Pitfalls and Considerations in
Cross-Border Estate Planning and Administration: A Primer

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I. International Scenarios in Estate Planning

A. There are wide variety of issues to consider when planning for or administering estates involving foreign persons or foreign assets. These materials are intended to provide a general and brief overview of select "cross-border" issues, and are not intended to provide a comprehensive explanation of all possible planning strategies, or succession or tax implications. Cross-border issues arise under the following relatively common situations:

1. A client is married to a person who is not a U.S. citizen, or has children who live abroad;

2. A client who is not a U.S. citizen lives in the U.S. and owns property in the U.S.;

3. A client who is not a U.S. citizen and does not live in the U.S., and owns property in the U.S.;

4. A client lives in the U.S. and owns property outside the U.S.;

5. A U.S. citizen lives abroad and owns property outside the U.S.; and

6. A U.S. citizen dies outside the U.S., whether owning property in the U.S. or abroad.

B. When dealing with cross-border issues, the estate planner must consider the following:

1. Where is the client domiciled and where are the client's intended beneficiaries domiciled?

2. Where are the client's assets sited?

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[1] These materials are for designed educational purposes only and are in no way intended to provide financial, tax, legal, accounting or other professional advice. In particular, nothing in these materials is intended to provide advice with respect to the laws of any foreign jurisdiction, specifically including Mexico or Canada, and the reader is cautioned to seek advice of local counsel licensed to practice law and local tax counsel in the applicable international jurisdiction. Additionally, the reader is cautioned that changes in law may be applicable, that these materials only provide a general discussion of issues, that critical information may be omitted, and that any ideas, concepts or strategies discussed herein may not be suitable for any particular individual.

3. If the client has assets outside the U.S., should the client use a single will covering disposition of the client's worldwide assets or multiple wills in each country where assets are sited?

4. Are there consequences to using trusts as part of the plan?

5. Is there a marital agreement in place and if so, what is its effect?

6. Are there forced heirship or marital property rights to consider?

7. What are the income, gift and estate tax consequences to the plan?

8. Are there applicable treaties, and if so, what is the impact?

9. Are there any reporting obligations to the U.S. or foreign jurisdictions?

10. When should you consult local (foreign) counsel?

11. If the client owns property outside the U.S., what are the reporting requirements in the U.S. and in the foreign jurisdiction?

12. If the client is considering moving outside the U.S., are there tax consequences or expatriation rules that apply?

II. Basic Rules for Income, Gift and Estate Taxes for U.S. Citizens, Resident Aliens and Non-Resident Aliens

A. U.S. Citizens - Born or Naturalized

1. U.S. citizens are subject to income tax on worldwide income.[2]

2. U.S. citizens are subject to estate and gift tax based on their worldwide assets, regardless of the property situs and the citizen's domicile[3]. Regardless of domicile, the available lifetime exemption is currently $5,450,000[4] and the annual exclusion for gift tax is $14,000 for gifts to persons other than a spouse. There is an unlimited estate and gift tax marital deduction for gifts to spouses of U.S. citizens.

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[2]I.R.C. §61.

[3]I.R.C. §§2001(a), 2031(a).

[4]I.R.C. § 2102.

3. Gifts by U.S. citizens to non-citizen spouses are limited to $148,000 per year in 2016 and the unlimited estate tax marital deduction is not available unless the assets are held in a qualified domestic trust ("QDOT").

B. Non-US Citizens. Persons who are not U.S. citizens are referred to as "aliens" in the Internal Revenue Code, and are either a "resident alien" (RA) or a "non-resident alien" (NRA).

1. Resident Aliens (RAs). RAs are treated almost exactly like U.S. citizens for income and transfer tax purposes. As discussed below, however, the definition of "resident" for purposes of U.S. income tax and U.S. transfer tax purposes differs.

a. Generally subject to income tax on worldwide income.

b. Subject to a special 30% capital gain rate (subject to modification by treaty) for certain gains derived from U.S. sources, if the taxpayer is present in the U.S. for 183 days or more.[5]

c. Gifts by RAs to U.S. citizen spouses qualify for the unlimited gift tax marital deduction, but gifts to non-citizen spouses (whether or not a resident of the U.S.) are limited to $148,00 per year.

d. Subject to federal estate tax based on their worldwide assets, regardless of situs or domicile, and are entitled to the same estate and gift tax deductions and exemptions as U.S. citizens[6].

2. Non-Resident Aliens (NRAs). NRAs are treated very differently from U.S. citizens and RAs for income and transfer tax purposes.

a. NRA income is generally divided into two categories: FDAP Income and ECI.

(1) FDAP. A 30% withholding and an equivalent flat tax is applied to U.S. source income not connected with a trade or business and constituting Fixed or Determinable Annual or Periodical Gains, Profits and Income ("FDAP Income").[7] FDAP income is often passive, but can be almost any type of U.S. source income including

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[5]I.R.C. §871.

[6] *Id.*

[7]I.R.C. § 871(a)(1). Note that withholding rates may be modified by treaty.

salaries, wages, interest, dividends and royalties. A flat 30% tax is applied to FDAP and no deductions are allowed against FDAP income.

(2) ECI. Special rules apply to income of an NRA that is effectively connected to a U.S. trade or business (also known as "effectively connected income" or ECI).[8] The same graduated rates apply to ECI as apply to income from U.S. citizens and RAs, and treaty benefits are often available.

b. Subject to certain limited exceptions[9] and treaty modifications, dispositions (including gifts) of U.S. real property by an NRA are subject to 15% withholding on amounts realized by the NRA under the Foreign Investment in Real Property Tax Act of 1980 (also referred to as FIRPTA).

c. Subject to gift tax on real and tangible personal property gifts to any one person exceeding $14,000/year. Gifts of intangible property not subject to gift tax. Gifts of tangible property given outside the U.S. is also not subject to gift tax.

d. Subject to U.S. estate tax on U.S. sited assets[10] only, and the available estate tax exemption is reduced to only $60,000. No unlimited estate tax marital deduction for transfers at death to non-citizen spouses.

III. Conflicts of Laws and Situs

A. Conflict of Laws. The issues surrounding the conflict of laws is an entire presentation unto itself. In the area of international estate planning, the issues are usually presented in the administration arena, but must be considered as part of the estate planning process. Clients with property in more than one jurisdiction require the determination of which documents are used, and for which assets. A U.S. citizen with foreign property may require more than one set of estate planning documents. You must consider the value of the foreign assets, the process to transfer that property at death, and the succession laws of those foreign

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[8]*See*, IRS guidance re EIC at https://www.irs.gov/Individuals/International-Taxpayers/Effectively-Connected-Income-(ECI); and IRS Pub 519, U.S. Tax Guide for Aliens.

[9]*See,* IRS guidance re FIRPTA exceptions at https://www.irs.gov/Individuals/International-Taxpayers/Exceptions-from-FIRPTA-Withholding

[10]I.R.C. §§101, 2103.

countries. The choice of law impacts the rights and obligations of the parties, how we define property, the validity and Will construction, and where administration will proceed.

1. Common Law v. Civil Law Jurisdictions. Many common law jurisdictions often provide that the law of situs controls for the succession of immovables (real estate) and the law of the decedent's domicile controls the succession of a decedent's movables. Civil law jurisdictions choice of law rules (private international law) often refer to the decedent's nationality/citizenship, and not to the decedent's domicile, and do not distinguish between different types of property. This may present a conflict between choice of law rules between a common law country (such as the U.S.) and a civil law country, (such as Germany). This outline will focus on common law jurisdiction conflict of law analysis.

2. The most common analysis in a conflict of laws scenario begins with the concept of domicile. Unlike in other areas of this outline, domicile in a conflict of laws analysis has two components: (a) being physically present in a jurisdiction, and (b) the intent to remain indefinitely. It can be easy to confuse domicile with a client's "residence," but note that one may have a number of residences but only one domicile. Also note that some countries utilize the concept of "nationality" when determining domicile, which is a concept not generally used in a U.S. conflict of laws analysis.

3. Determining appropriate jurisdiction is important, as that selection begins the conflict of laws analysis. Sometimes there is the option to select either the decedent's domicile or the jurisdiction in which the decedent owned property. The selection of a jurisdiction in estate planning documents are essential, knowing that a court may deny original jurisdiction if there are significant contacts in another location.

    a. After establishment of jurisdiction, the court determines which set of laws to apply. As mentioned, above, property is classified as either an immovable or movable. Note that not every common law jurisdiction will classify property the same way.

    b. After classifying the property, the court determines if the laws of its jurisdiction or those of another jurisdiction apply. This may depend on whether the question before the court is defined as either substantive or procedural.

    c. Countries differ as to the extent a court may apply foreign laws. The doctrine of *renvoi* involves the forum jurisdiction applying the substantive and procedural laws of a foreign jurisdiction.

B. Determining Situs of Assets.

1. Generally. Determining the situs of assets is critical for both estate planning and administration. While this section discusses the general situs rules, it is important to note that any applicable treaty must be consulted when analyzing situs of assets as treaty provisions may impact situs. Keep in mind that situs analysis is most relevant to NRAs since U.S. citizens and resident aliens are subject to transfer taxes based on their worldwide assets. Situs rules are also important when determining choice of law, and conflicts between countries with respect to situs of assets can be difficult to resolve if not covered by treaty.

2. U.S. Situs Assets.

a. I.R.C. § 2104 and its accompanying regulations address property that will be treated as sited in the U.S. for estate tax purposes. U.S. sited property is generally defined as property located in the U.S. and includes:

(1) Real property located in the U.S.;[11]

(2) Tangible personal property (including cash,[12] U.S. Treasury Bills,[13] vehicles, furnishings, jewelry, and most artwork) if the property is physically located in the U.S. on the date of death;[14]

(a) Note that certain exceptions for artwork on public exhibit or on loan apply;[15]

(3) Stock of U.S. corporations located in the U.S. or organized under U.S. law.[16] The location of the stock certificate is irrelevant.

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[11]Treas. Reg. §20.2104-1(a)(1).

[12]*See* Treas. Reg. §20.2104-1(a)(1)(a)(7)(ii) and 25.2511-3(b)(4)(iv) (implying currency is not a debt obligation but tangible personal property), and PLR 8138103 and 7737063 (cash is tangible personal property).

[13]PLR 8138103.

[14]Treas. Reg. §20.2104-1(a)(2).

[15]Treas. Reg. §20.2105-1(b).

[16]Treas. Reg. §20.2104-1(a)(5). Note, however, that stock owned by NRAs domiciled in France, the United Kingdom or the Netherlands is not subject to U.S. estate tax. Additionally,

(4) Debt obligations that are debts of a U.S. citizen or resident, domestic estate or trust, a domestic partnership or corporation, or the U.S. (e.g., U.S. bonds), or a state (including Washington D.C.);[17]

(5) Deposits held in a U.S. branch of a foreign commercial banking corporation;[18]

(6) Cash on deposit with U.S. brokers, held in money market accounts with U.S. mutual funds, or in U.S. safe deposit boxes;

(7) Any transfers within the meaning of I.R.C. §§ 2035 (gifts within 3 years of death), 2036 (transfers with retained life estates), 2037 (reversionary interests that exceed 5% of the value of the property at the time of decedent's death) or 2038 (revocable transfers) if the property was sited in the U.S. at the time of transfer or time of death;[19] and,

(8) Interests in certain partnerships.[20]

3. Assets Sited Outside the U.S. I.R.C. §2105 and its accompanying regulations address assets deemed to be sited outside the U.S. and include:

a. Life insurance proceeds from policies on an NRA's life;[21]

b. Shares of stock in foreign corporations;

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special rules apply to certain expatriates.

[17]I.R.C. § 2104(c); Treas. Reg. §20.2104-1(a)(7).

[18]Treas. Reg. §20.2104-1(a)(7-8).

[19]I.R.C. §2104(b)

[20] The situs rules for partnerships and other disregarded entities is not well-settled; however, several cases and rulings indicate that they may be U.S. sited. *See, Sanches v. Bowers*, 70 F.2d 715 (2nd Cir. 1934); Rev. Rul. 55-7-1, 1955-2 C.B. 836 and GCM 18718, 1937-2 C.B. 476.

[21]I.R.C. §2105(a).

c. Deposits in foreign branches of a domestic corporation or partnership engaged in commercial banking;[22]

d. Certain works of art on loan for exhibition;[23]

e. "Portfolio Debt Obligations" if the decedent was an NRA for income tax purposes;[24] and,

f. Deposits with persons carrying on the banking business, deposits with federal or state savings and loans institutions, and amounts held by an insurance company under an agreement to pay interest, if the interest on those deposits is not effectively connected with the conduct of a trade or business in the U.S. by the recipient (i.e., cash checking or savings accounts or C.D.s in U.S. banks or credit unions).[25]

C. The Impact of Treaties and Conventions. *It is critically important to determine whether a treaty exists between the U.S. and the foreign jurisdiction or whether the U.S. or foreign jurisdiction has adopted a Convention[26] when engaging in international estate planning, and to carefully review those agreements.* Treaties and Conventions often affect the outcome of conflicts of law issues, situs of assets, taxation of assets and income during life

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[22]I.R.C. §2105(b)(2).

[23]I.R.C. §2105(c).

[24]I.R.C. §2105(b)(3).

[25]I.R.C. §2105(b)(2); Treas. Reg. §20.2105-1(h).

[26]The Hague Conference on Private International Law has adopted a number of Conventions addressing multinational estate planning, including the Convention fo the Conflicts of Laws Relating to the Form of Testamentary Dispositions (Oct. 5, 1991) (ratified by 38 countries including Australia, Belgium, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland and the U.K.), the Convention Concerning the International Administration of the Estates of Deceased Persons (Oct. 2, 1973) (ratified by the Czech Republic, Portugal and Slovakia), the Convention on the Law Applicable to Trusts and on Their Recognition (July 1, 1985) (ratified by the U.S., the U.K., Australia and Canada), and the Convention on the Law Applicable to Succession to the Estates of Deceased Persons (Aug. 1, 1989) (signed by Argentina, Luxembourg, the Netherlands and Switzerland, and ratified by the Netherlands). While the U.S. has not ratified many of the Conventions relating to estate planning, they are useful tools when dealing with other adopting jurisdictions.

and at death and other estate planning and administration issues.[27] The Convention between Canada and the United States of America with Respect to Taxes on Income and Capital, signed on September 26, 1980, as amended by Protocols signed on June 14, 1983, March 28, 1984, March 17, 2995, July 29, 1997 and September 21, 2007 (the "U.S.-Canada treaty"), is the treaty between the United States and Canada with respect to income tax. A copy of the U.S.-Canada treaty is attached as Exhibit 1. The Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on September 18, 1992, as amended by Protocol signed on September 8, 1994 and November 25, 2002 (the "U.S.-Mexican treaty"), is the treaty between the United States and Canada with respect to income tax. A copy of the U.S.-Mexican treaty is attached as Exhibit 2. There is no separate estate, gift or succession tax treaty with Canada or Mexico.

IV. Income Tax Rules

A. How to Determine Client's Status for Income Tax - Residence

1. I.R.C. § 7701(b) states that an alien is also a resident for income tax purposes if the alien meets one of the following criteria:

   a. The alien is a lawful permanent resident (the "green card" test). A lawful permanent resident is an alien who is legally in the U.S. through the immigration system, which is most often done through obtaining a "green card" or a "commuter" green card.

   b. The alien meets the "substantial presence" test. This test is met if in the current calendar year an alien is present in the U.S. on at least 31 days of the current year, and the sum of the days the alien has been in the U.S. for the current year, and the last two years, is at least 183 days. Each day of the first preceding year is counted as 1/3 of one day, and each day of the second preceding year is counted as 1/6 of one day. This test does not apply to certain foreign diplomats/government employees, teachers, students, professional athletes, and their families.[28]

   c. Aliens who not meet either of the prior two tests may still elect to be treated as a RA to enhance certain tax benefits. An alien must be present for at

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[27]For a helpful summary of U.S.-Canada treaty benefits, see generally, IRS Pub. 597, *Information on the United States-Canada Income Tax Treaty* (Rev. Oct. 2015).

[28]I.R.C. §7701(b)(3)(D), (b)(5); Treas. Reg. §301.7701(b)(3).

least 31 consecutive days in the year and meet the "substantial presence" test in the following year. [29]

d. An alien who does meet the "substantial presence" test may still avoid being a U.S. resident if she (1) is present in the U.S. fewer than 183 days in the current year; (2) proves another country is her tax home; (3) has a closer connection to another country which is her tax home than the U.S.; and (4) has not applied or taken steps toward being a lawful permanent resident.[30]

B. Canadian Income Tax Issues. Again, the importance of obtaining competent local tax counsel to address international tax issues cannot be understated. However, the Canadian Revenue Agency ("CRA") provides an extensive and very informative website addressing a wide array of Canadian tax issues.[31]

1. Who is a Resident of Canada for Income Tax purposes?

a. "Deemed Residents" and "Factual Residents."

(1) The term "resident" is not defined in the Canadian Income Tax Act ("ITA"), but instead generally refers to a person who is "ordinarily resident" in Canada, a term which is also undefined in the ITA. Residency under this test is a question of fact and requires analysis of a number of factors described below. A person who is "ordinarily resident" is considered "factually resident" and subject to income tax in Canada.

(2) Even if a person is not "factually resident" after considering the residency factors, she will be a "deemed resident" if she was "sojourned in Canada" for a total of 183 days or more in the year. "Sojourned" is not defined in the ITA, but has been interpreted to mean temporarily present in Canada.

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[29] I.R.C. §7701(b)(1)(A)(iii).

[30] I.R.C. §7701(b)(3)(B) and (C).

[31] *See,* Canadian Revenue Agency ("CRA") main page at http://www.cra-arc.gc.ca/menu-eng.html. The CRA publication "Newcomers to Canada", T4055(E) is a helpful guide and can be found online at: http://www.cra-arc.gc.ca/E/pub/tg/t4055/t4055-15e.pdf. Additionally, the CRA publication "Non-residents and Income Tax" T4058(E) is also helpful and can be found online at: http://www.cra-arc.gc.ca/E/pub/tg/t4058/t4058-15e.pdf

b. Under Canadian common law, every person is assumed to have a residence at all times, which is generally where the person regularly lives; a person may be a resident of more than one country at the same time; and unlike the U.S., the taxpayer's intention with respect to residence is relevant but not determinative.[32]

c. Relevant factors suggesting a person is factually resident in Canada include: (1) past and present habits of life; (2) "significant residential ties" to Canada (see below); (3) regularity and duration of visits to the country where taxpayer claims to be a resident; (4) the residential ties taxpayer has to both the country where the taxpayer claims to be a resident and elsewhere; and, (5) the permanence or purposes of a stay abroad.[33]

d. Factors indicating "significant residential ties" to Canada include: (1) whether the taxpayer's spouse or common law partner is located in Canada; (2) whether the taxpayer's dependents are located in Canada; and, (3) whether the taxpayer owns or leases a home in Canada.

e. Other Canadian residency considerations or "secondary residential ties", many of which are similar to those considered in the U.S., include:

(1) The extent of the taxpayer's ties to another country;

(2) Whether personal property is located in Canada (cars, furniture, clothing, etc);

(3) The extent of social and professional ties in Canada such as memberships in social or religious organizations, or membership in Canadian unions or professional organizations;

(4) Financial and economic ties to Canada such as employment, active business in Canada, and maintaining banking and credit relationships and retirement plans;

(5) "Landed immigrant status" or work permits in Canada, or holds a Canadian passport;

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[32]*See,* C.R.A. Income Tax Folio S5-F1-C1, "Determining an Individual's Residence Status", at http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s5/f1/s5-f1-c1-eng.html.

[33]*Id.*

(6) Whether the taxpayer has obtained health care in a Canadian province or territory or hospital cards;

(7) Whether the taxpayer has a drivers license or vehicle registration in Canada;

(8) Whether taxpayer has a vacation/seasonal home in Canada (owned or leased); and,

(9) Whether the taxpayer has a Canadian mailing address, post office box, safety deposit box, personal stationary (including business cards) with a Canadian address or telephone listing in Canada, or subscriptions to newspapers or magazines delivered to a Canadian address.

f. TIP: The taxpayer can file a Form NR74 Determination of Residency Status (Entering Canada) if she is unsure whether she is a Canadian resident, and the Canadian Revenue Agency will analyze the taxpayer's situation and determine her status.

2. Overview of Canadian Tax Rules and Selected Income Tax Issues

a. Canada consists of ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan) and three territories (Yukon, Nunavut and Northwest Territories). Like the U.S. states and territories, the applicable rules vary depending on the province. The province of Quebec is unique both because it its official language is French, and because it is a civil law jurisdiction. As such Quebec's laws and procedures vary significantly from the other Canadian provinces and territories.

b. Federal, provincial and territorial taxes apply in Canada, with varying rates of tax and credits and varying items constituting taxable income. Whether the taxpayer is a resident or non-resident, it is critical that competent tax advisors be consulted to navigate the myriad of complex rules.

c. Canadian residents are subject to Canadian income tax on their worldwide income, subject to adjustments by treaty.[34] Nonresidents of Canada are

[34]*See*, CRA publication T4055(E) Rev. 15, *Newcomers to Canada-2015*, p. 14, at http://www.cra-arc.gc.ca/E/pub/tg/t4055/t4055-15e.pdf.

generally only taxed on Canadian source income.[35] Generally, in Canada taxable income will include earned income (e.g., from employment or business); interest, dividends and capital gain (i.e., profit that comes from the sale of an asset), including accrued interest on most retirement plans (even if undistributed) and investment contracts, such as annuities.[36] Items that are not generally subject to Canadian tax include most life insurance proceeds received as a result of the insured's death, lottery winnings, most gifts and inheritances received (excluding the capital gains at death paid by the decedent), and amounts received from a tax-free savings account (TFSA).[37]

d. Deemed Acquisitions. A new Canadian resident is generally deemed to have sold all of her property for the fair market value immediately before becoming a resident and reacquired them at the same value (referred to as a "deemed acquisition").[38] Thus, the taxpayer obtains a new income tax basis equal to the fair market value of the property. Exceptions to the deemed acquisition rule include (1) "taxable Canadian property"; (2) business inventory and certain capital property of a business carried on by the taxpayer in Canada at the time of disposition; and (3) an "excluded right or interest" (other than an interest in a nonresident testamentary trust not acquired for consideration). The excluded items are brought into Canada at their acquisition value.

(1) Note that the new basis may be adjusted downward upon entry to Canada if the property has depreciated in value. Therefore, if a loss can be utilized, a taxpayer should consider selling the depreciated property prior to moving to Canada.

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[35]*See*, CRA publication 5013G, *General Income Tax and Benefit Guide for Non-Residents and Deemed Residents of Canada-2015 at* http://www.cra-arc.gc.ca/E/pub/tg/5013-g/5013g-15e.pdf; and CRA publication T4058(E) Rev 15, *Non-Residents and Income Tax* -2015, at http://www.cra-arc.gc.ca/E/pub/tg/t4058/t4058-15e.pdf

[36]*See*, CRA Guide 5000g, *General Income Tax and Benefit Guide-2015*, at http://www.cra-arc.gc.ca/E/pub/tg/5000-g/5000g-15e.pdf.

[37]*Id*.

[38]*See*, CRA publication T4055(E) Rev. 15, *Newcomers to Canada-2015*, p 15, at http://www.cra-arc.gc.ca/E/pub/tg/t4055/t4055-15e.pdf.

(2) "Taxable Canadian property" includes real property located in Canada; certain capital property or property used or held in a business conducted in Canada; shares of certain corporate stock; certain interests in trusts, certain interests in partnerships; and certain interests in mutual funds.

e. Deemed dispositions. As discussed in more detail below, certain deemed disposition rules in Canada apply when a taxpayer ceases to be a Canadian resident or dies, subjecting the taxpayer to a capital gain or loss based on the fair market value of the property on the deemed disposition date.[39]

f. Definition of "Fair Market Value." Canada uses a definition of "fair market value" that is similar to the U.S. definition. "Fair market value" for capital gains purposes in Canada is generally defined as "the highest price available estimated in terms of money which a willing seller may obtain for the property in an open and unrestricted market from a willing, knowledgeable purchaser acting at arm's length."[40] Note that discounting for items such as blockage discounts, lack of control or lack of marketability may not be available in Canada for interests held in a family entity. Additionally, it appears that Canadian law will aggregate a family's holdings when determining valuation of interests, rather than view the taxpayer's interest in such entities in isolation as would be the case in the U.S.

g. Lifetime Capital Gain Exemption. A lifetime capital gain exemption ("LCGE") is available for certain dispositions of qualified small business corporation (SBC) shares, qualified farm property and qualified fishing property.[41] The LCGE is generally $800,000 (indexed for inflation after 2015) but may be increased to $1,000,000 in certain provinces, in particular for farm and fishing property. The Canadian tax rates range from 15% to 33% and the provincial and territorial taxes range from 4% to 21% depending on the amount of taxable income and the province or territory.

h. Principal Residence Exemption. Like the U.S., Canada provides a capital gain exception for the sale of a principal residence (including a residence

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[39] *See also,* CRA discussion of deemed disposition of property on its website at http://www.cra-arc.gc.ca/tx/ndvdls/lf-vnts/dth/dmd/menu-eng.html.

[40] *Minister of Finance v. Mann Estate*, [1972] 5 W.W.R. 23, 27, *aff'd* [1973] C.T.C. 561 (BCCA), *aff'd* [1974] C.T.C. 222 (SCC).

[41] *See,* CRA discussion of deemed disposition of property on its website at http://www.cra-arc.gc.ca/tx/ndvdls/lf-vnts/dth/dmd/menu-eng.html.

located outside of Canada), provided certain conditions are satisfied an the property qualifies as a principal residence.[42]

i. Transfers to Spouse, Common Law Partner or Certain Trusts. As discussed below, there is generally no gain or loss on transfers during life or at death to a spouse, common law partner, trust for a spouse or common law partner, or joint spousal trust.[43] Article XXIX B, paragraph 5 of the U.S.-Canadian treaty extends these benefits to decedents and spouses who are U.S. residents in most circumstances. Unlike the U.S. marital deduction, the deferral of tax ends at the earlier of the disposition of the asset or the date of the spouse's death.

j. Selected U.S.-Canadian Treaty Benefits.[44]

(1) Pensions, Annuities and Retirement Plans.

(a) Generally, the tax Canada imposes on the income paid to U.S. residents from pensions and annuities from Canadian sources (including IRAs in the U.S., registered retirement savings plans or RRSPs, and registered retirement income funds or RRIFs in Canada) is generally limited to 15% under Article XVIII of the U.S.-Canadian treaty. The U.S. may also tax these items, but the amount of included income must not exceed the amount that would be included in Canada if the person were a Canadian resident. Roth IRAs are generally treated as exempt in Canada to the same extent they are exempt in the U.S.

(b) As mentioned above, accrued income in most Canadian retirement plans (including RRSPs and RRIFs) is subject to tax in the U.S., but U.S. citizens can elect to defer that tax

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[42] *See*, CRA discussion of principal residence and other real estate on its website at http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/rprtng-ncm/lns101-170/127/rsdnc/menu-eng.html

[43] *See,* CRA discussion of transfers of property to spouses, common law partners and trusts for same at http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/rprtng-ncm/lns101-170/127/trnsfrs/trsts-eng.html

[44] *See generally*, IRS Pub. 597, *Information on the United States-Canada Income Tax Treaty* (Rev. Oct. 2015).

until the income is distributed. The election procedures are set out in Rev. Proc. 2014-55 and depend on whether a taxpayer is an "eligible individual". Note, however, election on Form 8891 is no longer required. Taxpayers who previously reported undistributed income in an RRSP or RRIF on a U.S. income tax return are not eligible for deferral and must continue to report, and pay tax on, that undistributed but accrued income.

(2) Investment Income from Canadian Sources.

(a) Under Article X of the U.S.-Canadian treaty, Canadian income tax on dividends received by U.S. residents is limited to 15% but may be further reduced to 5% or 10% in certain circumstances.

(b) Under Article XI of the U.S.-Canadian treaty, generally interest received by U.S. residents is exempt from Canadian income tax.

(c) Under Article XII of the U.S.-Canadian treaty, gains to U.S. residents from the sale of personal property are exempt from Canadian income tax.

(d) Under Article XII of the U.S.-Canadian treaty, certain copyright royalties, computer software royalties, royalties from patents, and certain broadcasting royalties are exempt from Canadian tax. The exemption does not apply to mineral, timber or other natural resource royalties.

(3) Social security benefits paid to Canadian residents are taxed in Canada as Canadian Pension Plan benefits, but 15% of those benefits are exempt from Canadian tax.

(4) Note that special exemptions and other rules also apply to income from the performance of dependent personal services in Canada (Article XV), certain self-employment attributable to a permanent establishment in Canada (Article VII), public entertainers (Article XVI), students and apprentices (Article XX) and compensation paid by the U.S. government (Article XIX).

k. Quebec. Quebec has its own tax regime and starts with the premise that anything earned, whatever its source, is income. This generally includes,

salaries, wages, interest, dividends, and annuities. However, certain items are not taxable including: inheritance received; life insurance proceeds received as a result of an insured's death; certain tax credits; lottery winnings; certain employer benefits for lost wages; income, gains or losses held in a tax free savings account (TFSA). The advice of a qualified tax practitioner is necessary to navigate these unique and highly technical rules. Revenu Quebec maintains a helpful website addressing common tax situations.[45]

l. Canadian Departure Tax. When a person ceases to be a Canadian resident, she is deemed to have disposed of certain capital assets at their fair market value. Exceptions include: Canadian real property; interest in most pensions and retirement plans (including RRSPs) and employee benefits; certain business property; certain interests in trusts; and interests in most life insurance policies.[46] Like other deemed dispositions, one-half of the accrued gain is included as taxable capital gain and any tax is payable in full upon departure from Canada.

(1) An election can be made to defer payment of the tax until the property is later sold or disposed of, if adequate security is posted with the CRA. The form to elect deferral is Form T1244, "Election under Subsection 220(4.5) of the Income Tax Act, to Defer the Payment of Tax on Income Relating to the Deemed Disposition of Property," and must be filed on or before April 30 of the year following departure.

(2) A taxpayer who leaves Canada and then returns can "unwind" the deemed disposition by making certain elections to adjust on her return.

m. As discussed in more detail below, subject to certain exceptions, a special deemed disposition rule applies to property held by most Canadian resident trusts every 21 years, resulting in capital gain on trust assets.

3. Select Tax Issues for Non-Residents of Canada.

a. Subject to adjustments by treaty, automatic withholding for non-residents of 25% on certain Canadian source income including: interest, dividends,

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[45] *See generally* http://www.revenuquebec.ca/en/citoyen/situation/.

[46] *See* http://www.cra-arc.gc.ca/tx/nnrsdnts/ndvdls/dspstn-eng.html (CRA website describing dispositions of property for emigrants of Canada)

pension and rental payments, royalty payments, annuity payments, and a host of retirement and pension payments including Canadian and Quebec Pension Plan benefits, old age security pensions, registered retirement savings plan payment, pooled registered pension plan payments and registered retirement income fund payments. Under the US-Canada treaty, the withholding rates are reduced or eliminated for U.S. citizens on interest, dividends, certain royalties and pensions/annuity payments.

b. Non-residents who dispose of certain kinds of property are required to report the disposition to the Canadian Revenue Agency and may be subject to tax.[47] If a non-resident disposes of or plans to dispose of any of the following types of property, Canadian tax advisors should be consulted: Canadian taxable property (defined below); Canadian real property (other than capital property); Canadian life insurance; Canadian resource property; or Canadian timber resource property. Treaty exemptions may be available to avoid the reporting obligations; however, certain declarations of eligibility for benefits under a treaty may be necessary to claim those exemptions.

c. Canadian taxable property is defined in section 248(1) of the ITA and includes: real property located in Canada; capital property used or held in a Canadian business; capital interests in a Canadian trust; and shares of certain corporations or partnerships resident in Canada.

d. Article XIII of the U.S.-Canadian treaty limits Canadian taxation of gains of U.S. residents to (1) real property located in Canada and shares of Canadian resident companies, if the value of those shares is principally derived from Canadian real property, and (2) disposition of personal property that is part of business property of a permanent establishment held by a U.S. resident in Canada or that is part of a fixed base in Canada for independent personal services.[48]

4. Due dates for tax returns in Canada is generally April 30th, but the dates and automatic extensions vary depending on whether the taxpayer is self-employed, or if the taxpayer is deceased, when the taxpayer died and whether the taxpayer was married with a spouse involved in a business.

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[47] *See* CRA Income Tax Information Circular IC72-17R6, *Procedures concerning the disposition of taxable Canadian property by non-residents of Canada – Section 116* at http://www.cra-arc.gc.ca/E/pub/tp/ic72-17r6/ic72-17r6-11e.pdf.

[48] *See* Article XIII, Paragraphs 1-4 of the U.S.-Canadian Treaty (as amended by the Fourth Protocol).

5. Gifts, Inheritance and Bequests. There is no Canadian gift or estate tax. However, as discussed above, given the deemed disposition rules, most transfers by gift or at death are realization events resulting in Canadian capital gains tax.

C. Mexican Income Tax Issues - This section is no substitute for local counsel, and only provides an overview of issues you may need to review more in depth.

1. Who is a Resident of Mexico for Income Tax Purposes?

a. Under the Mexican federal civil code, you may be considered a "resident" for income tax purposes if your primary "dwelling home" is in Mexico.

b. If you have more than one dwelling, and the other is outside of Mexico, you will be considered a tax resident of Mexico if it contains your "center of vital interests," meaning more than 50% of total income arises from Mexican sources, or if your professional activities are in Mexico.

c. Under Mexican income tax law, an income tax resident is taxed on her worldwide income. There is an income tax treaty between Mexico and the U.S. which gives guidance on these issues.

2. Selected Tax Issues for Non-Residents of Mexico - AGAIN, you must consult with a Mexican attorney and CPA regarding all tax issues.

a. Income. Non-residents of Mexico (without a permanent residence) only pay income tax on Mexican sourced income. There are many rules which define income as Mexican sourced, and there are exemptions for certain types of income if the non-resident is in Mexico less than 183 days/year.

b. Real Estate. The sale of Mexican real estate is generally taxed at 25% on the gross amount passing to a foreign owner, without any deductions. An option to only tax the gain at 35% is also available if (1) the seller has a representative in Mexico that is either a Mexican tax resident or a foreign resident with a permanent establishment in Mexico, who will make all relevant documents available to the tax agencies for five years after the tax return is filed, and (2) the sale is recorded in a deed authorized by a notary and recorded. The gain is calculated by a Mexican notary public, and there are MANY issues that can be involved in this calculation.

c. If a Mexican Land Trust/*fideicomiso* receives rental income and has non-resident beneficiaries, there is a tax rate of 25% on the gross rental income.

d. REITs. Interests in Mexican real estate investment trusts (REITs) can be sold without taxation if the interest is sold to third parties through the Mexican stock exchange or a recognized foreign market.

e. Shares of a Mexican Company. There is a Mexican withholding tax of 25%, with no deductions, if (1) the person who issued the shares is a Mexican tax resident, or (2) more than 50% of the value of the entity is directly or indirectly related to Mexican Real Estate. Just as with real estate, a foreign tax resident can decide to be taxed on the net capital gain only at 35% if (1) they appoint a Mexican tax resident as their tax representative for purposes of the transaction; (2) they do not reside in a preferential tax regime for Mexican tax purposes; and (3) they file an audited tax report on the transaction's tax implications with the Mexican tax authorities, prepared by an authorized CPA.

D. Charitable Gifts

1. Subject to authorization by treaty, only gifts to charities created or organized in the U.S. will qualify for the U.S. income tax charitable deduction.[49] The regulations make it clear, however, that a deduction is allowed even where a U.S. organization uses its assets for foreign charitable activity.[50] Donations cannot be earmarked to be used for a specific foreign charity, but a donor can direct that her donation be used for a specific program, even if that program is a foreign activity.

2. The U.S. has treaties with Canada, Mexico and Israel that authorize limited charitable deductions in both the U.S. and the foreign country. The treaties with Germany and the Netherlands provide for mutual recognition of tax-exempt entities but do not provide for reciprocal deductibility. If a taxpayer wishes to make a gift to a foreign charity in a country without specific charitable deduction treaty benefits, the taxpayer should generally make that gift either to a U.S. public charity with overseas operations (e.g., American Red Cross) or through a U.S. "friends of" organization that is recognized as a U.S. Section 501(c)(3) organization (.e.g, American Friends of the Louvre or Cambridge in America). Private Foundations may make grants to overseas charities if it exercises "expenditure responsibility" or other requirements are met.

3. Canada. Article XXI of the U.S.-Canadian treaty generally authorizes a U.S. taxpayer to deduct contributions to Canadian "registered charities" against their Canadian source income, subject to the percentage limitations imposed on

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[49] I.R.C. §170(a).

[50] Treas. Reg. §1.170A-8(a)(1).

charitable contributions in the U.S. (i.e., 50% of adjusted gross income (AGI) for cash to a pubic charity, 30% of AGI for most other gifts).[51] Gifts to Canadian colleges or universities at which the taxpayer or her family member attended may also be deducted against U.S. source income. Additionally, the treaty generally allows Canadian residents to deduct gifts to U.S. charities but only to the extent of their U.S. income. Paragraph 1 of Article XXIX B of the U.S.-Canadian treaty also treats charitable organizations of each country as eligible charities for purposes of the U.S. estate tax charitable deduction and Canadian income tax charitable deduction.

4. Mexico. The U.S.-Mexican treaty provides that a US person can deduct gifts to Mexican public charities (but not private foundations) against their Mexican source income, subject to the percentage limitations imposed on charitable contributions in the U.S. The treaty also provides for mutual recognition of income tax exemption of qualifying charities, allowing U.S. private foundations to give to Mexican charities without exercising expenditure responsibility, and exempting Mexican private foundations from the private foundation rules under Chapter 42 if substantially all support received is from non-U.S. sources.

5. For estate and gift tax purposes, the unlimited charitable deduction is available to U.S. citizens and residents for gifts to foreign charities, and to trusts that benefit foreign charities (but not foreign governments).[52] However, subject to modification by treaty, the gift tax charitable deduction for an NRA is generally limited to gifts to U.S. charities.[53] Similarly, NRAs may only take the estate tax charitable deduction for gifts to U.S. charities and only to the extent of the NRA's U.S. estate.[54] The U.S. has treaties with only 5 countries that address deductibility of charitable gifts for transfer tax purposes: Canada, Denmark, France, Germany and Sweden.

E. Tie Breaker Rules in Income Tax Treaties. There are situations in which a client qualifies as an income tax resident of more than one country. Many countries have an income tax

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[51] *See* IRS Pub 597, *Information on the United States-Canada Income Tax Treaty* (Rev. Oct. 2015).

[52] I.R.C. §2055(a).

[53] *See* I.R.C. §2522(b).

[54] *See* I.R.C. §2106(a)(2).

treaty with the U.S. to manage this situation. The IRS website has a list of those countries, as well as links to the actual treaties.[55]

1. US-Canadian Income Tax Treaty. Like Mexico, the U.S.-Canadian treaty provides "tiebreaker" rules to determine when a person is a resident of each country. Under the Canada-US Treaty, a person is deemed a resident of the country where she has a permanent home, used more than occasionally. If the taxpayer either has no permanent home in either country, or if the taxpayer has a permanent home in both countries, she will be deemed a resident of the country where the person has the closest personal and economic ties (the center of vital interests), or if that cannot be determined, then the country where she has a "habitual abode." A habitual abode is the place where the person returns regularly, frequently and continually and where she spends considerable time. If there is no habitual abode in neither or both countries, then residency is deemed where the person is a citizen, or if they are a dual citizen (or citizen of neither country), then the countries must agree.

2. U.S.-Mexican Income Tax Treaty. U.S.-Mexican treaty contains "tie breaking" language which gives residency status to the country in which the alien has a permanent home, and if she has a home in both countries, where the alien's personal and economic interests are greater. The treaty also contains a number of tax benefits for NRAs.

F. Income Tax for NRAs - As mentioned above, there is generally a 30% withholding on amounts paid to a NRA who has U.S. source income referred to as FDAP Income.

1. As discussed, above, there are a number of exceptions to the required withholding, including portfolio interest[56] and capital gains[57].

2. Income that is "effectively connected" with a U.S. trade or business is subject to U.S. income tax, just as income for a U.S. citizen would be.[58]

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[55]https://www.irs.gov/Businesses/International-Businesses/ United-States-Income-Tax-Treaties---A-to-Z

[56]I.R.C. § 871(h) and (i)

[57]Treas. Reg. § 871-7(a)(1)

[58]I.R.C. § section 871(b)

V. Transfer Tax Rules

A. How to Determine Client's Status for Transfer Tax Purposes - Domicile

1. There is not a lot of guidance for determining domicile for transfer tax purposes. An RA and an NRA is considered domiciled in the U.S. if she has resided in the U.S. for a period of time and has demonstrated an intent to stay.[59]

   a. There are a number of factors to consider when determining domicile. A few are:

      (1) Length of stay and the purpose;

      (2) Location of residence (resort area);

      (3) Personal reasons for location of the residence;

      (4) Bank accounts;

      (5) Social and religious affiliations;

      (6) Driver's license and voter registration;

      (7) Personal property registrations (cars, boats, trailers);

      (8) Visa status;

      (9) Type of residence; and

      (10) Location of business interests.

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[59] Treas. Reg. 20.0-1(b)

2. Mexico and Canada. Mexico and Canada have no gift or estate tax, therefore domicile is not a relevant factor.

B. Non-Resident Alien Rules - U.S. is not domicile

1. Gift Tax - Gifts by NRAs are subject to gift tax only if the gifts are sited in the U.S.[60] and generally only applies to gifts of real estate and tangible property[61]; however, gifts of tangible personal property given outside the U.S. are not subject to gift tax. Gifts of intangible property by an NRA is not subject to gift tax, even if it's a U.S. asset.[62] There is no option for a NRA to split gifts with a spouse.

a. NRAs do not have a unified credit to use for gifts.[63]

b. NRAs have a $14,000/year/donee gift tax exemption and unlimited gifts for education and medical expenses.[64]

c. NRAs have an unlimited gift tax exclusion for gifts to U.S. citizen spouses and a $148,000 annual exclusion to non-citizen spouses.[65]

d. NRAs may make unlimited gifts to U.S. charities.[66]

2. Estate and Generation-Skipping Transfer Tax (GSTT) Tax - NRAs are only subject to U.S. estate tax on property situated in the U.S.

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[60] I.R.C. § 2511(a).

[61] Treas. Regs. 25.2511-3(a)(1).

[62] I.R.C. § 2511(a)(2).

[63] I.R.C. § 2505(a).

[64] I.R.C. § 2503(b), (e).

[65] Treas Reg. 2523(i)-1(a) and (c)(2).

[66] I.R.C. § 2522(b).

a. NRAs have an estate tax exemption amount of only $60,000, and the excess is taxed the same as U.S. citizens and RAs (40%). NRAs are entitled to use the full GSTT exemption amount ($5.45M in 2016), but see the section on pitfalls.[67]

b. NRAs have an unlimited spousal exemption for amounts passing to a U.S. citizen spouse.[68] However, if the NRA's spouse is also an NRA, the use of a qualified domestic trust must be considered.

c. Generally, the transferee will receive inherited property with a stepped up basis.

d. NRAs may deduct expenses and debts in proportion to the U.S. gross estate of the entire estate. However this requires disclosure of the worldwide assets of the decedent NRA, which is not always preferable.[69]

e. Portability is not available to the estate of a NRA. When the decedent is a U.S. citizen/RA and the surviving spouse is a NRA, use of portability is limited to use only at the death of the surviving spouse. This is because a QDOT, when making distributions of principal, adjusts the amount of estate tax paid by the estate of the first spouse to die. Therefore, since it is an unknown, it can't be calculated during the life of the surviving spouse and therefore cannot be used for gifts by the NRA surviving spouse.[70]

C. Canadian Transfer Tax Issues. Canada has no estate tax and there is no estate tax treaty between the U.S. and Canada. However, as discussed more fully above, Canada generally treats any donative transfer during life, and any transfer at death as a realization event, subject to tax. A deemed disposition of the transferred property occurs on the transfer of assets by gift (including to a revocable or irrevocable trust) or at death and a capital gain tax is imposed at that time.

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[67] I.R.C. § 2631(a).

[68] I.R.C. § 2106(a)(3)

[69] I.R.C. § 2106(a)(1).

[70] Trea. Reg. 25.2505-2(d)(3).

D. Mexican Transfer Tax Issues

1. Donations, Inheritance and Bequests

a. Donations. This is the term used for “gifts” under the Mexican Federal Civil Code. Donations may be written or verbal, but donations over $5,000 Mexican pesos should be granted before a notary public; however unless the gift is real estate, it will still be valid even if not before a notary public. Although there is no gift tax, donations are considered “income” to the recipient, unless there is an exemption under Mexican law. Mexican residents are generally exempt from income tax on donations. All donations to a spouse or descendants are exempt from income tax, even if the recipient of the gift is a non-resident of Mexico.

b. Inheritance and Bequests. For recipients of certain property that are not Mexican tax residents, inheritance and bequests (as well as donations that do not pass to a spouse or descendants) will be taxed at 25% of the appraised value. This only applies to (1) shares of a Mexican entity; (2) shares of a foreign entity with 50% of its value is from Mexican real estate; or (2) real estate located in Mexico. This tax is paid through the notary pubic or directly by the non-resident.

VI. Mexican Real Property Ownership Issues for Non-Mexican Citizens

A. A Note About Mexican Notary Publics. The notary publics (*notario publico*) in Mexico have very little in common with those in the U.S. A Mexican notary public must be a practicing attorney for at least five years, then apprentice in notary law, and practice with another notary public for a period of time. The position of a notary public is appointed by the state governor, and must comply with local and state notary laws. There is supposed to be a notary public for every 30,000 residents. Legal contracts and documents, such as Wills, trusts, deeds, powers of attorney, must be executed before a notary public. *Notarios* handle all transfers involving real estate, and is responsible for the formalization of a final contract, collection of any taxes due, and recording the transfer in the public registry.

B. Real Property Ownership in Mexico

1. Section I of Article 27 of the Mexican constitution limits the ownership of Mexican real property to Mexican citizens (both born and naturalized) or a Mexican entity.

2. For certain lands the Mexican government, through the Mexican Ministry of Foreign Regulations (MMFR), has the right to issue a permit to a non-Mexican citizen to purchase and own Mexican real property. To do so, the non-Mexican citizen must agree before the MMFR:

   a. The purchaser will consider herself as a Mexican national with respect to her Mexican land ownership; and

   b. The purchaser will not invoke the protection of her own government with respect to the real property, under the penalty of losing the real estate for non compliance.

3. For real estate within 100km of a Mexican border or 50km from a coast (referred to collectively as the "Restricted Zone") individual ownership by a non-Mexican citizen or entity must be through a Mexican Land Trust or a Mexican entity, depending on whether the real estate is defined as residential or non-residential.

4. Defining Residential and Non-Residential Real Property

   a. Real estate for residential purposes is defined as property intended for housing the owner or third parties.

   b. Real estate for non-residential purposes includes a number of land uses, such as property intended for time sharing and property used for industrial, commercial, or tourism activity, and which is simultaneously used for residential purposes.

C. Ownership of "Restricted Zone" Real Property

1. Mexican Entities

a. An entity formed under Mexico law, even if 100% owned by foreigners, may purchase real estate in the Restricted Zone, so long as the property is *"non-residential"* only. The entity bylaws must contain the same language about being a Mexican resident for purposes of the land, and agreement not to invoke the foreign protection. Note there are notice and reporting requirements to the MMFR.

b. An entity formed under Mexican law, with foreign owners, may NOT purchase *residential* real estate in the Restricted Zone.

c. An entity or foreign individual must use a Mexican land trust/*fideicomiso* to own residential real property within the Restricted Zone.

d. A Mexican entity, which has organizational documents which include a prohibition on foreigners as owners, may own property, both residential and non-residential, in the Restricted Zone.

2. Mexican Land Trust/*Fideicomiso*

a. With the Mexican constitutional limitations on ownership of residential real estate within the Restricted Zone, non-Mexican citizens, Mexican entities with foreign owners and foreign entities may only own that property indirectly by use of a Mexican Land Trust (MLT), called a *fideicomiso* in Mexico.

b. A MLT can be established for a 50 year term, which is renewable. There does not appear to be a limitation on the number of renewals. There is a cost to renew.

c. Any individual or legal entity (Mexican or foreign) may be the beneficiary of a MLT.

d. A financial institution, as trustee, must first obtain a permit from the MMFR to acquire real estate within the Restricted Zone. The permit may contain provisions regarding investment in improvement, and a time limitation for the investment.

e. After the MMFR issues the permit, the Mexican financial institution (trustee) will work with a Mexican notary to draft a trust agreement. The trust agreement is recorded in the public registry of property and commerce in the municipality of the acquired real estate. There are a number of required provisions in the trust agreement:

(1) Similar to other real estate ownership arrangements, the trust agreement must state that the beneficiaries agree to consider themselves Mexican residents with respect to their rights as beneficiaries, and agree to not invoke the protection of a foreign government.

(2) While the trust exists, the trustee will not grant real estate ownership rights to the beneficiaries.

(3) The trustee files a report with the MMFR each year stating any change in trusteeship, substitute beneficiaries or assignment of beneficial interest, in either foreign or Mexican entities.

(4) The beneficiaries are obligated to inform the trustee regarding trust compliance, and the trustee is then obligated to inform the MMFR. If there is a non-compliance or breach issue, the trustee has 60 days to conform to the trust agreement.

(5) The trustee must obtain an additional permit from the MMFR if there is a charge or broadening of the purpose of the trust.

(6) The trustee must notify the MMFR within 40 business days from the termination of a trust.

(7) All parties must agree to terminate a trust at the request of the MMFR within 180 days from the request for non-compliance or breach.

(8) For ownership of real estate in the Restricted Zone, the trustee must register the trust with the National Foreign Investment Registry.

f. Transfer or Assignment of Beneficiary's Rights

(1) A beneficiary of a MLT may assign her rights her beneficial rights over the trust property by using an assignment which is signed before a Mexican notary, a deed for which is recorded in the public registry.

(2) A beneficiary of a MLT may sell her rights her beneficial rights over the trust property by terminating her beneficial rights in favor of a new beneficiary. The original trust agreement is terminated and the buyer obtains a new trust agreement with the trustee.

g. Death of a Trust Beneficiary

(1) Best practice is for a trust beneficiary to appoint a substitute beneficiary, and that person will become a trust beneficiary upon the death of the original trust beneficiary.

(2) The substitute trust beneficiary must give a death certificate (*apostilled* and translated) to the trustee.

(3) If no successor beneficiary exists, the trustee may require a number of documentation, including a court order regarding distribution of the trust assets. The trustee will most likely require the order be domesticated in the Mexican court and then delivered to the trustee, along with a letter of instruction. Remember, each document must be translated.

D. Ownership of "Non-Restricted Zone" Real Property

1. Real property outside the Restricted Zone may be acquired by a non-Mexican citizen or entity, so long as the acquirer agrees to the requirements regarding

considering yourself a Mexican national for purposes of that property, and agreeing not to invoke the protection of your own government.

2. The foreigner/foreign entity must first apply for a permit through the MMFR. The permit must detail the applicant's legal presence in Mexico and the legal ability to own real estate. For an entity, documentation must be presented which pertains to the entity's ability to conduct business in Mexico.

3. Title to property outside the Restricted Zone may be taken in the name of a U.S. person, LLC, U.S. trust or Mexican entity. Mexico does not recognize common U.S. forms of ownership, such as tenants in common and joint tenants.

4. It may be appropriate for foreign persons to execute a Mexican Will, issued before a notary public in Mexico, to dispose of Mexican real property.

VII. Estate Planning Considerations

A. Martial Rights, Interests and Agreements

1. Just as in any other estate planning representation, the issue of marital rights must be addressed. With international overlays, you must consider the laws of the jurisdiction in which property is sited and/or the domicile of the clients. Both current obligations/rights as well as those that exist at death, including forced heirship and elective share rights, must be reviewed carefully.

2. Extra care must be taken with clients who may be legally married in the U.S., but not in other countries. Same sex marriage is uncommon worldwide, and a country may have a prohibition to recognizing one from another country. The same can be said for couples that are "common law" married or have a domestic or civil partnership; being valid and recognized in the place of execution, but not elsewhere, may present conflict of laws issues.

3. Often civil law based countries have community property laws in which each spouse is generally entitled to ½ of the property of the community. In separate property jurisdictions, each spouse may own property independently of one another. Some countries, like the U.S., have some jurisdictions with community property laws, and some without.

4. Some countries allow couples to select between a separate or common property regime. However, that selection may only apply at divorce (e.g., British Columbia) while others apply at divorce and death (e.g, France). Many countries have some kind of elective share system by which a surviving spouse cannot be entirely disinherited.

5. Marital agreements executed outside the country of domicile at death may be ineffective and not enforced as to the property transferred under that country's jurisdiction.

6. Many countries also allow for the use of a cohabitation agreement. If clients plan to live unmarried for an extended length of time, it may be prudent to obtain a cohabitation agreement, following the required formalities of the country of residence.

7. Canadian Marital Issues

   a. Common-law marriage of same or opposite sex couples is generally recognized in Canada, with the exception of Quebec. Persons in these relationships are not treated as legally married, but are entitled to most, but not all, of the benefits of marriage. The requirements for common law marriage vary from province to province but generally involve living with someone in a conjugal relationship for some period of time (generally one to three years).

   b. For Canadian income tax purposes, the CRA defines a "common law partner" as a person the taxpayer is living with in a conjugal relationship other than their spouse (1) for 12 continuous months (excluding breakups of less than 90 days); or (2) who is the parent of the taxpayer's child by birth or adoption; or (3) who has custody of your child and the child is dependent on that person for support.[71]

   c. Since 1978 Family Law Reform Act (now continued in the Family Law Act), marital agreements have been enforceable in all of Canada. A marital

[71] *See* CRA website defining Marital Status at http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/prsnl-nf/mrtl-eng.html

agreement must be in writing, signed by the parties and witnessed. A marital agreement may encompass a broad range of matters, including the ownership or division of property, support obligations, matters concerning the education and "moral training" of children (but not custody) and "any other matter." The legislation precludes spouses from opting out of those provisions in the Act that protect the rights of each spouse to the matrimonial home.

8. Mexican Marital Issues

a. Mexican law allows married couples to choose between a common property or separate property regime, which will control the disposition of assets at both death and divorce.

b. The Mexican Supreme Court ordered recognition of the validity of same sex marriages in 2010, and since June 2015, that court ruled that all state bans on same sex marriage constitute discrimination, and now people of the same sex may legally marry in any Mexican state.

c. Mexican law does not recognize common law marriage, although there is the concept of a "concubinage" relationship.

d. Mexican law recognizes pre and post marital agreements, which must be executed before a judge or notary public. Because Mexico requires a great deal more formality and the use of a judge or notary, it is unclear how much weight a U.S. marital agreement may have. Instead of obtaining an *apostilled* version, it may be wiser to obtain local counsel and execute a marital agreement as to assets in Mexico only.

B. Required Formalities for Valid Wills - International Wills Act. Each jurisdiction will have its own requirements for validity of a will, and the practitioner should consult with local counsel to ensure that if a single will is used it meets the requirements in the applicable foreign jurisdictions. Colorado and a number of other U.S. and foreign jurisdictions have adopted the Uniform International Wills Act ("UIWA"), C.R.S. 15-11-1001 et seq establishing certain standard formalities for Wills, that if met, will be recognized as valid by adopting jurisdictions.

1. The UIWA was drafted to implement the Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will (Washington, D.C., October 26, 1973), also known as the "Washington Convention". UIWA has been adopted by 15 states, including Colorado, and several countries including: Austria, Belgium, Bosnia-Herzegovina, Canada, Cyprus, Ecuador, France, Iran, Italy, Laos, Lybia, Niger, Portugal, Russia, Sierra Leone, Slovenia, United Kingdom and the U.S.

2. If a will complies with the international wills act, it will be recognized as valid irrespective of where it was executed, "the place where it is made, of the location of the assets, and of the nationality, domicile, or residence of the testator".[72] However, it does not apply to joint wills (wills made and signed by more than one person).

3. To be a valid international will, C.R.S. §15-11-1004 requires:

    a. The Will be in writing, in any language, whether written by hand or otherwise;

    b. Testator must declare to two witnesses and an authorized person that the document is her will and she knows its contents;

    c. Testator must sign or acknowledge her signature in front of the witnesses and the authorized person, or if testator cannot sign, she must indicate why she cannot sign and the authorized person must make note of the reason on the will, and then any other person present (including the authorized person or a witness) may sign on the testator's behalf at the testator's direction if the authorized person makes note of this on the will. However, no person is required to sign for the testator.

    d. The witnesses and the authorized person must attest to the will by signing in the presence of the testator;

    e. Although the following"points of form" are set out in C.R.S. §15-11-1005, failure to comply with these requirements does not result in an invalid international will:

[72]C.R.S. §15-11-1103(1).

(1) Testator and each witness must sign at the end of the Will and sign each page of the Will;

(2) The date must be noted on the will by the authorized person; and,

(3) The authorized person must ask the testator whether she "wishes to make a declaration concerning the safekeeping" of the will, and if so, the place of safekeeping must be noted on the certificate.

4. "Authorized persons" include attorneys licensed in Colorado and those under "the laws of the United States, including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations," who are empowered to supervise the execution of international wills.[73]

5. Effect of Certificate. A certificate completed by an authorized person "is conclusive of the formal validity of the instrument as a will" under the Probate Code. However, absence of a certificate or "irregularities" in certificates "do not affect the formal validity" of the will.[74]

6. C.R.S. §15-11-1011 states that the certificate may be filed with the clerk of the county where the person resides, or if not a Colorado resident, where the will was executed.

C. Single Will vs Multiple ("Situs") Wills. There is some debate among practitioners as to whether an international client should use a single will that controls disposition of the client's assets wherever located, or if instead, multiple or "situs" wills should be used. For this purpose a "situs" will is one that conforms to the local law of the jurisdiction where the assets are located. Ultimately, the option that will be suit a client will depend on the facts and circumstances. However, if situs wills are used, it is imperative that the documents be coordinated and that local counsel be consulted. The advantages and disadvantages of using situs wills include:

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[73]C.R.S. §15-11-1002(1).

[74]C.R.S. §15-11-1007.

1. Use of a local Situs Will may simplify the estate administration and reduce administration expenses, particularly where the foreign jurisdiction imposes fees based on a percentage of assets administered in that jurisdiction.

2. Situs Wills use terminology familiar to the jurisdiction and are less likely to require interpretation or construction.

3. Situs Wills eliminate the need for translation, which may be difficult, if not impossible, given the technical terminology used in most wills. Additionally, some jurisdictions require that the witnesses understand the Will, thus one written in a foreign language and signed in that jurisdiction may not be valid.

4. In some circumstances, the testator may choose which law applies to the disposition of her assets. This may give the testator the ability to opt out of forced heirship laws.

5. Multiple jurisdictions may require an original Will. Although authentication may be acceptable, some countries will require an original will be lodged or filed with their courts to be valid.

6. Situs Wills may protect confidentiality and limit required disclosure if inventory or similar reporting is limited to those assets sited in the foreign jurisdiction.

7. Some jurisdictions do not recognize appointment of a fiduciary (such as an executor) by a foreign country and require the fiduciary be appointed by that jurisdiction before the person can deal with property in that jurisdiction.

D. Mexican Estate Planning Considerations

1. As a civil law country, trusts are not as commonly used in as an estate planning tool, with the exception of the Mexican Land Trust. Most common is the use of a Will or intestacy. However, because of possible tax upon transfer to a non-Mexican citizen, it is important to take care with any coordination with a U.S. estate plan. Always seek local counsel to discuss not only Mexican tax issues, but state and local tax issues as well. It may be best to use a trust or a Mexican entity, but those forms of ownership also result in tax upon transfer. Mexican laws regarding trusts are very different from the U.S., and discussing those differences with local counsel is required.

2. You must be 16 years of age and of sound mind to execute a Will in Mexico. Witnesses must be 16 years of age, sane, know the testator personally, know the language of the testator, not be deaf or mute, not a felon, and not an heir of the testator.

3. There are a variety of valid Wills in Mexico, categorized as either "ordinary" or "special." Special Wills are only used in very limited circumstances. Common Wills include:

   a. Public Open Wills are those in which the testator expresses her wishes to a notary public, who drafts the Will and reads it out loud, after which the testator agrees with the Will provisions, and the testator, notary and two witnesses sign the "public instrument."

   b. Public Closed Wills are those that are previously prepared by the testator or another person. The testator must initial each page and sign at the end, place in a sealed envelope and delivered by the testator to the notary with three witnesses. The testator declares it is her Will, and all four sign the envelope before the notary.

   c. Holographic Wills are valid so long as in the handwriting of the testator, there are two copies, and the testator takes the Will to the General Archives of Notaries to be sealed and signed by an official in that office.

E. Estate Planning for U.S. Citizens/RAs Married to an NRA.

1. Qualified Domestic Trust (QDOT). Although both U.S. citizens and RAs may utilize the full estate tax exemption, the use of the unlimited marital deduction is limited to U.S. citizen surviving spouses only. For situations which require the marital deduction to avoid estate tax at the death of the first spouse to die, use of the Qualified Domestic Trust (QDOT) is essential. Property passing to a valid QDOT for the sole benefit of a non U.S. citizen surviving spouse must still qualify for the marital deduction. The personal representative must elect QDOT treatment on a timely filed 706.

   a. The are regulations which allow for post mortem QDOT planning.

b. Required QDOT provisions.

(1) All income payable to the spouse for life.

(2) Principal distributions are to the spouse only.

(3) At least one trustee must be a U.S. citizen or domestic corporation.

(4) The U.S. trustee has to power to withhold estate tax on any distributions of principal.

(5) QDOTs in excess of $2,000,000 (this includes the aggregate of all QDOTS for the surviving spouse, and excluding up to $600,000 for the personal residence and content) must allow the trustee to choose one of four possible security arrangements:

(a) Require a U.S. bank as trustee.

(b) Require the trustee to post a bond in the amount of 65% of the QDOT assets, valued as of the decedent's date of death.

(c) Require the trustee to furnish a letter of credit issued by a bank to the IRS for an amount equal to 65% of the QDOT.

(d) All the trustee to choose among these options, and change, as needed.

(6) QDOTs less than $2,000,000 (excluding up to $600,000 for the personal residence and content) must hold less than 65% of trust assets as real estate outside of the U.S. Otherwise, the QDOT must satisfy the requirements of a QDOT in excess of $2,000,000.

(7) Distributions and Termination.

(a) The trustee is required to withhold from a distribution of trust principal an amount equal to the estate tax on such amount. These are reported on the 706-QDT. This form covers a calendar year and is due on April 15th.

(b) At the death of the surviving spouse, the trustee must file the 706-QDT within nine months of the date of death.

(c) If the surviving spouse becomes a U.S. citizen at any time during the QDOT, and either (i) was a resident of the U.S. at all times since the death of the decedent spouse and before becoming a citizen, or (ii) no tax was imposed under I.R.C. § 2056A(b)(1)(A) with respect to any distribution before the spouse became a citizen, then the trust ceases to be treated as a QDOT.

(d) Use of portability is complicated by the fact that the amount of estate tax paid by the decedent's estate is always subject to change because any distribution of principal from a QDOT will be subject to estate tax. This means that a surviving spouse cannot use any part of the portability amount from the spouse's estate for gifts. If the spouse becomes a citizen, then the decedent spouse's portability amount will no longer be subject to change, and can be used by the surviving spouse.

VIII. Powers of Attorney

A. DO NOT ASSUME YOUR U.S. DOCUMENTS WILL BE EFFECTIVE! Every country has it's own laws governing the validity and usage (or non-usage) of powers of attorney, and often the states/regions in those countries have additional requirements or formalities for those documents.

B. We always recommend obtaining local powers of attorney when a client plans to spend any significant amount of time in any one country. You should always strongly suggest clients seek local attorneys for preparation of valid local powers of attorney.

C. Canadian Powers of Attorney. Although Canada generally recognizes powers of attorney, the requirements for valid powers vary significantly between the provinces. Areas of difference include:

1. The names of the documents granting a person authority to act for financial affairs vary, from General Power of Attorney (in Quebec), to Enduring (or Continuing) Power of Attorney (outside Quebec), which is effective even if the principal loses capacity, to an Immediate Power of Attorney which is effective only while the principal has capacity.

2. Other terminology differences include principal vs donor vs mandatory (or grantor) as the person giving the power; and attorney vs attorney in fact vs agent vs donee vs mandatary as the person who is appointed to act;

   a. Some prohibit certain persons from acting as agent or witnesses;

   b. Some do not recognize springing powers;

   c. Some require two "qualified" witnesses;

   d. Some require registering the power of attorney with the court;

   e. Some require special government forms be used;

3. Some provinces require powers of attorney be witnessed by two qualified persons. For example, in Ontario, the following people may not serve as witnesses: the agent, the agent's spouse or partner, the principal's spouse, partner, child or person the principal treats as her child, a person under guardianship or anyone under age 18.

4. Medical Powers of Attorney are often referred to as "Personal Care" powers of attorney and can include a "living will." Although Colorado living wills typically only deal with termination of life support and artificial nourishment and hydration, living wills in Canada can be very specific (addressing items such as the use of pain relieving drugs) or very general.

5. Ontario Office of the Public Guardian provides a free "kit" for both financial and personal care powers of attorney.

6. In Quebec, the power of attorney is referred to as a "mandate."

7. Best practice to comply with requirements in the jurisdictions where client will be spending time to ensure documents will be respected or alternatively, obtain local powers of attorney for both jurisdictions. However, if multiple powers of attorney will be used, be sure that you do not revoke prior powers in your document.

D. Mexican Financial Powers of Attorney. The Mexican Federal Civil Code allows for the use of financial powers of attorney, also referred to as "mandates" and can be defined as either "general" or "special."[75] Powers of attorney must be executed in a pubic deed or through a proxy letter signed by two witnesses. Although it may not be required, and even if a lesser formality could be used, it is best to execute a power of attorney before witnesses and a notary public, and in some cases, recorded.

1. Three kinds of "general" powers of attorney:

    a. General Power of Attorney for Litigation and Collection

    b. General Power for Acts of Administration

    c. General Power of Attorney for Acts of Ownership

2. Any power of attorney which is not a general power is defined as "special" and can be used for a specific task or for a certain limited amount of time.

3. Mexico will recognize foreign powers of attorney. If the country from which the power of attorney originated is a member of the Hague Convention (which the U.S. and Mexico are), the use of an *apostilled*, along with a translated version of the document, will suffice. The translation must be done by a professional. The *apostilled* is a document affixed to the power of attorney which certifies the

[75]Ninth Title of the Mexican Federal Civil Code

authenticity of the signature, the capacity in which the person signing the documents were acting, and the identity of the notary.

4. It is less clear how Mexican states manage issues related to medical powers of attorney. It has been suggested it is best to *apostilled* your U.S. medical power of attorney for use in Mexico.

IX. Foreign Estates and Trusts

A. Specialized tax advisors needed. The income taxation and reporting and disclosure obligations of foreign trusts is highly technical and complex. Therefore, as with other international estate planning and administration issues addressed in these materials, the assistance of competent tax advisors who specialize in international tax and specifically in foreign trusts is essential.

B. Definitions. Foreign estates and trusts are defined in I.R.C. §7701 and its accompanying regulations.

1. Foreign estates are estates with income from sources outside the U.S. that are not effectively connected with a U.S. trade or business.[76]

2. Foreign trusts are any trusts that are not U.S. persons.[77] A trust that is a U.S. person is generally defined as one in which a U.S. court is "able to exercise primary supervision over the administration of the trust (court test)," and one or more U.S. persons "have all the authority to control all substantial decisions of the trust (control test)."[78] A foreign trust is any other trust. Note that the definition of foreign trust for income tax and FBAR purposes is different.

a. Court Test. The court test is satisfied if a U.S. court can "render orders or judgements resolving issues concerning administration of the trust" and has

[76] I.R.C. §7701(31)(A).

[77] I.R.C. §7701(31)(B).

[78] Treat. Reg. §301.7701-7(a)(1).

authority "to determine substantially all issues regarding the administration of the entire trust."[79]

(1) "Administration" for this purpose includes "maintaining the books and records of the trust, filing tax returns, managing and investing the assets of the trust, defending the trust from suits by creditors and determining the amount and timing of distributions."[80]

(2) Examples of situations that satisfy the court test include registering a trust in a U.S. court pursuant to state statute with provisions similar to Article VII of the Uniform Probate Code; fiduciaries of a testamentary trust have been "qualified as trustees of the trust" by a U.S. court;[81] the fiduciaries or beneficiaries of an inter vivos trust take steps with a U.S. court causing the administration of the trust to be subject to primary supervision of the court; and, if both the U.S. court and a foreign court are able to exercise primary supervision over the trust.[82]

(3) Note that if a trust contains an automatic migration provision stating generally that an attempt by a U.S. court to assert jurisdiction or directly or indirectly supervise the trust administration results in the trust "migrating" from the U.S. to another jurisdiction, the court test is generally not satisfied. This kind of provision is not uncommon in asset protection trusts.

b. Control Test. This test requires a U.S. person control all substantial decisions over the trust administration.[83] Therefore, if any non-U.S. person can veto a "substantial decision" then the trust is a foreign trust, even if it was created by a U.S. person, has U.S. beneficiaries, and all of its assets are

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[79]Treas. Reg. §301.7701-7(c)(3).

[80]*Id.*

[81]Treas. Reg. §301.7701-7(c)(4)(i)(B).

[82]Treas. Reg. §301.7701-7(c)(4)(i)(D).

[83]Treas. Reg. §301.7701-7(a)(1)(ii).

sited in the U.S.[84] This includes persons who are not necessarily fiduciaries, such as trust protectors.

(1) "Substantial decisions" are authorized or required decisions that are not ministerial and include the timing or amount of distributions and selection of beneficiary, allocation of receipts between income and principal, whether and under what conditions a trust can be terminated, whether to compromise claims, sue or defend the trust, whether to add, remove or replace a trustee or appoint a successor trustee who has ceased acting, and investment decisions, including hiring of an investment advisor.[85]

(2) If there is an "inadvertent change" in a person having the power to make a substantial decision of the trust that would result in the trust's residency to change from domestic to foreign or vice versa, the trust has a 12 month grace period under the regulations to make any changes necessary to avoid a change in residency.[86] Inadvertent change includes death, incapacity, resignation, change in residency or other change that would cause a change in trust residency but was not intended to change residency.[87] An extension of time is available under certain circumstances.

(3) If under the terms of the trust agreement, an attempt by any governmental agency or creditor to collect information from or assert a claim against a trust results in loss of control over any substantial decisions by U.S. persons, the trust will fail the control test. Again, this kind of automatic migration provision is relatively common in asset protection trusts.

C. U.S. Trusts with Foreign Beneficiaries. Generally, the rules governing income taxation of trusts also apply to NRAs, subject to modification by treaty, including rules relating to distributions to beneficiaries. The withholding and other income taxation rules applicable

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[84]Treas. Reg. §301.7701-7(d)(iii).

[85]Treas. Reg. §301.7701-7(d)(1)(ii).

[86]Treas. Reg. §301.7701-7(d)(2)(i).

[87]*Id.*

to NRAs, including those relating to taxation of fixed, determinable, annual or periodic (FDAP) income, effectively connected income (ECI), and withholding and taxes due under the Foreign Investment Real Property Tax Act (FIRPTA) will also apply, subject again to modification by treaty. Thus, the trustee must comply with its withholding obligations. See discussion above regarding income taxation of NRAs.

D. U.S. Settlors of Foreign Trusts and Grantor Trust Status.

1. I.R.C. §674 treats transfers of property to a foreign trust as a recognition event and requires the settlor to recognize gain on the transfer, unless the transfer is made to a grantor trust.

2. Under I.R.C. §679, a U.S. transferor remains the income tax owner of property transferred to a foreign trust that has a U.S. beneficiary. The definitions of terms used in I.R.C. §679 such as "U.S. transferor", "transfer of property", "foreign trust" and "U.S. beneficiary" are critical to determining whether this special grantor trust status applies. In several instances, these definitions apply even if there has been a change in citizenship or residency from domestic to foreign or vice versa.

3. Note that caution should be used when relying on this provision to qualify for grantor trust status when such status is desirable as the trust may inadvertently become a U.S. trust, resulting in the trust becoming a non-grantor trust unless it qualifies under other grantor trust provisions.

E. Foreign Non-grantor Trusts. For income tax purposes, these trusts are treated like NRAs who are not present in the U.S. (i.e., ECI and FDAP income).[88] Like NRAs, foreign trusts may make an election to treat income from real property as income effectively connected with a U.S. trade or business if the property is held for the production of income.[89]

[88] I.R.C. §641(b).

[89] I.R.C. §871(d)(1).

F. U.S. Trusts that become Foreign Trusts.

1. If a U.S. Trust becomes a foreign trust during the grantor's life, the trust is treated as if it were a foreign trust under I.R.C. §679 at the time of the initial transfer.[90]

2. If a U.S. trust becomes a foreign trust after the grantor's death, or if it has no U.S. beneficiaries, and no other person is treated as the grantor under I.R.C. §671, the trust is treated as having sold its assets immediately before it became a foreign trust and gain must be recognized.[91]

G. U.S. Beneficiaries of Foreign Trusts.

1. Foreign Grantor Trusts. In general, the U.S. grantor trust rules only apply if a U.S. person is deemed to be the grantor.[92] However, if a trust is revocable by a foreign grantor, or if distributions can only be made during the grantor's life to the grantor or grantor's spouse, a foreign trust may be treated as a grantor trust.[93] Like other NRAs, generally a foreign grantor is taxed only on FDAP and ECI income.

2. Foreign Non-Grantor Trusts.

a. U.S. beneficiaries may be subject to U.S. income tax on distributions from foreign trusts, including in some cases, loans made to them, and on income earned by controlled foreign corporations (CFCs) and passive foreign investment companies (PFICs) owned by the trust.

b. The definition of distributable net income (or DNI) for a foreign nongrantor trust includes capital gains.[94]

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[90] I.R.C. §679(a)(5).

[91] I.R.C. §684(c).

[92] I.R.C. §672(f)(1).

[93] I.R.C. §672(f)(2).

[94] I.R.C. §643(a)(6)(C).

c. Special complex income tax inclusion rules referred to as "throwback rules" also apply to certain "accumulation distributions", which are distributions in excess of DNI.[95] These rules generally require a U.S. beneficiary to include these distributions in her gross income.

H. Canadian Trusts

1. Generally. Trusts in Canada are among the least regulated planning or business vehicle. However, as discussed above, extreme care must be taken when using trusts in Canada given the significant tax consequences that arise when assets are transferred to trusts, particularly revocable trusts.

2. The types of express trusts include inter vivos (revocable and irrevocable), testamentary, charitable and unit trusts (a type of business trust used as an alternative to corporations). As discussed below, "spousal trusts" are recognized.

3. The types of implied trusts include constructive and resulting trusts. Canada also recognizes a form of trust called a "bare trust" or "nominee holdings", which is much like a nominee partnership in Colorado. Bare trusts are generally defined as a relationship in which legal title to property is held in the name of an other person purely for the convenience of the owner, where the trustee or nominee has few (or sometimes no) rights to deal with the trust property.

4. Trusts are treated as individuals in Canada for tax purposes.[96] Nonresident trusts are taxed on income earned in Canada. Resident trusts, like individual residents, are taxed on worldwide income. Testamentary trusts are taxed on the basis of a progressive marginal rate, while inter vivos trusts are taxed at the top marginal rate.

5. Canadian Revenue Agency guidance states that a trust is resident where the central management and control of the trust takes place, which is generally where the trustee resides.[97] If there is more than one trustee, the trust will be a resident of the

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[95]I.R.C. §665(b).

[96]See the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), ss. 104(2)(the "ITA").

[97]See CRA Income Tax Folio, S6-F1-C1, Residence of a Trust or Estate, http://www.cra-arc.gc.ca/tx/tchncl/ncmtx/fls/s6/f1/s6-f1-c1-eng.html

jurisdiction where the most substantial central management and control occurs. Like individuals, trusts can be a "factual resident" or a "deemed resident".

6. Beneficiaries are taxed on amounts distributable to them in the year the trust's tax year ends, not the year they actually receive the payment.[98]

7. When property is transferred to a trust, including to an inter vivos revocable trust, a deemed disposition occurs in which the transferor is deemed to have disposed of the property at its fair market value and the trust is deemed to acquire that property at that same value. As a result, the trust receives a new cost basis, but the transferor will incur a capital gain for the year of transfer.

8. Trusts that are created solely for the benefit of a spouse or common law partner that qualify as spousal trusts or common law partner trusts are exempt from both the 21 year deemed disposition rules and from the capital gains on transfer of assets to the trust if proper elections are made.

9. Canadian law generally imposes a deemed disposition rule for most trusts every 21 years, beginning on the date the trust is created. Certain exceptions to this rule apply including:

   a. "Spousal trusts" or "common law partner trusts" (which are essentially equivalent of U.S. marital deduction trusts) are generally exempt from the 21 year deemed disposition rule until the spouse's later death. These trusts defer the capital gain until the earlier of the date the trust disposes of the asset or the surviving spouse/common law partner's death.

   b. So called "alter ego trusts" established after 1999 by persons who are age 65 or older for their sole benefit and "joint spousal trusts" established for the benefit of themselves and their spouses (including common law spouses) are generally exempt from the 21 year deemed disposition rule until the settlor's death in the case of alter ego trusts, or the surviving spouse's death in the case of joint spousal trusts.

[98] Para. 104(23)(c) ITA.

c. The deemed disposition rule does not generally apply if the trust distributes its assets to Canadian resident beneficiaries. In that case, the beneficiary takes the asset at the trust's basis (i.e., carryover basis).

10. Trusts in Quebec. Prior to 1994, trusts were very limited in Quebec. However, the revised Civil Code of Quebec generally recognized trusts and expanded their use.[99] That said, the types of trusts available in Quebec and the rules governing their administration are unique to Quebec. As with all trust planning in Canada, engaging local counsel is critically important anytime residents of Quebec or those who own property in Quebec consider using trusts as part of their estate plan.

I. Mexican Land Trusts - *Fidecomisos*. There has always been uncertainty as to the necessity for the reporting of a *fideicomiso* (the Spanish word for "Trust") as a "foreign trust" under the U.S. reporting requirements. There have been PLRs and a court case, but in Rev Rul 2013-14, the IRS gave clear guidance for three specific *fideicomiso* arrangements; a U.S. single member LLC as sole beneficiary; a U.S. corporation as sole beneficiary; and a U.S. citizen. The IRS stated that under the circumstances described in the Revenue Ruling, there was no "trust" as exists under U.S. law, and therefore the *fideicomiso* is a disregarded entity under Treas Reg 301.7701-2. The Revenue Ruling described situations in which the Mexico trustee differs from what is normally considered trustee duties and powers. Those included:

1. The beneficiary can sell the trust property without trustee permission;

2. The trustee must grant a security interest in the trust property to a third person, at the request of the beneficiary;

3. The beneficiary is responsible for the payment of all liabilities related to trust property;

4. The beneficiary must pay any Mexican taxes due from the trust assets directly to the Mexican government;

[99] See Civil Code of Quebec, Title Six, Certain Patrimonies by Appropriation, Chapter II, The Trust, Article 1260 et seq.

5. The beneficiary has the exclusive right to possess and modify trust property;

6. The trustee has no duty to defend or maintain trust property, and collects a nominal fee from the beneficiary.

X. Foreign Reporting Obligations

A. Generally. Whenever assets are held outside the U.S., the practitioner should be aware that certain reporting obligations may be imposed on the taxpayer, whether the person is a U.S. citizen, resident alien or non-resident alien. In most cases, penalties can be imposed for failure to file required reports. This section highlights the most common reporting requirements, however, this area is highly technical and complex and taxpayers should be advised to obtain qualified international legal and accounting advice.

B. Reporting and Disclosure Requirements for Foreign Trusts and Beneficiaries of Foreign Trusts. A detailed discussion of foreign reporting and disclosure obligations is beyond the scope of these materials. As mentioned above, it is imperative to obtain competent tax counsel anytime there is a foreign beneficiary or foreign trust to ensure that all obligations are satisfied for all parties involved. That said, there are significant U.S. reporting and disclosure requirements imposed on settlors, trustees and beneficiaries of foreign trusts. Those obligations include, but are not limited to, annual information returns by settlors and trustees, annual returns to report transactions with foreign trusts or receipts of foreign gifts, foreign grantor trust owner statements, foreign trust beneficiary statements, appointment of a U.S. agent for tax reporting purposes, and, of course, U.S. individual income tax returns for NRAs, and U.S. fiduciary income tax returns. The penalties for failing to file or otherwise comply with the reporting obligations are significant and can be as high as 35% of the reportable amount, with additional penalties of up to $10,000 per month if filing does not occur after notice from the IRS.

C. Foreign Account Tax Compliance Act (FATCA). Requires "specified persons" to report ownership interests in "specified foreign financial assets" (SFFA) with the taxpayer's return on Form 8938, Statement of Foreign Financial Assets, if the aggregate value of all SFFAs exceeds the applicable threshholds. "Specified persons" includes U.S. citizens and residents and a limited number of nonresidents owning SFFAs. Generally, a Form 8939 is not required to be filed if the total value of all SFFAs is under $50,000 at the end of the tax year unless the total value exceeded $75,000 at any time during the year. The threshholds for married taxpayers filing jointly is doubled. Different threshholds apply to taxpayers living outside the U.S. Taxpayers not required to file a U.S. income tax return are not required to file the Form 8938. Significant penalties apply for failure to file the Form

8939. Note that this reporting obligation is in addition to the FBAR and other Fin-CIN reporting obligations.[100]

D. Fin-CIN Reports. The Financial Crimes Enforcement Network (or Fin-CEN) is a bureau of the U.S. Department of Treasury and its mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities." *See* https://www.fincen.gov/about_fincen/wwd/. Fin-CIN derives its regulatory authority from the Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of the USA PATRIOT Act of 2001 and related legislation, all of which is commonly referred to as the Bank Secrecy Act ("BSA"). The following reports must be filed with Fin-CEN:

1. Form 114, Report of Foreign Bank and Financial Accounts (FBAR). The FBAR is generally required when a "U.S. Person" has any direct or indirect interest in a "foreign financial account" including signature authority, if the aggregate value of all foreign financial accounts is in excess of $10,000 at any time during the year. "Foreign financial accounts" include bank, brokerage, securities, checking, deposit, commodities, futures and options accounts, life insurance policies with cash values and certain mutual funds or similar pooled funds which as physically located in a foreign country. "U.S. Persons" include U.S. Citizens, residents and resident entities.

a. If the assets are held with a U.S. military banking facility operated by a financial institution no FBAR is required.

b. Owners are not required to report foreign financial accounts held in an IRA or certain tax qualified retirement plans under 401(a), 403(a) or 403(b).

c. Both spouses are not required to file where accounts are owned jointly and one spouse files an FBAR returns and meets other requirements.

d. A trust is treated as an owner of an account, where a U.S. person is either (a) a grantor or (b) has an ownership interest under I.R.C. § 671-679. Additionally, trusts in which a U.S. person has a greater than 50% present interest in the assets or income of the trust for the calendar year have FBAR

[100] *See* IRS Comparison of Filing Requirements for Form 8939 and FBAR at https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

reporting obligations. However, a trust beneficiary is not required to report the trust's foreign financial accounts if the trust, trustee or agent of the trust is a U.S. person and files an FBAR disclosing the trust's foreign financial accounts.

e. This form must be filed electronically with Fin-CEN and is due June 30th of the year following the calendar year being reported. No extensions of time are available. Additionally, certain records must be kept for at least 5 years. For more information see the filing instructions at *www.bsaefiling.fincen.treas.gov/main.html*.

f. Civil penalties of $10,000 may be imposed for failure to file, but abatement for reasonable cause is available. Willful failure to file the FBAR can subject the taxpayer to a civil penalty equal to the greater of $100,000 or 50% of the balance of the account at the time of the violation, in addition to possible criminal prosecution.

2. Form 105, Report of International Transportation of Currency or Monetary Instruments. This is the anti-money laundering report required to be filed if a taxpayer physically transports, mails, ships, or causes to be physically transported, mailed or shipped in or out of the U.S., currency or other monetary instruments totaling more than $10,000 at one time. Certain recipients of those funds must also file this form.

XI. Estate Administration Considerations

A. Select Canadian Administration Issues

1. As mentioned above, although Canada imposes no transfer taxes per se, the decedent is treated as having disposed of her property immediately before death at its fair market value and having received deemed proceeds of disposition.[101] If the decedent's basis in the property is less than its fair market value, a capital gain is incurred and one-half of that gain is generally treated as taxable gain. An inflation adjusted deduction is available for limited classes of property, including qualified farm or fishing property or qualified small business corporation shares. The

[101]See CRA discussion of "deemed dispositions" at http://www.cra-arc.gc.ca/tx/ndvdls/lf-vnts/dth/dmd/menu-eng.html

available deduction in 2015 was $813,600 for qualified small business corporation shares and $1,000,000 for farm or fishing property.[102]

2. Spouses in some provinces have an "equalization claim" similar to an elective share.

3. As a civil law jurisdiction, Quebec has a distinct set of rules for estates (referred to in Quebec as "succession") and trusts. A "liquidator" is responsible for duties similar to a Personal Representative. The probate and succession process is very formal in Quebec and requires significant filings with the Court.[103]

4. Generally, there are no deductions available for funeral expenses, probate expenses or other estate administration fees on a decedent's final Canadian income tax return.

5. A request must be filed to update the decedent's records with CRA.[104]

B. Select Mexican Administration Issues. Estate administration is similar to many U.S. states, in that there is a legal representative who acts on behalf of the estate to wrap up the legal and financial affairs of a decedent, and distribute the estate assets to the appropriate recipients. Intestacy proceedings can be more expensive and by having a Mexican Will, it may be possible to avoid any formal probate proceeding, by applying the Mexican rules of civil procedure that allows a notary public to transfer the property to the person designated to receive it in the Will.

C. Foreign Death Tax Credit. The U.S. allows a credit for foreign death taxes paid.[105] Additionally, under most treaties, a foreign death tax credit is available to offset the taxes paid in a foreign jurisdiction and ensure no double taxation. Paragraph 7 of Article XXIX

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[102] *Id.*

[103] Revenu Quebec's guide "What to do in the Event of Death, 2015 Ed., provides a useful overview of Quebec specific estate administration issues and can be found at http://ftpmemoria.ca/memoria/In%20the%20event%20of%20death_2014_2015.pdf

[104] *See* CRA discussion of "What to Do When Someone Dies" at http://www.cra-arc.gc.ca/tx/ndvdls/lf-vnts/dth/menu-eng.html.

[105] I.R.C. §2014.

B of the U.S.-Canadian income tax treaty (as amended by the Third Protocol) provides that (1) Canadian taxes paid as a result of a taxpayer's death are allowed as a foreign death tax credit under I.R.C. §2014 against U.S. estate tax and (2) U.S. estate tax paid is allowed as a foreign death tax credit against Canadian income tax. Note, however, if a U.S. citizen is a resident of Canada, and her estate includes U.S. situs property, the foreign death tax credit allowed under paragraph 6 of Article XXIX B against the Canadian tax is limited to the amount of U.S. estate taxes that would have been paid if the taxpayer were not a U.S. citizen.

D. Select issues for Form 706.

1. Jointly owned property. The full value of property owned jointly with a non-citizen surviving spouse must be reported on Schedule E, Part 2 of the Form 706, unless the property originally belonged to the surviving spouse, was not acquired for less than full and adequate consideration, was acquired with the surviving spouse's assets, or was acquired by gift, bequest or inheritance as joint tenants.[106]

2. Canadian Marital Credit. Under the U.S.-Canadian treaty, a Canadian Marital Credit is allowed against U.S. estate tax for certain gifts to a surviving spouse who is a U.S. or Canadian resident the time of decedent's death.[107] The credit is included on line 15, page 1 of the Form 706 and a note stating "Canadian Marital Credit" should be added to the left of that line. To claim the benefit, the personal representative must elect treaty benefits and waive any estate tax marital deduction allowed under U.S. law. The credit is the lesser of the unified credit allowed to the estate under the treaty or the amount of U.S. estate tax that would be imposed on the transfer of the property to the surviving spouse.

3. Foreign Death Tax Credit. As discussed above, under I.R.C. §2014 a foreign death tax credit is generally available for foreign death tax paid to a foreign jurisdiction for property located in that jurisdiction. Under the U.S.-Canadian treaty, income tax paid to Canada as a result of death will be eligible for this credit. An estate claiming this benefit must complete Schedule P of Form 706 and attach a copy of Form 706-CE, Certificate of Payment of Foreign Death Tax to support the claim for the credit.

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[106]*See* I.R.M. 4.25.4.5.1 (01-06-2014) (International Estate Tax Examinations)

[107]See paragraphs 3 and 4 of Article XXIX B (Taxes Imposed by Reason of Death) U.S.-Canadian Income Tax Treaty as amended.

E. Form 706-QDT, Estate Tax Return for Qualified Domestic Trusts. This return must be filed when distributions are made from a QDOT. See general discussion of this return at section VII(E)(1), above.

F. Form 706-NA, Estate Tax Return for Non-resident Aliens. If an NRA has U.S. sited assets with a value in excess of $60,000, a Form 706-NA, U.S. Estate Tax Return for Non-resident Aliens must be filed. This is true even if a treaty benefit is available to increase the available exemption. This return reports the value of the NRA's U.S. assets and, in certain circumstances, the value of other assets if required under applicable treaties. For example, some U.S. treaties with other countries allow a NRA to be treated like a U.S. citizen, including making the estate tax exemption available to the NRA.

XII. Overview of Expatriation Rules

A. U.S. Exit Tax - I.R.C. §877A. Section 877A, also known as the Heroes Earnings Assistance and Relief Tax Act of 2008 or (HEART), significantly changed the expatriation regime by imposing an exit tax on certain covered expatriates. Under the mark-to-market rules, subject to certain exceptions, the covered expatriate is deemed to have sold all of her worldwide assets on the day prior to the expatriation date, realizing a gain on the deemed sale.[108] A covered expatriate can exclude up to $693,000 (indexed for inflation) of gain.

1. "Expatriate" for this purpose, is defined as a person who (1) renounces her U.S. citizenship (not merely someone who lives abroad); or (2) is a long-term U.S. resident (i.e., green card holders for 8 of the last 15 years) who cease to be a U.S. lawful permanent resident.

2. Section 877 applies to "covered expatriates" which the Act defines as expatriates who (1) have a net worth in excess of $2 million; (2) have an average income tax liability over the last 5 years of $161,000 (indexed for inflation);[109] or (3) fails to certify she complied with all federal tax obligations for the 5 years prior to expatriation. Exemptions exist for minors and certain dual citizens if they certify they have complied with federal tax obligations.[110]

[108] I.R.C. §877A(a)

[109] I.R.C. §§877(e)(2)(A), 877A(g)(1)(A).

[110] I.R.C. §877A(g)(1)(B).

3. An election can be made to defer the mark-to-market tax until the date the property is sold provided the taxpayer provides "adequate security" and irrevocably waives any treaty benefits that would prevent assessment of tax by the U.S.[111]

4. Certain eligible "deferred compensation items" are taxed when the assets are received and are subject to a 30% withholding requirement.[112]

5. "Specified tax deferred accounts" (e.g., IRAs and certain education and health savings accounts) are treated as having been distributed in full on the day before expatriation.[113]

6. Trustees are required to withhold 30% from any "taxable portion" (that portion of the trust that would have been taxable if the expatriate had not expatriated) of a distribution to a covered expatriate from a nongrantor trust.[114] Distribution of appreciated property is treated as a sale to the expatriate. Note that these rules apply to both U.S. and foreign trusts if the expatriate was not the grantor for tax purposes.

7. All extensions of time or deferrals previously granted to the expatriate are terminated as of the day before the expatriation date.[115]

B. Succession Tax - I.R.C. §2801. Section 2801 generally imposes a succession tax on U.S. persons who receive a "covered gift or bequest" from a "covered expatriate" as defined in

[111] I.R.C. §877A(b).

[112] I.R.C. §877A(c-d).

[113] I.R.C. §877A(e).

[114] I.R.C. §877A(f).

[115] I.R.C. §877A(h).

Section 877A.[116] Unlike the estate and gift tax, the tax under Section 2801 is required to be paid by the recipient (donee).[117]

1. Exceptions to the definition of "covered gift or bequest" include gifts covered by the annual exclusion under I.R.C. §2503(b),[118] taxable gifts reported on a U.S. gift tax return and property included on a U.S. estate tax return,[119] and gifts or bequests that qualify for the marital or charitable deduction.[120]

2. Special rules apply to covered gifts and bequests made to trusts. The succession tax on gifts to a domestic trust are paid by the trust. However, the succession tax on gifts to a foreign trust is applied when a U.S. person receives a distribution attributable to a transfer from a covered expatriate.[121] A foreign trust may elect to be treated as a domestic trust for purposes of Section 2801.

XIII. Planning and Drafting Tips and Common Pitfalls

A. General Preliminary Tips

1. Clients from foreign backgrounds may have very different attitudes about estate planning and be reluctant to share information about their worldwide assets, and in some cases may have a very justified fear of the government and the security of their property. Don't overlook the need to have a candid conversation regarding reporting rules, attorney/client priviledge and the need for accurate information about a client's assets and family issues that will impact the overall plan. It is not unusual for a client to have a poor or inaccurate understanding of their own tax status, both for U.S. law and the laws of another country. Be sure to discuss the complexities involved in analyzing the issue of "residence" as well as "domicile" and how those distinctions overlay the estate plan.

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[116] I.R.C. §2801.

[117] I.R.C. §2801(b).

[118] I.R.C. §2801(c).

[119] I.R.C. §2801(e)(2).

[120] I.R.C. §2801(e)(3).

[121] I.R.C. §2801(e)(4).

2. Always, always, always consult qualified foreign counsel regarding the validity, effect and tax implications of U.S. planning, particularly when using trusts in the jurisdiction where the client holds citizenship or resides, or where property is sited. In Canada in particular, transfers to most revocable and irrevocable trusts trigger a deemed disposition and capital gain. Additionally, transfers of Canadian sited assets via a pourover will to a revocable trust will likely not be recognized as valid. Review the issues and questions listed in the beginning to this outline.

3. When planning, consider use of a "situs will" to dispose of foreign assets, and consider any forced heirship rules, spouses's elective share or other marital rights.

4. Review any applicable treaty with the foreign jurisdiction to understand modifications to situs and tax rules.

5. Consider tax consequences and planning opportunities that arise when a person changes citizenship or residency. For example, NRAs should consider making large gifts of non-U.S. sited assets before establishing domicile in the U.S. However, care must be taken not to unnecessarily subject the assets to U.S. estate tax in the beneficiary's estate. Similarly, U.S. citizens and residents who plan to emigrate from the U.S. should consider making gifts of U.S. situs assets to use their remaining gift tax exclusion amount.

6. U.S. citizens and residents who plan to emigrate from the U.S. should consider and plan for the impact of the U.S. exit tax.

7. Ensure clients are aware of their reporting and disclosure obligations and strongly advice they consult with competent tax counsel to avoid penalties.

8. For NRAs with U.S. beneficiaries, there are a number of planning opportunities.

   a. Gifts of intangibles are not subject to U.S. gift or GST tax, making them attractive assets to use in funding a dynasty trust.

   b. NRAs should consider giving tangible personal property outside of the U.S. prior to becoming a U.S. resident, as those made in the U.S. are subject to gift tax.

B. Common Pitfalls

1. Failing to read the treaty between the U.S. and the foreign jurisdiction to determine how treaty provisions impact the estate plan or exemption available. Some treaties offer not only a foreign death tax credit but will treat the NRA as if she were a U.S. citizen or resident, providing the NRA with a significantly increased estate tax exemption (e.g., the U.S.-U.K. treaty).

2. Assuming an income tax resident is a NRA for transfer tax purposes. Residency for income tax purposes is not determined under the same test as domicile for estate tax purposes. It is possible for a U.S. green card holder to be a U.S. income tax resident but not a domiciliary of the U.S. for estate and gift tax purposes if her ties to her home country are stronger than U.S. ties and she has no intent to remain in the U.S. indefinitely.

3. Making lifetime gifts to non-citizen spouses in excess of the available marital deduction, including joint tenancy real property.

4. Gifts to a trust by a NRA may have beneficial tax treatment, but if the grantor immigrates to the U.S. within five years, the income from the trust will be attributed to the grantor of the trust, if the trust has U.S. resident or citizen beneficiaries.[122]

5. Holding oneself out as knowledgeable of laws in a foreign jurisdiction when not licensed to practice there. This presents both potential unauthorized practice of law issues and malpractice issues. The practitioner may identify potential international issues but should always seek the advice of (or advise client to seek the advice of) local counsel.

6. Accidentally revoking wills in other jurisdictions or not revoking those wills but creating will with conflicting provisions.

7. Using a revocable trust as part of an estate plan involving a Canadian or Canadian property. In Canada, a gift in a "pourover" will to a revocable trust will be invalid

[122] IRC 679(a)(4).

in all Canadian jurisdictions if the trust can be amended after the Will's execution in a manner other than by a codicil or will. Thus, the gift will be ineffective. Additionally, because the trust does not arise at the time of death, the foreign death tax credit will be inapplicable.

8. Failing to recognize filing and disclosure requirements in the U.S. for clients with international ties.

C. General Drafting Tips and Considerations. When drafting estate planning document for the international client, the practitioner should consider the following:

1. Include a nonrevocation provision. Accidental revocation of foreign estate planning documents is one of the most common errors. Any language in U.S. documents that purports to revoke all prior wills, powers of attorney or other planning documents should be closely examined to determine whether it should be either amended or deleted entirely if documents in other jurisdictions exist and the client intends they remain in effect. Ask the client whether they have a will in a foreign jurisdiction. If situs wills are used, the U.S. will should either specifically refer to the foreign will (including its date) and state that it is not revoking that specific will; or alternatively, restrict the application of the will to only those assets sited in the U.S. and specifically state that it is not revoking any other will in any other jurisdiction. The latter is more common practice.

2. Consider the effect of the statement of testator's residency. It is commonplace for U.S. wills and other estate planning documents to state where the testator or principal resides, therefore careful consideration of this issue is needed when dealing with an international client. Some practitioners recommend that no statement of residency be made to allow the client (or her estate) more flexibility in determining residency at a later time. Others, the authors included, use this section of the documents to clarify and affirmatively state the client's intent with regard to her residency status. For example, for a client who is not a resident alien and does not wish to become one, the phrase might read "Client A, a citizen of Canada, temporarily residing Aspen, Colorado while on a work assignment" or "temporarily sojourning in Aspen, Colorado." If a client intends to be a U.S. resident, the residency phrase might instead read "Client A, a citizen of Canada and permanent resident in the United States, residing in Aspen, Colorado."

3. Tax Apportionment, Source of Payment and Payment of Claims and Expenses. Where a client will use more than one will, it is particularly important to consider whether the tax apportionment clause used in the U.S. will adequately allocates tax

liability and whether the fiduciary responsible for paying the tax will have sufficient assets to do so, or have sufficient authority to insist on contribution from a foreign fiduciary. A pay from the residue clause in a U.S. will, for example, may result in inequitable tax allocations if a significant portion of the decedent's assets pass outside the U.S. will. If possible, the practitioner should coordinate with local counsel to estimate the tax to be paid in all jurisdictions and determine the most appropriate source of payment, ensuring that the fiduciary responsible for payment can obtain contribution from foreign estates where necessary. Similarly, it may be helpful if the fiduciary responsible for paying claims and expenses is authorized to require certification from the foreign executor as to those items.

4. Coordinating Beneficiaries and Beneficiary Designations. If assets pass to beneficiaries outside the U.S. will whether by a situs will, succession laws or beneficiary designation to persons other than those designated in the U.S. will, it is important to periodically review those dispositions to ensure the client's intent is carried out. For example, if a client leaves certain real property in a foreign jurisdiction to one beneficiary under a situs will, but later sells that property, the sales proceeds may be sited in another jurisdiction and pass under a different will to the exclusion of the original beneficiary.

5. Definitions of Terms. If a single will is used, it is important to clearly define important terms such as "spouse", "children", "descendants" in the will so that the client's intent is clear. The law in a foreign jurisdiction may greatly restrict or broaden terms routinely used in the United States if the will is silent as to a term's definition. Additionally, with respect to spouses, it can be useful to add a statement to the effect that the person who is defined as a spouse should be considered a spouse for all purposes in the Will, in the event that local law would not treat the person as a spouse. This is particularly important for same-sex couples, whose marital status may not be recognized worldwide, or for persons whose divorce may not be recognized in one jurisdiction and thus a subsequent marriage deemed invalid.

6. Capacity. Consider whether the testator has capacity to make a will, including the minimum required age and any restrictions imposed under religious law.

7. Tax Consequences. Always be mindful of the potential tax consequences of transfers during life and at death, the transferor and the transferee, domestically and in the foreign jurisdiction. In particular, consider the impact, both positively and negatively, of trusts in an estate plan.

XIV. List of Exhibits

Exhibit 1: The Convention between Canada and the United States of America with Respect to Taxes on Income and Capital, signed on September 26, 1980, as amended by Protocols signed on June 14, 1983, March 28, 1984, March 17, 2995, July 29, 1997 and September 21, 2007.

Exhibit 2: The Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed on September 18, 1992, as amended by Protocol signed on September 8, 1994 and November 25, 2002.

Exhibit 3: United States Estate and Gift Tax, An Overview for the International Executive, by John L. Campbell.

Exhibit 4: Canadian Revenue Agency publication, “What to do following a death”