COMING TO AMERICA . . . WHAT IT MEANS FOR YOUR ESTATE PLAN AND YOUR MARITAL PROPERTY RIGHTS

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I. YOUR ESTATE PLAN: WHAT NEEDS CLOSE SCRUTINY UPON YOUR ARRIVAL

A. Has Your Domicile Changed?

1. "Domicile" is the Determining Factor for Probate and Trust Law Purposes. Although the terms "residence" and "domicile" are used somewhat interchangeably in statute law and judicial decisions which determine the law governing the formal validity and the intrinsic validity of wills, the operative concept is domicile as that term is commonly understood rather than residence. California establishes the following rules for determining the place of "residence":

(a) the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which one returns in seasons of repose;

(b) there can only be one residence;

(c) a residence cannot be lost until another is gained.

See Cal. Gov. Code § 244. Consistent with case law, references to residence in California's Probate Code have been changed to references to "domicile". *See, e.g.*, Cal. Prob. Code § 7051.

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2. Non-Immigrant Status Does Not Preclude Acquisition of Domicile for State Law Purposes. An arriving executive should not assume that his non-immigrant status will preclude his acquisition of a new domicile for state law purposes in the political subdivision of the United States in which he resides. One's immigration status has been described by several courts as ". . . only one factor to be considered along with a myriad of other relevant factors." *See Cho v. Jeong*, 1997 WL 306017 (Tenn. Ct. App. 1997); *Alves v. Alves*, 262 A.2d 111 (DC App. 1970); *Bustamante v. Bustamante*, 645 P.2d 40 (Utah 1982); *Cocron v. Cocron*, 84 Misc. 2d 335, 375 N.Y.S. 2d 797 (N.Y. Sup. Ct., 1975); *In re Marriage of Dick*, 15 Cal. App. 4th 144, 18 Cal. Rptr. 2d 743 (2nd Dist. C.A. 1993); and *Perez v. Perez*, 164 So. 2d 561 (Fla. Dist. Ct. App. 1964); *cf. Elkins v. Moreno*, 435 U.S. 647, 98 S. Ct. 1338, n. 16 at 435 U.S. 662 (". . . the question of who can become a domiciliary of a state is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile . . ."). The overarching rationale as expressed by the California Court of Appeal in the *Dick* case is that "[i]t is not necessary for the courts of this state to carry out immigration policy by denying non-immigrant aliens a judicial forum when they otherwise meet domiciliary requirements and when they are subject to the courts of this state for other purposes." *See In re Marriage of Dick*, *supra*, 15 Cal. App. 4th 144, 155.

3. Domiciliary Status For Federal Transfer Tax Purposes Need Not Synchronize With Domiciliary Status for Probate and Trust Law Purposes. The continuing status of an alien as a domiciliary of a foreign jurisdiction for estate and gift tax purposes by reason of the treaty tie-breaker terms of a bilateral estate and gift tax convention, like visa status, is irrelevant to the determination whether an individual has acquired new domicile for other purposes at his new place of residence. Attempts to cope with the likelihood of the acquisition of new domicile for purposes of determining property rights and the devolution of property in the event of decease might, however, be construed by the Internal Revenue Service, in some instances, as evidence of a subjective intent to remain permanently in the United States with consequent adverse transfer tax

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implications absent an overriding treaty provision. *Cf. Estate of Jack v. United States*, 54 Fed. Cl. 590 (US Ct. Fed. Cl. 2002).

B. The Effect of Change of Domicile Upon a Last Will.

1. Differences in Formality of Execution Unlikely To Be a Problem. A change of domicile is unlikely to invalidate an existing will merely because the formalities of execution required by either (a) the jurisdiction in which the existing will was executed or (b) the jurisdiction of the former place of domicile differ (even materially) from the formalities of execution required by (c) the new jurisdiction of domicile. The states, following the lead of the Uniform Probate Code, have adopted statutory rules which provide that a will is validly executed if its execution complies with either

(a) the local law of such state, or

(b) the law at the time of execution of the place where the will was executed; or

(c) the law of the place where at the time of execution or at the time of death, the testator is domiciled, has a place of abode or is a national.

See, e.g., Cal. Prob. Code § 6113 and *cf.* NY EPTL § 3-5.1(c) (which is substantially similar).

2. A Change of Domicile May Vitiate "Intrinsic Validity". It is possible for the law of an executive's new domicile to invalidate all or portions of his existing will to the extent they violate provisions of the new jurisdiction's law regarding intrinsic validity. California law does provide that the "meaning and legal effect" of a disposition in an instrument is determined by the local law of the particular state selected by the transferor in the instrument (provided the application of such law is not contrary to the rights of the surviving spouse to community and quasi-community property) *See* Cal. Prob. Code § 21103. This provision is not nearly as helpful as it appears on its face because (a) many wills might be silent on the question of what law should govern

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meaning and legal effect and (b) "meaning and legal effect" are not, synonymous with "intrinsic validity" which relates to matters such as the capacity of the testator to make a will and the legality of the will's dispositive provisions. New York law expressly provides that a testamentary disposition of personal property intrinsically valid under the law of the jurisdiction in which the testator was domiciled at the time the will was executed shall not be affected by a subsequent change in the domicile of the testator to a jurisdiction by the law of which the disposition is intrinsically invalid. *See* NY EPTL § 3-5.1(d). California law is to the contrary. As a matter of California law, the validity and effect of a will in respect of personal property is governed by the law of the testator's domicile at death. *See in re Brace's Estate*, 180 Cal. App. 2d 797, 4 Cal. Rptr. 683 (2nd Dist. C.A. 1960). *See also* 12 *Witkin Summary* 9th (1990) Wills, § 108 [Validity of Will]. In consequence, a change in domicile may have the effect of acting as a revocation because the personal property cannot pass under the will when it tested by the laws of the new jurisdiction. *See, e.g.*, *In re Moore's Estate*, 190 Cal. App. 2d 833, 12 Cal. Rptr. 436 (4th Dist. C.A. 1961) (testator's change of domicile from California to Florida in advance of decease invalidated the will as it pertained to intangible personalty).

3. Assess the Impact of Quasi-Community Property and Elective Share Rules. The carve out for community and quasi-community property in the California statutory provision permitting a testator to choose the law governing the interpretation and effect of his will raises an important caution. Although the laws of American states (exclusive of Louisiana) do not grant forced shares to lineal heirs, every American state protects surviving spouses by granting them either "elective shares" or community and quasi-community property interests. For example, the executive who migrates from London to Los Angeles and acquires domicile in the State of California for probate law purposes will have the entirety of his separate property interests in properties that are attributable to the product of labors performed during the marriage converted to quasi-community property in which a surviving spouse would have an undivided 50% interest in the event of death (or divorce). Elective share and quasi-community rules do not

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inhibit the migrant executive's right to manage and dispose of such separate properties as are attributable to the product of previous labors in advance of death or divorce, but the potential interests of a surviving spouse need to be considered when assessing the continuing viability of the estate plan which the migrant executive brings to the United States.

4. Lack of A Will Can Put a "Public Administrator" In Control of An Estate. Having no will at all can be worse than having a will portions of which might be subject to adverse elections. Even if the migrant executive does not become domiciled in the United States for probate and trust law purposes, there is a likelihood that he will acquire properties of material value while resident in the United States some of which would require administration within the U.S. if he were to die. If the migrant executive dies intestate, even if the schedule of devolution decreed by governing laws is acceptable to the executive (a chancy assumption), the process of administration is likely to be convoluted, inefficient, time consuming and expensive. Interested heirs who are not residents of the United States may not assert priority rights to administer over the "public administrator", a public county official, notwithstanding that such heirs might speak excellent English, be of demonstrated responsible character and exhibit a willingness to undertake the duties of administration. *See*, *e.g.*, *Estate of Damskog v. Marchi*, 1 Cal. App. 4th 78, 1 Cal. Rptr. 2d 653 (1st Dist. C.A. 1991) construing effect of Cal. Prob. Code § 8402(a)(4). By contrast, a non-resident of the United States who is appointed as executor under the terms of the will may serve (subject to meeting bonding requirements or agreeing to blockage of U.S. situs assets pending issuance of an order permitting distribution) or such person may appoint a U.S. resident to serve in his place. *See* Cal. Prob. Code § 12510.

5. Carefully Explain and Document the Determination Whether to Avail of Standard Domestic Tax Planning Techniques. The will of a migrant executive who has become domiciled for probate and trust law purposes will in many instances remain domiciled, either arguably or to a certainty, outside of the United States for federal estate

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tax purposes, but the executive in such a mixed status position should at least be apprised of domestic planning techniques including the use of credit shelter trusts, marital deduction trusts and multi-generation trusts having inclusion rates of zero for generation skipping transfer tax purposes. In the purely domestic context, the failure of an attorney to apprise a client of such techniques and to keep accurate records of a client's having purposefully elected not to take advantage of such techniques has been the basis for several malpractice suits. *See*, *e.g.*, *Noble v. Bruce*, 709 A.2d 1624 (Maryland 1998).

6. Appointment of Guardian for Minor Children. Wills of persons domiciled in the United States for probate and trust law purposes typically include a provision naming the person preferred by the testator to act as guardian of any surviving minor children in the event of his decease not survived by the other parent of such children. If the migrant executive's existing will does not include guardian provisions and he has minor children, serious consideration should be given to the inclusion of such provisions in a new will.

7. "No Contest" Clauses. American wills (and trusts) often include "no contest" clauses. Such clauses typically provide that any individual upon whom some benefit is conferred under the terms of a will who acts to contest such will (in the hopes of getting more) will forfeit whatever he has been provided under the terms of the will. A "no contest" clause may not be used to deny a surviving spouse her rights in community and quasi community property, but it can be used to deny a surviving spouse, who elects against a will or trust in order to procure her community rights, any other benefits which would have been enjoyed by the surviving spouse had she not so elected. *See Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92 (1994). There is a diversity of approach within the United States to no contest clauses. Some states such as Florida treat no contest clauses as void and of no force or effect whereas other states such as California tend vigorously to uphold the validity of such clauses in order to advance the public policy of discouraging litigation and giving effect to the purposes expressed by the testator. Whether to include such a clause in a new will might be influenced by the consideration

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that that the notice mandated in connection with the probating of a will in the United States is designed almost to encourage the airing of whatever grievances might exist regarding the substantive contents of a will.

C. Living Trusts.

1. Change of Domicile Should Not Affect a Trust's Validity. For the migrant executive who has an intervivos trust in place before he acquires domicile for probate and trust law purposes in the United States, the change of domicile is unlikely to have any impact upon the essential validity of the trust provided the jurisdiction in which the trust has been settled allows selection of local law for determination of intrinsic validity, the trustor is in compliance with the requirements of such law and the trustor can demonstrate that the property he has contributed to the trust belonged exclusively to him. The migrant executive will, however, need to be alert to the tax implications of his acquisition of U.S. residence for such trust including the possibility that such trust might constitute a "grantor trust" under the terms of IRC § 671 *et. seq.* and the possibility that annual filings on Form 3520 will be required in respect of such trust pursuant to the provisions of IRS Notice 94-37.

2. "American-Style" Living Trusts. Living trusts ("American-style") pursuant to the terms in which an individual trustor or a trustor and his spouse execute a declaration naming themselves as the initial trustees are commonplace in many states of the United States, particularly California where high statutory fees are prescribed for probate administration. Living trusts of the self-declared variety are also preferred where there is a desire to avoid the publicity of wealth associated with a public probate or a desire to avoid multiple ancillary probates where real property is owned in several different states. Where such trusts are intended to serve in lieu of wills for the bulk of a trustor's estate, the trustor typically executes a general assignment document contemporaneous with his execution of the declaration. Actual title transfer is not strictly speaking necessary where the trustor serves as his own trustee, but it is highly recommended. *See Taliaferro v. Taliaferro*, 921 P.2d 803, 811 (Kansas 1996). Where

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third parties are named as trustees of a living trust and proper title transfers do not take place for the purpose of funding, malpractice litigation may follow. *See*, *e.g.*, *Pizel v. Zuspann*, 795 P.2d 42 (Kansas 1990).

3. Revisit the Sufficiency of An American-Style Living Trust Upon Departure. If a migrant executive adopts the format of the American style living trust while resident in the United States, he needs to consider the possibility that some jurisdictions outside of the United States might regard such trust as a mere agency on account of the very substantial powers which are reserved to the trustor under the terms of the typical self-declaration. The possibility of the agency argument being raised against the trust is likely to be of the greatest relevance in respect of

(a) assets situated outside of the United States which are intended to be governed by the terms of such trust, and

(b) a removal of the migrant executive from the United States to a new jurisdiction which either does not have a law of trusts or which takes a narrower view than American jurisprudence of what may constitute a trust.

Cf. Hayton, *The Law of Trusts* (2d Ed. 1993) at 128 ("There must come a stage when the settlor's influence or control is so excessive that the trustees must in substance be treated merely as agents administering and distributing the property as he wants . . .")

D. Life Insurance.

1. Caution: The Definition of Life Insurance Is Chameleonic. A life insurance policy owned by an individual who migrates to the United States is unlikely to be affected as a matter of contract law by the owner's change of residence. Such change of residence can, however, create material tax problems for the owner if the policy is either

(a) not "life insurance" within the meaning of IRC § 7702 (typically because it would have insufficient mortality risk built into the

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contract) in consequence of which the owner would be subject to tax at ordinary rates on annual incremental appreciation in respect of the policy's investment account pursuant to the provisions of IRC § 7702(g), or

(b) "life insurance" within the meaning of IRC § 7702, but by reason of the front loading of premium payments on purchase, is treated as a "modified endowment contract" with the result that any borrowings or withdrawals under the terms of the policy while the executive is resident in the United States will constitute taxable events.

2. *Is the Policy Partly Owned By Your Spouse*? Depending upon the source of funds used to pay for the policy premiums, it is possible that the ownership rights in the policy will constitute quasi-community property (in which the policy owner's spouse has rights in the event of divorce or death) or property which is part of the "augmented estate" for elective share purposes in those states which are not community property states. The American insurance industry has an established history of resisting the inclusion of life insurance in the "augmented estate", but the modern trend is to treat life insurance as includable in the augmented estate in order to prevent the use of life insurance to disinherit a surviving spouse. *See Gary, Share and Share Alike? The UPC Elective Share*, 12 ABA Probate Property 18 (1998).

E. Health Powers and Living Wills.

1. *Health Powers*. Health powers authorize one or more individuals to participate along with a patient's physician in the making of health care decisions where the patient himself is incapacitated and unable to participate in the decision making process. All executives should take note that Regulations adopted under the Health Insurance Portability and Accountability Act of 1966 ("HIPAA") which became effective April 14, 2003 very severely restrict the sharing of "protected health information". The HIPAA privacy rule does not change the way in which an individual can grant another person a health care power of attorney. *See* http://www.hipaa.cmich.edu/faqs_rep.asp.

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The effect of the HIPAA privacy rule is, however, to make it even more essential that adult individuals of all ages affirmatively act to repose special trust in some individual to act for them in health care matters if they should become incapacitated. *Cf.* Hughes, *When Worlds Collide: The Privacy Challenge to Casual Use of Protected Medical Information in Probate Courts and Estate Planning*, 24 Estate Planning & California Probate Reporter 133 (June 2003).

2. *Living Wills, DNR Orders and Mental Health Powers*. Health powers are often paired with living wills, and in many American jurisdictions the health power and the living will are part of the same document. *See, generally,* Gustius, *A Comparative View of Advance Health Care Directives in Florida and North Carolina,* 11 Quinnipiac Prob. L.J. 163 (1997). The living will describes the patient's wishes in respect of surgery, medication and other matters in the event he is in a terminal or irreversible condition and unable to express his wishes on a "real time" basis. In addition, some states have statutory provisions governing "Do Not Resuscitate" orders which are intended to guide paramedics who act with respect to a patient in advance of his arrival at a hospital; and finally, a number of states have begun to prescribe formats for mental health powers which speak to the use (or non-use) of psychoactive medications, shock therapy, restraints and the like. *See*, *generally,* Rosenfeld, *Mental Health Advance Directives: A False Sense of Autonomy For the Nation's Aging Population*, 9 Elder L.J. 53 (2001).

3. *Foreign Forms for Health Powers and Directives Are Likely to be Ineffective*. The form and formality of execution for health powers, living wills, DNR orders and mental health powers vary materially from state to state. Accordingly, if an individual anticipates that he will spend substantial time in more than one state and has favorite hospitals in more than one state, he may wish to consider duplicative documentation which meets the specific requirements of those states in which he considers it most likely that he might require medical care at a time when he is unable to express his own wishes by reason of incapacity. *A fortiori,* health powers or living wills

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created in accordance with the laws of a foreign jurisdiction risk being deemed ineffective by doctors and hospitals in the United States. In consequence, health powers and living wills are arguably the first documents to which a newly arrived executive should attend for himself and for other accompanying adult family members upon arrival in the United States.

II. MUTATING MARITAL PROPERTY RIGHTS . . . JUST DON'T GET DIVORCED OR DIE

A. Domicile Determined by Local Law in Family Law Matters.

The threshold for acquisition of domicile for purposes of applying local family law and for invoking the jurisdiction of local courts in dissolution actions is determined by reference to local state law. *See*, *e.g.*, *Penn Mut. Life Ins. Co. v. Fields*, 83 F. Supp. 54 (S.D. Cal. 1948) (California law applied to determine community property rights of the estranged wife of the late W.C. Fields). Non-immigrant status, even where the particular species of non-immigrant status requires continued maintenance of a home in a foreign jurisdiction, is at most an evidentiary fact which may be invoked against a person's alleged intention to remain in a state permanently. In numerous cases decided in a wide variety of jurisdictions, state courts have refused to hold that non-immigrant status precludes the establishment of domicile for purposes of the application of its family law and the invocation of the assistance of its courts for purposes of marital dissolution. *See* discussion, *supra* under I.A.2.

B. Marital Property Contracts - - "Prenups" and "Postnups".

1. Marital Property Contracts Are Commonly Utilized in the U.S. to Lawfully Alter the Effects of Family Law Rules. Prenuptial contracts have long been utilized in America's community property states to alter the incidents of the governing marital property regime notwithstanding judicial refusal in earlier times to enforce in those circumstances where the agreement was deemed a facilitator of divorce by promising sums certain or specific property in the event of divorce. Today, marital

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property contracts are accepted throughout the United States and are at least as important, and arguably more important, in common law jurisdictions which have adopted the concept of equitable distribution in the event of divorce (because some equitable distribution states, unlike community property states, will add gifts and inheritance into the mix of property divisible upon divorce). More than half of the American states have adopted in some form the Uniform Premarital Agreement Act (1983), and although the provisions of this Act deal exclusively with contracts entered into before marriage, Kansas' highest court has recently upheld the incorporation of the provisions of the Uniform Premarital Agreement Act as adopted by Kansas into a postmarital agreement reasoning that there is no public policy basis for disallowing a purposeful incorporation in such an agreement of statutory provisions enacted in respect of premarital agreements notwithstanding the different social dynamics involved in pre and postmarital agreements. *See Davis v. Miller*, 269 Kan. 732, 7 P.3d 1223 (2000).

2. Public Policy Considerations and Technical "Foot Faults" May Override. Because rules governing the validity of marital property agreements and the form and procedure which must be observed in order to insure enforceability vary significantly from one jurisdiction to the next, challenging issues may be raised when spouses party to a marital property agreement move their marital domicile. A recent California case illustrates the nature of the cultural issues which may be implicated. *See Marriage of Shaban*, 88 Cal. App. 4th 398 (3rd Dist. C.A. 2001). Ahmad and Sherifa Shaban were married in the Arab Republic of Egypt in 1974. They immigrated to the United States in the early 1980s and, after living in the United States for approximately 17 years, they had their marriage dissolved. The husband asserted that general references to "Islamic law" in what the trial court determined to be merely a marriage certificate constituted a prenuptial agreement to have separate property. The trial court and the appellate court both disagreed with husband's contention and found a community interest in his medical practice and in his retirement accounts. The California court declined to address the question of whether the agreement alleged by Ahmad Shaban was against

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public policy and rested its decisions solely on the lack of a writing and failure to comply with the requirements of the statute of frauds.

C. Offshore Trusts for "Asset Protection".

1. American Judicial Limitations and Reactions. An irrevocable offshore trust funded by a migrant executive with his separate property before acquiring domicile in the United States will almost certainly be beyond the jurisdiction of American courts so long as he has no retained controls over such trust. *See*, *e.g.*, *Reichers v. Reichers*, 170 Misc. 2d 170, 679 N.Y.S. 2d 233 (Sup. Ct. 1998); *aff'd* 267 A.D. 2d 445, 701 N.Y.S. 2d 113 (2d Dept. 1999). A migrant executive who looks to such a trust for protection against the claims of a spouse who becomes disgruntled after acquiring U.S. domicile and asserts her equitable distribution or quasi-community property rights needs to consider, however, that an American court

(a) has the ability to effect offsets against assets within the reach of its jurisdiction, and

(b) it will be dismissive of claims of poverty by a spouse who has organized his assets in such a way as to create "a labyrinth of trusts and corporations designed . . . to shield and protect [him] from creditors [including his spouse] . . ."

See in re Marriage of Dick, *supra*, 15 Cal. App. 4th 144, 161.

2. "Local Law Only" Rules Don't Divest Existing Property Rights. Numerous offshore jurisdictions have enacted laws to facilitate the validity of dispositions in trust which would not be recognized by the law of the settlor's home country by reason of either

(a) forced heirship laws, or

(b) rights, claims or interests conferred upon a person by reason of marriage.

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Such jurisdictions have not, however, asserted that their laws have the power to divest a spouse of his or her rights in community property that is used to fund a trust. *See*, *e.g.*, *Cayman Trusts (Foreign Element) Law*, 1987, § 5(a) (". . . Section [5] does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws determining whether the settlor is the owner of such property or the holder of such a power . . .")

3. Is There a Viable Distinction Between Dispossession of Community Rights and the Frustration of Equitable Distribution Rights? The dichotomy between the approach of offshore jurisdictions to rights acquired by marriage in America's common law states and presently vesting community rights acquired from the inception of the marriage by spouses domiciled in America's community property states is technically supportable but nonetheless tenuous. The Commissioners who drafted the 1990 revision to the Uniform Probate Code, Article 2, specifically commented

> "The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993. The main purpose of the revision is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both common-law and community-property states when a marriage ends in divorce."

See also Schoenblum, *Trusts, Settlors, and Spouses - A Cross-Jurisdictional Analysis of Property and Matrimonial Rights*, fn.1 at 1, IBC USA 14th Ann. Offshore Trust and Tax Planning Summit (2002).

D. Avoid Inadvertent Taxable Gifts.

Amicably married spouses, one or both of whom are not U.S. citizens, need to exercise particular caution in the titling of their assets during such times as they might be

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deemed domiciled in the United States for federal gift tax purposes. There is no marital deduction for living gifts to a non-citizen spouse and the annual exclusion permitted by IRC § 2523 for aggregate gifts to a non-U.S. spouse is currently an inflation adjusted $112,000. An inadvertent taxable transfer between spouses where the recipient is a non-citizen and the donor spouse is domiciled in the United States can be avoided if it can be shown either that

(a) the transfer constituted the discharge of a bona fide support obligation;

(b) in the case of real property titled in joint name or as a tenancy by the entirety, the special relief provisions of Treas. Reg. § 25.2523(i)-2 apply; or

(c) the property has been contributed to a joint bank account or a joint brokerage account in respect of which the securities are held in street name and from which the non-contributing non-citizen spouse has not yet withdrawn funds for the purpose of completing a gift within the meaning of IRC § 2511.

Although a spouse might be entitled to rights of equitable distribution or to quasi-community property rights in the event of divorce, such rights do not constitute a presently vested interest in the separate property of the other spouse during the term of the marriage. In consequence, such rights do not serve to avoid a gift tax or the unintended exhaustion of some portion of the applicable credit amount where a transfer in the nature of a completed gift rather than a contribution in satisfaction of a legal support obligation is made for the benefit of a non-citizen spouse by a domiciled donor spouse.

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