# ADMINISTRATION OF THE ESTATE WITH CROSS BORDER ISSUES

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State Bar of Texas
**38TH ANNUAL**
**ADVANCED ESTATE PLANNING & PROBATE COURSE**
June 10 - 12, 2014
San Antonio

**CHAPTER 33**

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## LEGAL EXPERIENCE

***ScottHulse PC*, El Paso, Texas and Las Cruces, New Mexico**.
Shareholder – January 2001 to present; Associate – September 1995 to December 2000.
Practice includes estate planning, asset protection, probate and contested estates. Experience includes eleven years of pure trial practice in employment, commercial and general litigation. Licensed in Texas and New Mexico and admitted to the federal courts in the Western District of Texas, the District of New Mexico and the United States Court of Appeals for the Fifth Circuit.

***United States District Court for the Western District of Texas*, El Paso, Texas.**
Law Clerk for Chief Judge Harry Lee Hudspeth – August 1994 to August 1995.

***Supreme Court of the State of Texas*, Austin, Texas.**
Intern for Justice Lloyd Doggett – January 1994 to May 1994.

## ARTICLES AND SPEECHES

- Author and Speaker: 21st Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *The Nuts and Bolts of a New Mexico Will*, October 24-25, 2013, Las Cruces, New Mexico.
- Author and Speaker: Houston Attorneys in Tax and Probate Luncheon. *International Estate Planning*, March 5, 2013, Houston, Texas.
- Author and Speaker: El Paso Estate Planning Council Luncheon. *Business Succession Planning*, December 19, 2012, El Paso, Texas.
- Author and Speaker: 20th Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *A Stroll Through the Uniform Probate Code*, November 1-2, 2012, Las Cruces, New Mexico.
- Author and Speaker: 19th Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *Business Succession Planning*, November 3-4, 2011, Las Cruces, New Mexico.
- Speaker: 2011 Southwest Regional Conference. American Society of Women Accountants. *Estate and Trust Accounting Under the Uniform Probate and Trust Codes*, May 20, 2011, Las Cruces, New Mexico.
- Author and Speaker: 2011 Tax Considerations in Estate Planning Course. State Bar of New Mexico. *The Federal Estate Tax – A Primer*, April 27-28, 2011, Albuquerque, New Mexico.
- Course Director and Speaker: 2nd through 7th Annual New Mexico State University Estate Planning Conference for Women, 2009 – 2014, Las Cruces, New Mexico.
- Speaker: 2011 UTEP Estate Planning Conference for Women. *Legal and Practical Aspects of Estate Planning*, January 27, 2011, El Paso, Texas.
- Speaker: UTEP Women's Estate Planning Conference Reunion. *Estate Planning Uncertainty: Planning in the Shadows of 2010 & 2011*, December 9, 2010, El Paso, Texas.
- Author: "Key Points as EGTRRA's Sunset Looms", Texas Lawyer, Vol. 26, No. 34 (November 22, 2010).
- Author and Speaker: 18th Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *Planning in Uncertain Times: Bypass (or Credit Shelter) and Marital Deduction Trusts in 2011 and Beyond*, November 4-5, 2010, Las Cruces, New Mexico.
- Author and Speaker: 2010 Advanced Estate Planning and Probate Course. State Bar of Texas. *International Issues in Estate Administration*, June 22-24, 2010, San Antonio, Texas.
- Speaker: El Paso Chapter, Texas Society of CPAs. *Estate Planning for 2010 & Beyond, or Be Careful of What You Wish for*, April 27, 2010, El Paso, Texas.

- Author and Speaker: 2009 Advanced Drafting: Estate Planning & Probate Course. State Bar of Texas. *Drafting for Non-Citizens and Non-Residents*, October 29-30, 2009, Dallas, Texas.
- Author and Speaker: 16th Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *Planning with Irrevocable Life Insurance Trusts*, November 6-7, 2008, Las Cruces, New Mexico.
- Author and Speaker: 19th Annual Advanced Drafting: Estate Planning and Probate Course. State Bar of Texas. *Drafting for the Settlement of Estates and Trusts*, October 30-31, 2008, Austin, Texas.
- Author and Speaker: 15th Annual Estate Planning Institute. Community Foundation of Southern New Mexico. *Advanced Planning Techniques with Incapacity in Mind*, November 1-2, 2007, Las Cruces, New Mexico.

## EDUCATION

***University of Texas School of Law***, J.D. with honors, Order of the Coif – May 1994.

***Texas A & M University***, B.A. in Economics, *magna cum laude* – May 1990.

## AWARDS AND CIVIC AND RELIGIOUS INVOLVEMENT

- *38th Annual Advanced Estate Planning and Probate Course Planning Committee*. State Bar of Texas. Member – 2014.
- *State Bar of New Mexico, Real Property, Trust and Estate Section Board of Directors*. Budget Officer – 2011 to 2013, *Member* – 2011 to 2013.
- *Southern New Mexico Estate Planning Council.* President – 2011 to 2012, 1st Vice-President – 2010 to 2011, Member – 2006 to present.
- *El Paso Estate Planning Council.* Board Member – 2014 to present, Member – 2005 to present.
- *Rio Grande Professional Advisor of the Year.* Community Foundation of Southern New Mexico. April 2009.
- *20th Annual Advanced Drafting: Estate Planning and Probate Course Planning Committee*. State Bar of Texas. Member – 2009.
- *17th – 22nd Annual Southern New Mexico Estate Planning Institute Planning Committees.* Community Foundation of Southern New Mexico. Member – 2009 to present.
- *Leadership El Paso Class XXIX*, The Greater El Paso Chamber of Commerce, El Paso, Texas. Participant – 2007.
- *Insights El Paso Science Museum*, El Paso, Texas. Board Member – July 2006 to May 2008; Vice President – June 2004 to June 2006; Board Member – June 2002 to June 2004.
- *Beth El Bible Evangelical Free Church*, El Paso, Texas. Elder – December 2001 to May 2008; Member – 1995 to present.

## FAMILY

Married to Laura Davis with five daughters: Emma (14), Audrey (12), Camille (10), Julia (10) and Charlotte (4).

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# ADMINISTRATION OF THE ESTATE WITH CROSS BORDER ISSUES

## I. INTRODUCTION

### A. The Problem

Our nation has always been one of immigrants and continues to be so. It also has become a haven for temporary visitors who come to the U.S. for education, work under temporary visas or even investment purposes. Foreign investment in the U.S. also continues to be quite strong. All of these people acquire property in the U.S., and, many times, also have property in their country of origin. At the same time, many U.S. persons acquire property or invest in other countries.

A person's ownership at death of property located in both the U.S. and abroad can raise several different issues during administration of the estate. The types of problems raised in a particular estate generally depend on a variety of factors, including the decedent's domicile, the validity of any wills, and the decedent's residency/citizenship status.

Texas attorneys who practice probate law should be able to assist non-domiciliaries in probating their foreign wills in Texas and administering ancillary estates. They also should be at least familiar with the special issues surrounding non-citizens owning property in the U.S. Regardless of whether the non-citizen has a taxable estate, special care should be taken to address the unique issues facing the estate. The issues only become more complicated if the estate is potentially subject to U.S. taxation. Further, the mere ownership of real estate in the U.S. almost always causes estate tax problems for non-residents.

### B. Scope of Paper

The goal of this paper is to explore those issues that arise in the administration of an estate with international contacts. The first part of the paper will focus on the administration in Texas of those estates of persons domiciled elsewhere. The paper will discuss both intestate and testate estates. The second part of the paper will then discuss the federal tax implications facing estates with international contacts. The paper does not, however, address tax implications under the Foreign Account Tax Compliance Act and other U.S. law for U.S. persons who make transfers to foreign trusts, or for U.S. persons who receive benefits from a foreign trust, as these issues would constitute a substantial paper in their own rights.

## II. ESTATE ADMINISTRATION

The legal framework for the administration of estates in general has been the topic of many papers in the past. This paper will therefore focus on the Texas Estates Code's framework for estates of persons who die abroad[1] and who owned property located in Texas.

### A. Domicile.

One's domicile at death is a central issue under the Texas Estates Code. For example, proper venue is dependent on one's domicile. *See* TEX. EST. CODE § 33.001 (proper county of venue dependent on the deceased's domicile). Further, whether a will is a "foreign will" and should be probated as such depends solely on whether the decedent was domiciled in Texas at death. *See id*. § 501.001 (equating a "foreign will" with the will of a testator who was not domiciled in Texas at the time of death).

Under Texas law, one's domicile is synonymous with one's fixed place of residence. *Maddox v. Surber*, 677 S.W.2d 226, 228-29 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also* TEX. EST. CODE § 33.001(1) (venue proper in the decedent's county of "domicile or fixed place of residence"). An individual's domicile is where the individual has an actual place of residence and an intention to make that residence his or her home. *In re Graham*, 251 S.W.3d 844, 850 (Tex. App.—Austin 2008, orig. proceeding); *In re Steed*, 152 S.W.3d 797, 804 (Tex. App.—Texarkana 2004, pet. denied). The length of time the decedent resided in a place is not relevant if the decedent had intended to make the place his or her domicile. *Maddox*, 677 S.W.2d at 229. Rather, the salient factors are "the actual fact as to the place of residence and [the] decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct." *Graham*, 251 S.W.3d at 850 (quoting *Texas v. Florida*, 306 U.S. 398, 425 (1939)). One does not change domicile until he or she actually leaves the domicile with an intent not to return. *Id*. at 851. Furthermore, one can only have a single domicile or fixed place of residence at any one time, even if the person might own several homes in which he or she spends a significant amount of time. *Steed*, 152 S.W.3d at 803. Finally, one's domicile does not necessarily change when a person is moved from one location to another for medical care after becoming incapacitated. *Thomas v. Price*, 534 S.W.2d 730, 733 (Tex. Civ. App.—Waco 1976, no writ) (decedent's domicile remained in county where he had lived when adjudged insane, despite residing in an institution in another county for 42 years).

The law of domicile can lead to some interesting results. For example, a will that most people would consider to be a foreign will actually might be a

[1] The Texas Estates Code does not make a distinction between persons domiciled in another U.S. state as compared to another country. If one dies outside of Texas, he or she died in a foreign land as far as the Texas law is concerned.

domestic will. Consider a person domiciled in India who executes a will written in Hindi under Indian law. If that person then moves to and establishes domicile in Texas, but never executes a new will, the Indian will would be magically transformed into a domestic will despite the circumstances of its execution.

A form of the converse is true as well. A common practice among estate planners is to have clients who own property in Texas and abroad execute two wills. *See, e.g.*, Chapter 5.2, Charles M. Hornberger, "Estate Planning for Resident Non-Citizens and Non-Resident Aliens", 14th Annual Advanced Estate Planning Strategies Course (April 2008). One of the wills is for the client's property in Texas, while the second is for the property located in the foreign nation. If the client is domiciled in the foreign nation, the will written for the Texas property actually is a foreign will despite that it was written with Texas law in mind.

The case of *In re Graham* illustrates the types of facts a court might consider in a domicile determination under the Estates Code. *Graham* was a mandatory venue case in which venue was originally set in Tom Green County based on a bald assertion that the decedent was domiciled in the county. *Graham*, 251 S.W.3d at 847. Some facts suggested that Tom Green County was the decedent's domicile. For example, she maintained a mailing address in the county for her bank account statements, driver's license and general business correspondence. *Id*. at 849. She also was registered to vote in Tom Green County. *Id*. Finally, the decedent's Will, which was executed thirteen years before her death, stated Tom Green County was her domicile. *Id*. at 851; *cf. McKinney v. Hair*, 434 S.W.2d 217, 218 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (declarations in a will as to the testator's residence "ordinarily carry great weight, and will be accepted *in the absence of a showing of change of residence before death*") (emphasis supplied).

The decedent in *Graham*, however, actually lived in an apartment located in Travis County where she also entertained guests and maintained a garden. *Graham*, 251 S.W.3d at 850. The decedent also stored her personal possessions and conducted day to day activities in Travis County. *Id*. at 851. The address in Tom Green County, by contrast, was a commercial office used by several members of the decedent's family for business purposes. *Id*. at 850.

The court found that the decedent's use of an address in Tom Green County for purposes of her business correspondence, driver's license and voter's registration "merely amount[ed] to conclusory statements that conflict[ed] with the facts of her actual residence". *Graham*, 251 S.W.3d at 851. The other facts, i.e., the place where the decedent slept, entertained guests, stored her personal possessions and conducted day to day activities, conclusively established domicile in Travis County. *Id*.

From a practical standpoint, however, the ruling in *Graham* and other cases determining domicile might seem to have little effect because the issue is so rarely raised. For example, the author is aware of a group of U.S. expatriates who reside in Mexico, but "maintain" a domicile in a certain east Texas county. These expatriates keep a mailing address for business correspondence in Texas, and provide this address for their Texas driver's licenses and Texas voter's registrations. Yet, they reside in Mexico or other places and maintain little contact with the east Texas county. *Graham* seems directly on point: the very facts on which the expatriates rely were held to be conclusory and no evidence of domicile. But if no one objects to venue, the cases can proceed to probate with little difficulty.

The problem with such a cavalier approach to the law of domicile is that the approach seems to cross the line set out by Rule 13 of the Texas Rules of Civil Procedure. Rule 13 states, in relevant part, that an attorney's signature on a pleading:

> constitutes a certificate by [the attorney] that [he or she] has read the pleading … [and] that to the best of [the attorney's] knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith.

TEX. R. CIV. P. 13. Any reasonable inquiry into the facts surrounding domicile under the above described circumstances would seem to lead to the conclusion that domicile was somewhere other than Texas.

The cavalier approach also is unnecessary. As will be seen below, a foreign will, that is the will of a person domiciled outside of Texas at death, can be probated in Texas in the same manner as the will of a person domiciled in Texas as long as the will affects property located in Texas. *See* TEX. EST. CODE § 502.001.

## B. Conflict of Laws

Estates with international contacts also raise potential conflict of laws issues. The Texas court hearing such a case may be called upon to decide which jurisdiction's law to apply: the law of the decedent's domicile or Texas law. As far as Texas law is concerned, the answer depends on whether the property is real property or personal property.

### 1) Law of Situs or Law of Domicile

#### a) *Governing Law for Real Property*

Texas law governs real property located in Texas regardless of the decedent's domicile at the time of death. *Toledo Soc. for Crippled Children v. Hickok*,

152 Tex. 578, 585-86 (1953) (Texas courts have "ultimate power over land situated within [this] state"); *Haga v. Thomas*, 409 S.W.3d 731, 736 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *Owen v. Younger*, 242 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1951, no writ). Moreover, "the Legislature of one state has no power to confer jurisdiction over property situated in another state." *De Tray v. Hardgrove*, 52 S.W.2d 239, 240 (Tex. Comm'n App. 1932); *Haga*, 409 S.W.3d at 736. The law of the situs governs disposition of real property located in Texas in all respects, even whether a foreign will is valid with respect to the real property. *Crossland v. Dunham*, 135 Tex. 301, 140 S.W.2d 1095, 1097 (1940); *Haga*, 409 S.W.3d at 736; *Owen*, 242 S.W.2d at 897. The *Crossland* court stated:

> But in respect to the real property of the testator, the place where the property is situated is to govern, not only as to the capacity of the testator and the extent of his power to dispose of the property, but as to the forms and solemnities to give the will its due attestation and effect.

*Crossland*, 140 S.W.2d at 1097.

One should be careful relying on the breadth of these cases regarding Texas real property, however. All of the above cited cases were decided before the adoption of the former Probate Code in 1956, with the sole exception being the *Haga* case decided in 2013. Before the Probate Code was adopted, former TEX. REV. CIV. STAT. art. 3352 governed Texas' acceptance of wills probated in another state or country. It stated that "the validity of [the foreign] will may be contested in the same manner as the original might have been." TEX. REV. CIV. STAT. art. 3352 (repealed eff. Jan. 1, 1956). In contrast, both former Probate Code § 100 and current Estates Code § 504.001(b) significantly limit the grounds upon which a will probated in the decedent's domicile may be contested. For example, and effective upon the adoption of the Probate Code in 1956, one may no longer contest such a will based upon the testator's incapacity. TEX. EST. CODE § 504.001(b); TEX. PROB. CODE § 100(a) (repealed eff. Jan. 1, 2014). Rather, one must go to the testator's domicile and contest the will there. *Id*. Further, if the foreign will was denied probate in the testator's domicile, that rejection also is binding on Texas courts, unless the wil was invalidated for a reason that would not invalidate it in Texas. TEX. EST. CODE § 504.053. On the other hand and with respect to wills probated in a jurisdiction other than the decedent's domicile, the older cases still have full force. *See id*. § 504.002 (a will probated in a jurisdiction other than the decedent's domicile may be contested on any ground).

Nevertheless, the older cases still provide guidance with respect to the construction of foreign wills and the application of Texas law to devises of Texas real property. The *Hickok* case is particularly instructive because of its result. The decedent was domiciled in Ohio and executed a will shortly before his death that gave the residue of his estate to a charitable remainder trust. *Hickok*, 152 Tex. at 580-81. An Ohio statute, however, invalidated all charitable gifts included in wills that were executed within one year of death. Based on this law, the Ohio Supreme Court held that the charitable remainder gift was invalid and that the trust remainder would instead pass by intestacy. *Id*. at 581.

The question for the Texas Supreme Court was whether the Ohio judgment also applied to real property located in Texas. *Hickok*, 152 Tex. at 583-84. It did not. Rather, Texas law applied to the devise of Texas real estate. *Id*. at 585-86. The effect of the holding was to validate a foreign will with respect to property in Texas despite that the will was invalid under its domestic law.

Similarly, the *Haga* case illustrates that the law of the situs controls construction of a will and applies to events that arise after execution of the will but before the testator's death. The decedent in *Haga* was married at the time he executed his will, which gave his estate to his wife, and alternatively, to his step-son. *Haga*, 409 S.W.3d at 733. By the time the decedent died, however, the decedent had both divorced and moved to North Carolina. *Id.* The decedent also died owning personal property located in North Carolina and real property in Texas. *Id.* at 738.

The decedent's will was originally probated in North Carolina and submitted for ancillary probate in Texas under former Probate Code Section 95 (now TEX. EST. CODE Chapt. 501). *Haga*, 409 S.W.3d at 737. A dispute arose between the decedent's heirs and the former step-son because North Carolina law apparently did not automatically revoke gifts to family members of a divorced spouse while Texas law did. *Id.* at 733. The court held that the North Carolina court lacked jurisdiction to construe the will so far as it related to the real property located in Texas. *Id.* at 737. Rather, only a Texas court had such jurisdiction. *Id.* at 737-38.

That the law of situs generally governs the construction of a foreign will, even one that has been probated in the testator's domicile, raises some interesting issues for Texas lawyers drafting wills that dispose of real property located in another jurisdiction. Consider the farmer of the Rio Grande valley north of El Paso, whose farm straddles the Texas/New Mexico border (because the river has moved over the years, the boundary between the states most of the time is found on usable land and regularly splits houses in two). Also consider that the farmer executes a will that contains a specific gift of the farm to his son, with the

residue to his daughter. Subsequently, the farmer sells a portion of the farm that also straddles the border to a developer in exchange for cash and a long term promissory note. Then, as all people eventually do, the farmer dies. What does the son inherit and what does the daughter inherit?

Under Texas law, the sale of the real property in Texas adeemed the specific devise at least to the extent of the property sold. *See San Antonio Area Foundation v. Lang*, 44 Tex. Sup. Ct. J. 57, 35 S.W.3d 636, 642 (2000). Consequently, the proceeds of the sale of the Texas real property would pass as part of the residue. *Id.* But New Mexico law (and the other 17 jurisdictions that have adopted the Uniform Probate Code) has a non-ademption statute. *See* NM STAT. ANN. § 45-3-606. Under this statute, the specific devisee generally is entitled to the sales proceeds and the promissory note related to the sold New Mexico real property. If New Mexico law governs construction of the will so far as it relates to real property located in New Mexico, then it seems the specific devise of the real property was not adeemed and the son would be entitled to the sales proceeds, at least to the extent they were related to the sale of the New Mexico property. This analysis then runs right into the fact that Texas law governs personal property. See the discussion in the next subsection regarding the law governing personal property. Perhaps in this situation, Texas law would trump because the promissory note and cash clearly are personal property.

Regardless of the outcome, the hypothetical illustrates the point. It can be dangerous for a Texas lawyer to draft a will conveying real property located in another jurisdiction because Texas law does not necessarily control.

b) *Governing Law for Personal Property*

In contrast to the rules regarding Texas real property, the law of the decedent's domicile at death governs the disposition of personal property wherever it might be located. *Crossland*, 140 S.W.2d at 1097 ("the law of the actual domicile of a testator is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country"); *Haga*, 409 S.W.3d at 736; *In re Garcia-Chapa*, 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.) (dicta, the court would have applied Mexican law to dispute regarding a Mexican domiciliary's ownership of U.S. bank deposits located in Texas if the claimant would have properly presented Mexican law to the trial court); *Ossorio v. Leon*, 705 S.W.2d 219, 222-223 (Tex. App.—San Antonio 1985, no writ) (applying a most significant relationship test to determine ownership of certain bank deposits in Texas and determining Mexican law governs because of domicile); *Van Hoose v. Moore*, 441 S.W.2d 597, 617 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.) (domiciliary law governs construction of will as it relates to personalty); *Owen v. Younger*, 242 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1951, no writ) ("It is now the well settled doctrine that the law of the actual domicile is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country."). Similarly, the law of the domicile governs the interpretation of a testamentary trust. *Lanius v. Fletcher*, 100 Tex. 550, 553 (1907).

Similar rules apply to the questions of community property and separate property when one spouse dies. For probate and intestacy purposes, Texas law recognizes the law of the "matrimonial domicile" at the time the property is acquired as governing the rights of the spouses. *Estate of Hanau v. Hanau*, 30 Tex. Sup. Ct. J. 442, 730 S.W.2d 663, 665 (1987) (in the context of a will); *Oliver v. Robertson*, 41 Tex. 422, 425 (1874) (real property); *McClain v. Holder*, 279 S.W.2d 105, 107 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.) (in the context of intestacy). Therefore, if the source of the funds to purchase the Texas property was the separate property of the decedent based upon the law of the matrimonial domicile at the relevant time, then the Texas property will continue to be the separate property of that spouse. On the other hand, if the funds were community property, the Texas property will likewise be community property at death.

In summary, Texas law will apply to most questions regarding real property located in Texas. Texas law also will apply to the personal property of a person domiciled in Texas at the time of death, regardless of where the property is located. (Of course, a foreign country might not agree with respect to personal property located in that country.) The law of the decedent's domicile, on the other hand, will control the disposition of personal property located in Texas if the decedent was domiciled elsewhere at the time of death. These rules seem to be generally accepted across the U.S. *See* Restatement 2d, Conflict of Laws §§ 236 (intestate succession – real property), 239 (validity and effect of will on real property), 240 (construction of will relating to real property), 260 (intestate succession – movables), 263 (validity and effect of will on movables), and 264 (construction of will relating to movables); 16 AM. JUR. 2d Conflict of Laws § 51.

2) Real Property or Personal Property

As discussed above, whether property is classified as real property or personal property is important when the decedent died while domiciled outside of Texas. The Estates Code provides a definition for both types

of property, which provides some, but not exhaustive, guidance as to whether a particular asset is real or personal.

The term "real property" is defined to include "estates and interests in land, whether corporeal or incorporeal or legal or equitable." TEX. EST. CODE § 22.030. The term does not, however, include real chattel[2]. *Id*. "Corporeal" means "having a physical, material existence; tangible." BLACK'S LAW DICT. 153 (3d pocket ed. 2006). Conversely, "incorporeal" means "having a conceptual existence but no physical existence; intangible." *Id*. at 350. A "chattel real" is an interest in land less than a freehold, such as a grant for a term of years or a lease. *See Robertson v. Scott*, 141 Tex. 374, 172 S.W.2d 478, 478 (1943) (a leasehold is a chattel real); *also see* 28 AM. JUR. 2d Estates § 131 (grants for term of years); 59 TEX. JUR. 3d Property § 4 (same). Real property also generally includes all rights and profits arising from and annexed to the land that are of a permanent and immovable nature. 59 TEX. JUR. 3d Property § 4.

The Texas Supreme Court considers the meaning of "real property" to have "a settled legal meaning" in the context of will construction suits. *San Antonio Area Foundation v. Lang*, 44 Tex. Sup. Ct. J. 57, 35 S.W.3d 636, 640 (2000). The court defines "real property" as used in Texas wills, to mean "land, and generally whatever is erected or growing upon or fixed to land." *Id*. Consequently, a gift of certain real property did not include certain promissory notes, net profit agreements, and cash in reserve accounts held in connection with a real estate development and associated with the real property in question. *Id*.

"Personal property," on the other hand, is defined in the Estates Code to include interests in goods, money, choses in action, evidences of debt, and real chattels. TEX. EST. CODE § 22.028. A "chose in action" merely is a right to damages arising from the commission of a tort, an omission of a duty, or the breach of a contract. 7 TEX. JUR. 3d Assignments § 1; 59 TEX. JUR. 3d Property § 1. A "real chattel," as discussed more fully above, is an interest in land such as a grant for a term of years or a lease. *See Robertson*, 172 S.W.2d at 478 (leasehold); *see also* 28 AM. JUR. 2d Estates § 131 (grants for term of years); 59 TEX. JUR. 3d Property § 4 (same). By statute, interests in Texas legal entities also are personal property. *See* TEX. BUS. ORG. CODE §§ 21.801 (stock in corporations), 101.106(a) (membership interests in limited liability companies), 154.001(a) (partnership interests in general and limited partnerships), and 201.153(1) (interests in real estate investment trusts).

Some types of tangible property have a dual character, depending on whether the property has been detached from the land. For example, crops and timber, while growing, are considered to be part of the underlying real property. The owner may sever the growing crops or trees, however, by contract, such that the crops and trees become transformed into personal property. 59 TEX. JUR. 3d Property § 6. Minerals in place also are considered real property. 51 TEX. JUR. 3d Mines & Minerals § 4. They too can be transformed into personal property by severing them by contract or extracting them. *Id*.

3) Proof of Foreign Law

Under the conflict of laws principals discussed above, foreign law will become relevant in a Texas probate proceeding only when administration of personal property located in Texas is necessary. If foreign law does become relevant, the proponent must keep in mind the proper method for establishing that law. *See Exxon Corp. v. Breezevale, Ltd*., 82 S.W.3d 429, 437 (Tex. App.—Dallas 2002, pet. denied) ("If a party fails to give notice and prove foreign law as provided by the rule [of evidence], the foreign law may not be applied."); *see also Pennwell Corp. v. Ken Assocs*., 123 S.W.3d 756, 761 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (failure to provide sufficient information as to how the foreign law differed from Texas law resulted in a presumption that the foreign law was identical to Texas law); *In re Garcia-Chapa*, 33 S.W.3d at 862 (proponent of foreign law failed to satisfy procedure for determination of foreign law; therefore, the court assumed foreign law was the same as Texas law).

The Estates Code has no specific provision governing proof of foreign law. Accordingly, one must turn to general evidentiary principals for guidance. *See* TEX. EST. CODE § 54.051 (the rules of evidence generally apply in probate proceedings). The proper manner of proof depends on whether the law in question is that of another U.S. state or a foreign country. *Compare* TEX. R. EVID. 202 (rule for law in another state) and 203 (rule for law in foreign country).

In the first instance, the proponent of the sister state's law must simply request the court to take judicial notice of the law and provide the court with sufficient information enabling the court to comply with the request. TEX. R. EVID. 202. There is no hard and fast deadline for the request that the court take judicial notice of the sister state's law; rather, the proponent must give notice of the request "as the court may deem necessary." *Id*. Despite the internet and the

[2] For some reason, the authors of the Estates Code switched the word order of the phrase "real chattel" from prior usage in Texas law. Historically, the phrase had been "chattels real." *See, e.g.*, TEX. PROB. CODE § 3(dd) (repealed effective January 1, 2014). In fact, a word search for the phrase "real chattel" in Texas law will turn up virtually empty. Instead, one should search for "chattels real," at least in the near term.

general availability of U.S. law to lawyers and judges, the best practice is to provide the court with copies of the relevant statutes and case law to comply with the requirements of Rule 202, rather than relying on mere legal citations. *See id*. (the proponent of another state's law has the burden of providing the court with sufficient information). Note that Rule 202 applies to the proof of foreign law with respect to any U.S. state, territory, or jurisdiction. *Id*. It also applies to proof of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of such jurisdictions. *Id*.

Proof of the law of a foreign country under Rule 203 is a bit more involved. The proponent of the foreign law must, at least 30 days before trial, (1) provide notice of the intent to raise an issue concerning foreign law; (2) furnish copies of all written materials upon which the party intends to rely; and (3) furnish copies of both the foreign text and an English translation, if applicable. TEX. R. EVID. 203. Unlike most evidentiary matters, the court is not limited to the information submitted by the parties. Indeed, the court may rely on any other source of information to assist it in determining the foreign law, and regardless of whether the source is otherwise admissible in evidence. *Id*. If the court conducts its own research, however, it must notify the parties and allow them to respond. *Id*. The rule gives examples of what a court might consider, including but not limited to affidavits, testimony, briefs, and treatises. *Id*. Ultimately, the court determines the foreign law (not the jury – despite that this is an issue governed by the Rules of Evidence), the determination of which is reviewed on appeal as a question of law. *Id*.

Examples of sufficient proof of foreign law include an uncontroverted affidavit from an English solicitor regarding English law and its application to the facts presented, *Lawrenson v. Global Marine, Inc*., 869 S.W.2d 519, 525-26 (Tex. App.—Texarkana 1993, writ denied), and uncontroverted affidavits from various foreign law experts, *AG Volkswagon v. Valdez*, 897 S.W.2d 458, 461-62 (Tex. App.—Corpus Christi 1995, orig. proceeding). In both examples, the text of the law in question appears to have been provided to the court and the affidavits appear to have been quite detailed. While uncontroverted opinions in the form of affidavits generally will be accepted, they do need to be reasonable and consistent with the text of the law. *AG Volkswagon*, 897 S.W.2d at 461. In contrast, an example of insufficient proof of the foreign law is submission of a mere two pages from a treatise on doing business in Japan. *Pennwell Corp*., 123 S.W.3d at 762-63 (reliance on a single excerpt from a business law treatise, without expert witness testimony or affidavits, deemed insufficient to distinguish Japanese law from Texas law regarding the recoverability of prejudgment interest).

### C. Determination of Heirship

There is no special procedure under the Estates Code to determine heirship of a person who died intestate while domiciled in a foreign land. Venue for heirship proceedings is determined, in most instances, in the same manner as in probate proceedings. TEX. EST. CODE § 33.004(a)(2). Otherwise, Chapter 202 of the Estates Code governs heirship determinations regardless of where the deceased was domiciled. Section 202.002, which states the circumstances under which an heirship determination are authorized, merely speaks of persons who die intestate owning real or personal property located in Texas requiring administration and makes no mention of domicile. Similarly, applications for letters of administration are proper under Section 301.052 of the Estates Code regardless of the decedent's domicile. *See* TEX. EST. CODE § 301.052(1) (must merely state the decedent's domicile in the application).

Also note that there is no method for filing the heirship determination of a foreign court in the deed records as there is for filing probated foreign wills. *See* TEX. EST. CODE § 503.001 (procedure for filing and recording foreign wills that have been probated elsewhere in deed records). When one considers the purposes for which foreign wills are filed in the deed records (i.e., to establish title) in light of Texas law with respect to disposition of real property, the reason for the omission becomes obvious. Texas law governs the intestate succession of real property located in Texas, not the law of the domicile. See Section II(B), above, for a discussion of the conflict of laws issue.

### D. Probate of Foreign Wills

There are three methods for probating a foreign will in Texas. As mentioned above, a "foreign will" is the will of a person who was domiciled somewhere other than Texas at death, regardless of whether the will was drafted with Texas law in mind. *See* TEX. EST. CODE § 501.001 (equating a "foreign will" with non-domiciliaries). Texas law makes no distinction between domiciliaries of foreign nations and domiciliaries of the other 49 states. *See id*. Therefore, most Texas practitioners will be familiar with the three methods for ancillary probates in Texas. The three methods will be discussed in the order of increasing complexity. The effect of the three methods of probate is to give full faith and credit to the probate of the will in another state. *See Haga v. Thomas*, 409 S.W.3d 731, 736 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (in the context of an ancillary probate under former Probate Code Section 95 (now Chapter 501 of the Estates Code)).

1) Probate by Filing in Deed Records

The first and easiest method for probating a foreign will amounts to a muniment of title. One must simply record authenticated copies[3] of the will and the foreign order admitting it to probate in the deed records of the Texas counties in which the foreign domiciliary owned real estate. TEX. EST. CODE § 503.001. This simple procedure is useful if the following requirements are met:

- The will was probated in another jurisdiction (whether a U.S. state or another country);
- The will disposes of real property located in Texas; and
- Administration of the estate and letters of administration in Texas are not necessary.

*Id.* Importantly, nothing in the statute requires the foreign will to be otherwise valid under Texas law. *See id*.

The filing operates as a deed of conveyance of all real property covered by the will and as a notice of title, and no further action is required to transfer the property to the devisees. *Id*. §§ 503.051 (deed of conveyance) and 503.052 (notice of title). Further, if the will grants the foreign executor the power to sell real property, the executor may sell the property without further formalities. *Id*. § 505.052; *cf. Leggett v. Church of St. Pius*, 619 S.W.2d 191, 192-93 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (executor's deed void if the will does not grant the power of sale). Otherwise, the foreign executor gains no powers in Texas by filing the foreign will in the deed records.

Whether the will and foreign proceedings dispose of the Texas real property is an important question in the context of a Section 503.001 filing. *See* TEX. EST. CODE § 503.001(a) (a foreign will probated in another jurisdiction "that conveys, or in another manner disposes of, land in this state" may be filed in the county records). In *McCuen v. Huey*, 255 S.W.3d 716, 732-33 (Tex. App.—Waco 2008, no pet.), the court considered whether the filing of an Alabama will and the associated Alabama probate documents in the deed records of a Texas county was sufficient to establish title in the person held by the Alabama court to be the sole devisee under the will. The facts of *McCuen* are somewhat convoluted. The decedent owned certain Texas property jointly with his brother. His will, which was probated in Alabama, gave the Texas property to his brother and the residue of the estate to his wife. The order admitting the will to probate in Alabama found that the wife was the sole legatee of the estate based in part upon the executor's assertion that the decedent had disposed of the Texas property before his death. The assertion was incorrect. Subsequently, the will and Alabama probate documents were filed in the deed records of the county where the Texas property was located.

The wife's heirs argued that the filing of the will, together with the Alabama probate court's order (which found that the wife was the sole legatee) in Texas operated as a muniment of title under Section 96 [now Section 503.001] and established the wife's title to the Texas property. *McCuen*, 255 S.W.3d at 732. The court held, however, that the omission of the Texas property from the final settlement caused a failure of the continuity of title necessary for a muniment of title. *Id*. at 732-33. Accordingly, Section 96 [now Section 503.001] did not operate to give the Texas property to the wife as the "sole legatee" and as found by the Alabama probate. *Id*. The Texas court therefore found that the Texas property passed to the brother despite the Alabama court's ruling. *Id*. at 733.

2) Ancillary Probate

The second method for probating a foreign will is useful if administration of the decedent's Texas property is required. *See* TEX. EST. CODE Chapt. 501. Instead of filing in the deed records, the second method requires an application together with authenticated copies[4] of the will and foreign order admitting the will to probate with the court having original probate jurisdiction in the relevant Texas county. *Id*. § 501.002. The exact method for ancillary probate of a foreign will under Chapter 501 depends on whether the original probate of the will occurred in the jurisdiction of the decedent's domicile. *Compare id*. §§ 501.002(a)

[3] The requirements for authenticated copies are found in TEX. EST. CODE § 501.002(c), which states that the copies must:

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

TEX. EST. CODE § 501.002(c). Note also that original signatures of the clerk and judge are not required for recordation under Section 503.001, despite the apparent requirement. *Id*. §§ 503.002 (dispensing with the original signature requirement), 505.052(c) (same with respect to the power to sell). This fact may prove useful for those non-domiciliaries who own real property in more than one Texas county.

[4] See TEX. EST. CODE § 501.002(c) and footnote 3 for the requirements of authenticated copies. For purposes of an ancillary probate under Chapter 501, the signatures authenticating the copies must themselves be original. TEX. EST. CODE § 501.002(c).

and (b). Each method will be discussed separately in subparts (a) and (b), below.

An ancillary probate has two steps. The first step, found in Section 501.002, is to prove up the will, under the methods described below. Once the will is recorded by the clerk under Section 501.004 (no court order is necessary), the will is probated and is effectual to dispose of both personal and real property located in Texas. TEX. EST. CODE § 501.007. Importantly, the will is recognized for all purposes if probated under this method, regardless of whether the will was executed under formalities as required by Texas law. *Id*.

The second step of an ancillary probate is found in TEX. EST. CODE § 501.006 and is necessary only if letters testamentary are required.[5] If the executor named in the will both requests ancillary letters testamentary and is able to prove that he or she qualified as executor in the foreign jurisdiction and is not disqualified to serve in Texas, the court must enter an order directing that ancillary letters testamentary be issued. TEX. EST. CODE § 501.006(b). Note that this procedure for obtaining letters testamentary does not appear available to a foreign executor who was not named in the will. *See id*. ("the executor *named in a foreign will* is entitled to receive ancillary letters testamentary", emphasis supplied). Therefore, if administration is required and the foreign executor was not named in the will, an original probate and appointment proceeding likely is necessary under TEX. EST. CODE Chapts. 301 (appointment proceeding) and 502 (original probate of foreign will). Please see subpart (3), below, for a discussion of the original probate of a foreign will.

The foreign executor is not required to give bond if the will appointing him or her so provides. TEX. EST. CODE § 505.051(a). If the foreign will is silent or requires a bond, the bond provisions applying to domestic representatives also apply to the foreign executor. *Id.* § 505.051(b). Otherwise, neither Chapter 501 (or any other part of subchapter K, regarding foreign wills and fiduciaries) nor the remainder of the Estates Code gives any guidance as to the powers of the foreign executor who has been issued ancillary letters testamentary, or as to whether the ancillary administration is to be independent or dependent. *Cf. id.* § 505.052 (on its face, the statute extending power to sell property if included in the will only applies to wills filed in the deed records under Chapter 503). Accordingly, one must refer to the Estates Code's general provisions governing domestic executors and administrators to determine the foreign executor's powers and whether court supervision applies.

a) *Ancillary Probate of Foreign Will Originally Probated in Domiciliary Jurisdiction*

If the decedent's foreign will was probated in his or her domiciliary jurisdiction, the ancillary probate in Texas under Section 501.002 is very simple. *See* TEX. EST. CODE § 501.002(a). The will's proponent must simply file an application with the court requesting probate of the will on the basis of the authenticated copies of the foreign proceedings. *Id*. § 501.002(a). No citation or notice is required in this case. *Id.* § 501.003(a). Upon filing, the clerk has a "ministerial duty" to record the will and evidence of its probate on the judge's probate docket. *Id*. § 501.004(a). Upon recording on the docket, the will is deemed probated and "has the same effect for all purposes as if the original will had been admitted to probate by a court of this state." *Id*. § 501.005.

b) *Ancillary Probate of Foreign Will Originally Probated in Non-Domiciliary Jurisdiction*

In contrast, if the decedent's will was originally probated somewhere other than the decedent's domicile, extra steps are necessary for the ancillary probate in Texas. *See* TEX. EST. CODE §§ 501.002(b) and 501.003(b). In such a case, the application for ancillary probate must contain (i) all the information as is required for the original probate of a Texas will, and (ii) the names and addresses of each devisee under the will and each person who would be an intestate heir. *Id*. § 501.002(b). As discussed above, the identity of the decedent's intestate heirs may depend upon both Texas law (for real property located in Texas) and the law of the decedent's domicile (for personal property). See the discussion regarding conflict of laws under Section II(B), above. The proponent of the will also must serve each of these persons with citation by registered or certified mail. *Id*. § 501.003(b).

The persons who have been served with citation then have an opportunity to contest the will in the same manner as if the decedent had been domiciled in Texas. TEX. EST. CODE §§ 501.004(b), 504.002. If no contest is filed within the normal time limits as are applicable to Texas wills, the clerk then shall file[6] the will and

[5] Technically, one may seek ancillary probate of a foreign will under Section 501.002 even if administration of the Texas estate is not necessary. Filing the foreign will in the deed records under Section 503.001, however, seems more efficient if an administration is unnecessary, especially because the foreign executor in this situation clearly has the statutory authority to sell Texas real property if that power is granted in the will. *See* TEX. EST. CODE § 505.052(a). On the other hand, if construction of the will in light of Texas law is required, filing with the Court is more appropriate.

[6] It is interesting that section 501.004(b) fails to state that "it is the ministerial duty of the court clerk to record" the ancillary filings with respect to a foreign will probated in a jurisdiction other than the decedent's domicile, as is the case

other documents in the judge's probate docket. *Id*. §§ 501.004(b), 504.003(a). A court order is not necessary for the clerk to file the records in the judge's probate docket. *Id.* § 501.004(c). Upon recording in the probate docket, the will is deemed probated and "has the same effect for all purposes as if the original will had been admitted to probate by order of a court of this state." *Id.* § 501.005.

The requirement that the clerk wait to see if a contest is filed with respect to the foreign will that was not originally probated in the decedent's domicile means the clerk will not record the ancillary filing on the judge's probate docket until the passage of two years after the filing. *Cf. id.* § 256.204(a) (the validity of a will may be contested no later than the second anniversary of the date the will was admitted to probate). The wait and see approach also means the ancillary probate will not take effect until the second anniversary. *Cf. id.* § 501.005 (it is the recording of the ancillary filing on the probate docket that causes the foreign will to be considered probated). Accordingly, if time is of the essence, one should consider originally probating the foreign will under Chapter 502.

3) Original Probate in Texas of Foreign Will

The final and most complicated method for probating a foreign will that operates on property located in Texas is simply to probate it in the same manner as the probate of a domestic will. *See* TEX. EST. CODE Chapt. 502. The foreign will may be originally probated in Texas even if it has already been probated elsewhere. TEX. EST. CODE §§ 502.001(b), 502.002(c). Generally, the foreign will cannot be probated in Texas, however, if it was denied probate in the testator's domicile. *Id*. § 502.001(b)(1) But if the will was denied probate for a reason that would not invalidate a will in Texas, the probate under Section 502.001 may proceed. *Id*. § 502.001(b)(2); *see also Toledo Soc. for Crippled Children v. Hickok*, 152 Tex. 578, 585-86 (1953) (will denied probate in domiciliary state of Ohio, admitted to probate in Texas). An example, as proposed by Professor Johanson, would be a holographic will signed only by the testator. Such a will would not be a valid will in states adopting the Uniform Probate Code, but that will would still be valid in Texas, and could still control real property located in Texas. Also, if the will had been previously probated, or perhaps denied probate in another jurisdiction, the proponent of the foreign will in Texas may rely upon an authenticated copy[7] of the will in most circumstances. *Id.* § 502.002(c).

Significantly, the foreign will must comply with Texas formalities to be probated under Chapter 502. This formality requirement is the main difference between the original probate of a foreign will under Chapter 502 and an ancillary probate under Chapter 501 and filing the will in the deed records under Chapter 503. Note also that the original probate of a foreign will is not guaranteed if the will was not probated in the domiciliary jurisdiction even if all other requirements are met. The Texas court may force the foreign will's proponent to secure probate of the will in the testator's domicile by delaying a ruling until that time. TEX. EST. CODE § 502.001(c).

Fortunately, Texas law was amended in 2011 to make it easier to establish that a will executed in a foreign land is self-proved. *See* TEX. EST. CODE § 256.152(b). With proof of the foreign law, a will that is both executed in another state or foreign country and is self-proved in accordance with the law of that state or country[8] is deemed to be self-proved under Texas law. *Id*.

Interestingly, Chapter 502 does not speak of administration of the estate. Rather, the Chapter only speaks of the original probate of the foreign will. *See* TEX. EST. CODE §§ 502.001, 502.002. Then again, nothing in Chapter 301, which addresses applications for letters testamentary or of administration, suggests that an application cannot be made for letters in connection with a foreign will. Accordingly, if an administration is required, the proper applicant should proceed in the same manner as any other applicant for letters testamentary.

**E. Probate of Wills Written in a Foreign Language**

Without proper planning, an estate with an international connection very well may involve a will written in a foreign language.[9] Such wills may be

for the foreign will originally probated in the decedent's domicile. *Compare* TEX. EST. CODE §§ 501.004(a) and (b).

[7] See TEX. EST. CODE § 501.002(c) and footnote 3 for the requirements of authenticated copies. For purposes of an original Texas probate of a foreign will under Chapter 502, the signatures authenticating the will must be original. *Id*.

[8] See Section II(B)(3), above, for a discussion of how one proves foreign law.

[9] Many planners have the testator execute two wills: One for property located in Texas and elsewhere in the U.S., and one for the property located in the foreign country. The use of a will written specifically for the domestic property obviates the concern regarding foreign language documents and should ensure the ability to probate the will in Texas under normal procedures. On the other hand, and especially for U.S. citizens and residents who have a single asset in the foreign country, a single will may suffice, and two wills might cause confusion. We are told that Mexican judges, for example, sometimes have a hard time understanding that a person might have two wills. The problem with such an approach, however, is that the law of the situs generally governs disposition of real property, including the validity and construction of the will. See Section II(B)(1)(a), above, for a discussion of the law of the situs. One wonders

classified either as a domestic will or a foreign will. The classification, and therefore, the proper probate procedure, depends solely on the decedent's domicile at the time of death. See the discussion of domicile in Section II(A), above.

The first hurdle to overcome in either context is proof of the will's contents. Despite that the Texas Estates Code has specific provisions for the wills of foreign domiciliaries (including those of foreign nations), it has no specific provision to address foreign language documents. Further, documents written in foreign languages relating to real or personal property, generally speaking, may not be recorded or operate as constructive notice. TEX. PROP. CODE §§ 11.002(a), (c); *cf.* TEX. EST. CODE § 52.001(a) (the Judge's Probate Docket is maintained by the County Clerk).

1) Probated Wills in a Foreign Language

Documents written in a language other than English may be recorded only if they were properly acknowledged outside the United States. TEX. PROP. CODE § 11.002(c). To be properly acknowledged, the document must:

- be acknowledged before certain United States consular officials or a notary public or other official authorized to administer oaths in the jurisdiction; and
- contain a certificate, stamp, or seal of the notary public or other official, or an apostille relating to the acknowledgement.

*Id.*; TEX. CIV. PRAC. & REM. CODE § 121.001(c) (governing proper acknowledgements outside the United States). One must also include "a correct English translation" of the non-English portion of the document, together with a sworn statement as to the accuracy of the translation. TEX. PROP. CODE § 11.002(c). By implication, the English translation requirement applies not only to the substantive portion of the foreign language document, but also to the notary stamp, which also likely will be in a foreign language.

Probably the easiest way to comply with the requirements regarding the recording of non-English documents is to obtain an apostille of the probated documents and the sworn translation. An apostille is simply a certificate authenticating the original of a public document and arises out of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legislation of Foreign Public Documents (also known as the Apostille Convention). *See* TEX. PROP. CODE § 11.002(c)(3) (requiring apostilles to satisfy the requirements of the Apostille Convention); *Hague Convention on Private International Law*, "The ABCs of Apostilles," available at www.hcch.net/upload/abc12e.pdf. About 106 nations have adopted the Apostille Convention, including most countries in the Americas, Europe, Asia, and Australia. A list of the contracting countries is available at the website for the Hague Convention on Private International Law, www.hcch.net.[10] Because the apostille is issued by an official of the foreign country, coordination with the attorneys who probated the will in the foreign country likely will be necessary, or at least helpful.

In the converse, Texas attorneys may need to obtain an apostille for a will probated in Texas to assist with the probate of the Texas will in a foreign nation. The proper authority in Texas to issue apostilles is the Texas Secretary of State, authentications unit. More information regarding apostilles, including forms for requesting the apostille and fees, can be found on the Secretary of State's website, www.sos.state.tx.us. Among the documents that the Secretary of State will authenticate through an apostille are certified copies of court records (which would include probated wills) and documents notarized by a Texas notary public. It is through the last category of documents that one can obtain an apostille for a sworn translation of the Texas probate documents in the language of choice.

Unfortunately, not all countries are members of the Apostille Convention. If Texas documents are required for a probate or other proceeding in one of these countries, one must seek the assistance of the United States Department of State, Office of Authentications, which issues Authentication Certificates for use in such countries. Generally speaking and for state and local documents such as probated wills, judgments, and vital record certificates, one must complete a Form DS-4194 and submit the original document that includes both (1) the raised and/or stamped seal of the relevant court, and (2) the certification of the Texas Secretary of State. The Office of Authentications also issues apostilles. Both the Form DS-4194 and more information can be found on the Office of Authentications website at: travel.state.gov/content/travel/english.

2) Wills in a Foreign Language That Have Not Been Probated

For original probates of foreign wills written in a foreign language, one must turn to general evidentiary principles for guidance. *See* TEX. EST. CODE § 54.051 (the rules of evidence applicable for district courts apply to probate proceedings).

whether a Texas lawyer can write a will that properly disposes of real property in a foreign country (or even another state).

[10] Interestingly, there also are Conventions relating to the form of wills, administration of estates, succession to estates, and trusts. But the United States does not appear to have signed any of these conventions, except the one relating to trusts, which it has not ratified.

The translation of a foreign language document may be established in two ways. *See* McClure, Ann C., Texas/Mexico Law: Proving It Up and Getting It In: Foreign Law and Foreign Evidence, 70 Tex. B. J. 136 (Feb. 2007). The first and most practical method in the context of a probate proceeding is found in TEX. R. EVID. 1009. The procedure under Rule 1009 requires that the proponent of a translation serve on all parties at least 45 days before trial the following: (1) the underlying foreign language documents, (2) the translation, and (3) the affidavit of a qualified translator, setting forth (a) the translator's qualifications, and (b) the translator's certification that the translation is fair and accurate. TEX. R. EVID. 1009(a). The Rule does not address the qualifications of the translator. Instead, the rules regarding the admission of expert testimony apply. Under Rule 702, an expert witness may be qualified to testify based upon his or her "knowledge, skill, experience, training, or education." *Id*. 702. If no one objects to the proffered translation at least 15 days before trial, the translation "shall" be admissible. *Id*. 1009(b), (c). If a party objects, the objecting party also must serve what the party contends is a fair and accurate translation. *Id*.

Because probate proceedings require the will to be attached to the application, the translation and accompanying affidavit under Rule 1009 also should be made part of the original application to ensure the time requirements are met. *See* TEX. EST. CODE §§ 256.053(a) (probate of domestic will), 502.001 (original probate of foreign will).

A party also may establish the contents through expert testimony. *See* TEX. R. EVID. 1009(e) (stating that Rule 1009 does not preclude admission of a translation through expert testimony). The second method, however, does not seem practical for most probate proceedings (except perhaps in the context of a will contest). *See* TEX. EST. CODE § 256.157(a) (requiring testimony to be put in written form).

### F. Contests of Foreign Wills

Foreign wills that have been probated under any of the three methods described above in Section II(D), may be contested under Estates Code Chapter 504.[11] The time and method by which the contest must be filed are the same as for domestic wills. TEX. EST. CODE § 504.003(b); *cf. id.* § 256.204 (time limit to contest a will admitted to probate is two years after the date the will was probated or, for cases of forgery or fraud, two years after discovery of the forgery or fraud). Unlike domestic wills, however, there is no procedure to contest a foreign will probated in the decedent's domicile submitted for ancillary probate under Chapter 501, or that has been simply recorded under Chapter 503, until after the foreign will has in effect been probated in Texas. *See Wagner v. Duncan*, 546 S.W.2d 859, 862 (Tex. Civ. App—Dallas 1977, no writ). This is because the probate of a will under these two procedures is a pure ministerial act required of the county clerk. *Id.*; *See* TEX. EST. CODE § 501.004(a) (recording of such a foreign will is "the ministerial duty" of the county clerk). The type of contest that may be brought depends, however, on whether the will was originally probated in the decedent's domicile. *Id*. §§ 501.008 (foreign wills probated in domiciliary jurisdiction and filed for ancillary probate under Chapter 501); 504.001 (all foreign wills probated in domiciliary jurisdiction); 504.002 (foreign wills probated in non-domiciliary jurisdiction).

Three separate statutory sections govern foreign wills that were probated, allegedly, in the decedent's domicile. The first two sections only apply if the foreign will was admitted to ancillary probate under Section 501.002(a), which relies upon authenticated copies of the foreign probate. TEX. EST. CODE §§ 501.008(a), 504.004(a)(1). In such a situation, one may contest the will on the basis that the jurisdiction in which the will was originally probated was not, in fact, the decedent's domicile, but only if proper service of citation was not had. *Id.* §§ 501.008(b), 504.004(a). Otherwise and regardless of the method of probating the foreign will in Texas, if the will was originally probated in the decedent's domicile, the opponent may contest the will only on the following three additional grounds: (1) the foreign proceedings were not authenticated in the manner required by Texas law for the ancillary probate; (2) the will was rejected for probate in Texas in another proceeding; or (3) the domiciliary probate was subsequently set aside. TEX. EST. CODE § 504.001(b). The effect of these limitations is to give full faith and credit to the domicile's probate of the original will. They also force an opponent to contest the will in the domiciliary jurisdiction if the grounds are lack of testamentary capacity or undue influence.

On the other hand, if the will was originally probated in a jurisdiction other than the decedent's domicile, the foreign will may be contested on any ground giving rise to a contest for a domestic will. TEX. EST. CODE § 504.002.

Further, if the will is contested in the foreign jurisdiction, one may file notice of the contest with the court or deed records where the foreign will was probated in Texas. TEX. EST. CODE § 504.051. The notice causes the ancillary probate to lose the legal effect it otherwise would have had. *Id*. § 504.052. The ancillary probate may be reinstated upon the filing of "verified proof" that the foreign contest has been terminated in favor of the will or that the foreign

[11] See Section II(B)(1)(a), above, for a discussion concerning construction of foreign wills as they relate to Texas real property.

proceedings were never instituted. *Id.* The statute does not give guidance as to the requirements for the verified proof.

### G. Foreign Executors and Administrators

Foreign Executors and Administrators who have not been granted letters by a Texas court have very limited powers with respect to property in Texas. As stated above, a foreign executor who has been granted the power to sell real property has that authority if the foreign will has been filed in the deed records where the land is located. TEX. EST. CODE § 505.052. Foreign executors also may sue a debtor of the estate located in Texas by giving notice of the suit to Texas residents who are creditors of the Estate and by filing a copy of the foreign letters with the suit. *Id.* § 505.101. By doing so, the foreign executor submits to the jurisdiction of Texas courts with respect to claims of Texas residents against the foreign estate. *Id.* § 505.502. Notwithstanding the general rule for suits against the estate's debtors, foreign executors and administrators must file an ancillary probate under Chapter 501 of the Estates Code to property qualify as plaintiff in both wrongful death and survival actions. TEX. CIV. PRAC. & REM. CODE §§ 71.012 (wrongful death), 71.022 (survival). Further, the foreign personal representative is prohibited from bringing an action if a representative for the estate has been appointed in Texas or if an application is pending. TEX. EST. CODE § 505.503. Otherwise, foreign executors have no power in Texas.

### H. Deaths Abroad

1) Generally

The U.S. Department of State, Bureau of Consular Affairs, provides a significant amount of assistance to the family and friends of U.S. citizens who die abroad. In such situations, the decedent's family should immediately contact the local U.S. embassy or consulate office for assistance. Among the services provided are:

- Confirmation of the identity, citizenship, and death of the decedent;
- Information about the disposition of the remains and personal effects of the decedent;
- Information and guidance on forwarding funds to cover costs;
- Service as provisional conservator of the decedent's estate in the absence of a legal representative in the country;
- Preparation of the necessary documents for the disposition of the decedent's remains according to the instructions of the decedent's next-of-kin or legal representative;
- Oversight of the performance of the disposition of the remains and the distribution of the personal effects of the decedent; and
- Preparation of the Consular Report of Death of an U.S. Citizen Abroad for use in U.S. legal proceedings based upon the local foreign death certificate.

More information on this topic can be found at the Department of State's website at: travel.state.gov.

2) Repatriation of Remains

Many times, and especially if the decedent was merely traveling abroad at the time of death, the family will like to return the remains of the decedent for burial in the U.S. Again, the consular officers in the country of death should provide significant assistance in the repatriation of the body. Of course, the arrangements must be in conformance with both U.S. and local law. Among the assistance provided by the Consular Officer will be arranging for the required Consular Mortuary Certificate, the Affidavit of Foreign Funeral Director, and Transit Permit. Payment for the mortuary services and shipment must be provided by the family, however.

3) Provisional Conservator of the Estate

The local Consular Officer generally takes possession of a U.S. citizen's personal effects when the citizen dies abroad. If the personal effects are not located within a reasonable distance of the Foreign Service post, the Consular Officer will request the temporary custodian of the personal effects (e.g., the hotel, tour operator, hospital, police official, and the like) to forward the items at the expense of the estate. The Consular Officer generally does not, however, take actual possession of large, bulky items, such as those found in a residence. In such situations, the Officer will arrange for the safe keeping of the items until the decedent's legal representative is able to make other arrangements. The Consular Officer also will make arrangements for shipping personal effects and the like, again at the estate's expense. The Department of State seems to have a loose definition of "legal representative." The definition tightens up as the value of the estate and level of disagreement among the family increases. In its view, the legal representative could be anyone from the executor to a next-of-kin. Ultimately, though, the Consular Officer may require Letters Testamentary or Letters of Administration before turning over possession of the decedent's property.

## III. FEDERAL TRANSFER TAX ISSUES

Several special rules apply to estates with international contacts, especially when non-U.S. citizens are involved. For example, transfers to non-

U.S. citizen spouses are not eligible for the unlimited marital deduction. Further, the estate tax exemption for decedents who are neither citizens nor residents of the U.S. is only $60,000. Details of the transfer tax scheme as far as it relates to international issues follow. Note that executors have an affirmative duty to file Gift Tax Returns that were not filed by the decedent. *See* 26 C.F.R. § 25.6019-1(g). Accordingly, this paper also discusses the gift tax as it applies to citizens, resident aliens and non-resident aliens.

### A. Definitions for Federal Transfer Tax Purposes

Federal law makes significant distinctions for transfer tax purposes between (i) citizens, (ii) resident aliens ("RAs") and (iii) non-resident aliens ("NRAs").[12] Because federal transfer taxes apply differently to each of these categories, the attorney handling an estate with international contacts always should determine a decedent's citizenship and residency status. The following explains the differences between the three concepts.

1) U.S. Citizens

The U.S. imposes transfer taxes on its citizens regardless of their residency. 26 U.S.C. (hereinafter "Code") §§ 2001(a) (the estate tax is imposed on every decedent "who is a *citizen* or resident of the United States") (emphasis supplied), 2501(a) (the gift tax is imposed on all individuals, both residents and nonresidents, with certain exceptions for residents of certain possessions), 2612(c) (the generation-skipping transfer tax is imposed on transfers that would otherwise be subject to the estate or gift tax).

If one is born in the territory of the U.S., he or she is a citizen. U.S. CONST., AMEND. XIV. U.S. territory, for citizenship purposes, includes the fifty states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and the Northern Mariana Islands. 8 U.S.C. § 1101(a)(38); Covenant of Political Union between the United States and Northern Mariana Islands. For citizenship purposes, native reservations within the U.S. are considered U.S. territory. *Id*. § 1401(b). The territory of the U.S. also extends twelve nautical miles from shore. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923). Therefore, persons born on private ships or airplanes within the territorial limit also are citizens. Note that there are some narrow exceptions to the natural born rule related to children of recognized diplomats.

Citizenship based on birth to a U.S. citizen parent or parents is statutory in nature and not guaranteed by the Constitution. Rules governing citizenship *jus sanguinis* have changed over the years, so an analysis of the rules in effect at the time of birth must be made. Currently, and generally speaking, a person born outside the U.S. but to a U.S. citizen parent is a U.S. citizen under the following circumstances:

- Both parents are U.S. citizens and either parent resided in the U.S. at any time before the person's birth;
- One parent is a U.S. citizen who resided in the U.S. for a continuous period of at least one year immediately before the person's birth and the other parent is a U.S. national (e.g., born in American Samoa); or
- One parent is a U.S. citizen and resided in the U.S. for at least five years, two of which occurred after the parent attained the age of 14.

*See* 8 U.S.C. § 1401.

Persons also may become citizens by naturalization. Ironically, it is many times easier to document citizenship by naturalization because of the necessary administrative hurdles to achieve naturalization than by other means.

Consistent with the Byzantine nature of federal law in general and the Code in particular, the practitioner should note that the gift tax does not necessarily apply to all U.S. citizens. For example, U.S. citizens who are residents of U.S. possessions are not considered "citizens" for gift tax purposes, but only if their U.S. citizenship is based on their citizenship of the possession or their birth within the possession. Code §§ 2501(b), (c); *see also* 26 C.F.R. (hereinafter "Regs.") § 25.2501-1(c). Rather, such persons are considered non-resident, non-citizens for purposes of the gift tax. *Id*. For practical purposes, this means a person born in Puerto Rico, for example, is not subject to the gift tax as a U.S. citizen for gifts made while residing in Puerto Rico despite being a U.S. citizen. That same person, however, is subject to the estate tax.

2) Resident Non-Citizen

Once the attorney determines the decedent was not a citizen, the next question is whether he or she was a U.S. resident for transfer tax purposes. While the concepts of residency for income tax purposes and transfer tax purposes are similar, they are not identical.

[12] Federal law also draws distinctions between NRAs and recent expatriates (that is, persons who have relinquished their U.S. citizenship) and former long-term RAs who have recently left the U.S. *See* Code §§ 2107 (imposing an estate tax on certain expatriates), 2501(a)(3) (expatriates who are subject to Section 877(b) in the year the gift is made not eligible to escape the gift tax for transfers of tangible properties), 877(e) (applying similar rules to former long-term RAs). Other than to point out that it takes some time for expatriates and former long-term RAs to avoid the clutches of the IRS's long fingers, the paper will, for the most part, ignore this distinction. *See* Heimos, 837-3rd T.M., *Non-Citizens – Estate, Gift and Generation-Skipping Taxation*, § V, for an exhaustive analysis of the distinctions among such persons.

One may be a resident for one purpose, but not the other.

For transfer tax purposes, the Code imposes a tax on "residents". Code §§ 2001(a) (the estate tax is imposed on every decedent "who is a citizen or *resident of* the United States") (emphasis supplied), 2501(a) (the gift tax is imposed on all individuals, both residents and nonresidents, with certain exceptions for nonresidents). Again, the generation-skipping transfer tax is imposed on those transfers that are otherwise subject to the estate or gift tax. *Id*. § 2612(c). For residency purposes, the extent of the U.S. is not as broad as it is for citizenship purposes. Instead, the "U.S." only extends to the fifty states and the District of Columbia. Regs. §§ 20.0-1(b)(1), 25.2501-1(b). The Code does not, however, provide a definition of "resident" for transfer tax purposes.

To learn what "resident" means, one must turn to the Regulations. A "resident" is a decedent who had his or her domicile in the U.S. at the time of death. Regs. § 20.0-1(b); *see also id*. § 25.2501-1(b) (providing similar definition in the context of the gift tax). A "nonresident" is the converse, that is, a person who has his or her domicile outside of the U.S. *Id*. § 20.0-1(b)(2), 25.2501-1(b) ("All other individuals [*i.e.*, those who are not 'residents'] are nonresidents.").

The Regulations under both the estate and gift taxes explain the term "domicile" in the same manner by describing how one acquires a domicile:

> A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.

Regs. §§ 20.0-1(b)(1), 25.2501-1(b). Domicile therefore has two elements: (i) an actual physical presence; and (ii) an intent "to remain indefinitely". *Id*. The brevity of a physical residence is not determinative because the physical presence is sufficient even if for a "brief period of time". *Id.* Similarly, the length of a physical residence also does not govern if there is no intent to remain indefinitely. *Id*. Once a domicile is established, a presumption exists that the domicile does not change until it is shown to have changed. *See Mitchell v. U.S.*, 88 U.S. 350 (1874) (determined in the context of the legality of contracts between residents of the Northern States and the Southern States during the Civil War); *Nienhuys v. Commissioner*, 17 T.C. 1149 (1952) (determined in the context of the estate tax). Note that the U.S. has a handful of bilateral transfer tax treaties with other nations that may weigh in on the determination of domicile. See Section III(C), below.

Ultimately, it seems one typically acquires a U.S. domicile by moving to the U.S. with no intent to leave after a period of time. Conversely, a non-citizen who moves to the U.S. may nevertheless avoid acquiring residency status for purposes of transfer taxes by having a present intention of returning home at some point in the future.

Residency under the transfer tax regime, which is subjective in nature, should be contrasted with residency under the income tax, which depends on much more objective factors. For all purposes of the Code, with the exception of transfer taxes, a person is considered to be a U.S. resident if: (i) he or she is a lawful permanent resident (regardless of actual residence); (ii) he or she meets the substantial presence test; or (iii) he or she makes an election under the Code. Code § 7701(b)(1). Whether one meets the substantial presence test requires a somewhat fact intensive analysis. In very general and simplistic terms, the substantial presence test is met if the person is present in the U.S. for 31 days in the tax year and has been present for 183 days over the current and the two preceding years. *See id*. § 7701(b)(3) (stating the substantial presence test in detail).

In the context of the recent and continuing violence in Ciudad Juarez, Nuevo Laredo and other locales along the U.S./Mexico border, the concept of residency and how one obtains it requires estate planners who are advising Mexican citizens who are contemplating removal or who have removed to the U.S. to escape such violence to address these issues in a meaningful way. Failure to do so could result in U.S. taxation of such persons' U.S. and Mexican assets. For all intents and purposes, the Mexican citizens who have fled the violence seem to be refugees, albeit privileged refugees (law abiding persons without means seem to be effectively excluded from seeking refuge on the north side of the river). Current U.S. policy seems to be ignoring the reality of the situation and, at least to the author's awareness, none are officially recognized as refugees. Instead, and on a purely anecdotal basis, most of those who have entered the U.S. legally have done so on either an investor's visa or a shopping visa (those who have entered on a shopping visa and stay are staying illegally).

The critical issue in the analysis (and in litigation) is the requisite intent. To avoid taxation, for example in the context of the Mexican elite escaping to the U.S., one must have an intent to return to Mexico. It is one thing simply to state such an intent. It is another to prove that intent. Myriad factors have been considered. The following is a list of factors, none of which are determinative, as compiled by Michael A.

Heimos, 837-3rd T.M., *Non-Citizens—Estate, Gift and Generation-Skipping Taxation*, § III(C)(4).

- Immigration and Work Status – A person's immigration status can provide evidence as to intent. For example, a permanent resident probably would be found to have the requisite intent to be found a resident for transfer tax purposes. On the other hand, a person's status as a nonimmigrant with a temporary visa, for example, an H-1B visa which allows skilled workers to work temporarily in the U.S., would tend to provide evidence of the opposite intent. Applicants for such visas must declare an intent not to immigrate. Still, and despite such official declarations and legal requirements, the IRS may argue that the person's intent to stay changed while in the U.S. *See, e.g., Jack v. United States*, 54 Fed. Cl. 590 (2002) (question of fact as to intent existed despite nonimmigrant status of decedent); *Kahn v. Commissioner*, T.C. Memo 1998-22 (1998) (U.S. permanent resident who died in his native Pakistan ruled an RA after the IRS attempted to tax his estate as an NRA). The statements of the immigrant (or nonimmigrant) in official documents also must be taken into account. If he or she is declaring a U.S. residency or domicile, those facts will tend to outweigh evidence to the contrary.
- Location of Business and Property Interests – The location of one's business and investment interests tend to reveal one's intent as to domicile. If the decedent has no property interests in his or her country of origin, he or she likely has an intent to live indefinitely right where the residence is located. On the other hand, if the person has significant business and other property interests in the country of origin, the balance is tilted to suggesting an intent to return. For those Mexican citizens escaping drug violence, 100% investment in the U.S. would be a mistake if the goal is to avoid U.S. residency.
- Family Immigration History – The more one's family has immigrated to the U.S., the more likely a court will find the decedent had the same intent.
- Residential Property Comparisons – Many foreign nationals maintain homes in both the U.S. and the countries of their origin. A comparison of the relative physical characteristics and values of these residential structures may provide evidence of intent. Also important is whether the residence is rented, is associated with recreational opportunities, and is appropriate for year round living. Another factor to consider especially important along the border is the location where guests are entertained.
- Testimony and Statements of the Individual in Question – Careful attention should be paid to testimony, statements (especially written) and correspondence. Each may provide evidence one way or the other. To the extent a decedent obtains a domestic driver's license or a residential hunting license, for example, he or she is more likely a U.S. resident. Of course, many statements can be self-serving and sometimes do not carry much weight. On the other hand, it does not hurt to create such lasting evidence (as long as it is true).
- Motivations for Being Within the U.S. – A person's motivation for being in the U.S. can be very important in the analysis. For example, the decedent in *Niehuys v. Commissioner*, 17 T.C. 1139 (1952), had fled the Netherlands because of World War II. He had intended to return, but was prevented from doing so because of the war. In the meantime, he worked in the U.S. and acquired property. He was found to be a nonresident. Similarly, the decedent in *Paquette v. Commissioner*, T.C. Memo 1983-571, was found to have been a nonresident in part because he was in the U.S. for medical care. In the context of the current drug violence, establishing a motivation for being in the U.S. seems to be quite important.
- Travel and Duration of Stays in the U.S. – While the length of stay in the U.S. certainly is not determinative, the relative length and frequency of visits to the U.S. certainly provide some evidence of intent. *See* Regs. § 20.0-1(b) (length of residence not determinative).
- Community Affairs and Group Affiliations – A person's community involvement tends to establish domicile. The thought is that a person who has no intention of staying for the long term will not become involved in the community. While this argument may be fallacious, the courts certainly consider the factor.

3) Non-Resident, Non-Citizen

No special definition is required for NRAs as all persons who are not citizens and not residents of the U.S. are NRAs.

**B. Federal Transfer Tax Consequences**

A person's status as a citizen, RA or NRA bears a direct relation to the transfer tax consequences for his or her estate. The U.S. imposes the estate tax on all U.S. citizens and residents on his or her world wide property. Code §§ 2001 (estate tax imposed on citizens and residents), 2031 (the estate is composed of "all property, real or personal, tangible or intangible, wherever situated"). Similarly, the gift tax also is imposed on all U.S. citizens and residents (though making an exception for certain residents of U.S.

territories). *Id*. § 2501(a) (gift tax imposed on any "transfer of property by gift").

The attorney also must ascertain the citizenship of the decedent's spouse, if any, to give proper advice. Regardless of the transferor's status, a transfer to a non-citizen spouse does not qualify for the marital deduction. Code §§ 2056(d)(1) (estate tax), 2523(i) (gift tax). The rule applies even if the non-citizen spouse is a U.S. resident.

In contrast to transfers by citizens and RAs, transfers by NRAs are subject to U.S. taxation only if the property has a U.S. situs. *Id*. §§ 2101(a) (estate tax imposed on NRAs), 2103 (on property situated in the U.S.), 2501(a) (gift tax imposed on NRA), 2511 (but excluding property not situated in the U.S.). Other rules also apply to NRAs with respect to U.S. situs property that, on the surface at least, would seem to discourage U.S. investment. Both the rules and some techniques designed to avoid their application also will be discussed below.

Finally, and depending on the circumstances, the practitioner also may be forced to consult a handful of bilateral treaties to determine the possible estate tax exposure for the estate, without respect to the decedent's status, if the decedent owned property located in more than one country. See Section III(C), below. Ultimately, the executor and the attorney may need to consult with competent counsel in the sister nation to come to a final conclusion.

1) Transfers to Non-Citizen Spouses

Transfers to non-citizen spouses, even if the spouse is nevertheless a resident, do not qualify for the marital deduction. Code §§ 2056(d)(1) (estate tax), 2523(i) (gift tax). Therefore, transfers to a non-citizen spouse must fall under some other exception to avoid taxation.

a) *Transfers at Death*

In the context of the estate tax and for taxable estates, there are only two options to defer taxation until the death of the non-citizen spouse. The first option, which likely may not be very practical, is for the non-citizen spouse to become a citizen before the day on which the decedent's estate tax return is due. *See* Code § 2056(d)(4) (defining time by which the surviving spouse must obtain citizenship to avoid application of the no marital deduction rule). The second and more practical option is for the transferor to establish a Qualified Domestic Trust ("QDOT") for the benefit of the surviving non-citizen spouse. *Id*. § 2056(d)(2). Of course, the QDOT also must meet the requirements of Code section 2056(b) for the marital deduction, such as being a qualified terminable interest property ("QTIP") trust as well. Regs. § 20.2056A-2(b).

Apparently in recognition that some folks mistakenly rely upon the marital deduction in their estate planning, the Code also allows post mortem planning to qualify for QDOT treatment. *Id*. §§ 2056(d)(2)(B), (d)(5). If the decedent, for example, established a QTIP trust for the surviving spouse that does not qualify as a QDOT trust, a reformation of the trust may be sought. *Id*. § 2056(d)(5). Such a reformation is timely if it is either accomplished or the state action seeking the reformation is filed before the due date (including extensions) of the decedent's estate tax return. *Id*. If the decedent did not establish a trust for the surviving non-citizen spouse, the spouse herself may establish the QDOT trust. *Id*. § 2056(d)(2)(B). In the later situation, the surviving non-citizen spouse must either actually transfer or irrevocably assign the property to the QDOT on or before the date the decedent's estate tax return is due. *Id*.

QDOTs have quite extensive requirements that are designed to ensure the non-citizen surviving spouse does not abscond from the U.S. with the QDOT property to avoid taxation. *See* Code § 2056A; Regs. § 20.2056A. The statutory requirements, in general, are as follows:

- U.S. Trustee – At least one of the QDOT's trustees must be either a U.S. citizen individual or a domestic corporation. Code § 2056A(a)(1)(A). For purposes of this section, a domestic corporation is one that is established under the laws of the U.S., one of its states or the District of Columbia. Regs. § 20.2056A-2(c).
- Withholding Right – The trust must provide that the U.S. trustee has the right to withhold from any distribution of principal the tax imposed by section 2056A (the "QDOT tax"). Code § 2056A(a)(1)(B).
- Regulatory Compliance – the trust must comply with applicable regulations. *Id*. § 2056A(a)(2).
- Election – the executor of the decedent's estate must have elected QDOT treatment for the trust. *Id*. § 2056A(a)(3).

The regulatory requirements, in general, are as follows:

- U.S. Trust – The trust must be governed by and administered under the law of one of the fifty states or the District of Columbia. Regs. § 20.2056A-2(a). To be administered under U.S. law, the trust must maintain its records (or copies) in the U.S. *Id*. The trust also must be an "ordinary trust" as defined in section 301.7701-4(a) of the Regulations, without regard to the type of property (for example, an active trade or business) being transferred to the trust. *Id*.
- Marital Deduction – The trust must otherwise qualify for the marital deduction if the property passed from the decedent to the QDOT. *Id*. §

20.2056A(b)(1). If the surviving spouse established the QDOT, the property with which the trust is funded must have been eligible to qualify for the marital deduction had it not been that she was not a U.S. citizen. *Id.* § 20.2056A(b)(2).

- Security Requirements – The trust must contain significant and detailed language giving the U.S. security in the trust's assets. *Id.* § 20.2056A(d)(1). The failure to include such language disqualifies the trust as a QDOT. The IRS has issued model language for use to satisfy this requirement. *See* Rev. Proc. 96-54. The model language is found below at Exhibit A.

The QDOT tax applies to almost all distributions of principal, whether made to the surviving spouse during life, or to the remaindermen at her death. Code § 2056A(b)(1), Regs. § 20.2056A-5(a). The only exception to the QDOT tax applying to distributions of principal to the surviving spouse during her lifetime are those made to the spouse "on account of hardship." Code § 2056A(b)(3)(B). The Regulations state that a distribution is made "on account of hardship" if it is made:

> in response to an immediate and substantial need relating to the spouse's health, maintenance, education, or support, or the health, maintenance, education, or support of any person that the surviving spouse is legally obligated to support.

Regs. § 20.2056A-5(c)(1). Distributions of income, however, are not subject to the QDOT tax. Code § 2056A(b)(3)(A).

QDOT trusts are taxed in a substantially different way than a simple QTIP trust that is included in the surviving spouse's gross estate either by virtue of Code Section 2044 or as a general power of appointment QTIP under Section 2056(b)(5). In contrast, QDOT trusts are taxed in the context of the grantor's estate. Code § 2056A(b)(2). Generally speaking, the tax for each taxable distribution is equal to:

- The tax that would have been imposed on the grantor's estate if it had been increased by the sum of:
  - The amount of the taxable distribution, plus
  - The aggregate amount of previous taxable distributions, less
- The tax on the aggregate amounts previously distributed.

*Id.*; s*ee also* Regs. 20.2056A-6(a). For a nice detailed description of how the QDOT tax is calculated, *See* Chapter 12, Michele A. Mobley, "QDOTs: Drafting and Administering Marital Trusts for Non-Citizens," 24th Annual Estate Planning and Probate Drafting Course (October 2013).

Taxes for lifetime distributions from QDOT trusts are due by April 15 of the year immediately following the year in which the lifetime distribution was made. Code § 2056A(b)(5)(A); Regs. § 20.2056A-11(a). The tax related to the death of the surviving spouse is due nine months after the surviving spouse's death. Code § 2056A(b)(5)(B); Regs. § 20.2056A-11(b). Certain extensions are available under both circumstances. Regs. § 20.2056A-11.

Given the stringent requirements of a QDOT and the manner in which they are taxed, one should avoid them if possible. Accordingly, provisions relating to QDOTs should be designed as flexible as possible. For example, they should be triggered only if necessary to avoid taxation, i.e., only if the surviving spouse does not become a citizen within the time and restrictions as found in Code section 2056(d)(4). To provide further flexibility, the plan could include an outright gift to the surviving spouse, who could then disclaim the gift into a QDOT. Relying on the surviving spouse's ability to establish the QDOT post mortem probably is not the safest approach from the planner's perspective because of the additional requirement of funding the QDOT before the return is filed. Because the QDOT is no longer necessary if the surviving spouse eventually becomes a U.S. citizen (even after the decedent's return is filed and the QDOT if funded), provisions should be included that allow the QDOT to be terminated (or at least the QDOT language if a QTIP is deemed nevertheless desirable). Model QDOT language can be found in the attached Exhibits as follows:

- Exhibit A – IRS Model Language for QDOTs. The relevant portion of Rev. Proc. 96-54 is reproduced here.
- Exhibit B – Sample Post Mortem QDOT. The sample language is from a QDOT established by an executor in an estate which did not include the necessary QDOT for the gift to the surviving non-citizen spouse. Provisions unrelated to the QDOT nature of the trust have been omitted.
- Exhibit C – Sample Irrevocable Assignment. The assignment is designed to comply with the irrevocable assignment requirement of Code section 2056(d)(2)(B) in connection with the post mortem creation of a QDOT.

b) *Gifts During Life*

The marital deduction also is not available for gifts to non-citizen spouses. Code § 2523(i). Instead, gifts to non-citizen spouses are eligible for an annual exclusion of sorts that is similar to the annual exclusion found in Code section 2503(b). *Id.* The amount is

adjusted with inflation. For the 2014 tax year, the marital annual exclusion for gifts to non-citizen spouses is $145,000. Rev. Proc. 2013-35 § 3.34(2). Note that QDOTs are unavailable for lifetime transfers to non-citizen spouses. *See* Code § 2056A(a) (QDOTs are defined "with respect to any decedent").

The lack of a marital deduction for gifts to non-citizen spouse can create possible gift tax issues in the context of joint tenancies and tenancies by the entirety. Under Section 2523(i)(3), the gift of tax treatment applied to joint tenancies and tenancies by the entirety as found in former Sections 2515 and 2515A of the 1954 Code (which were repealed in 1981) still apply with respect to spouses who are not U.S. citizens. Under these former statutes, the creation and subsequent termination of such joint properties can be treated as a gift under certain circumstances and trigger use of the annual exclusion for gifts to non-U.S. citizen spouses and taxes if the annual exclusion is exhausted.

With respect to joint tenancies in real property created on or after July 14, 1988, no gift is made upon the mere creation of the joint tenancy. Code § 2523(i)(3); Regs. § 25.2523(i)-2(b)(1). A gift can be triggered upon termination of the joint tenancy, however, if the non-U.S. citizen spouse receives more than his or her share of the proceeds attributable to the total consideration he or she has furnished. Regs. § 25.2523(i)-2(b)(2). For example, if the U.S. citizen spouse contributed 100% of the purchase price for the property held as joint tenants, and that spouse and the non-citizen spouse split the proceeds upon sale, the citizen spouse made a taxable gift equal to the amount the non-citizen spouse received. If the value of the gift exceeds the annual exclusion for gifts to non-citizen spouses, then gift taxes would be owed. Note that different rules might apply for gifts made before July 14, 1988. *See* Siegler, 842-2nd T.M., *Transfers to Non Citizen Spouses*, § IX.B.2 (2011) for a detailed discussion of the prior and current rules relating to joint tenancies in real property and non-citizen spouses.

Joint tenancies with rights of survivorship in personal property present even greater potential gift tax liability when one spouse is not a U.S. citizen. For gifts on or after July 14, 1988, the creation of a joint tenancy with a non-citizen spouse in personal property generally is a taxable gift, unless both spouses contributed equal amounts to the joint tenancy. Code § 2523(i)(3); Regs. § 25.2523(i)-2(c)(1).

Fortunately, joint bank accounts and most typical joint brokerage accounts are treated slightly differently than other types of personal property. The mere creation of a joint bank account of which the contributor can unilaterally withdraw the funds does not result in a gift. Regs. § 25.2511-1(h)(4). On the other hand, each time the non-citizen spouse withdraws funds for his or her own benefit, a gift results. *Id.* The IRS applied the same rule to a joint brokerage account in which the securities were held in the name of a nominee of the brokerage firm. Rev. Rul. 69-148. Note, however, that the creation of a joint account in some instances can cause an automatic gift of up to one-half of the account to the non-citizen spouse. *See* Regs. § 25.2511-1(h)(5). Again, different rules may apply for gifts before July 14, 1988. *See* Siegler, 842-2nd T.M. § IX.B.2 for a detailed discussion. Regardless, joint properties are a potential minefield where one of the spouses is a non-U.S. citizen.

The lack of a full marital deduction for lifetime gifts to non-citizen spouses also can affect planning related to attempted equalization of estates between a husband and wife with significant disparities in separate property. For spouses both of whom are citizens, it is common practice for the wealthier spouse simply to give assets to the other. If the less wealthy spouse is a non-citizen, however, any cumulative gifts in a single year that exceed (beginning in 2014) $145,000 will be taxable. Therefore, the planner must give extra thought as to how to accomplish estate equalization.

2) Portability

Estates of RAs may elect portability of the deceased spousal unused exclusion ("DSUE") amount. Code § 2010; Regs. § 20.2010-2T(a)(5). Estates of NRAs, however, are not eligible for portability. Regs. § 20.2010-2T(a)(5) ("an executor of the estate of a [NRA] at the time of death may not elect portability on behalf of that decedent, and the timely filing of such a decedent's estate tax return will not constitute the making of a portability election"). Also, the estate of an NRA who was the surviving spouse of a citizen or RA, whose estate had elected portability, nevertheless may not take advantage of the DSUE amount. *Id.* § 20.2010-3T(e).

Special rules also apply to the calculations of the DSUE amount when property passes to a QDOT. Regs. §§ 20.2010-2T(c)(4), 20.2010-3T(c)(2). Unlike the typical case, the DSUE amount in the context of a QDOT is redetermined when the QDOT tax is imposed under Code Section 2056A. *Id.* The temporary regulations provide an example of how to redetermine the DSUE amount. *Id.* § 20.2010-2T(c)(5), ex. 3. The general result takes into account that the QDOT tax under Section 2056A is calculated based upon the tax in effect when the deceased spouse died, but on the value of the QDOT taxable distribution. The details of the recalculation are beyond the scope of this paper.

3) Property Situs

The situs of the decedent's property is especially important. Just because the property may be "located"

in the U.S. does not mean the property has a U.S. situs, especially for purposes of the gift tax. The converse is true as well, property "located" in a foreign nation may be deemed to be situated in the U.S. To add to the complexity of the situation, the situs of some categories of property shifts depending on whether the transfer occurs during life or at death. Ultimately, if the property has a U.S. situs at the moment of transfer, it is potentially subject to taxation.

As a general statement, tangible personal and real property is deemed situated where it is physically located at the time of transfer. Code §§ 2104 (estate tax), 2511 (gift tax); Regs. §§ 20.2104(a) (estate tax), 25.2511-3(b)(1) (gift tax). For example, if an NRA purchases a valuable article of jewelry while making a trip to San Antonio, and then gives it to her daughter (whether a citizen, RA or NRA) before she returns to Monterrey, Mexico, the NRA has made a taxable gift of property situated in the U.S. In contrast, if she had waited until she returned to Mexico, the NRA would not have made a taxable gift, even if the daughter was a U.S. citizen.

U.S. currency (not deposits) is treated as tangible personal property for estate tax purposes. Regs. § 20.2104-1(a)(7)(ii); *see also* Rev. Rul. 55-143. On the other hand, there is no clear answer as to the situs of currency for gift tax purposes. The safe approach, therefore, is to treat cash as tangible personal property. Deposits, generally speaking, fall under the rules for intangible property.

The situs of intangible property would have been anyone's guess had Congress and the Treasury Department not given some guidance. For example, stock in a U.S. corporation is deemed situated in the U.S. for estate tax purposes despite that the stock certificate is located elsewhere. Regs. § 20.2104-1(a)(5). In stark contrast, and for gift tax purposes only, U.S. corporate stock is located outside the U.S. under the general rule for intangibles. Code § 2501(a)(2); Regs. § 25.2501-1(a)(3). The proceeds of life insurance are deemed situated outside the U.S. for estate tax purposes. Regs. § 20.2105-1(a)(5) (estate tax). The same holds true for deposits at U.S. financial institutions. Code §§ 2105(b) (estate tax), 2501(a)(2) (gift tax). Rather than attempt to provide a list in narrative form, the chart found at Exhibit D provides a quick reference for common types of property and their situs depending on whether the transfer is made during life or at death. Please note that the rules given are general rules. As is the case for any area of the law, there are exceptions.

Given the cavernous loophole under the gift tax for intangible property (i.e., gifts of intangibles by NRAs are not subject to gift tax regardless of the nature of the underlying obligation), any NRA who is contemplating a move to the U.S. should consider giving away intangible property before establishing U.S. residency.[13] Residency for gift tax purposes requires physical presence. If the NRA has a taxable estate, he or she could give away intangibles (even to U.S. citizens) before making the move with no transfer tax consequence.[14]

The distinction between tangible and intangibles also is important for estate tax planning purposes. The typical planning device for NRAs to avoid the application of estate tax for real property located in the U.S. is to establish a foreign corporation to purchase the property. Of course, the NRA must respect the corporate form or risk an attempt by the IRS to pierce the corporate veil. As in any gifting scenario for estate tax planning, the client should consider making the gift in trust. The advisor should, however, carefully consider whether the trust should be a foreign trust, or a U.S. trust. U.S. persons who are either treated as owners or beneficiaries of foreign trusts are subject to certain reporting requirements.[15] *See, e.g.*, Code §§ 6038D, 6048. Further, the NRA will run the risk of establishing a step transaction if he or she attempts to transfer previously owned real property to the foreign corporation.

Another significant risk of establishing a foreign owned corporation solely for purposes of owning U.S. real estate is similar to the risk of family limited partnerships and limited liability companies under Code sections 2036 through 2038. Code section 2104(b) specifically makes the concepts developed under Code sections 2036 through 2038 applicable to the situs rules. If the NRA has made a transfer within the meaning of these sections, the property will be considered situated in the U.S. if it was so situated at the time of the transfer or at the time of death. Code § 2104(b). Thus, even if the underlying real property had been sold and converted to real property in a

[13] Note that U.S. persons who receive gifts with a value of $10,000 or more, as adjusted for inflation, from non-U.S. persons must report the receipt to the IRS under Code section 6039F(a). Beginning in 2014, the inflation adjusted amount is $15,358. Rev. Proc. 2013-35 § 3.38. *See* Section IV(A), below, for more information.

[14] Respecting the corporate form usually means the foreign corporation should charge rent to anyone using the property, including the owner of the corporation and his or her family members. Charging rent raises other income tax issues that should be considered by the foreign owner. *See* Sanna, Dina K. and Stephen Ziobrowski, "Foreign-Owned U.S. Real Estate: To Rent or Not to Rent," Estate Planning, April 2014, for a nice discussion of the U.S. income tax implications arising out of such attempts to respect the corporate form.

[15] As stated when describing the scope of this paper, taxation issues related to foreign trusts are well outside the scope of this paper.

foreign country before the NRA's death, the transferred property will be situated in the U.S. Therefore, any plan to utilize a foreign holding company needs to be analyzed in the same way one would approach a domestic family LP or LLC.

4) NRA's Transfer Tax Exposure

To the extent an NRA has an estate situated in the U.S. under the rules discussed in Section III(B)(2), above, that estate is subject to taxation in the same manner as for citizens and RAs with one major exception. Unlike citizens and RAs, the NRA is entitled to an estate tax credit of only $13,000 (which equates to an exemption of $60,000).[16] Code § 2102(b)(2)(A). The estate tax rates on an NRA's taxable estate are the same as those applicable to other estates. *Id*. § 2101(b). NRAs also are not eligible to take advantage of portability, even if the NRA was the surviving spouse of a person whose estate elected portability. Regs. § 20.2010-3T(e).

As an example, if an NRA has a U.S. taxable estate of $600,000, the tentative estate tax will be $192,800, based upon the current tables. This tentative estate tax will then be reduced by the $13,000 credit, resulting in an estate tax liability of $179,800 ($192,800 minus $13,000). On the other hand, if the decedent had been an RA, he would have been entitled to the $2,481,800 unified credit as adjusted for inflation in 2014 under current law. Of course, the RA's worldwide assets also would have been subject to taxation.

Because of the differences in tax credit available, an NRA whose worldwide estate consists mostly of U.S. property should consider establishing U.S. citizenship or residency for estate tax purposes. For example, if a person has a $4,000,000 worldwide estate, $3,000,000 of which is situated in the U.S., the RA would effectively have no U.S. taxable estate because the available exemption of $5,340,000 would swallow the entire estate. The NRA, on the other hand would have a U.S. taxable estate of $2,940,000 after application of the $60,000 exemption amount. Neither the citizen nor the RA would have to pay an estate tax, while the NRA would pay $1,145,800 in taxes.

The estate of an NRA also is entitled to the marital deduction for transfers to U.S. citizen spouses. Code § 2106(a)(3). Accordingly, a QTIP type of trust could be appropriate to defer taxes in the event the NRA is married to a U.S. citizen, or a QDOT trust if the spouse is a non-citizen.

With respect to the gift tax, NRAs are entitled to the annual exclusion in the same manner it is available to citizens and RAs. Code § 2503(b). NRAs also are eligible for the annual exclusion for gifts to non-citizen spouses of $145,000 per year (for 2014). *Id*. § 2523(i). NRAs may not, however, split gifts with a spouse. *Id*. § 2513(a)(1) (split gifts specifically limited to citizens and residents). Perhaps more significant, NRAs also are not entitled to the $5,340,000 lifetime exemption amount for taxable gifts. *See id*. § 2505(a) (credit is available only to citizens and residents). Accordingly, any gift of real or tangible property situated in the U.S. that exceeds the annual exclusion is subject to taxation and payment of tax, and regardless of whether the NRA has an otherwise taxable estate.

Transfers made by NRAs generally are subject to the GST tax to the extent the transfer also is subject to either the estate tax or the gift tax. *See* Code § 2601 (imposing tax on all generation-skipping transfers without distinction as to status of the transferor).

5) The Foreign Trust Tax Trap

Code Section 2104(b) interjects a significant tax trap for the unwary NRA (and his or her tax advisors). Under the section, any property with a U.S. situs transferred by the NRA during his or her life within the meaning of Sections 2035, 2036, 2037, or 2038, is deemed to have a U.S. situs at the time of death. Code § 2104(b). The subsection states:

> For purposes of this subchapter, any property of which the decedent has made a transfer, by trust or otherwise, within the meaning of Sections 2035 to 2038 inclusive, shall be deemed to be situated in the United States, if so situated *at the time of the transfer* or at the time of the decedent's death.

*Id.* (emphasis added). The consequence of this Section is that the NRA might die with some power or right over property with a foreign situs, but nevertheless be subject to U.S. estate taxation if the NRA originally had property with a U.S. situs. *See* TAM 9507044 (applying Section 2104(b) in this manner). For example, an NRA might transfer U.S. real property, which has a clear U.S. situs to a foreign revocable trust. Even if the foreign Trustee subsequently sells the property and acquires assets such as real estate in the NRA's domicile, which has a clear foreign situs, the foreign situs property is nevertheless deemed situated in the U.S. when the NRA dies. To avoid this result, the NRA must convert the U.S. situs property to a foreign situs before making a transfer within the meaning of Sections 2035 to 2038.

[16] Technically, an NRA could claim a credit up to $46,800. Code § 2102(b)(2)(B). The higher credit is virtually meaningless, however, because the NRA would be required to report his or her worldwide assets and most do not want to take this step. Further, at least 27.9% of the NRA's assets must be situated in the U.S. to claim more than the standard $13,000 credit.

6) Charitable Deductions

In general, the estates of NRAs also are entitled to deductions for gifts for public, charitable and religious use. Code § 2106(a)(2). The deduction, however, is limited to the extent the property given to the charity was includable in the NRA's taxable estate. *Id*. § 2106(a)(2)(D). Further, the charitable gift must be to either a domestic non-profit corporation or a trust for use within the U.S. *Id*. § 2106(a)(2)(A).

### C. Bilateral Transfer Tax Treaties

To add to the complexity of handling estates for RAs and NRAs, the U.S. has entered into bilateral treaties with a handful of other nations which impose property transfer taxes. Significantly, it has not entered a treaty with all such nations and persons with property in both the U.S. and such a country are at risk of double taxation. *See* Hauser, Barbara A., "Death Taxes Around the World in 2013," Trusts and Estates, November 2013, 56-64 (providing a survey of death taxes around the world). The existing treaties are with the following sovereigns:

- Australia;
- Austria;
- Canada (really part of the Income Tax Treaty);
- Denmark;
- Finland;
- France;
- Germany;
- Greece;
- Ireland;
- Italy;
- Japan;
- Netherlands;
- Norway;
- South Africa;
- Sweden[17];
- Switzerland; and
- The United Kingdom.

The details of these treaties are beyond the scope of this paper. Suffice it to say that they may alter the situs rules and eligibility for credits, among other items. Significantly, the Code provides that the tax treaties do not automatically trump U.S. tax law, unless the treaty was in effect before August 16, 1954. Code § 7852(d). Instead, "neither the treaty nor the law shall have preferential status by reason of its being a treaty or law." *Id.* § 7852(d)(1). In advising the executor of an international estate with connections with any of the listed nations, the attorney is well advised to consult the applicable treaty. The treaties are available both on Lexis-Nexis and (the author assumes) Westlaw as well as appendices to Schoenblum, 851-2d T.M., *U.S. Estate and Gift Tax Treaties* (2012).

The U.S. has no transfer tax treaty with Mexico. Traditionally, Mexico has not imposed an inheritance tax. Effective January 1, 2014, however, Mexico now imposes an income tax on non-residents (regardless of citizenship) related to the inheritance of real property located in Mexico. (Mexican residents are not subject to the tax until the property is sold.) The tax is 25% of the value of the inherited real property. The United States does have an income tax treaty with Mexico, which may address possible double taxation in this context. But it would seem there is no double taxation for the U.S. person because no taxable event has occurred in the U.S. upon mere inheritance. The several Mexican states and the Federal District (i.e., Mexico City) also impose a transfer tax upon the transfer of real property even if the transfer arises out of inheritance at rates of up to 4.5% of the value of the property.

### D. Necessity of U. S. Executor.

Under Code Section 2203 and Regulation section 20.2203-1, if no executor has been appointed for the NRA's estate, the person in actual custody of the asset is deemed to be an "executor" under the Code. This means that a securities firm holding the NRA's investment account or the bank holding the NRA's deposits can be personally liable for estate taxes that are due. Code § 2002 (imposing liability for the tax upon the executor). It has been the author's experience that securities firms are reluctant to release possession of an NRA's securities, even into the hands of a U.S. executor, until an estate tax closing document or partial release of lien has been issued by the IRS, apparently for fear of this potential liability. To smooth the way for a successful administration, it may be necessary to appoint a U.S. executor.

## IV. TRAPS FOR THE UNWARY U.S. PERSON ACQUIRING PROPERTY THROUGH GIFTS OR INHERITANCES FROM ABROAD

### A. Receipt of Gifts and Bequests from NRAs

U.S. persons who receive, in the aggregate, gifts and bequests with a value of $10,000 or more, as adjusted for inflation, from non-U.S. persons in any one tax year must report the receipt to the IRS. Code § 6039F(a). For purposes of this Section, a "U.S. person" is defined to include citizens, RAs, and domestic trusts. *Id.* § 7701(a)(30). Beginning in 2014, the inflation adjusted amount is $15,358. Rev. Proc. 2013-35 § 3.38. Significantly, the statute only requires such reporting "as the Secretary may prescribe

[17] The treaty with Sweden was terminated effective January 1, 2008.

regarding each foreign gift received." Code § 6039F(a). In Notice 97-34, the IRS addressed the reporting thresholds and indicated that U.S. persons would have to report gifts from NRAs or foreign estates only if the aggregate amount in the taxable year exceeds $100,000. Notice 97-34, 1997-25 I.R.B. 22, § VI(B)(1). On the other hand, purported gifts from foreign corporations or foreign partnerships would have to be reported at the statutory threshold. *Id.* § VI(B)(2). Failure to report the gift carries with it a potential penalty of 5.0% of the value of the unreported gift for each month the report is late, up to 25.0% of the gift. Code § 6039F(c).

Such gifts are reported on Form 3520. The reporting thresholds as reflected in the Instructions to Form 3520 and the Form itself are consistent with Notice 97-34. The Form is due to be filed on or before April 15 of the year following the receipt of the gift or bequest.

### B. Gifts and Bequests from Certain Expatriates

Citizens and RAs who receive gifts or bequests from certain "covered expatriates" also must pay an inheritance tax on the value of the gift or bequest. *See* Code § 2801. A "covered expatriate" is, generally speaking, a person who has either lost his or her citizenship or legal residency status, and meets certain financial tests. *Id*. §§ 877(a)(2), 877A(g)(1). The financial tests include either an average annual net income tax for a 5 year period before becoming an expatriate of greater than $124,000, as adjusted for inflation, or a net worth of $2 million, with no adjustment for inflation, or more as of the date of expatriation. *Id*. § 877(a)(2). For 2014, the adjusted annual net income tax amount is $157,000. Rev. Proc. 2013-35 § 3.29. The inheritance tax applies to the extent the gift or bequest exceeds the annual gift tax exclusion amount in effect during the calendar year. Code § 2801(c). The tax rate is equal to the highest estate tax rate found in Code section 2001(c) effective on the date of the gift or bequest. *Id*. § 2801(a)(1). The U.S. person receiving the gift or inheritance is responsible for the tax. *Id*. § 2801(b). *See* Toce, Joseph H., Jr. and Joseph R. Kluemper, "Estate Planning for Expatriates Under Chapter 15(c)", Vol. 40, No. 1 Estate Planning 3-11 (January, 2013); and Liss, Stephen, "HEART-ache: Expatriation Under the New Inheritance Tax," Vol. 37, No. 4, Estate Planning 18-21 (April 2010) for two detailed articles regarding this inheritance tax.

A fairly common example of a covered expatriate might be a physician of foreign birth who practices in the U.S. for several years and then returns home. If the doctor had children while in the U.S., his or her children will be U.S. persons. Any gifts to the children over $14,000 (the current annual exclusion amount) after expatriation likely would be taxable if the financial tests are met.

The IRS has announced it intends to issue guidance under Section 2801 and promulgate a new Form 708 on which U.S. persons may report receipt of gifts or bequests from expatriates. Announcement 2009-57, 2009-29 I.R.B. 158. As of the date the author worked on this portion of the paper (April 2014), however, neither the guidance nor the new form were available.

## V. CONCLUSION

The author hopes that the legal discussion surrounding the administration of estates with an international connection proves helpful to other attorneys.

# APPENDIX

# A PRIMER ON MEXICAN PROBATE LAW

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**ADVANCED ESTATE PLANNING & PROBATE COURSE**
**JUNE 10 – 12, 2014**
**SAN ANTONIO, TEXAS**

**CHAPTER 33**

## ALEJANDRO SOTELO
## LEGAL EXPERIENCE

Alejandro Sotelo, a licensed Mexico attorney with nearly 20 years of experience, advises ScottHulse clients on matters involving Mexico law, enabling the Firm to provide its clients with single-source, dual representation in both the U.S. and Mexico. Born and educated in Mexico and now a resident and citizen of the United States, Mr. Sotelo is bicultural and bilingual, which enables him to work effectively and efficiently in both countries, while serving a diverse client base.

The scope of Mr. Sotelo's law practice includes and is not limited to Corporate & Securities; International Trade and Cross-Border Business; cross-border transactions, including Mergers and Acquisitions (M&A); complex Litigation; and Tax Law. In addition to working collaboratively with ScottHulse's U.S. attorneys on cross-border matters, Mr. Sotelo leads the Firm's Mexico Law practice.

Mr. Sotelo received his Law Degree from Instituto Tecnologico y de Estudios Superiores de Monterrey, a civil law tradition institution in Mexico, and earned his Master of International Business Law degree from the McGill University Institute of Comparative Law in Montreal, Quebec, Canada. Additionally, he holds a Post Graduate Diploma in International Tax Law from Robert Kennedy University in Zurich, Switzerland. He is currently pursuing a Master's Degree in International Commercial Law (LL.M.) from the University of California at Davis.

Mr. Sotelo has served as a professor of comparative law at the Universidad Autonoma de Juarez School of Law. Also, he was a professor at the Instituto Tecnologico de Estudios Superiores de Monterrey, Campus Ciudad Juarez, where he taught business law and international business law from 1995 to 1999. He is the author of the thesis "Enforcement of the Intellectual Property Rights and Transfers in Mexico, within the North American Context".

### EDUCATION

**Instituto Tecnologico y de Estudios Superiores de Monterrey**, BCL, Civil Law - 1994

**McGill University,** LLM in International Business Law - 2002

**Robert Kennedy University**, Zurich, Switzerland, Post Graduate Diploma – International Tax Law - 2000

**University of California at Davis**, Candidate for Master's Degree in International Commercial Law (LL.M.)

### ADMISSIONS & QUALIFICATIONS

Licensed to Practice in Mexico – 1994

Member of the Mexican National Association of Corporate Counsel (ANADE)

Foreign Legal Consultant (FLC) – Certified by the Texas Board of Law Examiners

## A PRIMER ON MEXICAN PROBATE LAW

Probate law in Mexico is not very different from that in the United States. The substantive and procedural aspects of Mexican probate law are governed by state law. The law in Mexico's thirty-two states and the Federal District of Mexico (Mexico City) are generally uniform, with only slight differences among the states. Generally speaking, state law governs property rights.[18] Federal law, however, governs certain rights and obligations with respect to matters such as ownership of stock and bonds in corporations.[19]

The first issue to address in any Mexican probate is to determine the decedent's domicile. Mexican law presumes that all persons have a domicile.[20] Domicile is determined based upon both objective and subjective factors. Generally, a person's domicile is where the person habitually resides (the objective component) with an intent to live indefinitely (the subjective component).[21] The length of stay in one place, however, is not determinative. Rather, the person only must physically establish a new residence and have the intent to reside at that place indefinitely. On the other hand, a stay of six months in a location can create a legal presumption of domicile.[22]

Under Mexican law, the decedent's domicile at the time of death establishes the venue (understood as jurisdiction under Mexican law) for the probate proceeding. The place of death is not determinative, though it could be a factor.[23]

If the decedent was domiciled in Mexico, the state judge with authority in the state district of domicile will have jurisdiction to conduct the probate proceeding. The judge is considered as the universal judge, with authority over all aspects of the decedent's estate, including the executor, the heirs, and all parties involved with the property of the decedent.[24] An interested party, usually a family member, will initiate the probate proceeding with the appropriate judge, and the decedent's heirs will be notified. If, on the other hand, the decedent was domiciled outside of Mexico, a state judge for the place where the decedent's real property is located has jurisdiction for the Mexican probate proceeding.[25] Typically, the Mexican judge will enforce the orders and decisions of the foreign courts with jurisdiction over the decedent's domicile. If a decedent owns real property located in more than one Mexican state, a process similar to ancillary probates in Texas is used.

Unlike in the U.S., most Mexican wills are filed either in the general archives of a notary public or in the public registry. The best practice is to execute the will in front of a notary public, which will make the will self-proved. The judge will initiate a search through the notarial archives and the public registry to locate the decedent's last will. Other types of wills (for example, a will prepared in another jurisdiction) can also be presented to the Court. Notice of the probate proceeding also will be published in a state newspaper so that persons who believe they have rights over the decedent's property can assert their respective claims[26].

If there is a will, its validity is determined based upon the law of the place where it was executed. For example, if the decedent was a foreigner and the will was drafted in the foreign jurisdiction, the foreign law will govern the will's validity.[27] Mexican law will recognize the foreign will executed with the formalities of foreign law even if it was not executed in conformance with Mexican law. Of course, there are always exceptions. Mexican law does not recognize wills executed under legal principles which fundamentally contravene Mexican law.[28] To prove the foreign law, the will proponent may rely upon expert witness testimony of licensed attorneys from the jurisdiction in question.

Mexican law regarding intestate succession is significantly different from Texas law. Note that Mexican law as to intestacy will be applied only to the estates of decedents who were domiciled in Mexico when they died. Mexico will apply the foreign law of the decedent's domicile to determine intestacy, even for real property located in Mexico, if the decedent

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[18] Article 121 paragraphs I and II, of the Mexican Constitution of year 1917, states that State Laws will only have effects on their territory and that goods and property will be regulated by the laws of their location.

[19] Commercial entities are regulated by Federal Law, and State Law cannot restrict or regulate commercial transactions between States of the Union.

[20] Article 29 of the Federal Civil Code, which is essentially the same as the Civil Codes of the thirty-two States, states that the domicile of a person is the place of habitual residence, or if there is no such place, then the place where a person chooses as his or her principal place of business or occupation; or in the absence of those domiciles, then the place of residence or in the place where a person can be found. In that respect, the jurist Mr. Rafael Rojina-Villegas (*Compendio de Derecho Civil, Introducción, Personas y Familia, 1989*) states that according to Article 29, all persons must have a domicile.

[21] *Id*., Rafael Rojina-Villegas.

[22] *Id*.

[23] *See* Article 24 paragraph VI of the Federal Code of Civil Procedure, which is consistent with the State Codes of Civil Procedure.

[24] *Id.*

[25] *Id.*

[26] As an example of this typical process, see articles 510 to 636 of Code of Civil Procedure of the State of Chihuahua.

[27] *See* article 13 of the Federal Civil Code, which establishes that contracts and/or other legal situations validly created on a different State or in a foreign country, shall be recognized.

[28] *See* article 15 of the Federal Civil Code.

died domiciled in another country.

For single persons domiciled in Mexico, the decedent's heirs are his or her descendants, "*por estirpe*." If the decedent had no descendants, then the decedent's parents, or the survivor of them, take. If both parents also do not survive the decedent, his or her surviving maternal grandparents will share one-half of the estate and the surviving paternal grandparents will share the other one-half. If both maternal grandparents, for example, do not survive, then their one-half of the estate will go to the parents' descendants, "*por estirpe*". The parents' descendants share the entire estate if there are no surviving grandparents. If none of the parents' descendants survive, then grandparents' descendants, "*por estirpe"*, take.[29] Based on a discussion with Glenn Davis, the author of the main paper, "*por estirpe*" under Mexican law has the same meaning as "per stirpes" under Texas law.

If the decedent was married, the decedent's spouse takes an equal share of the decedent's estate with his or her descendants, *por estirpe*, but only if the decedent's spouse does not have assets with a value at least equal to the portion of one descendant. If there are no children, but the parents or grandparents survive the decedent, the surviving spouse takes one half and the parents or grandparents of the decedent take the other half. If there are no parents or grandparents of the decedent, but other relatives within fourth grade survive (no farther than a cousin), then the spouse takes two thirds, and the other family members take the other third, again "*por estirpe*".[30]

For example, if the decedent was married and had three children, two of whom predeceased the decedent, with one predeceased child leaving three grandchildren, and the other leaving one grandchild, the distribution would be: 1/4 to the surviving spouse, 1/4 to the surviving child, 1/12 to each grandchild by the first predeceased child (for a total 1/4), and 1/4 to the grandchild by the second predeceased child.

Mexico recognizes community property for married couples. At the time of marriage, the couple can chose to have the property acquired during the marriage to be treated as community property or separate property. The rules of intestate distribution apply to both the decedent's separate property and one-half of the community property. The surviving spouse always keeps his or her one-half of the community property.

In many instances, persons who are domiciled outside of Mexico (both foreigners and Mexican citizens) and who own real property located in Mexico will execute two wills. The first is executed in conformance with the law of the testator's domicile and for property outside of Mexico while the second is executed in conformance with Mexican law and only for property located in Mexico. Under Mexican law, however, there should be only one probate proceeding which is controlling and universal and there should not be two separate original probate proceedings in different courts. Accordingly, it is recommended to probate both wills in the decedent's domicile. Then the probated Mexican will can be filed with the appropriate state judge in Mexico for enforcement of the will.

The Mexican constitution does not allow foreign nationals to own residential real property within certain distances of Mexico's national borders and the coast.[31] To avoid this constitutional barrier to property ownership, foreign nationals will enter trust arrangements by which a Mexican bank will own legal title to the property for the benefit of the foreign national.[32] The trust should include dispositive provisions directing the disposition of the property upon the foreign national's death. A probate proceeding is not required to effect the transfer because the trust is considered contractual in nature. Failure to include such provisions will result in an intestacy with respect to the decedent's rights in the trust, which is considered personal property. Of course, if the foreign national has a will, that will could be used to direct disposition of the decedent's rights in the trust.

A similar issue arises when a non-Mexican citizen inherits residential property located near the borders or coasts of Mexico. Regardless of inheritance, the foreign national is prohibited from owning title to the residential property. In such situations, the foreign national can request the judge with jurisdiction over the probate proceeding to establish a trust in the same form as that used to allow foreign nationals to purchase residential real property in those locations.

Effective January 1, 2014, Mexican Federal law was amended to impose an income tax of 25% of the fair market value of real property inherited by non-residents of Mexico, including both foreign nationals and Mexican citizens who do not reside in Mexico.[33] For Mexican residents who inherit real property, the tax is deferred until the property sells. A gaping loop hole exists for gifts (in Mexican law – a "donation") and transfers effected by some other mean other than a will, for example, a trust.[34] For donations and trusts, the spouse, direct descendants, and direct ascendants are excepted from the tax regardless of where the transferee resides. Note also that there are rumors of a movement in the Mexican congress to remove the exemption from the tax for Mexican residents, too.

[29] *See* articles 1599 to 1623 of the Federal Civil Code.
[30] *See* articles 1624 to 1634 of the Federal Civil Code.
[31] *See* article 27 of the Mexican Constitution.
[32] *See* articles 381 to 394 of the General Law of Negotiable Instruments and Credit Operations.
[33] *See* article 160 of the Income Tax Law.
[34] *See* articles 93 paragraph XXIII-A and 160 of the Income Tax Law.

# Exhibit A – IRS Model Language for QDOTs

From Rev. Proc. 96-54

SEC. 4. SAMPLE QUALIFIED DOMESTIC TRUST LANGUAGE THAT MAY BE USED TO SATISFY THE "GOVERNING INSTRUMENT" REQUIREMENTS OF § 20.2056A-2 (d) (1) (i) and (ii).

My trustee shall comply with the requirements for security arrangements for qualified domestic trusts as set forth in Treas. Reg. § 20.2056A-2 (d) (1) (i) or (ii), summarized as follows:

(a) *Trust in Excess of $2 Million.* If the fair market value of the assets passing to the trust (determined without reduction for any indebtedness thereon) exceeds $2 million on the relevant valuation date, then my Trustee must at all times during the term of the Trust either satisfy the U.S. Bank as Trustee requirement (see Treas. Reg. § 20.2056A-2 (d)-(1) (i) (A)), or furnish a bond that satisfies the requirements of Treas. Reg. § 20.2056A-2 (d) (1) (i) (B), or furnish an irrevocable letter of credit that satisfies the requirements of Treas. Reg. § 20.2056A-2 (d) (1) (i) (C), (hereinafter referred to as the U.S. Bank, Bond, or Letter of Credit Requirement). My Trustee may alternate between any of the security arrangements described in the preceding sentence provided that, at all times during the term of the trust, one of the arrangements is operative. If my Trustee elects to furnish a bond or letter of credit as security, then in the event the Internal Revenue Service draws on the instrument in accordance with its terms, neither my U.S. Trustee nor any other person will seek a return of any part of the remittance until after April 15th of the calendar year following the year in which the bond or letter of credit is drawn upon.

(b) *Trust of $2 Million or Less.* If the fair market value of the assets passing to the trust (determined without reduction for any indebtedness) is $2 million or less on the relevant valuation date, then my Trustee must comply with either the U.S. Bank, Bond, or Letter of Credit Requirement only if more than 35% of the fair market value of the trust assets, determined annually on the last day of the taxable year of the trust, consists of real property located outside the United States. For purposes of determining whether more than 35% of the trust assets consist of foreign real property, Treas. Reg. § 20.2056A-2 (d) (1)-(ii) (B) applies.

(c) *Determination of Value.* For purposes of determining whether the fair market value of the trust assets exceeds $2 million, my Trustee is authorized to make the election under Treas. Reg. § 20.2056A-2 (d) (1) (iv) (A) with respect to real property used as my spouse's personal residence.

(d) *Amount of Bond or Letter of Credit.* For purposes of determining the amount of the bond or letter of credit, my Trustee is authorized to make the election under Treas. Reg. § 20.2056A-2 (d) (1) (iv) (B) with respect to real property used as my spouse's personal residence.

(e) *Annual Statements.* My Trustee is directed to file any annual statements required under Treas. Reg. § 20.2056A-2 (d) (3).

(f) *General Conduct.* Notwithstanding anything contained herein to the contrary, my U.S. Trustee is hereby authorized to enter into alternative plans or arrangements with the Internal Revenue Service pursuant to Treas. Reg. § 20.2056A-2 (d) (4) to assure collection of the deferred estate tax, in lieu of the provisions contained herein.

(g) *References to Regulations.* All references to "Treas. Reg." in this document shall be references to regulations published under 26 CFR as in effect on the date of execution of this document, or, in the event that any such regulation is amended or superseded thereafter, to the regulation (or any successor regulation) as so amended.

(h) *Dollar Values.* The use of the dollar sign ($) shall indicate amounts stated in U.S. dollars

# Exhibit B – Sample Post Mortem QDOT

**THE _____ QUALIFIED DOMESTIC TRUST**

We, _____, individually, joined by _____ and _____, in their capacities as the Independent Co-Executors of the Will and Estate of _____, Deceased, declare that we, as Grantors (hereinafter collectively referred to as "Grantor", unless otherwise specified), hereby establish this trust pursuant to the terms and provisions of this agreement, effective as of _____, 20__. We have transferred to _____ and _____, as Co-Trustees, the property described in Schedule A attached hereto.

**ARTICLE I**
**ESTABLISHMENT OF TRUST**

**1.1 Name of Trust.** This trust shall be known as **THE _____ QUALIFIED DOMESTIC TRUST** and shall be held and administered as set forth below.

**1.2 Appointment of Trustees.** Grantor appoints _____ and _____**(BANK)**, as initial Co-Trustees of the trust.

**a. Appointment of Successor Co-Trustees.** If _____**(Individual Trustee)** ceases to serve as Trustee, Grantor appoints _____ to serve as the successor Co-Trustee of this trust to serve with _____**(Bank)**.

**1.3 Revocation and Amendment.** This trust is irrevocable. Except as specified in Article II, Paragraph 2.8(g), this trust also may not be amended.

**ARTICLE II**
**TERMS AND CONDITIONS**

**2.1 Beneficiary.** During her lifetime, _____ (the "Primary Beneficiary") shall be the sole beneficiary of this trust.

**2.2 Mandatory Distributions of Income.** The Trustee shall distribute the entire net income of the trust to the Primary Beneficiary in monthly, quarterly, or other convenient installments, but at least annually. The Trustee also shall distribute to the Primary Beneficiary all income of any Retirement Benefit payable to the trust. To ensure the Primary Beneficiary's right to income, the Primary Beneficiary may direct the Trustee, in writing, to convert any non-income producing or unproductive trust assets into income producing assets within a reasonable time.

**2.3 Discretionary Distributions of Principal.** The Trustee also may distribute the trust principal for the Primary Beneficiary's health, education, maintenance and support at such times and in such amounts as the Trustee determines to be in the Primary Beneficiary's best interest. The Independent Trustee [only], if any, may distribute trust principal to the Primary Beneficiary at any time and from time to time when the Independent Trustee, in its sole discretion, determines that such a distribution is advisable or appropriate for any purpose and for any reason. The primary purpose of this trust is to provide adequate support and maintenance to the Primary Beneficiary and the distribution of the trust remainder to the remainder beneficiaries is only of secondary interest to the Grantors. The Trustee shall give priority to the Primary Beneficiary's health and support in that standard of living to which he or she was accustomed at the date of the death of the first Grantor to die.

**2.4 Testamentary Power of Appointment**. the Primary Beneficiary may appoint all or a portion of the trust remainder on termination of the trust to or among the class composed of the Grantors' descendants, but specifically excluding the Primary Beneficiary, his or her creditors, the Primary Beneficiary's estate and its creditors, upon such conditions and estates, outright or in trust, in such manner and in such amounts and proportions as the Primary Beneficiary may designate in his or her last Will. The Primary Beneficiary does not, however, have any power of appointment over any portion of the trust principal that was funded with property as a result of the Primary Beneficiary's qualified disclaimer of that property.

**2.5 Sole Beneficiary.** During his or her lifetime, the Primary Beneficiary shall be the sole beneficiary of this trust. No person, including but not limited to the Trustee and the Primary Beneficiary, has any power to appoint any of the trust property to any person other than the Primary Beneficiary.

**2.6 Distribution of Trust Income and Assets on Death of Beneficiary.** The Trustee shall distribute all accumulated income to the Primary Beneficiary's estate. Subject to the preceding provisions of this Article **and the Primary Beneficiary's power of appointment**, the Trustee shall distribute the trust principal and any income accumulated after the date of the Primary Beneficiary's death according to the provisions of Article IV of this agreement.

**2.7 Marital Deduction Qualification.** The Grantor intends that the property she transfers to this trust qualify for the marital deduction in the estate of _____, deceased. To the extent that any term or condition in this agreement would cause the disqualification of the trust as such, that term or condition shall be void. The Trustee shall not accept any assets that do not qualify for the marital deduction in the estate of _____, deceased.

**2.8 Qualified Domestic Trust Provisions**. At the time of this agreement, Grantor _____ is not a United States citizen. Grantor intends this trust to qualify as a qualified domestic trust and therefore intends that the trust shall also be governed by the following provisions, notwithstanding any contrary provision in this agreement.

**a. Special Trustee Provisions**. **_____(Bank)** shall serve as a Co-Trustee of this trust. In the event the named bank ceases to serve for any reason, the remaining Co-Trustee shall immediately appoint a replacement bank meeting the U. S. Bank as Trustee requirements, under applicable federal regulations.

**b. U. S. Trustee**. At least one Trustee shall always be either an individual United States citizen whose tax home is the United States or a corporation created or organized under the laws of the United States or under the laws of any state of the United States or the District of Columbia ("U. S. Trustee"). In the event that the Trustee is not a U. S. Trustee, the Trustee shall immediately appoint a Co-Trustee that meets the requirements of this subparagraph.

**c. Withholding Requirement**. The U. S. Trustee shall withhold any tax imposed by section 2056A of the Code from any distribution other than a distribution of income and pay such tax to the appropriate authority. The Trustee's selection of any assets to be sold to make payments pursuant to this subparagraph, and the tax effects thereof, shall not be subject to question by any beneficiary.

**d. Trust Situs and Administration Requirements**. The records of the trust or copies thereof must be kept in and administration of the trust must be governed by the laws of one of the United States or the District of Columbia.

**e. Security Requirements**. The Trustee shall comply with the requirements for security arrangements for qualified domestic trusts as set forth in TREAS. REG. § 20.2056A-2(d)(1)(i) or (ii), summarized as follows:

**(1) Trust in Excess of $2 Million**. If the fair market value of the assets passing to the trust (determined without reduction for any indebtedness thereon) exceeds $2 million on the relevant valuation date, then the Trustee must at all times during the term of the trust either satisfy the U. S. Bank as Trustee requirement (*see* TREAS. REG. § 20.2056A-2 (d)(1)(i)(A)), or furnish a bond that satisfies the requirements of TREAS. REG. § 20.2056A-2 (d)(1)(i)(B), or furnish an irrevocable letter of credit that satisfies the requirements of TREAS. REG. § 20.2056A-2(d)(1)(i)(C), (hereinafter referred to as the U. S. Bank, Bond, or Letter of Credit Requirement). The Trustee may alternate between any of the security arrangements described in the preceding sentence, provided that, at all times during the term of the trust, one of the arrangements is operative. If the Trustee elects to furnish a bond or letter of credit as security, then in the event the Internal Revenue Service draws on the instrument in accordance with its terms, neither the U. S. Trustee nor any other person will seek a return of any part of the remittance until after April 15th of the calendar year following the year in which the bond or letter of credit is drawn upon.

**(2) Trust of $2 Million or Less**. If the fair market value of the assets passing to the trust (determined without reduction for any indebtedness) is $2 million or less on the relevant valuation date, then the Trustee must comply with either the U. S. Bank, Bond, or Letter of Credit Requirement only if more than 35% of the fair market value of the trust assets, determined annually on the last day of the taxable year of the trust, consists of real property located outside the United States. For purposes of determining whether more than 35% of the trust assets consist of foreign real property, TREAS. REG. § 20.2056A-2(d)(1)(ii)(B) applies.

**(3) Determination of Value**. For purposes of determining whether the fair market value of the trust assets exceeds $2 million, the Trustee is authorized to make the election under TREAS. REG. § 20.2056A-2(d)(1)(iv)(A) with respect to real property used as the Grantor's personal residence. The "fair market value" of the trust assets shall be the fair market value of the assets passing, treated, or deemed to have passed to the trust, determined without reduction for any indebtedness with respect to the assets, as finally determined for federal estate tax purposes as of the date of death of the Grantor, or, if applicable, the alternate valuation date (adjusted as provided in the Treasury Regulations regarding the exclusion of a certain portion of the value of the Grantor's principal residence and related furnishings.)

**(4) Amount of Bond or Letter of Credit**. For purposes of determining the amount of the bond or letter of credit, the Trustee is authorized to make the election under TREAS. REG. § 20.2056A-2(d)(1)(vi)(B) with respect to real property used as the Grantor's personal residence.

**(5) Annual Statements**. The Trustee is directed to file any annual statements required under TREAS. REG. § 20.2056A-2(d)(3).

**(6) General Conduct**. Notwithstanding anything contained herein to the contrary, the U. S. Trustee is hereby authorized to enter into alternative plans or arrangements with the Internal Revenue Service pursuant to TREAS. REG. § 20.2056A-2(d)(4) to assure collection of the deferred estate tax, in lieu of the provisions contained herein.

**(7) References to Regulations**. All references to "Treas. Reg." in this document shall be references to regulations published under 26 CFR as in effect on the date of execution of this trust, or, in the event that any such regulation is amended or superseded thereafter, to the regulation (or any successor regulation) as so amended.

**(8) Dollar Values**. The use of the dollar sign ($) shall indicate amounts stated in U. S. dollars.

**f. QDOT Election**. Grantor intends that this trust qualify as a "qualified domestic trust" as that term is defined in section 2056A(a) of the Code. To the extent that any term or condition in this agreement would cause the disqualification of the trust as such, that term or condition shall be void. Subject to the provisions of section 2203 of the Code, the Trustee is hereby authorized, in the exercise of its discretion, to elect that the trust be treated as a "qualified domestic trust". The Trustee may make the election regardless of the respective interests of the income beneficiary and remaindermen of the trust and is hereby exonerated from any liability or responsibility as a result of its exercise or non-exercise of that election.

**g. Power to Amend for QDOT Treatment**. The Trustee shall have the power to amend this trust or any provisions of this agreement relating to such trust to assure its qualification as a qualified domestic trust. Further, the Trustee is authorized to amend any of the provisions of this agreement to meet any requirements for a qualified domestic trust that the Secretary of the Treasury may prescribe by regulations or otherwise. Any such amendment shall be by a written instrument which is signed, dated and notarized. The original amending instrument shall be kept with the trust records and may, in the Trustee's discretion, be recorded in the appropriate real property records. A copy of the amending instrument shall be delivered to the Grantor. No court action shall be necessary to effectuate any such amendment.

**Appropriate termination, disposition and administrative provisions would follow.**

# Exhibit C – Sample Assignment to QDOT Trust

## IRREVOCABLE ASSIGNMENT

**IRREVOCABLE ASSIGNMENT** made effective the _____ day of _____, 20__, by and between _____ (referred to herein as "Assignor") and _____ and _____, as Co-Trustees of the _____ QUALIFIED DOMESTIC TRUST, dated effective _____, 20__ (collectively referred to herein as "Assignee").

## RECITALS.

**WHEREAS,** _____ is not a United States citizen, and she has established, as one of the Grantors, the _____ QUALIFIED DOMESTIC TRUST, dated effective _____, 20__, ("Trust") in accordance with 26 U.S.C. §§ 2056 and 2056A, and with the express intent and purpose such that certain assets passing to her by operation of the residuary clause of the Will of _____, deceased, ("Decedent") qualify for the marital deduction for purposes of the United States estate tax; and

**WHEREAS,** in connection with the distribution of the assets of the estate of Decedent, and the funding of the Trust, Assignor desires to irrevocably transfer, assign, set over and deliver unto Assignee all of the assets which are listed on the attached Exhibit A; and

**WHEREAS,** Assignee desires to accept the assets listed on the attached Exhibit A upon the terms herein contained;

**NOW, THEREFORE,** it is agreed as follows:

**1. Assignment of Interest.** In partial distribution of the assets of the estate of Decedent, and to accomplish the funding of the Trust, Assignor does hereby irrevocably transfer, assign, set over and deliver unto Assignee all of the assets listed on the attached Exhibit A, together with all sums due or to become due to Assignor thereunder (the "Interest").

**2. Assumption of Liabilities.** Assignee hereby acknowledges and agrees that it is assuming all of Assignor's liabilities and obligations with respect to the Interest herein assigned.

**3. Title.** Assignor represents and warrants that it is the owner, free and clear of any encumbrances, of the Interest delivered by Assignor hereunder.

**4. Benefits.** All of the terms and provisions of this Assignment shall inure to and be binding upon Assignor and Assignee and their respective heirs, executors, administrators, successors and assigns.

**Signatures to Follow**

# EXHIBIT D – Situs of NRA Property for Estate and Gift Tax Purposes (Generally Speaking)

| Type of Property | Estate Tax Situs | Estate Tax Citation | Gift Tax Situs | Gift Tax Citation |
|---|---|---|---|---|
| Real property | Place of location | 20.2104-1(a)(1), 20.2105-1(a)(1) | Place of location | 25.2511-3(b)(1) |
| Tangible personal property | Place of location | 20.2104-1(a)(2), 20.2105-1(a)(2) | Place of location | 25.2511-3(b)(1) |
| Currency (not deposits) | Place of location | 20.2104-1(a)(7)(ii), Rev. Rul. 55-143 | To be safe - place of location | *See* 25.2511-3(b)(1) |
| Intangible personal property (the written evidence of which is not treated as the property itself) | U.S. (if enforceable against a U.S. person) | 20.2104-1(a)(4) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Intangible personal property (the written evidence of which is not treated as the property itself) | Foreign situs (only if not enforceable against a U.S. person) | 20.2105-1(e) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Domestic corporate stock | U.S. | 2104(a), 20.2104-1(a)(5) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Foreign corporate stock | Foreign situs | 20.2105-1(f) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Debt obligation of U.S. person | U.S. | 2104(c) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Deposits with U.S. banks (unless the deposit is associated with a trade or business in the U.S., or the NRA is a U.S. resident for income tax purposes) | Foreign situs | 2105(b) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |
| Transfers with retained interests (Code §§ 2035-2038) | U.S. (if property situated in U.S. at time of transfer) | 2104(b) | N/A | |
| Proceeds of life insurance on life of NRA | Foreign situs | 2105(a) | N/A | |
| Domestic partnerships and other entities taxed as partnerships | Probably U.S. | *See* 2103; *cf.* 2105 | Probably Foreign situs[35] | 2501(a)(2), 25.2501-1(a)(3) |
| Beneficial interests in trusts & estates | The situs of the underlying asset | *See* Rev. Rul. 55-163 | Probably situs of underlying asset | *See* Rev. Rul. 55-163 |
| Commercial annuities issued by U.S. persons | Probably U.S. | 2103, 2104(c), *cf.* 2105(a) | Foreign situs | 2501(a)(2), 25.2501-1(a)(3) |

[35] There seems to be a significant amount of debate as to whether an interest in a domestic partnership or other entity that is taxed as a partnership (like a limited liability company) has a foreign situs under Code Section 2501(a)(2). Many commentators believe the IRS will look to the nature of the underlying assets to determine the gift tax consequences, and ignore that a partnership interest, generally speaking, is intangible personal property the written evidence of which is not treated as the property itself under state law. Adding to the concern of some authors is the fact that the IRS will not ordinarily issue private letter rulings regarding "[w]hether a partnership is intangible property for purposes of § 2501(a)(2)". Rev. Proc. 2014-7 § 4.01(28). Unfortunately, the IRS has created a chilling effect on some estate planners because its stated reason for refusing to issue PLRs in this context is "either because issues are inherently factual *or for other reasons.*" *Id.* § 2.01.