADHERE TO THE HAGUE CONVENTION ON TRUSTS HAVE NO WAY OF CONFERRING TITLE OR OWNERSHIP OF DOMESTIC REAL ESTATE TO A COMMON LAW TRUST. THEY USUALLY RECOGNIZE THE RIGHT OF PERSONS WHO OWN PROPERTY TO PERMITTING ANOTHER PERSON TO ENJOY THE “USE” OR “FRUITS” OF THE PROPERTY.

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RESULTS: GENERALLY, ONE MUST EXPLORE THE POSSIBILITY OF TRANSFERRING OWNERSHIP OF THE PROPERTY IN THE NAME OF THE REMAINDER BENEFICIARIES WHILE THEY CONSENT TO THE INCOME BENEFICIARY HAVING THE RIGHT TO USE THE PROPERTY OR TO RECEIVE ITS “FRUITS” OR INCOME. U.S. TAX LAW DOES RECOGNIZE THE RIGHT OF A USUFRUCTUARY INTEREST TO QUALIFY AS A VALID SPOUSAL INTEREST FOR MARITAL DEDUCTION PURPOSES ALTHOUGH THERE MAY STILL BE ISSUES REGARDING THE ROLE OF THE U.S. DOMESTIC TRUSTEES IN ANY SUCH TRANSACTION.

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IV

TAKEAWAYS ABOUT DRAFTING WILLS AND OTHER ADVICE

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A. NEW YORK WILL COVERING WORLDWIDE ASSETS

1. INCLUDE A GOVERNING LAW ELECTION. DESCRIBE THE SCOPE OF MATTERS AND ISSUES TO BE GOVERNED BY THE CHOSEN LAW.
2. ENSURE THAT NEW YORK FORM OF WILL MEETS REQUIREMENTS FOR FORMAL VALIDITY OF OTHER JURISDICTIONS.
3. DRAFT SEPARATE ARTICLES DEALING WITH ASSETS IN OTHER JURISDICTIONS (DON'T LEAVE A FOREIGN JUDGE OR NOTARY TO FIGURE OUT HOW A RESIDUARY DISPOSITION WORKS!).

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4. CONSIDER POSSIBLE APPLICATION OF MANDATORY SHARES OF FOREIGN PROPERTY IN ALLOCATING ASSETS AMONG SHARES OF RESIDUARY ESTATE.
5. CONSIDER "IN TERROREM" CLAUSE REGARDING ASSERTION OF FOREIGN INHERITANCE RIGHTS.
6. MAXIMIZE AUTHORITY CONFERRED ON EXECUTOR TO DEAL WITH ASSETS IN FOREIGN JURISDICTIONS.

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7. ADDRESS ISSUE OF FOREIGN EXPENSES AND TAXES IN ARTICLES DEALING WITH ALLOCATION OF DEBTS, ADMINISTRATION EXPENSES AND TAXES. IF FOREIGN TAXES ARE TO BE PAID FROM THE U.S. ASSETS, MAKE THAT PROVISION A SEPARATE DIRECTION.
8. TAX: MAKE SURE THAT CREDIT SHELTER PROVISION CONTEMPLATES FOREIGN DEATH TAX CREDIT THAT MAY OTHERWISE BE WASTED IF NO TAX IS DUE IN THE USA.

9. TAX: DO NOT LIMIT DISCRETIONARY RIGHT TO DISTRIBUTE ASSETS TO CHARITIES TO THOSE THAT QUALIFY FOR THE U.S. INCOME TAX DEDUCTION.
10. ASK NON-U.S. ADVISORS REVIEW DRAFT OF WILL BEFORE IT IS EXECUTED.

B. NEW YORK WILL TO GOVERN U.S. ASSETS BUT FOREIGN WILLS TO GOVERN FOREIGN ASSETS

1. BE EXTREMELY CAREFUL WITH REVOCATION PROVISIONS AND AVOID ACCIDENTAL UNINTENDED REVOCATIONS.
2. BE DETAILED AND CLEAR ABOUT THE SCOPE OF EACH WILL. HAVE VERY CLEAR DEFINITIONS OF WHAT CONSTITUTES A "U.S. TRUST" OR A "NEW YORK ASSET" AND WHAT CONSTITUTES ASSETS IN THE OTHER COUNTRIES TO BE GOVERNED BY FOREIGN WILLS.

3. BE VERY CAREFUL ABOUT THE LIABILITY OF THE U.S. ESTATE FOR FOREIGN DEBTS, EXPENSES AND ASSETS.
4. CONSIDER EFFECT OF GOVERNING LAW CLAUSES IN FOREIGN WILLS AND MAKE SURE THEY COORDINATE PROPERLY WITH CHOICE OF LAW ELECTION IN NEW YORK WILL.
5. ASSEMBLE TEAM OF CONSULTANTS IN EACH RELEVANT JURISDICTION TO JOINTLY REVIEW ALL JURISDICTIONAL WILLS AND RE-EXAMINE NEW YORK WILL AFTER EACH NON-U.S. WILL HAS BEEN EXECUTED.

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C. ADVISING U.S. CLIENTS INHERITING FOREIGN PROPERTY
    1. ANALYZE AUTHORITY OF U.S. BENEFICIARIES OVER FOREIGN PROPERTY AND WHETHER THEY HAVE DISCLOSURE OBLIGATIONS UNDER FOREIGN AND OTHER U.S. LAWS.
        - FBAR
        - FORM 3520
        - FORM 8938

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2. CONSIDER THAT IN MANY JURISDICTIONS HEIRS BECOME IMMEDIATELY “SEIZED” OF A DECEDENT’S ASSETS AND THE INCOME DERIVING FROM THEM
    - U.S. INCOME TAX LIABILITY
    - STATE INCOME TAX LIABILITY
    - POSSIBLE “MISMATCH” BETWEEN U.S. TREATMENT OF COMMON LAW AND CIVIL LAW ESTATES AFFECTING U.S. CREDITS ON FOREIGN TAXES
3. CAUTION U.S. BENEFICIARIES ABOUT “ACCEPTING” ASSETS FROM A FOREIGN SUCCESSION UNTIL THE EXTENT OF THE DECEDENT’S LIABILITIES HAS BEEN CLARIFIED.

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4. DETERMINE EXTENT TO WHICH AUTHORITY OF U.S. EXECUTOR CAN BE ASSERTED IN FOREIGN JURISDICTIONS.
5. DETERMINE APPLICABLE STATUTES OF LIMITATIONS FOR CREDITORS AND NON-U.S. TAXES AND CONSIDER THESE IN DETERMINING NECESSARY PARTIES TO ANY NEW YORK ACCOUNTING PROCEEDING.

SAMPLE CLAUSE PRESERVING NEW YORK PROPERTY OPTION:

WITHOUT LIMITING ANYTHING IN THE FOREGOING PROVISION, I HEREBY ELECT, PURSUANT TO SECTION 3-5.1(h) OF THE NEW YORK ESTATES, POWERS AND TRUSTS LAW, TO HAVE THE DISPOSITION OF MY PROPERTY LOCATED IN THE STATE OF NEW YORK GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

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SAMPLE CLAUSE FOR CHOICE OF LAW ACCORDING TO THE REGULATION:

I AM A CITIZEN OF THE UNITED STATES OF AMERICA PURSUANT TO ARTICLES 22, 24(2) AND 36(2)(B) OF THE EUROPEAN SUCCESSION REGULATION DATED JULY 14, 2012, I ELECT THAT THE LAW OF THE UNITED STATES' NATIONALITY SHALL GOVERN MY SUCCESSION AS A WHOLE, INCLUDING WITHOUT LIMITATION, THE ADMISSIBILITY AND SUBSTANTIVE VALIDITY OF THIS MY WILL, WHICH LAW I EXPECT TO BE THE LAW OF NEW YORK, THE STATE OF THE UNITED STATES WITH WHICH I HAVE THE CLOSEST CONNECTION.

In depth

US expatriate persons and property owners, the European Union Succession Regulation and the choice of New York law

Michael W. Galligan*

Abstract

The EU Succession Regulation represents perhaps the most ambitious and comprehensive effort to date to regularize the rules about choice of law that apply to the succession of decedents' estates in any part of the world. The Article highlights the significance of the Regulation not only in planning for U.S. persons who live in the European Union, but also in planning for U.S. persons who live outside the European Union but who own property there. The Article also discusses the reception that a choice of law made under the Regulation may be expected to receive in New York State–one of the most prominent jurisdictions of the United States where issues of cross-border succession planning constantly arise and for which the Regulation may be especially relevant.

As with many basic issues relating to human life and social organization, different parts of the world have widely differing views about the requisite moral, political, and legal rules that should apply to the transfer of property when its owner dies. This is equally true when dealing with what rights an owner of property should have to direct the ownership of property after the owner's death, what are the legitimate expectations of those who survive a property owner to share in the deceased owner's bounty, and what social charges (ie taxes) should be applied when property passes by reason of the death of its owner. No one has yet been so bold as to think that it would be possible to have a model or uniform law for all nations that would deal with issues of inheritance and property succession along the lines of the model laws promulgated by the United Nations Commission on International Trade Law (UNCITRAL) in the areas of commercial law, much less to propose an international treaty on the subject analogous to the Vienna Convention on Contracts for the International Sale of Goods, which has now been adopted by over 70 countries, notwithstanding their very different legal traditions and sources.

There have been, however, efforts to take some of the uncertainty out of the process of determining what law should apply when the law of more than one country has a claim to apply to an inheritance because the same individuals own property in different countries, or because individuals from different countries have claims to share in the inheritance of property in the same or different countries, or because individuals want to import or export estate planning vehicles and legal concepts from one country to another. There have been several bilateral treaties in this area[1] and, after World War II, the Hague Conference on Private International Law promulgated the 5 October 1961 Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, which was

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1. For example, the Treaty between France and Tunisia dated 9 March 1957; the Treaty between Germany and Turkey, dated 28 May 1929; and the Treaty among Finland, Denmark, Iceland, Norway, and Sweden dated 19 November 1934.

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mildly successful, especially in Europe. A much more ambitious project was undertaken by the Hague Conference in the 1980's resulting in the 1 August 1989 Convention on the Law Applicable to Succession of Deceased Persons, which aimed to reconcile the choice-of-law principles of the civil law and common law traditions in matters of succession but which has, to this date, still not garnered enough ratifications to even come into effect. Especially in the light of this rather discouraging history, it is all the more remarkable that the European Union (the EU) has now succeeded in promulgating a comprehensive set of rules for determining the choice of law applicable to matters of succession,[2] which, as of its effective date on 17 August 2015, became effective in more than 20 countries—all the states of the EU in Western and Eastern Europe except for the United Kingdom, Denmark, and Ireland—and which, as will be shown in this article, can affect the succession not only of US and other foreign citizens living in these EU countries but the succession of many individuals with ties to the USA and other countries both within and without Europe, who for one reason or another own or succeed to property located in these EU countries.[3]

The purpose of this article is two-fold: (i) to discuss the major components of the EU Succession Regulation and to emphasize especially the option the EU Succession Regulation offers to US persons who are residents of the EU or who own property there to apply the law of their US nationality to their succession, and then (ii) to consider in some detail the reception that choices of US law under the EU Succession Regulation may be expected to have in one of the most prominent jurisdictions of the USA—that is, New York—when the time comes to give effect to an exercise of the EU Succession Regulation's choice-of-law option not only by a US person situated in Europe but even by one 'back home'—in the United States itself.

European succession law and the development of the Succession Regulation

Most civil law jurisdictions in Europe require that a substantial part of a decedent's estate pass directly (not in trust) to the 'reserved' heirs—particularly surviving children and more remote issue; more recently, to some degree, surviving spouses; and in some cases, even ancestors. Among these jurisdictions, a rough distinction can be made between 'northern' and 'southern' countries. In the 'southern' countries (which this author thinks of as encompassing such countries as Spain and Italy but also importantly France), the property of the decedent vests in the heirs immediately on death and the heirs form a 'hereditary community' until a division of the property is affected. 'Clawback' of lifetime gifts (usually without any time limitation) is permitted to establish the mandatory inheritance shares. The heirs are usually the effective administrators of the estate and are ordinarily liable for the full extent of the decedent's liabilities at death, absent timely elections and sometimes cumbersome procedures to limit the liability of heirs to the benefit they receive by way of inheritance. While France has liberalized matters a little, these countries tend to be strict about the application of their mandatory inheritance rules, do not allow trusts to be used to circumvent the direct succession of property, and tend to be unfriendly to efforts to vary the rules by family agreements and waivers.

In the 'northern' countries (which this author thinks of as encompassing such countries as Germany and Switzerland), by contrast, the reserved heirs may be given a monetary claim against the property of the deceased equal to the value of their statutory shares rather than a direct share in the decedent's property. 'Clawback' is allowed but sometimes only for a limited period of time. Courts have a role in the administration of an estate although the role is quite

2. Such set of rules is set forth in Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (herein referred to as the 'EU Succession Regulation' or 'Regulation'). The Regulation may be accessed at <http://ec.europa.eu/justice/civil/family-matters/successions/index_en.htm> accessed on 5 January 2017.

3. For details about the rules for determining the applicability of the EU Succession Regulation, especially in the case of 'dispositions of property upon death' executed before 17 August 2015, please see Appendix III.

limited in comparison with the role of US courts. The 'northern' countries tend to be more accepting of family agreements and waivers than the ''southern'' countries.

It is important to realize that the EU Succession Regulation is not an isolated phenomenon within the development of EU law but follows on a well-travelled effort to find ways to harmonize judicial decisions within the legal systems of the members of the EU and to institute a broad regime of what we in the USA would call 'full faith and credit' for judicial determinations across a wide spectrum of social as well as commercial life. The EU Succession Regulation is also known as 'Brussels IV', precisely because it stands in this growing line of efforts to facilitate coordination between the national courts and judicial systems of the EU. For example, the regulation known as 'Brussels I' is the EU's version of what those of us in the USA might call 'full faith and credit' with regard to judgments of courts that are largely commercial in nature—a set of rules designed to encourage the recognition of civil law judgments by national courts among the different states of the EU and, for that purpose, to establish common standards for determining jurisdiction to ensure that the courts whose judgments are to be recognized constitute the proper forums for the resolution of these cases in the first place. The regulation known as 'Brussels II' seeks to facilitate common rules about the jurisdiction of courts and the recognition and enforcement of court judgments in matrimonial matters and matters of parental responsibility. The title of 'Brussels III' (now known as 'Rome IV') has been assigned to a set of rules still under development dealing with jurisdiction, determination of applicable law, and recognition and enforcement of court decisions in matters of matrimonial property. Complementing the sets of rules honoured to carry the name of 'Brussels', there is also a set of rules honoured to have the name of 'Rome'—'Rome I' being a regulation on the law applicable to contractual obligations, 'Rome II' being a regulation on conflict of laws related to disputes about non-contractual obligations, and finally 'Rome III' being a regulation designed to enhance cooperation in the law applicable to divorce and legal separation. As the implementation of the EU Succession Regulation develops, it will no doubt be important to interpret and construe the EU Succession Regulation in light of these earlier precedents and ongoing parallel efforts.

Determination of applicable law and choice of applicable law under the European Union Succession Regulation

Article 1 of the EU Succession Regulation sets forth its scope: to establish rules to determine the law applicable to the succession of a decedent on death. The EU Succession Regulation, in Article 3, defines succession as 'succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession'. Thus, the EU Succession Regulation applies both to certain instruments expressing the intentions of a decedent as to the inheritance of that decedent's assets at death as well as the inheritance of property when a deceased leaves no legally enforceable directions in this regard.

It is important to be clear about the type of instruments that the EU Succession Regulation recognizes for this purpose—what the EU Succession Regulation styles as 'dispositions of property upon death'. Article 3 makes clear that these 'dispositions' cover only three types of documents: (i) a will of a single individual person; (ii) a joint will made by two individual persons together, and (iii) something that is a relative novelty to the USA—a succession agreement, which in some European countries can operate directly to dispose of property at death, like a will itself.[4] Note that the EU Succession Regulation does not consider

4. For reasons of clarity and relevance to most US-related contexts, this article will mainly discuss the EU Succession Regulation in so far as it applies to wills and not to succession agreements.

a trust agreement to constitute a 'disposition of property upon death'—and thus one cannot expect to invoke the choice-of-national law (discussed below) permitted by the EU Succession Regulation in a trust document—even a revocable trust agreement. This should not come as a total surprise—granted that the trust is not an institution incorporated in the civil law and that several of the continental European jurisdictions such as France and Germany have adopted tax legislation significantly disfavourable to trusts. But leaving the issue of trusts aside, this author thinks it is fair to say that the most interesting and probably the most important aspects of the EU Succession Regulation for a US estate planner are the provisions dealing with the law applicable to the validity, interpretation, and enforceability of these 'dispositions'.

First, under Article 27, a written 'disposition of property upon death' (eg a will) will be determined to be valid with respect to its form so long as its form complies with the law of any of the following: (i) the state in which the disposition was made; (ii) the state of testator's nationality either at the time of death or at the time of the making of the disposition; (iii) the state of testator's domicile either at the time of death or at the time of the making of the disposition; (iv) the state of testator's habitual residence either at the time of death or at the time of the making of the disposition; or (v) the state where the property at issue is located, in so far as such property concerns immoveable property.

Article 21 sets forth the following general default rule under the EU Succession Regulation for determining what law of succession should apply where no effective election is made by the testator pursuant to the Regulation: The law governing a succession shall be the law of the state of the decedent's habitual residence[5] at the time of the decedent's death, except that if, at the time of death, the decedent 'manifestly' had a closer connection to another state, the law of the latter state would govern the succession. In contrast to Article 21's focus on the circumstances at the time of decedent's death, Article 24(1) provides that when dealing with questions about the admissibility and substantive validity of a 'disposition of property upon death', the governing law as to these questions is the law of the state of the decedent's habitual residence at the time of the making of the 'disposition', unless on such date the decedent 'manifestly' had a closer connection to another state, in which case, the governing law as to these questions would be the law of the alternate state.

Of course, a country with a federal structure like the USA does not have a national law of inheritance; in such a case, Article 36 of the EU Succession Regulation requires resorting to that country's national conflict-of-laws rules. But, in the case of a country like the USA, which also does not appear to have national conflict-of-laws rules governing a decedent's succession,[6] Article 36 requires resorting to the law of the territorial unit of the decedent's respective 'habitual residence' or 'closest connection'.

It is interesting to note that the 'connections' of a decedent are not irrelevant to the determination of that decedent's 'habitual residence'. In identifying the 'habitual residence' of a decedent, Paragraph 23 of the Preamble to the EU Succession Regulation counsels that,

> [i]n order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the [s]tate concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the

5. The EU Succession Regulation does not define 'habitual residence'. However, see para 23 of the Preamble to the Regulation discussed infra in this article, which provides some direction as to its meaning.

6. Some authors have suggested that the principles of law expressed in the Restatement (Second) of Conflict of Laws could meet the test of a national conflict-of-laws rule but this author remains sceptical that the Regulation intends to import any rules that do not have the full force of the law behind them. See James I. Dougherty and Robin Paul, 'A New Tool in Cross-Atlantic Estate Planning: Implementing EU Regulation 650/2012' [April 2014] Trusts & Estates 30, 32.

[s]tate concerned taking into account the specific aims of this Regulation.

Thus, this could be well argued that if the usual residence of a decedent especially in the last year of a life was a mere sheen on a more complex array of relations and attachments to another jurisdiction, the EU Succession Regulation would likely require the application of the law of that other jurisdiction.

At the outset, it should be noted that the distinction between the law of 'habitual residence' and the law of 'closest connection' has a significance, under Article 21, beyond the formal identity of the jurisdiction whose law applies; it also goes to the critical issue of whether '*renvoi*' applies or not—and thus determines whether one must look to the 'whole law' of the applicable jurisdiction or only to the 'substantive law' of that jurisdiction. This is critical because, if the reference is to the 'whole law', it is possible that what, at first blush, may seem to be a designation of the law of one country may actually turn out to be a designation of the law of another country because, under Article 34(1), where the law of the state of 'habitual residence' applies but such state is not an EU country subject to the Regulation, the conflict-of-laws rules of such state are permitted to displace the application of its own substantive law either in favour of the application of the law of an EU country or the law of a non-EU country 'which would apply its own law'. However, under Article 34(2), '*renvoi*' does not apply in cases where the applicable law is the law of the jurisdiction of 'closest connection'. Thus, if the law of the state of habitual residence of a decedent owning real property in France is deemed to be the governing law under the EU Succession Regulation and the USA is determined to be the state of decedent's habitual residence but the relevant law in the USA defers to the law of France, based on the location of that property, French law and not the otherwise applicable US law would apply, but if US law is the governing law under the EU Succession Regulation's criterion of 'closest connection', the relevant US law would apply because '*renvoi*' is not countenanced when the applicable law is the law of the state of closest connection.

Article 22 of the EU Succession Regulation contains the very consequential provision of the Regulation already alluded to, which allows an individual to opt out of the Regulation's 'default' choice-of-law rules and to elect the application of the law of the state of decedent's nationality to govern his/her succession—which can be the law of the relevant state of which the decedent was a national either at the time of his/her death or at the time he/she made the choice afforded by Article 22. As to dual nationals, the law chosen can be the law of whichever of the decedent's nationalities the individual prefers. The choice must be made in 'the form of a disposition of property upon death' (as noted above, basically a will or a succession agreement) or 'demonstrated by the terms of such a disposition'. In the case of a country with a federal structure like the USA, a choice of nationality under Article 22, pursuant to Article 36, is a choice of the law of the 'territorial unit' indicated by the internal conflict-of-laws rules of the country or, in the absence of any such rules, the law of the 'territorial unit' with which the decedent had the 'closest connection'.[7] Thus, in what is perhaps the most interesting dimension of the new legal horizon opened up by the EU Succession Regulation, a US citizen habitually residing in a jurisdiction of the EU that is subject to the EU Succession Regulation (ie any of the EU countries except for the UK, Denmark, and Ireland or whose closest connections are to one of these countries) can nevertheless elect to have the law of the United States apply to that U.S. citizen's entire succession—real property as well as personal property—and, since the USA does not have a national law of inheritance nor does it appear to have a national law for resolving conflict-of-laws pertaining to succession, such an election would effectively cause the

7. Please see Appendix I for a sample clause that a US citizen whose closest connection to a US jurisdiction would be New York might use to exercise this option.

law of the jurisdiction of the USA with which that US citizen was most 'closely connected' to govern that citizen's succession and estate plan. In what is a matter of almost equal interest, the EU Succession Regulation appears to give a US citizen who is not resident in Europe but who owns property in Europe the ability to make an election to have US law apply to the disposition of that property and thus ensure that the property will pass according to the law of the US jurisdiction with which that US citizen has the closest connection.

Very significantly for the reasons discussed above in connection with the distinction between the application of the law of habitual residence and the law of closest connection, under Article 34(2), '*renvoi*' does not apply at all in cases where a choice of the law of nationality has been made, and thus the possibility that the substantive law of the chosen jurisdiction could be supplanted by the law of another country appears to be eliminated. This is especially important for a US citizen who may wish to make an election of US law under the EU Succession Regulation because it gives that citizen the assurance that the choice of US law will not be chimerical and will not simply result in a referral back to the very European law that the US citizen was trying to avoid. Thus, it is important, even in the case where the habitual residence of a US citizen who owns property in a EU country subject to the EU Succession Regulation is in a state of the USA, for that US citizen to make an election of US law under the EU Succession Regulation to ensure that the substantive law of that US state apply to the succession of the US citizen's EU real property as well as that citizen's personal property.

What is particularly striking about the elective choice-of-law provision of the EU Succession Regulation is its breadth of application. Firstly, the EU Succession Regulation, under Article 23(1), following the legal preference of many civil law countries, abjures the common law preference for distinguishing between real property and personal property in matters of choice of law; the choice of the law of a person's nationality—like the default rules of habitual residence and closest connection in the case no elective choice is available or made—applies to all of the property of the decedent, whether real or personal, whether 'immoveable or moveable. Secondly, the elective choice of law applies to a wide variety of legal topics. Pursuant to Article 24(2) of the Regulation, a testator may elect in the testator's will to have the law of the state of the testator's nationality (whether the testator chooses the law of the state whose nationality the testator possesses at the time of the testator's death or the law of the state whose nationality the testator possesses at the time of making such choice) govern the resolution of questions pertaining to the admissibility and substantive validity of such will, notwithstanding the rule of Article 24(1) of the Regulation that requires that the applicable law at the time of the disposition should govern. The questions pertaining to the admissibility and substantive validity of a will include the very important issues of (i) capacity, (ii) limits on succession, (iii) interpretation and (iv) consent and intention. In addition, the choice of law of nationality applies to the following matters, identified under Article 23(2) of the Regulation: (i) the determination of the beneficiaries, and their respective shares of inherited property, as well as other succession rights such as spousal rights, (ii) the capacity to inherit, (iii) issues of disinheritance and disqualification by conduct, (iv) issues about transfer to heirs and legatees of assets and the rights and obligations of estates, including conditions and effects of acceptance or waiver, (v) the determination of the 'disposable part of the estate, the reserve shares and other restrictions on the disposal of property upon death', (vi) issues about liability for the debts under succession (meaning, most importantly, the extent of the liability of the heirs for the debts of the decedent), (vii) the nature of 'any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries', and (viii) the 'sharing-out' of the estate. Finally, also under Article 23 of the Regulation, the choice of law of nationality also applies to issues that we in the common law tradition might think as being more administrative or procedural such as (i) the causes, time and place of the opening of the succession, and (ii) the powers of heirs, executors of wills and other estate administrators, in particular as regards the sale of property and the payment of creditors.[8]

Determination of applicable inheritance law under New York law (NY EPTL section 3-5.1)

The preceding parts of this article have highlighted the exciting possibility afforded to US citizens who either reside in or own property in one of the many European jurisdictions that are parties to the EU Succession Regulation to direct that the law of their nationality (ie the law of the USA) apply to their succession—and thereby effectively direct that the law of the jurisdiction of the USA with which they are most 'closely connected' govern their estates. But now this article turns to the equally important question as to what reception such elections of US law by US citizens pursuant to the EU Succession Regulation are likely to receive in the USA itself when that choice of law must be given effect not only in the European country in which the US citizen may reside or own property but in the USA itself. This question is especially pressing for US citizens who reside in one of the European countries subject to the requirements of the EU Succession Regulation but who own property in the USA and want to have a uniform law apply to all dispositions provided for in their estate planning documents, whether in or outside the USA.

If one had to summarize the general pattern of the laws of the states of the USA as to choice of law in matters of inheritance, one would generally say that the law of the location of real property applies to the inheritance of a decedent's real property holdings and that the law of a decedent's domicile applies to the inheritance of the decedent's personal property holdings—and that generally US courts are not inclined to apply '*renvoi*'.[9] Now, it might seem obvious to the reader as a matter of general policy that the courts of a particular US state would gladly accept a choice of such state's law to govern the inheritance of personal property over which such state has jurisdiction even if the decedent who owned the property was not domiciled in such state. However, one cannot assume that all US state courts will be so enamoured with their own law that they will automatically defer to a choice of law in their regard, especially when such acceptance would contradict the traditional choice-of-law rules of such state—especially in a case where such state's choice-of-law rules would dictate the application of the law of the domicile of a US citizen living in Europe—precisely, the law that the US citizen would likely be trying to avoid by electing the law of the USA pursuant to the EU Succession Regulation in the first place. After all, no US jurisdiction, to the best of this author's knowledge, has wholeheartedly embraced a principle allowing a testator the unlimited right to choose the law applicable to the testator's estate and thus one cannot presume that such a choice sanctioned by the EU Succession Regulation, even if limited only to a choice of the law of testator's nationality, makes that rule equally enforceable in the USA as it is now in much of Europe.

This article will now attempt to assess the degree to which an election of US law by a US citizen resident in Europe would be accepted by the courts of one of the most internationally-focused and involved states of the USA—the state of New York. It will be shown that the New York courts can take the EU Succession Regulation into account and can recognize the choice of national law option thereunder, but only within the highly articulated framework of the New York choice-of-law statute; in the case of US citizens who are not domiciled in New York, there may not be a total supplanting of all other relevant laws but New York law should apply to the issues that can most destabilize

8. The EU Succession Regulation also provides for the possibility that a provision of law specified by the Regulation may be refused recognition or application if such recognition or application would be 'manifestly incompatible with the public policy (*ordre public*) of the forum'. (See art 35 of the Regulation.) This author believes that this provision—which appears in most, if not all, private international law treaties, including the Hague Convention on Trusts and the Hague Convention's own proposed Convention on the Law Applicable to Succession of Deceased Persons—is intended to be construed and applied narrowly, much as is the 'public policy' exception to the US constitutional requirement that US states afford 'full faith and credit' to the judgments of each other's courts.

9. See generally, ss 239–265 of the Restatement (Second) of Conflict of Laws; see also Michael W. Galligan, '"Forced Heirship" in the United States of America with particular reference to New York State' 22(1) (2016) Trusts & Trustees 103–18.

the estate plan of a US citizen accustomed to US concepts of inheritance law and US forms of estate and income tax planning, including such issues pertaining to mandatory interests of children in their parent's succession and the responsibility of heirs for the liabilities of deceased persons.

Among the jurisdictions of the USA, New York State was a leader in the second half of the past century in adopting a more nuanced, contextualized approach to choice-of-law issues rather than an approach based on the sometimes arbitrary or mechanical factors of location and residence/domicile. Under this so-called 'modern' approach, a court must identify and weigh the contacts of a given case with each jurisdiction implicated in the matter, note the policies reflected in the differences between the laws of the relevant jurisdictions, and apply the law of the jurisdiction with the greatest governmental interest in the policy outcome.[10] In the matter of inheritance, however, New York law offers in New York Estate, Powers, and Trusts Law (EPTL) section 3-5.1 a set of highly articulated rules, which use the traditional concepts of situs and domicile, but applies them in a way that is very detailed and nuanced and requires careful attention.

To appreciate this degree of detail and nuance, one must first of all consider the definition of 'local law' under EPTL section 3-5.1(a) because the distinction between 'local law' and 'law' runs throughout the statute and can be said to be its central axis. 'Local law' is defined as 'the law which the courts of a jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction'—and therefore do not require reference to the laws of another jurisdiction. 'Law' is not expressly defined but it is clear that references to 'law' in the statute, by contrast with 'local law', refer to the law that courts of a jurisdiction would apply in adjudicating a legal question that can or in fact does have a relation to another jurisdiction and that would therefore necessarily require consideration of that jurisdiction's conflict-of-laws rules and raise the possibility of '*renvoi*'. It should also be noted at the outset that the statute lays out six major areas of law with which choice-of-law determinations must be made—(i) formal validity (ie 'the formalities prescribed by the law of a jurisdiction for the execution and attestation of a will'), (ii) intrinsic validity (ie substantive rules determining 'the legality of a testamentary disposition, including the general capacity of the testator'), (iii) effect (defined as the 'legal consequences attributed under the law of a jurisdiction to a valid testamentary disposition' and therefore the area of law that most directly implicates the extent, if any, to which a foreign legal regime of forced heirship could possibly displace the otherwise valid dispositions of a testamentary instrument), (iv) interpretation (ie 'the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the testator where the testator's intention is not otherwise ascertainable'), (v) the revocation or alteration of a testamentary disposition of property, and (vi) the manner in which property descends when not disposed of by will.

For the determination of any of the six areas of law listed above as they relate to the inheritance of real property, EPTL section 3-5.1(b)(1) directs that the 'law' of the jurisdiction in which such real property is situated shall apply. This means that the court must not only look to the substantive law of the jurisdiction in which such real property is situated, but must also take into account such jurisdiction's choice-of-law rules as well, which may then direct that the substantive law of another jurisdiction govern the determination. The threshold question of whether an estate in, leasehold of, fixture, mortgage or other lien on land is real property in the first place (as opposed to personal property) is to be decided based on the 'local law'—that is, the substantive law only—of the jurisdiction where the land is situated.[11]

10. For a recent example of this approach in an estate planning case not governed by New York EPTL 3-5.1 (such statute to be discussed in greater detail infra in this article), see *Matter of Chappell*, 883 NYS.2d 857 (Sur Ct NY County, 2009). One area where New York sets aside this contextualized approach and deliberately seeks to enlarge its jurisdiction is in the matter of contracts, where parties can elect to apply New York law even where there are no New York contacts with respect to the matter as long as the value of the contract is $250,000 or greater (see New York GOL 5-1401); similarly, parties can elect to make the courts of New York State the exclusive forum for the resolution of disputes in contract matters as long as the value at stake is $1,000,000 or more (see GOL 5-1402).

11. See EPTL 3-5.1(i).

The determination of the applicable law to decide the six areas of law listed above as they pertain to the inheritance of personal property, on the other hand, is more variegated under the New York statute. As to issues concerning the formal validity of a will, the statute provides that such will is valid and admissible to probate in New York if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the 'local law' (ie again only looking to the substantive rules of the relevant jurisdiction and not its conflict-of-laws rules as well) of any of the following three options: (i) the 'local law' of New York, (ii) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (iii) the 'local law' of the testator's domicile, either at the time of the execution of the will or at the time of the testator's death.[12] The statute, in EPTL section 3-5.1(e), directs that, in matters concerning the interpretation of a testamentary disposition of personal property, the 'local law' of the testator's domicile at the time the will was executed would govern—again without any need to make reference to or inquiry about the choice-of-law rules of that jurisdiction. As to matters concerning whether a testamentary disposition of personal property is effectively revoked or altered by the provisions of a subsequent testamentary instrument or by a physical act to or upon the will by which the testamentary disposition was made, EPTL section 3-5.1(f), directs that the governing law in determining those matters is the 'law' (not just the 'local law') of the domicile of the testator at the time of the execution of the subsequent instrument or performance of the physical act—and thus, in this instance, it appears that the 'whole law' (including the private international law rules of the testator's domicile) must be considered, with the possibility of a '*renvoi*' to the law of another jurisdiction. The last three areas of law—that being, (i) intrinsic validity, (ii) effect (again the area of law perhaps most relevant to the determination of whether or not a foreign regime's notion of forced heirship should be respected), and (iii) the manner in which property devolves when not disposed of by will—are, pursuant to EPTL section 3-5.1(b)(2), governed by the 'law' (not just the 'local law') of the jurisdiction in which the decedent was domiciled at the time of his/her death—and thus the applicable law for deciding these three areas of law as they pertain to the disposition of personal property includes the 'whole law' of that jurisdiction, again opening up the possibility of '*renvoi*'.

It is commonly said that most jurisdictions of the USA are hostile to '*renvoi*' and the 'whole law' approach that leads to it. That this was the case in New York for at least much of the first half of the past century could perhaps be inferred from the then leading New York County Surrogate's Court case of Matter of Tallmadge, 181 NYS 336 (Sur Ct NY County, 1919), in which the New York Surrogate insisted that New York law's reference to the law of a foreign jurisdiction (ie France) based on the domicile of the decedent (a US citizen domiciled in France at the time of his death) must always be understood to mean a reference to the substantive law of the foreign jurisdiction only, lest reference to the foreign jurisdiction's choice-of-law rules give rise to 'an indefinite oscillation between the two laws'.[13] The opposition to the application of '*renvoi*' in Tallmadge was criticized, and one might even suggest reversed, by the same New York County Surrogate's Court some decades later in Matter of Schneider's Estate, 198 Misc 1017 (Sur Ct NY County, 1950). The latter case involved the disposition of the proceeds of sale of real property in Switzerland, which had belonged to a Swiss–US dual national decedent who had been domiciled in New York at the time of his death, and which proceeds had been brought into New York after the sale. The New York Surrogate not only looked to the substantive law rules of Switzerland (ie the jurisdiction where the real property had been located) but also considered Switzerland's conflict-of-laws rules in determining

12. See EPTL 3-5.1(c).
13. *Matter of Tallmadge*, 181 NYS at 344.

what law should govern the disposition of the proceeds of the sale and, based on the latter rules, accepted a referral under Swiss law back to New York law.

The influential Report No. 8.2.1A of Messrs. Samuel Hoffman and I. Leo Glasser on choice-of-law issues, included in the Fifth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates to the Governor and the Legislature (more familiarly known as the 'Bennett Commission', after the distinguished Surrogate of Nassau County, New York who chaired it) and upon whose recommendations EPTL section 3-5.1 was drafted, confirms the interpretation of the term 'law' in the statute as referring to the 'whole law' of the relevant jurisdiction.[14] According to the Report, the

> effect . . . of dispositions of real property . . . should be governed by the law of the situs of the property (including its conflict of laws) [and] [t]he . . . effect . . . of a testamentary disposition of personalty . . . should be governed by the law of the testator's last domicile (including its conflict of laws).[15]

Not surprisingly, the Report cites Matter of Schneider approvingly and makes no mention of Matter of Tallmadge. That this author's interpretation of EPTL section 3-5.1 (especially in respect to the areas of law to which '*renvoi*' may apply and those to which it cannot apply) is correct is further confirmed by another important provision of the statute—the provision that allows non-New York domiciliaries to elect in their wills that New York law should apply to their New York property. The formal validity of such a will would continue to be governed either by (i) the 'local law' of New York, (ii) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (iii) the 'local law' of the testator's domicile, either at the time of the execution of the will or at the time of the testator's death. However, pursuant to EPTL section 3-5.1(h) (as confirmed by the New York Court of Appeals in its renowned decision of Matter of Renard),[16] the testator, by electing in his/her will to have New York law govern the disposition of any of his/her property (be it real or personal) situated in New York, would ensure that the 'local law' rather than the 'law' of New York govern issues concerning the intrinsic validity, effect (including whether forced heirship applies or does not apply), interpretation, and the revocation/alteration of his/her will, thus ensuring, for example, that any foreign forced heirship rules applicable under the laws of the testator's domicile at death would not apply to the testator's New York property.[17] Only in the case where New York property was not disposed of by the will itself would the 'law'—not only the 'local law'—apply to the disposition of the New York property.[18]

To illustrate and test out the provisions of New York law in the context of the choice-of-law option afforded by the EU Succession Regulation to US nationals who reside in or own property in Europe as this article has earlier discussed, several scenarios are now considered where these provisions may be called on to operate. A first scenario illustrates the application of these rules when a New York domiciliary dies with one 'universal will' disposing of his/her worldwide estate, which is admitted to original probate in a Surrogate's Court of New York County.[19] In this case,

14. See Report No. 8.2.1A, entitled 'The Decedent's Estate Law as Affected by Conflict of Laws Considerations', authored by Samuel Hoffman and I. Leo Glasser, included on pages 610 through 659 in the Fifth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates to the Governor and the Legislature, dated 31 March 1966 (the 'Hoffman—Glasser Report').

15. See Hoffman—Glasser Report at page 658.

16. *Matter of Renard*, 108 Misc 2d 31 (Sur Ct NY County 1981), aff'd, 85 A.D.2d 501 (1st Dept 1981), aff'd, 56 NY.2d 973 (1982).

17. For a sample of a clause designed for the making of such an election of New York law by a non-New York domiciliary, please see Appendix I.

18. New York property can include New York real property, tangible personal property located in New York, bank and investment accounts with New York financial institutions, stock of New York corporations, and, it seems, interests in at least many New York partnerships and limited liability companies. See *Matter of Renard*, 108 Misc. 2d 31 (Sur Ct NY County 1981), aff'd, 85 AD.2d 501 (1st Dept 1981), aff'd, 56 NY.2d 973 (1982) (bank accounts and brokerage accounts); *Hutchison v Ross*, 262 NY 381 (1933) (shares of corporations or debts when evidences of ownership of such are physically located in New York).

19. There are generally two alternative bases for a New York court to accept jurisdiction over an estate for original probate. The first basis as set forth in New York Surrogate's Court Procedure Act (SCPA) 205 provides that the Surrogate's Court of New York has jurisdiction over the estate of a decedent who was domiciled in the state at the time of his/her death. In such a case, the New York Surrogate's Court must exercise jurisdiction over the will of a New York domiciliary decedent for original probate in New York regardless of whether such will was drafted to have worldwide application or only to address the disposition of the

New York 'local law' effectively applies to all issues affecting New York real property because New York applies the law where real property is situated and New York 'local law' effectively applies to all issues regarding the disposition of personal property of a New York domiciled decedent and without limitation as to the location of the personal assets, except for the issues concerning interpretation of the will if the decedent had been domiciled in a jurisdiction other than New York at the time the will was executed.

A second scenario involves the 'universal will' of a US citizen domiciled in Europe that is admitted for original probate in New York,[20] under which neither the election to apply New York law to New York property under EPTL section 3-5.1(h) nor any election of US law (as the law of testator's nationality) allowed under the EU Succession Regulation was made. In this case, New York 'local law' will effectively apply to all New York real property based on the property's New York location. As to personal property, wherever located, the will shall be determined to have formal validity so long as it was in writing and signed by the testator, and otherwise executed and attested in accordance either with (i) the 'local law' of New York, (ii) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (iii) the 'local law' of the testator's domicile, either at the time of the execution of the will or at the time of the testator's death. The interpretation of the will shall be governed by the 'local law' of the domicile of the decedent at the time the will was executed. Issues concerning revocation of the will or any dispositions thereunder shall be governed by the 'law' (not only the 'local law') of the decedent's domicile at time of the execution of the subsequent instrument or the performance of the revocatory act. The 'law' (not only the 'local law') of the decedent's European domicile at death will govern issues about the all-important issues of intrinsic validity, effect, and the manner in which property devolves when not disposed of by will. Of course, in many cases, the conflict-of-laws rules of the decedent's domicile will likely effectively refer to the law of the decedent's habitual residence or closest connection as designated by the 'default rule' under the EU Succession Regulation, and so the relevant substantive rules of European succession law (eg particular rules providing for forced heirship)—not New York law—can be expected to apply.

A third scenario involves the situation of a US citizen domiciled in Europe at the time of death who leaves a 'universal will' in which the decedent made an election to have New York law apply to his/her New York property pursuant to EPTL section 3-

decedent's New York property. The second basis for a New York court to accept jurisdiction over an estate for original probate is set forth in SCPA 206, which provides that the Surrogate's Court of New York has jurisdiction over the estate of any non-New York domiciliary decedent who leaves property in the state. Note that even though SCPA 206 seems to imply that the New York Surrogate's Court would be obligated to exercise its jurisdiction over an estate of a non-New York domiciliary decedent who left property physically located in New York, the exercise of that jurisdiction is effectively left to the discretion of the New York Surrogate's Court, and, in determining whether or not to grant original probate, the court will measure the New York connections in deciding whether to exercise its discretion. See, eg, *Matter of Heller-Baghero*, 310 NYS.2d 313 (1970).

20. New York law generally allows (and perhaps even encourages), under certain circumstances, a New York Surrogate's Court the discretion to grant original probate to the will of a decedent not domiciled in New York but who owned property in New York at the time of the decedent's death as long as the decedent's will had not previously been admitted to probate in another jurisdiction. Under certain circumstances, a New York Surrogate's Court even has the discretion to grant original probate when another jurisdiction has already granted probate. See SCPA 206 & 1605(2)(b); see also *Matter of Heller-Baghero*, 310 NYS.2d 313 (1970) and *Matter of Renard*, 417 NYS.2d 155 (Sur Ct NY County, 1979), aff'd, 418 NYS.2d 553 (1st Dep't 1979). Art 4 of the Regulation confers 'general jurisdiction' on the courts of a state that is subject to the Regulation (a 'Member State') and in which the deceased was a habitual resident at the time of death and authorizes the courts of that state to rule on the deceased's succession 'as a whole'. Ironically, testators are not given the ability to choose the forum that will have jurisdiction over their successions, even though they have authority under art 22 of the Regulation to elect the law of their nationality rather than allowing the default rules which favour either the law of their habitual residence or closer connection to come into play to govern their successions. The Regulation generally allows for the forum of nationality to have general jurisdiction, under art 5, only in the case where the state of nationality is a Member State and only when 'the parties concerned' agree that the courts of that Member State should have jurisdiction. Generally, the courts of New York prefer to extend comity to the exercise of jurisdiction by a non-New York court over the estate of a non-domiciliary decedent when a will has been submitted for probate to the non-New York court, as discussed at some length in *Matter of Heller-Baghero* and the cases cited therein. However, in many countries of Europe, courts have very little, if any, involvement in the establishment of a will or the supervision of a succession. Thus, it is unclear, at this juncture, if a New York court would be inclined to deny original probate for a will in which New York original probate was requested simply because of the jurisdictional rules contained in Articles 4 through 10 of the Regulation. In *Matter of Renard*, 417 NYS.2d 155, 158 (Sur Ct NY County, 1979), the New York Surrogate's Court agreed to accept jurisdiction over decedent's will disposing of her New York assets and to admit it to original probate even though the Court assumed that such will had already been established in France—a jurisdiction that is now a Member State to the EU Succession Regulation but one in which its local courts generally do not exercise any direct role in the establishment of a will or the administration of a succession.

5.1(h). The will requests and is granted original probate in New York. Under this scenario, New York law effectively applies to all real property located in New York. As to personal property situated in New York, issues concerning formal validity, as usual, shall be determined by looking to either (i) the 'local law' of New York, (ii) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (iii) the 'local law' of the decedent's domicile, either at the time of the execution of the will or at the time of the decedent's death. The following significant issues regarding personal property having a New York situs shall be governed by New York 'local law': the intrinsic validity, effect, interpretation and revocation/alteration of any disposition with respect to such property. Only the disposition of any personal property situated in New York not effectively disposed of by the will would be governed by the 'law' (not just the 'local law') of the jurisdiction in which the decedent was domiciled at death. As to the personal property situated outside of New York, again issues concerning formal validity, as usual, shall be determined by looking to either (i) the 'local law' of New York, (ii) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (iii) the 'local law' of the decedent's domicile, either at the time of the execution of the will or at the time of the decedent's death. Issues of interpretation will be governed by the 'local law' of the decedent's domicile when the will was executed. Issues about any revocation will be governed by the law (not only the 'local law') of the jurisdiction in which the decedent was domiciled at the time of the execution of the subsequent instrument or the performance of the revocatory act. But the following critical issues about the property not situated in New York would be governed by the 'law' (not just the 'local law') of the jurisdiction in Europe in which the decedent was domiciled at death: the intrinsic validity, effect, revocation/alteration, and the devolution of property not disposed of by the will. Again, in many cases, the conflict-of-laws rules of the decedent's domicile will likely effectively refer to the law of the decedent's habitual residence or closest connection as designated by the 'default rule' under the EU Succession Regulation, and so the relevant substantive rules of European succession law (including laws of forced heirship and the unlimited liability of the heirs for the decedent's liabilities)—not New York law—will apply to property not situated in New York.

A fourth and final scenario involves the situation of a US citizen who at his/her death was domiciled in Europe and whose then closest connection among the states of the USA was the state of New York and whose will, drafted as a 'universal will', requested and is granted original probate in New York. Suppose also that this individual in his/her will elected under EPTL section 3-5.1(h) to have New York law apply to the disposition of his/her New York property and also elected pursuant to the EU Succession Regulation to have his/her succession governed by the law of his/her nationality—ie the USA (and, thus, effectively the law of New York—ie the territorial unit in which he/she had the closest connection). In this case, New York law will of course effectively apply to all issues affecting real property located in New York. The election of New York law would ensure that, as to personal property located in New York, (i) issues concerning formal validity, as usual, would be determined by looking to either (a) the 'local law' of New York, (b) the 'local law' of the jurisdiction in which the will was executed, at the time of the execution, or (c) the 'local law' of the decedent's domicile, either at the time of the execution of the will or at the time of the decedent's death, and (ii) issues concerning the all-important questions of intrinsic validity, effect, interpretation, and revocation/modification would be determined by looking to the 'local law' of New York. Assuming the New York court accepts the choice of USA/New York law under the EU Succession Regulation, the following should result as to personal property located outside of New York that is collected or regulated by the New York administration: issues of formal validity would be subject not only to the 'local law' of New York, place of execution or domicile at time of execution or death, but also the law of the citizenship of the decedent or the law of the decedent's habitual residence, either at the time the will was executed or at the time of death. The interpretation of the will would continue to be governed by the 'local law' of the decedent's domicile at the time the will was executed, but the 'local law' of New York, not the otherwise relevant substantive European law, would apply to the critical issues of intrinsic validity, effect, and revocation/alteration. Since an election of New York law would, pursuant to Article 22(1) of the Regulation, apply to the 'succession as a whole', it appears that the 'local law' of New York would also govern the manner in which property devolves when not disposed of by the will.

It is important to underscore that the reason why this author believes that a New York court should recognize a will's 'effective' designation of New York law pursuant to the EU Succession Regulation is not based on a naïve assumption that New York courts will liberally entertain such an election but precisely because, under a strict reading of EPTL section 3-5.1, 'law' is not limited to 'local law'; references to the 'law of domicile' in the case of a non-New York domiciliary require consideration of the 'whole law' including the conflict-of-laws rules of the domiciliary jurisdiction; and the law of most European countries now recognize a choice of USA/New York law made pursuant to the EU Succession Regulation. In that event, New York substantive (no '*renvoi*') law should generally apply to the issues that are most likely to be important to a decedent's estate plan, including the 'effect' of a testamentary disposition, thus assuring that provisions of European 'forced heirship' law and unlimited liability for decedent's debts would not apply as to all property passing under the will, with the possible exception of real property located outside of the New York Court's jurisdiction if that property is not located in a jurisdiction that is already a party to the EU Succession Regulation and thus not required to respect the choice of US law in the will.

The European Union Succession Regulation and New York ancillary probate: an uncertain case

In the examples so far provided, this article considered situations in which wills are offered and admitted for original probate in New York. But New York also allows, pursuant to Section 1602 of the New York Surrogate's Court Procedure Act (SCPA), in the case of many decedents who were not domiciled in New York but who own property in New York at the time of their death, the alternative of ancillary probate: '[a] written will which ... may operate upon any property in this state shall be admitted to probate [in New York] ... upon proof that it has been admitted to probate at the testator's domicile or has been established in accordance with the law of such jurisdiction ... '. A will so admitted to probate 'is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the testator's domicile in respect of legal capacity'. However, the last sentence of SCPA section 1602 states that '[r]ights granted by the law of the domicile to take against the will are not affected by this section', thus giving rise to a concern that this provision could apply to rules of forced heirship and other rules characteristic of the European civil law tradition. The origins of this sentence may go back to a concern that, in the case of a non-domiciliary estate where no election to apply New York law to decedent's New York property pursuant to EPTL section 3-5.1(h) was made in the will and therefore the surviving spouse would not have the protection afforded him/her under the New York's spousal right of election provisions, such surviving spouse should therefore at least be assured of whatever protection the law of the decedent's domicile would grant him or her,[21] but the wording of the sentence is more general and therefore might seem to apply to the rights of children and other relations as well as spouses.[22]

21. See EPTL 5-1.1(d)(7) and 5-1.1-A(c)(6)).

22. See, eg, discussion in Margaret V. Turano, 58A McKinney's Consolidated Laws of New York, p 222 (2012) where Professor Turano refers to the last sentence of SCPA 1602 as 'a clause whose meaning is not entirely clear'.

Below, for consideration, are a number of examples in which the will of a non-domiciliary decedent is only admitted for ancillary probate in New York. First, under consideration is the scenario in which a US citizen, who at his/her death was domiciled in Europe, left a 'universal will' which did not elect pursuant to EPTL section 3-5.1(h) to have New York law apply to the decedent's New York property. Assume that the will is recognized as the valid testamentary instrument of the US citizen decedent by the European country of the decedent's habitual residence and that the will is only admitted for ancillary probate in New York. Under case law antedating the passage of SCPA section 1602, it would seem clear that New York substantive law should apply to the disposition of New York real property.[23] If the last sentence of SCPA section 1602 is read narrowly to refer only to matters of spousal protection, New York substantive law should still effectively apply as to most issues regarding New York real estate except for excluding the New York spousal right of election. But if the last sentence of SCPA section 1602 is to be taken literally, there seems to be no reason why it could not also safeguard a claim of a descendent in forced heirship as to real property. As to New York personal property, as would be the case of a 'universal will' of a US citizen domiciled in Europe whose will was admitted in New York for original probate, issues about the interpretation of the will would be governed by the 'local law' where the decedent was domiciled when the will was executed and issues about revocation of the will or any dispositions thereunder would be governed by the law (not only the 'local law') of the decedent's domicile at the time of execution of the revocatory instrument or act. The 'law' (not only 'local law') of the decedent's European domicile at death would govern such key issues as the intrinsic validity and effect of the relevant property dispositions under the will and the manner in which property devolves when not disposed of by will. Again, in many cases, the conflict-of-laws rules of the decedent's domicile would likely effectively refer to the law of the decedent's habitual residence or closest connection as designated by the 'default rule' under the EU Succession Regulation.

A second scenario involves the case of a 'universal will' of a US citizen/European domiciliary admitted for ancillary probate in New York where the will does make an election of New York law either under EPTL section 3-5.1(h) or pursuant to the EU Succession Regulation. As to New York real property, New York 'local law' should effectively apply, assuming the New York election prevails over SCPA section 1602 (last sentence). As to New York personal property, New York 'local law' should effectively apply to issues of intrinsic validity, interpretation, and effect, again assuming that the election of New York law pursuant to EPTL section 3-5.1(h) prevails over SCPA section 1602.

This uncertainty about the effect of ancillary probate on the application of New York law to New York property (and whether an election of New York law under EPTL 3-5.1(h) effectively prevails over SCPA section 1602) might be addressed by having a US citizen domiciled in Europe execute a separate will directing that it be offered for original probate in New York and dealing only with the disposition of New York property that would be admitted to original probate in New York. If no express election of New York law were made, however, New York law should effectively apply to all issues regarding New York real property but the all-important issues of intrinsic validity and effect as to dispositions of New York personal property would still be governed by the 'law' (not only the 'local law') of decedent's domicile. However, in the case of a New York-specific will of a US citizen domiciled in Europe, which only addresses the disposition of the decedent's New York property, directs that the will be offered for original probate in New York, and makes an election of New York law under EPTL section 3-5.1(h), New York 'local law' should apply to all issues regarding New York real property and New York 'local law' should also apply to all issues about the intrinsic

23. *Matter of Tamburri*, 198 Misc 809 (Sur Ct Richmond County, 1950).

validity, effect, interpretation, and revocation/alteration of the will as it pertains to the disposition of decedent's New York personal property.

Article 22 of the EU Succession Regulation requires that an election of US law by a US citizen habitually resident in a jurisdiction where the EU Succession Regulation is effective must be an election of US law to govern the 'succession as a whole'. A concern has been raised that a bifurcation of an estate plan into separate wills for property located in different jurisdictions might somehow invalidate an election under Article 22 because the election, being made effectively in two different wills, would not constitute an election as to the whole of the estate.[24] The provisions of the EU Succession Regulation that deal with jurisdiction over successions stipulate that one jurisdiction—the jurisdiction of habitual residence, if that is an EU Member State—should have general jurisdiction to rule on the succession, in the words of Article 4, 'as a whole'.[25] Identifying the courts of a Member State that have general authority over a succession appears to be an important foundation for the provisions of the Regulation seeking to facilitate the recognition of decisions in matters of succession by the courts of other Member States (Articles 39–58), the acceptance and enforceability of 'authentic instruments' (Articles 59–61), and the effectiveness of the new 'European Certificate of Succession' to eliminate the need for separate proceedings in every jurisdiction (at least within the EU) where a decedent may have owned assets (Articles 62–73).

But, on the other hand, nothing in the EU Succession Regulation stipulates that a decedent who owns property in more than one jurisdiction cannot decide to execute separate wills for each jurisdiction in which the decedent owned property—even if executing multiple wills may have inherent pitfalls and risks.[26] One can see a more plausible objection if a testator were to use different jurisdiction-specific wills to elect different laws to govern the succession in different places, but when two or more jurisdictionally specific wills all choose the same law voluntarily, pursuant to Article 22, it seems hard to maintain that the election of the law of nationality is not, perhaps even more convincingly, an election of the law of US nationality to apply to the succession 'as a whole', provided that the effect is to ensure that a US law does apply to the whole of the estate. Clearly, there are risks that some assets might fall outside either will, with the consequence that the election might then not be valid. In the event that, for this or any other reason, a testator should not be comfortable with the 'multiple will' approach suggested above to ensure the application of New York law to New York property, a testator whose habitual residence is in an EU Member State could consider directing in his/her universal will that it be admitted for original probate in New York even if it should be probated or established in the jurisdiction of habitual residence and make an election of New York law both under EPTL section 3-5.1(h) and the EU Succession Regulation. SCPA section 1605(2) provides that a will that has already been 'admitted to probate or established' in the domicile of the testator may still be admitted to original probate in New York 'where the testator has directed in such will that it shall be offered for probate in this state' (as well as in circumstances where ancillary probate may be 'unduly expensive, inconvenient or impossible under the circumstances' or where the laws of the domiciliary jurisdiction 'discriminate' against domiciliaries of New York either as beneficiaries or as fiduciaries').[27]

24. See Richard Frimston, 'The EU Succession Regulation, No. 650/2012: Frequently Asked Questions and Frequent Misunderstandings' available at <http://www.step.org/sites/default/files/Policy/Succession_Regulation_FAQs_1.pdf> accessed on 5 January 2017.

25. For some more details on the jurisdictional rules of the Regulation, please see Appendix II.

26. For a discussion of such risks, see Michael W. Galligan, 'International Estate Planning for U.S. Citizens: An Integrated Approach' (2009) 36(10) Estate Planning 11–21.

27. The grant of such a request would remain, of course, subject to the discretion of the relevant New York Surrogate's Court, and thus runs the risk that the Court may find the connections to New York not sufficient to grant the request for original probate. See the discussion in footnote 20 above regarding the uncertain interaction between the provisions of New York law that may persuade a New York court to assume original jurisdiction over the estates of non-New York decedents and the jurisdictional rules contained in arts 4–10 of the Regulation that generally favour retaining general jurisdiction over successions of decedents resident in the jurisdictions where the Regulation is effective.

Conclusions

There can be no doubt, it seems to this author, that the option for choosing the law of one's nationality under the EU Succession Regulation is a valuable tool for coordinating the estate planning for US citizens residing in Europe with US estate planning concepts (both tax and non-tax), and for US citizens residing in the USA or elsewhere outside the relevant EU jurisdiction but who own property located in those EU jurisdictions subject to the Regulation), even though European property law concepts not generally related to matters of succession and European inheritance and wealth tax concepts will generally still apply. It would seem that New York courts should apply New York law at least to New York real property on ancillary probate of European wills of US citizens domiciled in Europe, even in the absence of a New York election. Caution, however, is urged in light of the generality of the last sentence of SCPA section 1602 and, thus, it may well be advisable even for a US citizen domiciled in Europe owning only New York real property but no personal property in New York to execute a New York-specific will, electing New York law, invoking EPTL section 3-5.1(h), and requesting original probate in New York.

The submission to a New York court for original probate of the 'universal will' of a US citizen domiciled in Europe with a US/New York election under the EU Succession Regulation, in the opinion of this author, should generally result in the application of substantive New York inheritance law to the disposition of the decedent's New York real property as well as to most significant issues regarding the disposition of all personal property subject to the New York Court's jurisdiction (whether initially situated in New York or outside of New York) as long as the New York court (i) applies the 'whole-law' of that US citizen's European domicile and (ii) accepts '*renvoi*' from the European domicile, as EPTL section 3-5.1, according to this author, requires. But where prudence dictates, absent New York court decisions addressing choice-of-law issues under the EU Succession Regulation or a New York statutory clarification, it may still be advisable for a US citizen domiciled in Europe (i) to execute a separate will governing the disposition of that person's New York property only, which invokes the choice of New York law under EPTL section 3-5.1(h) and requests original probate in New York, and (ii) to execute a European will governing disposition of the European assets, under which an 'effective' choice of US/New York law under the EU Succession Regulation is made. Any doubt about the application by New York courts of a choice of New York law pursuant to the EU Succession Regulation could of course be best laid to rest by the adoption of an express amendment to EPTL section 3-5.1 requiring the recognition of a choice of New York law under the will of a domiciliary decedent of a jurisdiction of Europe that is subject to the EU Succession Regulation over all relevant aspects of the inheritance of all property that is in any way subject to the jurisdiction of a New York court, regardless of whether that New York court admits the decedent's will to original probate or to ancillary probate.

Appendix I Sample Clauses

Sample clause for choice of law according to the EU Succession Regulation

I am a citizen of the United States of America. Pursuant to Articles 22, 24(2) and 36(2)(b) of Regulation (EU) No 650/2012 of the European Parliament and of the Council dated 4 July 2012, I elect that the law of my United States' nationality shall govern my succession as a whole, including without limitation, the admissibility and substantive validity of this my will, which law I expect to be the law of New York, the state of the United States with which I have the closest connection.

Sample clause preserving New York property option

Without limiting anything in the foregoing provisions, I direct that this Will be submitted for, and I request that this Will be admitted to, original probate in the State of New York and I hereby elect, pursuant to section 3-5.1(h) of the Estates, Powers and Trusts Law of the State of New York, to have the disposition of any and all of my property located in the State of New York governed by the laws of the State of New York.

Appendix II Jurisdiction under the EU Succession Regulation

a. General jurisdiction: The courts of the Member State in which the deceased had his habitual residence at the time of death have jurisdiction to rule on the deceased's succession 'as a whole.' [Article 4].
b. Choice of court: When the deceased has chosen the law of the state of his nationality to govern his or her succession pursuant to Article 22 and that state of nationality is a Member State, 'the parties concerned' may agree that such state of nationality will have exclusive jurisdiction to rule on any succession matter [Article 5]. When the deceased has chosen the law of the state of his or her nationality to govern his or her succession pursuant to Article 22 and that state of nationality is a Member State, a court that is seized of matters pertaining to the deceased's succession under Article 4 (General Jurisdiction) or Article 10 (Subsidiary Jurisdiction) may, at the request of the parties concerned, decline jurisdiction over the succession, if the court considers that the courts of the Member State of the chosen law of nationality are better placed to rule on the succession [Article 6(a)], but the court is required to decline jurisdiction if the parties concerned have agreed, pursuant to Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law of nationality [Article 6(b)].
c. Indirect choice of courts: The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if:
    1. A court previously seised has declined jurisdiction pursuant to Article 6;
    2. The parties have agreed under Article 5 to confer jurisdiction on the courts of the Member State whose law was chosen by the deceased pursuant to Article 22; or
    3. The parties have expressly accepted the jurisdiction of the court seised [Article 7].
a. Subsidiary jurisdiction: Where the deceased's habitual residence at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall still have jurisdiction insofar as
    1. the deceased had the nationality of that Member State at the time of death; or, failing that,
    2. the deceased had his or her previous habitual residence in that Member State, as long as, at the time the court is seised, a period of not more than 5 years has elapsed since that habitual residence changed [Article 10].

A court with subsidiary jurisdiction may also defer to a court of the Member State of the chosen law of nationality under the same circumstances described above under Article 6(a).

Appendix III Applicability of the Regulation

a. EU Succession Regulation applies to the succession of persons who die on or after 17 August 2015 [Article 83(1)].
b. Choices of law made prior to 17 August 2015:
    1. A choice is valid if it meets the conditions of the EU Succession Regulation.
    2. A choice is valid if valid under the rules of private international law at the time the choice was made
        a. in the State where deceased was habitually resident; or

   b. in any State whose nationality the deceased held [Article 83(2)].

c. A 'disposition of property upon death' executed prior to 17 August 2015 is admissible and valid in substantive terms and as regards form if it meets:
   1. The conditions of the EU Succession Regulation; or
   2. The rules of private international law that were in force at the time the disposition was made
      a. in the State where deceased was habitually resident;
      b. in any State whose nationality the deceased held; or
      c. in the Member State of the authority dealing with the succession [Article 83(3)].

d. For 'dispositions of property upon death' made prior to 17 August 2015 in accordance with the law that decedent could have chosen according to the EU Succession Regulation, that law shall be deemed to have been chosen as the law applicable to the succession [Article 83(4)].

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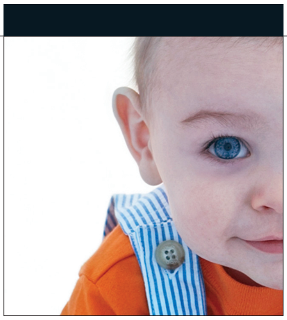

International Estate Planning for the Domestic Lawyer

Knowing the questions to ask and forms to file helps practitioners service clients with estate planning issues that reach beyond U.S. borders.

MICHAEL T. MELTZER, MICHAEL S. SCHWARTZ, AND SEAN R. WEISSBART

As the iconic Disney Theme Park ride repeatedly states, "it's a small world after all." And in an increasingly international society, the world is getting even smaller. It is now fairly common for the average trusts and estates client to have connections to countries outside of the U.S. From a U.S. client who owns foreign assets or who is a beneficiary of a foreign trust to a nonresident alien (NRA) who owns U.S.-source assets, a failure by the practitioner to identify and plan around potential international estate planning issues may result in large tax bills that could otherwise have been avoided by using the strategies discussed below.

The purpose of this article is to make estate planners who focus primarily on domestic issues cognizant of the international estate planning considerations and techniques that cannot be ignored in our ever-globalized society. The article begins by highlighting some of the latest developments in international estate planning and then continues by exploring some of the more important international estate planning questions that every trusts and estates practitioner should consider.[1]

Latest developments

Although the majority of this article is devoted to briefly outlining the fundamentals of international estate planning, recent developments in this field are both interesting and indicative of the need to remain cognizant of the rapidly changing laws. The following are some of the more significant developments from the last year or so, all of which are discussed in more detail below:

- *EU law allowing choice of succession laws.* The European Council passed new legislation, sometimes referred to as "Brussels IV," which, in effect, may allow residents, nationals, or owners of property in participating countries in the European Union to elect out of the inheritance or succession laws of the participating country, and instead apply the succession laws of a country of which such person is a national (even a country that is not a participant to "Brussels IV" or a part of the EU).[2]
- *Proposed regulations on transfer tax on covered gifts and bequests from covered expatriates.* The IRS issued proposed regulations under Section 2801, which imposes a special transfer tax on certain gifts or

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bequests received by a U.S. citizen or resident from a person who has expatriated from the U.S., but only if the expatriate is deemed to be a "covered expatriate" as defined in the Code.[3]

- *Increased guidance on failure to file FBARs.* The IRS issued interim guidance regarding the annual Report of Foreign Bank and Financial Account (FBAR) Form that must be filed with the U.S. Department of Treasury—Financial Crimes Enforcement Network ("FinCen") to report ownership interests in, or signature authority over, foreign accounts, lessening potential penalties for failure to file FBARs.[4] In addition, it was recently announced that effective for FBAR Forms relating to calendar year 2016 and later, the FBAR Form will be due on April 15 of the following year (with a six-month extension available on request) as opposed to its previous due date of June 30.[5]
- *Penalties for failure to file BE-10.* The U.S. Department of Commerce-Bureau of Economic Analysis increased the potential penalties associated with a failure to file Form BE-10, which is required for U.S. entities that directly or indirectly own or control 10% or more of the voting interest in a "foreign affiliate," such as a foreign corporation.[6]

International estate planning—the "fundamentals"

International estate planning is a complex, quickly evolving area of the law, the nuances of which could fill (and have filled) multiple volumes of legal treatises.[7] However, as a starting point for practitioners who fashion themselves as primarily domestic estate planners, below is a basic primer geared towards identifying and planning effectively when international considerations are involved. This primer is presented as a series of questions that estate planners should consider when confronting an international problem, followed by the answers and related planning strategies.

What is the client's tax status: U.S. citizen, U.S. resident alien, or NRA?
Perhaps the most obvious place to start is to determine whether the client is a U.S. or foreign person. This may seem to be a fairly straightforward inquiry, but unless the individual is a U.S. citizen (in which case he or she is clearly a U.S. person), there are complexities involved in this determination that are sometimes overlooked. The answer to this first question can have a tremendous impact on the client's tax and reporting obligations.

The definition of residency for U.S. gift and estate tax purposes differs significantly from the definition of residency for U.S. income tax purposes. For U.S. income tax purposes, in general, a citizen of another country is considered a U.S. resident based on two objective tests:

1. The substantial presence test, which examines the number of days the individual spent in the U.S.[8]
2. The "green card test," which examines whether the individual is a "Lawful Permanent Resident" for U.S. immigration purposes.[9]

The definition of residency for U.S. gift and estate tax purposes differs significantly from the definition of residency for U.S. income tax purposes.

The determination of residency for U.S. gift and estate tax purposes, on the other hand, involves a much more subjective analysis: A U.S. resident is someone who was domiciled in the U.S. at the time of the property transfer.[10] A person is deemed to acquire a domicile in the U.S. if that person resides in the U.S. and has no present intention of leaving.[11] Once a domicile is established, it remains so until it is shown to have changed.

Determining intent in this context is a question based on the facts and circumstances of each case.[12] Courts often look at such factors as:

1. Whether the person has a visa, work permit, or similar official document.

1 An in-depth discussion on all things related to international estate planning is beyond the scope of a single article. Although this article briefly flags many important international estate planning considerations, the reader is encouraged to review independently the cited sources for complete details on any given topic.

2 Regulation (EU) 650/2012.

3 Guidance Under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests From Covered Expatriates, 9/10/2015; www.federalregister.gov/articles/2015/09/10/2015-22574/guidance-under-section-2801-regarding-the-imposition-of-tax-on-certain-gifts-and-bequests-from (last visited on 1/25/2016).

4 Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, (5/13/2015), Control Number: SBSE-04-0515-0025; www.irs.gov/pub/foia/ig/spder/SBSE-04-0515-0025%5B1%5D.pdf (last visited on 1/25/2016).

5 Pub. Law 114-41.

6 For more on Form BE-10, see www.bea.gov/surveys/respondent_be10.htm (last visited on 12/21/2015).

7 See e.g. Lawrence, *International Tax and Estate Planning*, 3rd Ed. (Practicing Law Institute, 2014).

8 Reg. 301.7701(b)-1(c).

9 Section 7701(b).

10 Regs. 20.0-1(b)(1) and (2).

11 See e.g. Rev. Rul. 80-363, 1980-2 CB 249.

12 See e.g. Bank of New York & Trust Co., 21 BTA 197 (1930).

13 Sections 1 and 61.

14 Section 871.

15 FactSet Universal Screening, accessed 10/6/2015.

2. The number and location of the person's business and property interests.
3. The person's family immigration history.
4. A comparison of the size and other attributes of the person's residential property.
5. Testimony and statements of individuals acquainted with the person.
6. Travel and duration of stay in the U.S.
7. Community affairs and group affiliations.

Is there U.S. income tax exposure?

U.S. citizens and income tax residents are taxed on their worldwide income.[13] Thus, a truly domestic client has income tax exposure that is broad reaching, but fairly straightforward. In contrast, NRAs are generally subject to U.S. income tax on only their U.S.-source income.[14]

Therefore, it is logical to question why any NRA would invest money in a U.S.-sourced investment that produces taxable income. The answer to this question varies from person to person and depends on each individual's unique circumstances. This should be carefully coordinated with the client and an investment advisor who has expertise in this particularly sensitive subject.

From an investment perspective, focusing on after-tax returns is highly important. After all, the only dollars and cents that a client actually has at his or her disposal are those that are left in the client's portfolio after taxes have been paid. Professional investors who ignore the tax implications of their clients' investments are doing their clients an immense injustice. Suppose, for example, an investor (a U.S. resident with a marginal tax rate of 40% for simplicity's sake) buys a high-yield corporate bond that yields 8% of fully taxable interest. Now suppose the same investor buys a tax-free municipal bond with a 5% yield. At first blush, 8% appears to be far superior to 5%. However, on an after-tax basis, the 5% yield for the tax-free municipal bond is actually greater than the 4.8% after-tax yield of the high-yield corporate bond.

This example very simply illustrates the importance of focusing on after-tax returns. Equally important, do not let "the tax tail wag the investment dog," meaning investment decisions should not be based solely on what is better for tax purposes. Over 40% of the worldwide stock market consists of U.S companies,[15] and to exclude 40% of the

EXHIBIT 1
Different Tax Treatments for U.S. Citizens, Residents, and NRAs

	Income Tax Base	U.S. Gift Tax Exemption	U.S. Estate Tax Exemption	Tax on Marital Transfers	U.S. Annual Exclusion for Gifts
U.S. Citizen	Worldwide income	$5.45 million	$5.45 million	Full marital deduction for assets passing to a U.S. citizen spouse or in a qualified marital trust, such as a "QTIP trust"	$14,000 per donee each year
U.S. Tax Resident (non-Citizen)	Worldwide income	$5.45 million	$5.45 million	Same as above	$14,000 per donee each year
NRAs	U.S.-source income	$0	$60,000	Gifts or bequests to an NRA spouse are not eligible for the marital deduction unless made to a QDOT trust. However, annual exclusion gifts are allowed to be made to an NRA spouse in the amount of $148,000 per year.	$14,000 per donee each year

Notes:
1. For the "Tax on Marital Transfers" column, the tax status of the donee spouse determines the tax impact. The tax status of the donor spouse is irrelevant for these purposes.
2. The figures reflect 2016 inflation adjustments, where applicable.

worldwide market simply for tax considerations may not make the most sense. After all, investors look for diversification in their investment portfolios and strive to construct a portfolio of assets that do not correlate with one another to reduce the overall volatility of their holdings. While eliminating U.S. investments completely on tax grounds might not make sense, the tax implications of including U.S.-sourced investments should certainly be carefully considered.

Circumstances also change from year to year. Losses in a business interest or real estate investment outside the investment portfolio may offset certain components of investment income in a given year. Alternatively, there may be a year when income is higher than usual from combined sources. In that year, the tax implications of U.S-sourced investment income could be more substantial than in a typical year. Finally, other mitigating considerations may be present—such as:

- The existence of treaty benefits (discussed in more detail below).
- The possibility of using the portfolio-interest exemption.
- The offsetting impact of foreign tax credits or other preferential tax regimes (the details of which are outside the scope of this article).

Because of all these moving parts, it is crucial to advise the NRA client to maintain close and regular communication with both his or her investment and tax advisors. Likewise, these advisors should be in close and regular communication with one another. By keeping on top of the various moving parts, these advisors can work with the client as a team to optimize the after-tax returns, which after all, produce the dollars and cents the client ultimately has in his or her portfolio.

Is there U.S. estate or gift tax exposure? As alluded to above, the classification of an individual as a U.S. resident[16] determines whether his or her non-U.S. property is subject to transfer tax in the U.S. and the amount and availability of any exemptions or exclusions from that U.S. transfer tax. Similarly, the tax status of an individual's spouse affects the applicability of the marital deduction. Exhibit 1 summarizes the different tax treatment between U.S. citizens, residents, and NRAs. The discussion that follows provides a more detailed explanation of these distinctions.

Every individual who makes a gift or bequest of assets deemed to be situated (or having a situs) in the U.S.—whether citizen, resident, or NRA—is subject to the U.S. estate or gift tax with respect to those assets.[17] In addition, U.S. citizens and residents are subject to U.S. estate or gift tax with respect to transfers of their worldwide assets.[18] Again, this is a very straightforward test. For NRAs, the rules get much more complicated.

Despite the unification of the estate and gift tax, NRAs face different exposure under the estate and gift tax systems. NRAs are generally subject to U.S. gift tax on only transfers of real or tangible personal property deemed situated in the U.S.[19] Although this seems like a fairly clear-cut rule, intricacies may result in unintended gift tax exposure for the unwary transferor.

For example, because cash itself is a physical item and may, therefore, be considered tangible personal property, a gift of cash even if made via a bank, wire transfer, or check may also be considered a transfer of tangible personal property. Thus, if an NRA desires to make a cash gift, the transfer should ideally be made from an offshore bank in the name of the transferor to another offshore bank in the name of the recipient.[20] That way, even if the assets being transferred are deemed to be tangible personal property, they will not be deemed to be "situated in the U.S.," and thus the transfer should not be subject to U.S. gift tax. Any gift that is subject to U.S. gift tax is subject to a maximum federal gift tax rate of 40%.

The list of assets subject to U.S. estate tax if held by an NRA is generally more expansive than the categories of assets subject to U.S. gift tax.[21] An NRA is subject to U.S. estate tax with respect to his or her property deemed situated in the U.S., whether tangible or intangible. Assets deemed situated in the U.S. for these purposes generally include:

- Real and tangible property situated in the U.S.
- Deposits with a U.S. bank if they are connected with a U.S. trade or business (as opposed to deposits with U.S. banks that are not connected with a U.S. trade or business, or deposits in foreign banks).
- Stock issued by a U.S. corporation.

The determination of whether a partnership interest is deemed to be situated in the U.S. for these purposes requires a very fact-specific inquiry, and even then, the rules regarding the situs of partnership interests are relatively unsettled.

The disconnect between the property subject to U.S. gift tax and the property subject to U.S. estate tax presents unique estate planning opportunities for NRAs. In addition to the possibility of either restructuring the investment plan/holdings so that the NRA's assets consist only of non-U.S.-situs assets, or of transferring the U.S.-situs property into a foreign corporation so that it should not be subject to U.S. estate tax, it is common and sometimes advisable for NRAs to make lifetime gifts of property that is not subject to U.S. gift tax, but which would be subject to U.S. estate tax (e.g., shares of stock of U.S. companies).

A gift can be made into a trust that is structured so that the client may be able to still receive benefits from the trust. If this route is pursued, however, care must be taken to ensure that doing so does not result in adverse U.S. estate or income tax consequences for the client.[22] Such planning is especially important because of the much lower U.S. estate and gift tax exemptions given to NRAs, as detailed in Exhibit 1.

Unintended estate or gift tax may also result for transfers by clients (even U.S. citizens or residents) to spouses who are NRAs. Although transfers between U.S. spouses normally enjoy an unlimited marital deduction, such deduction is not available for transfers to NRA spouses.[23] Instead, annual gift-tax-free transfers in the amount of $148,000[24] are allowed to be made to the NRA spouse. Any gifts in excess of this amount, and any bequests at death that are left to

16 As discussed above, the definition of residency for U.S. estate and gift tax purposes differs from the definition of residency for U.S. income tax purposes.

17 Sections 2101 and 2501.

18 *Id.*

19 Reg. 25.2511-3(a)(1).

20 Although, if the gift is to a U.S. person, this may be easier said than done, as foreign banks and foreign branches of U.S. banks are becoming increasingly reluctant to allow for U.S. account holders due to onerous reporting requirements.

21 Section 2104.

22 For example, care must be taken to ensure that the client's creditors cannot reach the trust assets so as to cause estate tax inclusion under Section 2036.

23 Sections 2056(d) and 2523(i).

24 The 2016 amount is listed above. This amount is indexed annually for inflation.

the NRA spouse, are subject to U.S. gift or estate tax (subject, in the case of a U.S. citizen or resident transferor or decedent, to the use of his or her unused gift or estate tax exemption).

Despite the unification of the estate and gift tax, NRAs face different exposure under the estate and gift tax systems.

To defer (not avoid) the imposition of the estate or gift tax, the transfer can instead be made to a qualified domestic trust (QDOT) for the benefit of the non-U.S. spouse.[25] QDOTs are similar in certain respects to standard qualified terminable interest property (QTIP) trusts that are commonly implemented in the "pure domestic" estate plan. The computation of the U.S. estate/gift tax on the trust property differs slightly, however, and the restrictions associated with their use are generally more onerous (and consequently, more complicated). If the use of a QDOT is desired, a careful study of and strict compliance with the QDOT regulations is recommended.

If there are trusts, are they foreign or domestic?[26] The distinction between a "foreign trust" and "domestic trust" is important. The tax and reporting implications of this distinction may be significant both for trusts established by the client, and also for trusts of which the client is a beneficiary or fiduciary.

A trust is a "domestic trust," and is therefore treated as a U.S. person for U.S. income tax purposes, if (1) a U.S. court is able to exercise primary supervision over the administration of the trust (the "court test") and (2) one or more U.S. persons have the authority to control *all* substantial decisions of the trust (the "control test").[27] A "foreign trust" is any trust that is not a domestic trust.[28]

The court test is satisfied if a U.S. court is able to exercise primary authority over the trust.[29] The "control test" involves more analysis, and is the portion of the inquiry that contains nuances that are easier to inadvertently overlook. To meet the control test, U.S. persons must have the ability to control all substantial decisions of the trust.[30] This means that if an NRA has the ability to control a single substantial decision, the trust will have failed the test and will be classified as a "foreign trust." The definition of a "substantial decision" is fairly expansive, and includes not only obvious powers such as distribution decisions, investment decisions, and whether to terminate the trust, but also includes other powers such as the power to remove, add, or replace a trustee, and the power to appoint successor trustees (unless this power is limited so that the appointment of the successor cannot change the residency status of the trust).[31]

What are the tax and reporting ramifications of using foreign trusts? The desirability of a "foreign trust" or a "domestic trust" vary depending on the applicable facts of a given situation. Taxable income of a nongrantor foreign trust is generally computed in the same manner as if the assets were held by an NRA. Compare this to a nongrantor domestic trust, where the trust (or perhaps, as discussed below, its beneficiaries, if distributions are made) is generally taxed on its worldwide income.

If a nongrantor trust makes a distribution to a beneficiary, the distribution carries out distributable net income (DNI) to the extent of the trust's current year income, and thus for U.S. beneficiaries, it will be subject to tax on their individual income tax returns.[32] This is the same for foreign and domestic trusts. Things get complicated if the foreign trust has U.S. beneficiaries and the foreign trust makes distributions to those U.S. beneficiaries in any year following the year in which the income was earned.

In addition, to the extent a foreign or domestic nongrantor trust distributes its DNI, it will not be subject to tax on its income in the year it was earned, because trusts are allowed to take a distribution deduction, which is equal to the DNI that is actually distributed in the year it was earned.[33] However, capital gains are generally not included in DNI of a domestic trust, but are included in the DNI of a foreign trust.[34]

If distributions of income are not made by a foreign nongrantor trust in a given year, and the income is instead accumulated, that income becomes undistributed net income (UNI).[35] Distributions of UNI (also called "accumulation distributions") are not only taxed at ordinary income rates even if the original source is capital gain, but the distributed UNI also becomes subject to the "throwback rules."[36] The

25 Section 2056A.

26 Portions of this section and the following section have been taken in large part from Sheehan and Schwartz, *Stocker on Drawing Wills and Trusts*, 14th Ed. (Practicing Law Institute, 2015).

27 Reg. 301.7701-7(a).

28 Reg. 301.7701-7(a)(2).

29 Reg. 301.7701-7(c).

30 Reg. 301.7701-7(d).

31 For a complete list of what is a "substantial decision" for these purposes, see Reg. 301.7701-7(d)(1)(ii).

32 Sections 652(a) and 662(a).

33 Sections 651(a) and 661(a).

34 Sections 643(a)(6)(C).

35 Sections 665.

36 Sections 665 through 667.

throwback rules do not apply to domestic trusts.[37] As a general proposition, the throwback rules provide that UNI that is distributed to a U.S. beneficiary is not only taxable to the beneficiary, but is also subject to onerous interest charges depending on the length of time between the date the income was earned and its subsequent distribution. This can sometimes result in up to a 100% tax on the distributed UNI.

If a foreign trust with U.S. beneficiaries has significant UNI, below are some potential strategies to avoid or minimize the impact of the "throwback rules":

- Convert the foreign trust to a domestic trust to stop the build-up of UNI within the trust.[38] However, UNI accumulated during a period of foreign trust status remains potentially subject to the throwback rules.
- Make a distribution to a non-U.S. beneficiary equal to or in excess of undistributed trust income from prior years. This should "cleanse" the trust of UNI. Thereafter, unless additional UNI accrues, the trust would have no UNI. Care must be taken in using this approach. First, the distribution to the U.S. person should not be made in the same calendar year as the distribution to the foreign person; otherwise some of the UNI will be allocated to the distribution to the U.S. person. In addition, if the foreign person is anticipated to give funds back to the U.S. person after the UNI has been "cleansed," this will often not work because of intermediary rules enacted by the IRS to prevent this perceived abuse.[39]
- Limit trust distributions so that they will not carry out UNI. For example, distributions in each year can be capped at the DNI or the trust's fiduciary accounting income for that year.[40]

Note also that UNI will not accrue if the foreign trust is treated as a grantor trust for U.S. income tax purposes. However, foreign persons generally will be treated as the owners of a trust for U.S. income tax purposes in only very limited situations: If the trust is revocable or if the only people who can receive benefits from the trust during the life of the grantor are the grantor or the grantor's spouse.[41] Depending on what assets are used to fund the trust, the intended objectives of the trust, and whether the applicable trust jurisdiction allows for self-settled asset protection trusts, structuring a foreign trust so that it will be treated as a grantor trust for U.S. income tax purposes may inadvertently have the effect of triggering an estate tax on the death of the grantor.

In addition to being an important distinction for accumulation distribution purposes, whether a trust is classified as a foreign or a domestic trust matters for other reasons. First, there are additional reporting requirements for U.S. persons who receive distributions from a foreign trust, such as the requirement to file a Form 3520 (discussed in more detail below). Depending on the assets of the trust, there may be other reporting consequences for the U.S. beneficiaries (and even possibly the U.S. trustees), including the filing of FBAR and BE-10 forms, both of which are discussed below. Additionally, if a U.S. person transfers property to a foreign trust, he or she generally must recognize any gain on the property, but will not be allowed to recognize a loss.[42]

Does the client have an ownership interest in a foreign corporation? U.S. citizens or residents with (direct or indirect) ownership interests in foreign corporations may be subject to "anti-deferral rules" that impose a U.S. tax on the U.S. person's share of the foreign corporation's earnings and profits. These anti-deferral rules prevent U.S. per-

37 Section 665(c).

38 The trust will have to meet the control test and the court test (discussed above) to be converted to domestic status.

39 Section 643(h).

40 Section 665(b).

41 Section 672 (f). However, foreign grantors of certain older trusts may be treated as the owners of the trust for U.S. income tax purposes even if the trust does not meet these requirements, if the trust is grandfathered under the provisions of the Code.

42 Reg. 1.684-1(a).

sons from avoiding U.S. corporate tax by conducting activities through foreign entities, which are not subject to corporate income tax in the United States. If these rules did not exist, the U.S. corporate tax could easily be avoided by incorporating in a foreign country.

These anti-deferral rules are important to international estate planning because ownership in a foreign corporation is determined not only by what a U.S. person owns directly, but also by what a U.S. person owns indirectly through foreign corporations, partnerships, trusts, and estates. Thus, a U.S. beneficiary of a foreign trust or estate that is a shareholder of a foreign corporation may be subject to these anti-deferral rules.

Fortunately, the anti-deferral rules do not apply to all foreign corporations owned by U.S. persons; rather, they apply only to corporations classified by the Code as controlled foreign corporations (CFCs) or passive foreign investment companies (PFICs). This section briefly flags some of the general rules and considerations relating to CFCs and PFICs. However, the anti-deferral rules are among the most complex rules in the Code, and thus the practitioner is encouraged to review the cited sources and additional literature in order to obtain a greater understanding regarding these rules.

CFCs. Foreign corporations are not classified as CFCs unless at least (1) one or more U.S. person owns at least 10% of the total combined voting power of all classes of stock entitled to vote[43] ("U.S. Shareholders") and (2) the U.S. Shareholders collectively own *more than* 50% of the total combined voting power of the corporation's outstanding stock or more than 50% of the total value of the stock of the corporation.[44] If both tests are met, the corporation is classified as a CFC. However, the U.S. Shareholders will face a current U.S. tax only if the CFC has what the Code classifies as "Subpart F income."[45] Although the highly complex rules and exceptions are outside the scope of this article, Subpart F income generally includes income from passive assets or from operating activities with related parties that occur outside of the country of incorporation.

A domestic trust can also be considered to be a U.S. Shareholder, if the above test is met, because the trust itself is considered a U.S. person.[46] Obviously, the same rule does not apply to foreign trusts because they are not considered U.S. persons. Instead, U.S. beneficiaries of foreign trusts may be treated as the "owners" based on the Code's indirect ownership rules.[47] For example, this would include a U.S. person that is a partner in a foreign partnership, and most importantly for the estate planner, a U.S. person that is a beneficiary of a foreign trust.[48]

The Code does not clearly explain how to apply the indirect ownership rules to U.S. beneficiaries of foreign trusts. The Code simply states that "stock owned, directly or indirectly, by or for a ... foreign trust or foreign estate (within the meaning of section 7701(a)(31)) shall be considered as being owned proportionately by its beneficiaries."[49] This leaves some questions unanswered:

1. How do these rules apply to U.S. persons who are discretionary beneficiaries of a foreign trust?
2. Given the Code's requirement that the U.S. shareholder own at least 10% of the *voting* power of the trust, how can a beneficiary—a person with a mere equitable interest in the trust's assets—be deemed to own *voting* power when the right to vote the trust's shares of stock in the foreign corporation rests in the hands of the trustee?

The IRS has not provided sufficient guidance to answer these questions. Suffice it to say that given the uncertainty and lack of guidance in this area, practitioners should proceed with caution and independently consult the relevant authority before taking a position as to whether U.S. beneficiaries of a foreign trust will meet these tests.[50]

Passive foreign investment companies (PFICs). Foreign corporations are classified as PFICs when they meet either of two tests:

1. At least 75% of the corporation's gross income is characterized as passive income.
2. At least 50% of its assets[51] produce or are held for the production of passive income.[52]

Thus, for example, a foreign hedge fund or mutual fund that produces entirely investment income would be considered a PFIC. On the other hand, a foreign corporation which, for example, consists primarily of an active business and fails the above-described thresholds, would not be considered a PFIC (although it may be

43 Section 951(b).

44 Section 957(a).

45 See generally Section 952.

46 In this case, the trust itself (and not its beneficiaries) is considered the U.S. person and shareholder of the CFC. Thus, the trust (in accordance with general Subchapter J principles) would pay a current U.S. tax on its proportionate share of the CFC's Subpart F income.

47 Section 958(a)(2).

48 The same rules apply to foreign estates, but given the relatively short nature of estates, this article focuses on foreign trusts.

49 Section 958(a)(2).

50 For more on indirect ownership of CFCs in this context, see Moore, "Indirect Ownership of CFC and PFIC Shares by U.S. Beneficiaries of Foreign Trusts," 108 J. Tax'n 105 (February 2008).

51 Assets are generally based on fair market value.

52 Section 1297(a).

considered a CFC). When a corporation could be considered both a PFIC and CFC, a U.S. shareholder who owns at least 10% of the voting power of the company is taxed only on its share of Subpart F income under the CFC rules.[53]

Like with the CFC regulations, the PFIC rules do not set forth a clear method to determine indirect ownership of PFICs in all cases. The Service has not issued final regulations, but proposed regulations provide "if an estate or trust ... directly or indirectly owns stock, the beneficiaries of such estate or trust will be considered to own a proportionate amount of such stock."[54] Therefore, if a foreign trust was divided into discrete shares, the proposed regulations support that a U.S. beneficiary might have PFIC income. Indeed, unlike CFCs, ownership in a PFIC is not based on the shareholder's voting rights. However, there is still a lack of clarity on how to determine ownership attributable to a discretionary beneficiary of a trust.

In fact, the proposed regulations do not address how such beneficiaries would calculate any PFIC income other than a mere reference to using "reasonable methods" of the Code.[55] In TAM 200733024, the IRS indicated that it would use a "facts and circumstances" test for these purposes, which may result in purely discretionary beneficiaries being treated as the owner of the company for purposes of determining if it is a PFIC, even though the beneficiary may not actually receive any distributions from the trust. Of course, this TAM is merely an expression of the IRS's likely position in litigation, and thus is not binding authority.

The consequences of a U.S. person being treated as an owner of a PFIC can be severe:

1. The U.S. shareholder would be required to file Form 8621 each year the corporation is treated as a PFIC.
2. The computation of the tax on a dividend received or proceeds from the sale of shares of a PFIC can be extremely complicated and punitive.
3. There is an interest charge that involves the PFIC's return over the entire holding period, the calculation of which is beyond the scope of this article (and probably also beyond the ability of many inexperienced accountants).
4. Capital gains in PFICs are taxed at the highest effective tax rate for ordinary income (instead of the lower capital gains rates), and capital loss on a PFIC cannot be used to offset capital gains on other investments.

If a U.S. client is treated as the owner of a PFIC, or wishes to invest in a PFIC, an election can be made (called a qualified electing fund (QEF) election) that would effectively eliminate the punitive tax rates associated with PFICs.[56] However, this involves the U.S. owner being taxed on his or her share of income and gains of the company in the year it is incurred, even if no dividend is received. There are also strict accounting and reporting requirements that need to be met to make a QEF election, which not all PFICs will comply with.

Thus, given the unfavorable regime that accompanies the ownership of PFICs, it is best to advise the client to invest in such companies only with extreme caution. If a U.S. client has an ownership interest in a PFIC (whether direct or indirect), the practitioner is well advised to review the options for minimizing the associated tax and reporting obligations.

Convert the foreign trust to a domestic trust in order to stop the build-up of UNI within the trust.

Is there proper reporting to the IRS? An increasingly popular topic over the last few years has been reporting by U.S. persons of interests in foreign accounts, gifts received from foreign persons, or distributions received from foreign trusts or estates. These reporting requirements involve disclosures of information to the IRS that are above and beyond the normal annual income tax filing requirements, although most of the forms discussed in this section are filed together with a U.S. income tax return. Although this additional reporting typically involves only disclosure of information, and does not yield additional tax, penalties for failure to file these forms if otherwise required can be severe.[57]

Below is a list of some of the more common annual reporting forms, together with a very brief description of when they are required. Practitioners are encouraged to review the forms and the related instructions in more detail if any form appears to be possibly applicable, as the below is a very cursory introduction to these forms.[58]

1. *Statement of Specified Foreign Financial Assets (Form 8938).*[59] In general, this form is required for U.S. persons who have certain foreign financial assets or interests,

53 Section 1297(d).
54 Prop. Reg. 1.1291-1(b)(8)(iii)(C).
55 Prop. Reg. 1.1291-1(j).
56 Section 1295.
57 Failure to file these forms may also result in leaving open the statute of limitations for the IRS to examine *the entire* tax return.

such as foreign accounts (including bank and brokerage accounts) maintained by a foreign financial institution, and foreign financial assets not held in a financial account but held for investment purposes, such as stock or securities issued by a foreign corporation, a capital or profits interest in a foreign partnership, or an interest in a foreign trust or estate. This filing requirement is triggered only if the taxpayer meets certain minimal filing thresholds based on the value of the specified foreign financial assets which vary depending on the taxpayer's filing status (e.g. for unmarried taxpayer's living outside the U.S., filing is required only if the value of such assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year). If the taxpayer lives in the U.S., however, there is no minimum filing threshold.

2. *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts (Form 3520).*[60] In general, this form requires a U.S. person to report the receipt of gifts, bequests, or distributions from foreign persons, trusts, or other entities during the calendar year if they are in excess of $100,000. If the gift is from a foreign corporation or foreign partnership, the threshold for filing this form is reduced (to $15,671 in 2016 and adjusted annually). This form is also required if the U.S. taxpayer is treated as the owner of a foreign trust under the grantor trust rules (similarly, the trust itself may be required to filed an Annual Information Return of Foreign Trust with a U.S. Owner (Form 3520-A)).
3. *Information Return of U.S. Persons with Respect to Certain Foreign Corporations (Form 5471).*[61] This form is generally required to be filed by U.S. persons who are officers, directors, or shareholders of certain foreign corporations. While direct ownership of a foreign corporation is fairly straightforward, as discussed above, determining deemed ownership of a foreign corporation by U.S. beneficiaries of foreign trusts can be complicated. The result of that analysis will inform as to the necessity to file this form.
4. *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund (Form 8621).*[62] This form is generally required to be filed by U.S. persons who own a direct or indirect interest in a PFIC. Again, as discussed above, determining indirect ownership of PFICs can be complicated.
5. *Return of U.S. Persons with Respect to Certain Foreign Partnerships (Form 8865).*[63] This form is generally required to be filed by U.S. persons with varying degrees of ownership or control of a foreign partnership or a foreign flow-through LLC (however, if the LLC is disregarded for tax purposes, Information Return of U.S. Persons with Respect to Foreign Disregarded Entities (Form 8858) must be filed instead).[64] Review of the instructions to this form is recommended, because the applicable thresholds vary depending on the specific facts of a particular taxpayer.

Is there proper reporting to other U.S. agencies? U.S. reporting obligations relating to foreign assets is of such prominence in recent international estate planning developments that it appears twice on this list. Justifying this second appearance is the fact that it is not just the IRS who is ramping up its reporting requirements; other governmental agencies are also getting in on the action, requiring sometimes duplicative reporting.

58 For example, to the extent that there are duplicative or overlapping reporting requirements, the Code, or the regulations or guidance thereunder, may provide mitigating relief, and allow for reporting on a single form. Again, a detailed review of the forms, related instructions and applicable guidance is strongly recommended in this respect.

59 For more information, see www.irs.gov/uac/Form-8938,-Statement-of-Foreign-Financial-Assets (last visited on 1/25/2016).

60 For more information, see www.irs.gov/Businesses/Gifts-from-Foreign-Person (last visited on 1/25/2016).

61 For more information, see www.irs.gov/uac/Form-5471,-Information-Return-of-U.S.-Persons-With-Respect-to-Certain-Foreign-Corporations (last visited 1/25/2016).

62 For more information, see www.irs.gov/uac/Form-8621,-Return-by-a-Shareholder-of-a-Passive-Foreign-Investment-Company-or-Qualified-Electing-Fund (last visited 1/25/2016).

63 For more information, see www.irs.gov/uac/Form-8865,-Return-of-U.S.-Persons-With-Respect-to-Certain-Foreign-Partnerships (last visited on 12/21/2015).

64 For more information, see www.irs.gov/uac/Form-8858,-Information-Return-of-U.S.-Persons-With-Respect-To-Foreign-Disregarded-Entities (last visited on 11/25/2016).

65 Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, (5/13/2015), Control Number: SBSE-04-0515-0025; www.irs.gov/pub/foia/ig/spder/SBSE-04-0515-0025%5B1%5D.pdf (last visited on 1/25/2016).

66 Pub. Law 114-41.

67 For more on Form BE-10, see www.bea.gov/surveys/respondent_be10.htm (last visited on 1/25/2016).

68 The process of expatriation may vary slightly depending on the applicable consulate to which the application is submitted. The intricacies of the expatriation process and the nontax ramifications (such as possible immigration considerations) relating to the expatriation are outside the scope of this article. Instead, this discussion focuses on the estate and gift tax considerations accompanying a client who has expatriated or a client who receives a gift or bequest from an expatriate.

For example, as discussed above, the FBAR form, which is mandated by FinCen, requires that an individual list all foreign financial accounts he or she owns or over which he or she has signature authority (even if the individual has no ownership interest in the account over which signature authority is held). Thus, FBARs are a concern for account holders as well as for fiduciaries who have signature authority over foreign accounts.

Fortunately for trust beneficiaries, an FBAR need not be filed in any of the following three instances:

1. If they hold only a remainder interest in the trust.
2. If they are merely a discretionary beneficiary with no fixed interest in the trust and do not receive distributions totaling 50% or more of the trust income during the year.
3. If the trust, trustee, or agent is a U.S. person who filed an FBAR listing the foreign account.

The FBAR is a reporting form only, and results in no tax due.

As discussed above, on 5/13/2015, the IRS issued interim guidance that seems to somewhat soften potential penalties for failure to file FBARs, which previously could have exceeded the full value of the foreign account.[65] In addition, in an effort to facilitate compliance, it was recently announced that effective for FBARs relating to calendar year 2016 and later, the FBAR Form will be due on April 15 of the following year (with a six-month extension available on request) as opposed to its previous due date of June 30.[66]

As also mentioned above, the U.S. Department of Commerce-Bureau of Economic Analysis has also thrown its hat into the mandatory reporting ring, requiring the BE-10 Form to be filed by U.S. persons (including trusts) with at least a 10% voting interest in a foreign business enterprise (such as a foreign company). To perhaps unintentionally add an element of confusion, the BE-10 Form is not due on the same date as the income tax return. Instead, it is due on May 29 (however, in 2015, an automatic extension was given to June 30). The burden of reporting with respect to this form is somewhat lessened because unlike reporting associated with the income tax return and the FBAR Form, the BE-10 Form is not due annually, and instead it is due every five years.

In addition, just like the FBAR, there is no tax due with respect to the BE-10 Form, but, there are increased penalties for failure to file. If a BE-10 Form is required but not filed, the failure to file carries with it the potential for civil penalties of between $2,500 and $25,000. In theory, in the case of willful failure to report, criminal penalties and even the possibility of imprisonment exist.[67]

Is there a covered expatriate in the mix? Given the onerous reporting and tax obligations associated with U.S. citizenship, there has been a growing trend for individuals to expatriate from the U.S. to achieve more favorable tax treatment. However, as explained below, mere expatriation from the U.S. does not absolve the former U.S. person (or his or her intended beneficiaries) of all obligations under the U.S. tax laws.[68]

As an initial matter, many of these ongoing U.S. obligations generally apply only if the expatriate is deemed to be a "covered expatriate." A "covered expatriate" is an expatriate who meets *any* of the following three tests:

1. His or her average annual U.S. income tax liability for the five tax years preceding his or her expatriation date is more than $161,000.[69]
2. His or her net worth is at least $2 million on his or her expatriation date.
3. He or she is unable to certify under penalty of perjury that he or she has complied with all of his or her U.S. federal tax filing obligations for the five tax years preceding his or her expatriation date.[70]

Certain exceptions apply to the definition of "covered expatriate," which include individuals born in foreign countries who continue to reside in those countries and minors. In addition, the above-described rules regarding covered expatriates apply only to persons expatriating from the U.S. after 6/17/2008.[71]

Under the current rules, an expatriate from the U.S. must report on Form 8854 (Expatriation Statement) all of his or her assets on the day before the expatriation, including every interest he or she has in a "non-grantor trust" on the day before the expatriation date. For these purposes, the term "non-grantor trust" is much broader than the normal use of the term, and applies to any trust of which the expatriate is not deemed to be the owner for U.S. income tax purposes.[72] Thus, if the expatriate is a beneficiary of a "grantor trust," but someone else is deemed to be the owner of the trust for U.S. income tax purposes, the trust would be considered a "non-grantor trust" for expatriation purposes.

For these purposes, a person is deemed to have an "interest" in the "non-grantor trust" if he or she is a person (1) who is entitled or permitted, under the terms of the trust instrument or applicable local law, to receive a direct or indirect distribution of trust income or principal (including, for example, a distribution in discharge of an obligation of that person), (2) with the power to apply trust income or principal for his or her own benefit or (3) to whom the trust income or principal could be paid if the trust or the current interests in the trust were then terminated.[73]

Given the unfavorable regime that accompanies the ownership of PFICs, it is best to advise the client to invest in such companies only with extreme caution.

In addition, normally a "covered expatriate" is treated as selling his or her worldwide assets for their fair market value on the day before his or her expatriation date and is required to recognize, and pay tax on, any gain on this deemed sale (after reducing such net gain, but not below zero, by a $693,000[74] exemption) (referred to as the "mark-to-market rules").[75]

The mark-to-market rules, however, do not apply to a covered expatriate's interest in a "non-grantor trust," as defined above. Instead, after expatriation, if there is a direct or indirect distribution of property to a covered expatriate from a non-grantor trust of which the covered expatriate was a beneficiary on the day before his or her expatriation date, the trustee must deduct and withhold from the distribution an amount equal to 30% of the taxable portion of the distribution.[76]

In addition, after expatriation, a "covered expatriate" is generally subject to U.S. estate and gift tax only on the transfer of U.S.-situs assets in the same manner as an NRA. However, a U.S. citizen or resident who receives any direct or indirect gift or bequest from the covered expatriate (a "covered gift" or a "covered bequest") is subject to tax (referred to in this article as the "2801 Tax") on the value of such covered gift or bequest at the higher of the estate or gift tax rate in effect for the tax year of receipt.[77] Note that a covered gift or bequest of *any* property is subject to the 2801 Tax; such tax is not limited to property owned by the covered expatriate on his or her expatriation date (or the value of such property).

The definition of covered gift or bequest, however, has exceptions. For example, a gift or bequest that does not exceed the gift tax annual exclusion amount is not subject to the 2801 Tax, nor is a gift or bequest that would have qualified for the charitable or marital deduction if the covered expatriate were still a U.S. citizen.[78] In addition, a gift or bequest that a covered expatriate is required to report as taxable on a U.S. gift or estate tax return (such as real property, tangible personal property, or other property deemed

69 The 2016 amount is listed above. This amount is indexed annually for inflation.

70 Sections 877A(g)(1) and 877(a)(2)(A) through (C).

71 Further inquiry is required if an individual expatriated from the U.S. prior to this date, as a different (typically less onerous) set of rules would apply.

72 Section 877A(f)(3).

73 Sections 877A(c) and (f); Notice 2009-85, 2009-45 IRB 598.

74 This is the amount for 2016. The exemption is indexed annually for inflation.

75 Sections 877A(a)(1), (2), and (3).

76 Sections 877A(f). The term "taxable portion" means, with respect to any distribution, the portion of the distribution that would have been includable in the covered expatriate's gross income if the covered expatriate had continued to be subject to tax as a citizen or resident of the U.S.

77 Sections 2801(a) and (e)(1).

78 Sections 2801(c) and (e)(3).

situated in the U.S. for U.S. estate or gift tax purposes) is not subject to the 2801 Tax if it is in fact reported on a timely filed U.S. gift or estate tax return.[79] The 2801 Tax is payable by the recipient of the covered gift or bequest, not by the covered expatriate.

It is possible that multiple marital or inheritance regimes will apply to the same client.

The 2801 Tax also applies to covered gifts or bequests to U.S. trusts and certain distributions from foreign trusts. A U.S. trust is treated as a U.S. citizen for purposes of these rules and, therefore, is itself subject to the 2801 Tax on the receipt of a covered gift or bequest in the same manner as a U.S. citizen or resident.[80] Further, a U.S. citizen or resident is subject to the 2801 Tax on a distribution from a foreign trust that is attributable to a covered gift or bequest to the trust (generally reduced by foreign taxes paid by the U.S. beneficiary).[81]

As discussed above, in September 2015, the IRS issued proposed regulations regarding the 2801 Tax, which provide some guidance with respect to these rules. However, there still is no tax form to report any such transfers and pay the corresponding tax, and none will be issued until the proposed regulations are finalized.[82]

Thus, even if the client is not a covered expatriate, care must be taken in structuring any transfer of property to the client from another person (such as a relative) who is a covered expatriate.

Are there any restrictions on the transfer of property? If the client is a resident of a foreign jurisdiction, or if a married client has property subject to the marital regime of another jurisdiction, there may be restrictions on the client's ability to transfer some or all of his or her property because of the fixed rights of a spouse or other family member. Some of these considerations are not unique to international estate planning.

Spousal property rights vary by jurisdiction even within the U.S. In many separate-property jurisdictions, such as New York, a surviving spouse is entitled to an "elective share" of the deceased spouse's estate, which in effect ensures that the surviving spouse will receive a minimum amount from the deceased spouse's estate.[83] Similarly, in community-property states, such as California, as a general matter, spouses are each deemed automatically to own one-half of the marital property.[84] Thus, in community-property jurisdictions, even if property is titled in the name of only one spouse, he or she is generally free to dispose of only one-half of that property, because the other half is deemed to be owned by the other spouse.

Although in the U.S. these restrictions generally apply to only spouses, Louisiana has forced heirship rules that also entitle children to fixed shares of a decedent's estate.[85]

Not surprisingly, the restrictions on the transfer of property are more varied among foreign jurisdictions. For example, some countries, such as France, provide fixed shares of a decedent's estate for spouses and other family members, such as children.[86] Complicating matters further is the fact that different rules may apply depending on where and when (1) spouses were married, (2) the property was acquired, or (3) the decedent or transferor was resident at the time of death or a gift, as applicable. Thus, it is possible that multiple marital or inheritance regimes will apply to the same client.

Perhaps recognizing the possibility for confusion and the benefit of a single regime to apply to an individual, "Brussels IV" was recently enacted by the European Council, as mentioned above.[87] In addition to other substantive provisions, "Brussels IV" in effect may allow residents, nationals, or owners of property in participating countries in the European Union to elect out of the inheritance or succession laws of the participating country, and instead apply the succession laws of a country of which such person is a national (even a country which is not a participant to "Brussels IV"). This is especially important for residents or owners of property in countries with onerous forced heirship regimes, such as France, which require set shares of a decedent's property to be left to surviving spouses and surviving children.

For example, under these new rules, a U.S. citizen who resides in France and owns an apartment in Paris can opt to have the laws of the U.S. govern the disposition of the apartment on death. Generally, this legislation will provide qualifying individuals with more testamentary freedom. "Brussels IV" took effect on 8/17/2015.

"Brussels IV" applies, however, only to inheritance or succession rights, and does not apply to the marital regime applicable to an individ-

79 Section 2801(e)(2).

80 Section 2801(e)(4)(A).

81 Sections 2801(e)(4)(B)(i) and (ii).

82 Guidance Under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests From Covered Expatriates, 9/10/2015; www.federalregister.gov/articles/2015/09/10/2015-22574/guidance-under-section-2801-regarding-the-imposition-of-tax-on-certain-gifts-and-bequests-from (last visited on 1/25/2016).

83 EPTL § 5-1.1A.

84 California Family Code § 760-761.

85 Louisiana Civil Code, Chapter 3, Article 1493.

86 C. Civ. 913.

87 Regulation (EU) 650/2012.

ual's property. Thus, even if an individual is a member of a participating European country, his or her spouse may be automatically deemed to own a fixed interest in marital property under the applicable marital regime, and this ownership interest is not affected by the new legislation.

Also, as may be obvious, "Brussels IV" allows an individual to opt out of the inheritance or succession rules of only a participating European country. An individual cannot opt out of a non-participating country's succession rules, even if it is in favor of the rules of a participating country.

Is there an applicable treaty? Up until this point, this article has discussed the general rules and considerations relating to international estate planning. However, if a practitioner is dealing with a client who has sufficient connections to a jurisdiction that has an applicable treaty with the U.S., the taxpayer may be eligible for preferential tax treatment under the treaty. Although the U.S. has income tax treaties with many foreign countries,[88] fewer than 20 countries currently have active estate or gift tax treaties with the U.S.[89] To make matters more complicated, of these countries, some have negotiated only estate or gift tax treaties, but not both, with the U.S. Finally, when a taxpayer takes a position that deviates from the Code but is consistent with an estate or gift tax treaty, this position must generally be disclosed on the taxpayer's return.[90]

As a general rule, estate and gift tax treaties provide a more favorable tax result than would occur under the Code. Consider, for example, an individual who is a Canadian citizen who owns substantial U.S.-source assets; the individual is neither a U.S. citizen nor resident at the time of his or her death. Under the Code, this individual would receive a mere $13,000 applicable exclusion against estate tax in the U.S. Here, the U.S.-Canada estate tax treaty provides a more favorable result. The estate can take a credit against the U.S. estate tax equal to the value of the decedent's U.S. assets over the value of the decedent's world-wide assets multiplied by the exclusion amount available to U.S. citizens in the year of the decedent's death.[91]

Of course, a taxpayer generally must be a tax resident in a jurisdiction that is a party to the tax treaty to be eligible for benefits under that treaty. Thus, a tax resident of Brazil could not elect the application of the U.S.-Canada treaty even though it might provide a more favorable tax result. The rules governing the required minimum contacts with the participating countries should be spelled out in the applicable treaty.

Finally, the Service has ruled that taxpayers cannot "cherrypick" application of treaty provisions in a given year.[92] Thus, although treaties generally provide a more favorable result, taxpayers should evaluate the treaty's overall tax effects before claiming the benefits of a tax treaty.

Given the importance and potential benefit accompanying treaties, practitioners should always evaluate whether a treaty exists and applies when advising clients with international residences, citizenships, or property.

Has local counsel been consulted? All of the foregoing questions and analysis focus on U.S. implications and considerations. However, if a client has a connection to another country, local counsel in that jurisdiction should be consulted. There may be other restrictions on the transfer of property or the structure in which it can be held, special tax considerations relating to property ownership or transfer in that country, or restrictions on the use of trusts or the benefits thereof. The U.S. estate plan can be undermined if any applicable foreign considerations are not also contemplated.

Conclusion

In the modern globalized world in which we live, it is becoming increasingly common for trusts and estates practitioners to encounter international estate planning issues. Although some practitioners may think to focus on these considerations only if the client is an NRA, these issues may even arise in the case of U.S. clients who have non-U.S. family members, who own foreign assets, or who are beneficiaries or fiduciaries of foreign estates or trusts. Thus, it is important for all estate planning practitioners to have an understanding of the fundamental international estate planning concepts discussed throughout this article. Failure to identify and plan around potential international estate planning issues may result in frustration of the client's wishes and the incurrence of an otherwise potentially avoidable tax bill. The average client's global reach is expanding; so too should the estate planning practitioner's knowledge of international estate planning issues. ■

88 www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-TreatiesA-to-Z (last visited on 12/21/2015).

89 www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-&-Gift-Tax-Treaties-International (last visited 12/21/2015).

90 Section 6114.

91 Canada-U.S. Income Tax Convention at Article XXIXB (9/26/1980).

92 Rev. Rul. 84-17, 1984-1 CB 308 (prohibiting treaty shopping and ruling that if a taxpayer takes advantage of a treaty for a given year, all items of income from that year must be governed by the treaty).

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in program order

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Carl Merino is a tax attorney in Day Pitney's International Trusts and Estates practice, where he represents U.S. and non-U.S. families on personal and business tax matters, with a focus on cross-border tax and estate planning. Carl advises non-U.S. clients on structuring inbound investments and gifts to U.S. persons, including both U.S. and foreign trust and holding company structures. He advises U.S. clients on tax aspects of foreign investments, including GILTI and other foreign anti-deferral rules, entity classification issues and reporting requirements for foreign entities and trusts. His work encompasses pre-immigration and expatriation planning, tax issues of foreign trusts with U.S. beneficiaries and corporate structuring for foreign companies setting up U.S. operations.

Carl is co-chair of the International Estate Planning Committee of the New York State Bar Association's Trusts and Estates Law Section. He also is a frequent speaker and writer on cross-border tax and estate planning matters.

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Warren is a prolific writer and international speaker, having been published or cited nearly 80 times in various publications. He is the lead author of Private Clients Legal and Tax Planning, published by PLI in 2016, and co-authored the United States sections of Tottel's Succession Law and Bloomsbury's International Succession Laws. He has also served in a variety of leadership roles in his professional community, including serving as U.S. chair of the U.K.-based Society of Trusts and Estates Practitioners (STEP), member of the STEP Worldwide Council and chair of the Trusts and Estates Law Section of the New York State Bar Association, as well as the Section's International Estate Planning Committee and Estate Administration Committee and a former district representative. Among his honors and recognitions is selection as a fellow of the prestigious American College of Trusts and Estates Counsel (ACTEC).

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Megan R. Worrell is the Vice Chair of the Duane Morris' Private Client Services Practice Group, and head of the group's International Practice division. She practices in the area of U.S. and international tax and wealth transfer planning, specifically assisting clients with cross-border issues to develop tax-efficient estate plans. Her work involves foreign trusts, pre-immigration and expatriation planning, planning for the purchase of U.S. property by non-U.S. persons, asset transfers, beneficiary conflicts, and compliance with federal and state estate, gift, inheritance and income tax returns. She also has extensive experience with clients who have made voluntary disclosures to the IRS, including clients disclosing overseas accounts and complying with reporting obligations for those with overseas interests.

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Eric's practice centers on the needs of domestic and international high-net-worth individuals and families, taking a holistic approach to the wide range of issues related to their assets and business interests. In essence, Eric acts as a general counsel to his clients on matters related to their tax concerns, family goals and business priorities. He is a sophisticated legal thinker and an intuitive advisor who navigates complex areas of the law and multi-layered family dynamics with equal skill and attention.

Eric relishes the problem-solving nature of his practice and enjoys engaging with especially challenging taxation and governance matters. Eric provides guidance to his clients on issues ranging from domestic and international estate planning to governance and tax optimization of family held businesses and investments. He has developed a particular expertise in expatriation planning, planning for foreign trusts, pre-immigration planning and issues related to the IRS foreign asset reporting compliance programs.

Prior to joining Kozusko Harris Duncan, Eric was an executive at the New York City Business Integrity Commission and the Civilian Complaint Review Board. Eric began his legal career as a juvenile and adult public defender.

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Mr. Galligan is a graduate of Columbia University Law School [J.D., 1985), where he was an Editor of the *Columbia Law Review* and a Harlan Fiske Stone Scholar. He also holds a PhD in Religious Studies from the Yale University Graduate School and an MA in International Affairs from Columbia's School of Public and International Affairs. He is a Fellow of the American College of Trust and Estate Counsel, an Academician of the International Academy of Estate and Trust Law and a Member of STEP and of the American Immigration Lawyers Association. He served as the 2009-2010 Chair of the International Section of the New York State Bar Association and became the first Chair of the International Section to be elected as an At-Large Member of the Association's Executive Committee, on which he served from 2014 through 2018.

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