Planning for Property and Family in Other Countries

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PLANNING FOR PROPERTY AND FAMILY IN OTHER COUNTRIES

I. Property Held in Foreign Country and in U.S.

A. Estate Tax Issues

1. Determination of Decedent's Status as U.S. Citizen or Resident Alien

a. Status Determined by Domicile

Transfer taxes are imposed on the estate of "every decedent who is a citizen or resident of the United States. I.R.C. § 2001. A resident decedent , pursuant to Treas. Reg. §20.0-1(b)(1), is a decedent who, at the time of his death, has his *domicile* in the United States. Thus, an alien's status for transfer tax purposes is determined by his or her domicile. The rules for determining domicile are found in the Treasury Regulations and relevant case law. (In contrast, residence for income tax purposes is determined by more specific statutory guidance found in I.R.C. § 7701.)

b. How to Establish Domicile

In general, to establish domicile, an alien must actually reside in the United States for a period of time *and* must have demonstrated an intent to stay at that domicile indefinitely. Residing there without the requisite intent to remain indefinitely is not sufficient to establish domicile and changing one's intent to stay does not change status for domicile unless one actually moves. Treas. Reg. § 20.0-1(b)(1).

c. Factors in Establishing Domicile

Factors that have been considered in various cases for the purpose of determining domicile of an alien for federal transfer tax purposes include the following: the duration and purpose of the alien's stay in the United States, the address used for legal documents, the type of homes and other assets owned by the alien in the United States, whether the home in the

United States is a resort or a non-resort home, personal motivations for location, such as health reasons, what visa is held by the alien, and the existence and location of family, close friends and business interests. See various cases discussing the meaning of domicile, both in the estate tax context and otherwise, including ***Vlandus v. Kline***, 412 U.S. 441, 454 (1973); ***Mitchell v. United States***, 88 U.S. 350 (1874); ***Elkins v. Moreno***, 435 U.S. 647 (1978); Toll V. Moreno, 458 U.S. 1 (1982); ***Estate of Jack v. United States***, 54 Fed. Cl. 590 (2002); ***Estate of Barkat Khan***, 75 T.C.M. 1597 (1998).

2. Gift Tax Rules

The gift tax is imposed under I.R.C. §2511(a) on gifts of real and personal property, tangible or intangible. The tax is imposed on direct or indirect gifts and to transfers in trust or outright transfers. There is an unlimited marital deduction for gifts to spouses that are United States citizens; however, there is *no marital deduction* for gifts to non-citizen spouses. I.R.C. §§ 2523(a) and 2523(i).

Generally, a $16,000 annual exclusion gift is available for 2022 under I.R.C. § 2503(b) with respect to donee spouses that are citizens. That exclusion is increased to $164,000 for gifts to non-citizen spouses pursuant to I.R.C § 2523(i). To qualify for the increased annual exclusion, the gift must otherwise qualify for the marital deduction and be a gift of a present interest. See Treas. Reg. § 2523(i) -1(c).

3. Estate Tax Rules

The estate tax is imposed under I.R.C. § 2001 on the taxable estate of every decedent who is a United States citizen (or a resident alien). The gross estate of a decedent is the value at the date of death of all property, real or personal, tangible or intangible, wherever situated. I.R.C. § 2031(a). The estate tax exemption is available for all bequests from a decedent's estate if the decedent is a United States citizen (or a resident alien). The 2022 estate tax exemption (referred to in the Internal Revenue Code as "applicable exclusion amount") for each person is $12.06 million.

A non-resident alien with an estate situated in the United States, on the other hand, is entitled to an estate tax exemption of only $60,000 under I.R.C. § 2102(b).

Generally, a decedent who is a United States citizen is subject to the same estate tax rules whether his surviving spouse is a citizen or a non-citizen (a resident alien or a non-resident alien), with one significant exception. The unlimited marital deduction under I.R.C. § 2056(a) is disallowed under I.R.C. § 2056(d) for transfers to non-citizen spouses unless certain conditions are met. Treasury Reg. § 20.2056A-1(a). The marital deduction will be allowed if the non-citizen surviving spouse either (1) becomes a citizen of the United States before the estate tax return of the decedent is filed or (2) if the property passing to the surviving spouse passes in a "qualified domestic trust", or "QDOT". I.R.C. § 2056(d)(2) and (d)(4).

4. QDOT as Solution

If property passes from a decedent to a QDOT (or to his spouse and then to the QDOT), you still do not obtain the unlimited marital deduction; however, you can postpone the payment of estate taxes on that portion of the decedent's estate.

There are many technical requirements for the QDOT. Generally, you must have a U.S. Trustee and the governing law of the trust must be a state or the District of Columbia. If the assets exceed a certain amount, the trustee must be a bank or post a bond or letter of credit. A smaller trust can provide in its trust agreement, in the alternative, that not more that 35% of the fair market value of the trust is invested in non-U.S. real property.

The deferred estate tax is incurred for distributions from the QDOT and when the surviving spouse dies. The tax will not be imposed on certain hardship distributions. If the spouse becomes a U.S. citizen, the deferred tax will not be imposed. The tax would also be triggered if the trust ceases to qualify as a QDOT.

The tax is equal to the estate tax that the decedent's estate would have owed if property did not qualify for the marital deduction.

Note: The generation-skipping transfer tax exemption is not available for property passing to a QDOT.

5. Portability Issues

To maximize the benefit of the exemption amount of U.S. citizens and resident aliens, Congress passed legislation permanently allowing portability of any unused estate tax exemption amounts of a first-to-die spouse.

Portability generally permits a surviving spouse to use the most recent deceased spouse's unused exemption ("DSUE"), effectively avoiding any waste of a first-to-die spouse's remaining exemption. In order to take advantage of this taxpayer-friendly provision, a decedent's estate representative must make a timely and proper portability election.

The portability election is not allowed to all decedents.

The estate representative of a U.S. citizen or resident alien may elect portability, thereby passing the decedent's DSUE amount to his/her surviving spouse. However, the estate representative of a non-resident alien is not generally permitted to make a portability election in favor of a surviving spouse, unless otherwise provided by a treaty.

However, the existence of a tax treaty may cause a different result. In certain cases where a non-resident alien's estate representative is able to take a treaty position, the unified credit amount may be increased for that tax-payer.

Planning Point: Is your client's estate large enough to incur estate taxes? If so, determine if there is a treaty with the other country, whether they need a QDOT, and whether a lifetime gift plan may alleviate the issue.

B. Consider Necessity for Two Wills

1. Domicile at Death

Domicile is a pivotal issue under Texas probate law as well as for federal estate taxes. Venue for probating a will in Texas depends on the decedent's domicile under Texas Estates Code Section 33.001. Probate of a "foreign" will, for a testator not domiciled in Texas is allowed under separate rules. *See* Texas Estates Code Section 501.001.

Under Texas law, one's domicile is synonymous with one's fixed place of residence. ***Maddox v. Surber***, 677 S.W.2d 266, 228-29 (Tex. App.-Houston [1st Dist.] 1984, no writ); *also see* Texas Estates Code § 33.001(a)(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, 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 intended

to make the place his or her domicile. *Maddox,* 677 S.W.2d at 229. Rather, the salient factors are the actual facts 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". ***In re Graham***, 251 S.W.3d at 850 (quoting ***Texas v. Florida***, 306 U.S. 398, 425 (1938)). One does not change domicile until he or she actually leaves the domicile with an intent not to return. *Id*, at 851.

Although a Texas will can often be probated in another state or country and a foreign will (whether from another state or country) can be probated in Texas, a common practice among Texas estate planners is to have clients who own property in a foreign country execute two wills.

This approach may alleviate some "conflict of laws" issues.

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. Hockok,*** 152 Tex. 578, 585-86 (1953); ***Owen v. Younger,*** 242 S.W.2d.895, 897 (Tex. Civ. App.Amarillo 1951, no writ). The law of the situs governs in all respects, even in determining whether a foreign will is valid. ***Crossland v. Dunham,*** 140 S.W.2d 1095, 1097 (Tex. 1940); ***Owen,*** 242 S.W.2d at 897.

With respect to personal property, the law of the decedent's domicile at death governs the disposition of such property. ***Crossland,*** 1410 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 county); ***In re Garcia-Chapa,*** 33 .S.W.3d 859, 862 (Tex. App. Corpus Christi 2000, no pet.). ***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).

Planning Point: Determine the country where property is held, consult with an attorney in that country regarding the need for a separate will (i.e., whether the Texas will would be upheld in an ancillary probate) and then determine with your client whether two wills are necessary.

Note: Don't assume that there are no estate / gift tax issues because your testator's estate is under the exemption amount. Some countries, such as Germany, imposes an inheritance tax on the domicile no matter how small the gift.

2. Probate of Foreign Will

There are three alternatives for probating a foreign will in Texas (whether from another country or another state).

First, under Texas Estates Code Section 503.001, a certified exemplified copy of the will and the order admitting the will to probate in another state or country are filed in the deed records of the Texas county where the decedent owned real property. The filing operates as a deed of conveyance under Section 503.051, with respect to all real property covered by the will. If the will grants the executor the power to sell real property, the executor can sell the Texas property at that point. Texas Estates Code Sec. 505.052; ***Leggett v. Church of St. Pius***, 619 S.W.2d 191 (Tex. Civ. App. Houston [1st Dist.] 1981, writ ref'd n.r.e.).

Planning Point: If the will does not clearly dispose of the Texas real property this simple method may not work.

Second, the will can be probated in an ancillary probate, with an application that included the foreign probate documents. Texas Estates Code Section 501.002. The Will is proved up and then the will is effective to dispose of real and personal property in Texas. Texas Estates Code Section 501.007.

If the executor needs letters testamentary, he or she can then request them, under Estates Code Section 501.006. If the applicant proves that he or she qualified as executor in the other state or country and the applicant is not disqualified to serve in Texas, the applicant can receive ancillary letters testamentary. Note that the executor must have been named in the will.

Note: If the will was originally probated somewhere other than the decedent's domicile, extra steps must be taken for the ancillary probate, such as serving citation on named beneficiaries and intestate heirs.
Finally, the will can be probated as the original probate of the foreign will under Section 502.001 of the Texas Estates Code. The availability of this method depends on the facts as to why it was not probated in the other jurisdiction and whether it complies with the Texas will formalities.

If the testator's foreign will is written in a foreign language, "qualified translation" rules must be met.

The foreign will may be contested under rules found in Texas Estates Code Sections 504.001 - 504.004. The grounds for the contest may be limited if the original will was probated in the decedent's domicile.

II. Fiduciary Issues

A. Guardianship

1. Incapacitated Person

Any person who does not have an "adverse interest" to the proposed ward has the right to commence a guardianship proceeding under Section 1055.001 of the Texas Estates Code. Currently, there is no statutory definition of an adverse interest. The few examples of an adverse interest must be ascertained through case law. Examples of individuals who may have an adverse interest to a proposed ward include: (i) spouse filing for a divorce; (ii) person claiming assets from the proposed ward; (iii) potential creditor; and (iv) business partner of the proposed ward. Sections 1104.101 - 1104.103 of the Texas Estates Code give the Court broad discretion to appoint a guardian for a person other than a minor according the circumstances and considering the best interest of the proposed ward. However, Section 1104.102 does stipulate that certain persons have priority to be appointed provided that they are found to be eligible to serve. These include a proposed ward's spouse; and then the proposed ward's nearest of kin. Any person entitled to be appointed guardian may waive his or her right to serve.

2. Minors

A minor's parents are the natural guardians of the minor person. Prior to the 1993 amendments, a minor's parents could be jointly appointed co-guardians of a minor's estate. Section 1104.051 of the Texas Estates Code now provides that if both parents are living, only one parent may be appointed guardian of the minor's estate. Generally, the parents may decide which one should be appointed guardian; however, if they can not agree, the court may appoint the parent it determines is better qualified to serve. If one parent is dead the surviving parent is the natural guardian of the minor's person and is

entitled to be appointed guardian of the minor's estate.

In the event both parents are deceased, a determination should be made whether the minor's last surviving parent appointed a guardian of the minor prior to the parent's death. A surviving parent of a minor may now appoint under the terms of his or her will or other written declarations any eligible person to be guardian of the person of his or her minor children after the death of the parent. Upon the death of the last surviving parent and compliance with the Texas Estates Code, an eligible person is also entitled to be appointed guardian of the child's estate. If it is determined that the last surviving parent did not make such a designation, the closest ascendant is entitled to be appointed guardian of the minor's person and estate. If the minor has no ascendant in the direct line, the nearest of kin is then entitled to be appointed. Finally, in the event no relative of the minor is eligible to be appointed as guardian, the court may appoint a qualified person as the minor's guardian.

3. Persons Disqualified to Serve

Sections 1104.351 - 1104.353 of the Texas Estates Code enumerated the individuals who are ineligible to be appointed guardian. This includes individuals whose conduct is "notoriously bad" are incapacitated, sho are a party to a lawsuit or whose parents are parties to a lawsuit concerning or affecting the proposed ward's welfare (unless the court determines that the applicant and the proposed ward's interests do not conflict or the court appoints a guardian ad litem to cure the conflict), who are indebted to the proposed ward (unless the applicant repays the debt prior to his or her appointment), who are asserting a claim adverse to the proposed ward of his or her property, who are incapable of managing and controlling the proposed ward's person or estate, or who are non-residents of Texas and have not filed a designation of resident agent. It also includes a minor, any person the court determines to be an "unsuitable" individual, and any individual who the proposed ward disqualified in a written declaration pursuant to Sections 1104.202 - 1104.203 of the Texas Estates Code.

Note: It is very important to discuss the potential disqualification provisions with a client before filing the application seeking his or her appointment.

4. Practical Considerations

Some practical matters to consider before naming family members in another country to serve as guardian of minor children are these:

a. the proposed guardian must appoint a resident agent in Texas for purposes of the guardianship proceeding.

b. with regard to a guardianship of the estate, the proposed guardian may need to have transactions with a U.S. bank and issues can arise from having a foreign signatory.

c. the Probate Court can require a bond even though the will waives the bond requirement and it is difficult to find a bonding company in that situation.

d. moving the ward or the ward's assets outside the jurisdiction of the court may cause problems.

B. Executor

1. Statutory Provisions

Section 304.001 of the Texas Estates Code indicates that the Probate Court shall grant letters testamentary to the person named as executor in the will. If no executor is named, a list is provided of other persons who are eligible for appointment as administrator.

Section 304.003 of the Estates Code specifically precludes the appointment of certain individuals and entities as executor: (1) an incapacitated person; (2) a convicted felon; (3) a nonresident individual or corporation who has not filed an appointment of resident agent for service of process; (4) a corporation unauthorized to act as a fiduciary in Texas; or (5) "a person whom the court finds unsuitable." However, a court has no discretionary power to refuse to issue letters testamentary to a person named as executor who comes forward within the statutory time and offers to probate the will and applies for letters unless the executor is incompetent, a minor or otherwise disqualified from serving. ***Sales v. Passmore,*** 786 S.W. 2d. 35 (Tex. App.–El Paso 1995, writ dism'd by agr.)

There is no statutory definition of unsuitable and there is only a small amount of case law on the issue. Factors such as some mental impairment, old age or physical infirmity might be considered. An applicant for executor is not "unsuitable" merely because he is also a creditor of the estate. ***Boyles v. Gresham***, 309 S.W.2d. 50 (Tex. 1958).

2. Corporate Fiduciaries Eligible to Serve

Pursuant to Section 22.006 of the Texas Estates Code, a corporate fiduciary is a bank or trust company having trust powers, existing or doing business under the laws of Texas or of the United States which is authorized to act under the order of appointment of the court as an executor, administrator, guardian, trustee, receiver, or depositary. *See* 12 U.S.C. § 92(a) (national bank operating in Texas may be empowered by the Comptroller of the Currency to act as an executor or administrator of a decedent's estate to the same extent that state banks in Texas may so operate).

3. Foreign Bank as Executor

A foreign bank or trust company organized outside the State of Texas (assuming it has the corporate power to act as an executor or administrator) may be appointed by a Texas court to act as executor or administrator if the jurisdiction in which the foreign bank or trust company is organized grants authority to Texas banks and trust companies to serve in a like fiduciary capacity.

4. Practical Considerations

In addition to the issues listed above for guardians, the foreign person appointed as executor may face additional obstacles:

a. traveling to the U.S to attend the probate hearings in the time of Covid and various other restrictions on foreign travel.

b. meeting complex federal withholding requirements for payments to a foreign person.

c. the difficulty of transferring assets from foreign executor to successor executor who resides in the United States.

C. Trustee

1. Capacity of Trustee

Under Section 112.008 of the Texas Trust Code, the Trustee must have the legal capacity to hold property. If it is a corporation, it must have the power to act as trustee in Texas.

2. Personal Attributes

Various personal attributes to be considered in selecting the trustee include common sense, sound judgment, impartiality, financial ability and responsibility, integrity and honesty, locality, permanence and continuity (particularly important for long-lived trusts), loyalty, and trustworthiness.

3. Income Tax and Estate Tax Consequences

The issues of whether a trustee may be subject to income tax or estate tax are complex even for trustees that are U.S. citizens or U.S. financial institutions. Adding the layers of complexity of using a foreign person will substantially complicate the administration of the trust.

4. Trustees Subject to Various Fiduciary Duties

Each trustee will be bound by the fiduciary duties and other responsibilities found in the Texas Trust Code and the governing documents.

5. Practical Considerations

As with foreign guardians and executors, a foreign trustee will be subject to numerous state trust laws, federal and state banking laws and complex federal and state income and estate tax laws.

Planning Point: Consider using a United State trustee or co-trustee. A financial institution may have legal resources that would make it a abetter choice that an individual family member.

III. Beneficiaries Reside in Foreign Country

Naming beneficiaries in your Texas will or trust who reside in other countries can present a myriad of challenges. The following are just a few of the issues to consider when meeting with these clients:

- the logistics of transferring cash, cash equivalents, stocks and bonds and title to real property

- the logistics and cost of shipping personal effects and other tangible personal property

- the need for formal translations of various documents that may need to be provided to foreign beneficiaries (such as "Chapter 308" notices or waivers). Another option that may now available in Texas is an unsworn declaration in lieu of a sworn oath under Texas Civil Practice and Remedies Code Section 132.00. It is not always clear under this provision when the unsworn declaration is available and some Texas probate judges do not accept the declaration for certain documents even through the statute appears to allow it.

- the difficulty of requiring signatures of the foreign beneficiaries on even the simplest probate documents (such as receipt or waiver of citation, agreement to independent administration, documents acknowledging receipt of tangible personal property or cash payment or other assets)

- if the signature of the beneficiary has to be notarized, whether the foreign "notary" process will be accepted or the beneficiary will have to visit a U.S. Consulate for a notary

- if the probate proceeding is involved in litigation of any sort, many issues may arise trying to try the case or settle the case involving foreign beneficiaries