

An Introduction to International Estate Planning

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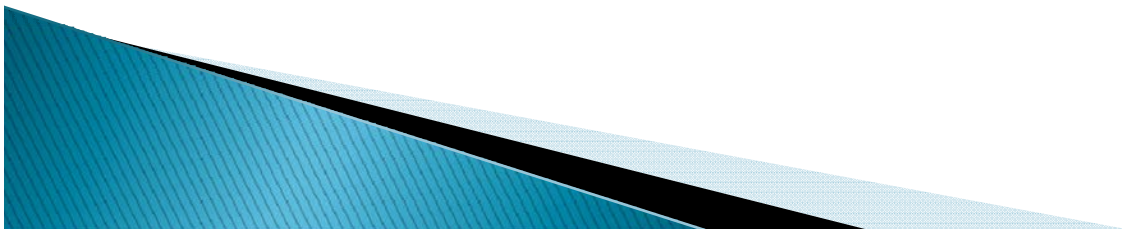


Table of Contents

I.	Introduction -----	4
II.	Steps: International Estate Planning -----	9
III.	Foreign Asset Planning -----	10
IV.	Guardianship Planning -----	12
V.	U.S. Citizens -----	13
VI.	Income Tax Test-----	15
VII.	Reporting Requirements for U.S. Persons-----	20
VIII.	U.S. Source Income for NRAs -----	24
IX.	U.S. Domiciliary Test -----	28
X.	Transfers by U.S. Domiciliaries-----	30
XI.	Transfers by Non-Resident Aliens (NRAs) -----	31
XII.	Gifts and Bequests to Non-U.S. Citizen Spouse-----	34

Table of Contents

XIII.	Planning for Permanent NRAs -----	38
XIV.	Pre-Immigration Planning for NRAs -----	43
XV.	Departure Planning -----	46
XVI.	Foreign vs. Domestic Trust -----	52
XVII.	Unintended Foreign Trusts -----	54
XVIII.	Hypotheticals -----	57

Full-Page Printouts of Charts

Chart 1 – Tax Treaties

Chart 2 – U.S. Residency Chart

Chart 3 – Non-U.S. Citizens - Transfer Tax Basics

Charts 4 and 5 – CP Planning with QDOT

Chart 6 – 2014 Estate and Gift Tax Rate Schedule

I. Introduction

A. Disclaimer

Nothing contained in this presentation is intended to be used or can be used by any taxpayer for the purpose of avoiding penalties under the Internal Revenue Code of 1986, as amended. A taxpayer should seek advice from a qualified professional with respect to any tax transaction or matters contained in this presentation.

The information provided in this presentation is not legal advice. No attorney-client relationship is created as a result of this presentation. The content is intended to be a general overview of the subject matter covered and is educational and informational only.

I. Introduction (cont.)

B. A Story

- Husband's wife died in a car accident leaving a small child. Husband's parents from a foreign country decide to help raise child, so they get green cards and move to the U.S.
- Parents have \$30M of non-U.S. situs assets.
- No reporting done, no world-wide income tax returns filed.
- Exit Tax if they are "covered expatriates." Exit tax covered later.
- Have to take active steps to give up green card.
- Impetus for this presentation

I. Introduction (cont.)

C. International Estate Planning

- World is global – many cross-border issues.
 - U.S. citizens with foreign situs assets.
 - Resident aliens (Green Card holders) with foreign situs assets or not.
 - Non-resident aliens (NRAs) with U.S. situs assets.
- U.S. income tax applicable to non-resident aliens (NRAs).
- U.S. transfer taxes (estate, gift, and generation-skipping transfer taxes) applicable to gratuitous transfers by NRAs.
- The term "residence" has different meanings for immigration law purposes, income tax purposes, and transfer tax purposes.

I. Introduction (cont.)

C. International Estate Planning (cont.)

- IRC § 2100 et seq. – default rules - not necessarily applicable if there is a treaty. (See Chart 1 – Tax Treaties)
- Not necessary to know foreign laws but should engage local counsel for collaboration or limit scope of engagement.
- Reporting Requirements (applicable to trustees and executors)
 - FBAR – has substantial criminal and civil penalties.
 - IRS Form 8938 (FATCA).
 - Other reporting requirements (listed later).
- Offshore Voluntary Disclosure Program (OVDP).
- Foreign trusts, asset protection, and fraudulent conveyances.

Chart 1 - TAX TREATIES

COUNTRY	INCOME TAX	ESTATE TAX	GIFT TAX TREATIES
Australia	✓	✓	✓
Austria	✓	✓	✓
Barbados	✓		
Belgium	✓		
Bermuda	✓		
Canada	✓	Addressed in Income Tax Treaty	
China	✓		
Cyprus	✓		
Czech Republic	✓		
Denmark	✓	✓	✓
Egypt	✓		
Estonia	✓		
Finland	✓	✓	
France	✓	✓	✓
Germany	✓	✓	✓
Greece	✓	✓	
Hungary	✓		
Iceland	✓		
India	✓		
Indonesia	✓		
Ireland	✓	✓	
Israel	✓		
Italy	✓	✓	
Jamaica	✓		
Japan	✓	✓	✓
Kazakhstan	✓		
Korea	✓		
Latvia	✓		
Lithuania	✓		
Luxembourg	✓		
Mexico	✓		
Morocco	✓		
Netherlands	✓	✓	
New Zealand	✓		
Norway	✓	✓	
Pakistan	✓		
Philippines	✓		
Poland	✓		
Portugal	✓		
Romania	✓		
Russian Federation	✓		
Slovak Republic	✓		
Slovenia	✓		
South Africa	✓	✓	
Spain	✓		
Sri Lanka	✓		
Sweden	✓	✓	✓
Switzerland	✓	✓	
Thailand	✓		
Trinidad and Tobago	✓		
Tunisia	✓		
Turkey	✓		
Ukraine	✓		
USSR	✓		
UK	✓	✓	✓
Venezuela	✓		

Copies of Tax Treaties can be found at the IRS and Department of Treasury websites.

II. Steps: International Estate Planning

1. Is the client a U.S. person (U.S. citizen or resident-alien) or a non-resident alien (NRA)? Where is the client domiciled?
2. What assets does the client own and where are they situated?
3. What taxes apply to this client?
4. What type of reporting requirements does this client have: e.g., FBAR, FATCA, income and/or gift or estate tax returns, receipt of gifts, bequests and distributions from foreign trusts?
5. What professionals knowledgeable in international issues are needed for this client? Trust and estate lawyer, tax accountant, tax controversy lawyer (civil and criminal), professional trustee, financial planner or investment advisor, immigration lawyer?
6. What type of estate planning is needed for this client?

III. Foreign Asset Planning

- If the client holds foreign situs assets, you may need to work with local counsel in that country (e.g., forced heirship).
- In Canada, revocable trusts are generally undesirable. Canada has no estate, gift, or GST taxes, but generally, any transfer of property, even to a revocable trust, will cause a recognition of gain or loss (deemed disposition).
- **International Will:** Uniform Law on the Form of an International Will appears in CA Probate Code §§ 6380-6386.
- Best practice, however, is to engage local counsel for estate planning in that foreign jurisdiction and collaboration.

III. Foreign Asset Planning (cont.)

- **Hague Conventions** – International treaties promoting the harmonization of conflict of laws within private international law in subject matters such as protection of children, property rights, contracts, wills and trusts, litigation.
- Seventy-two nations are currently members of the Hague Conference, including the United States, Brazil, Russia, India, China and all 27 member states of the European Union.
- If no estate plan has been created, determine whether the foreign country is a signatory to the applicable Hague Convention and what the treaty states.
- May take a long time and be costly to work through channels of Hague Convention.

IV. Guardianship Planning

Guardianship of Minors if Guardians are not in U.S.:

- Name local temporary guardians with explicit powers to file guardianship petition on behalf of foreign guardians.
- Explain in writing why foreign guardians are in best interest of child.
- Decide whether to name a U.S. trustee or foreign trustee (but if a foreign trustee has control over trust assets, the trust may be treated as a foreign trust for U.S. tax purposes).

V. U.S. Citizens

A. You are a U.S. citizen if:

- Born in the U.S. or naturalized.
- Born outside the U.S. with a U.S. parent, generally. See State Department guidance because application is very fact specific.
 - Even if such a child has never set foot in the U.S., upon turning 18, this child must file U.S. income tax returns and has U.S. reporting requirements, unless he or she gives up U.S. citizenship by age 18 ½.
- **Dual Citizens:** Even if they have never set foot in the U.S., he or she still must file U.S. income tax returns.
 - They have reporting requirements (FBAR and/or FATCA) because they are U.S. citizens.

V. U.S. Citizens (cont.)

B. Giving up U.S. citizenship/Green Card

- Intent to Relinquish Citizenship
- Green Card must be returned to the State Dept. or U.S. Consulate Office overseas. Simply not returning to the U.S. (“abandoning”) a green card is not considered relinquishment of permanent residency status for tax purposes.
- Make Report to IRS (Form 8854) – Initial and Annual Expatriation Statement
- Exit Tax for Covered Expatriates (see Part XV, below)
- Must obtain certificate from IRS that all U.S. tax liabilities have been paid.

VI. Income Tax Test

A. Resident vs. Non-Resident

- See Chart 2 – Resident or Non-Resident Alien?
- This type of analysis should always be done with a tax professional well-versed in these issues. Work with an international tax lawyer or accountant.
- **Example of substantial presence:**
 - Physically present in the U.S. for 120 days in each of the years 2012, 2013, and 2014.
 - Count the full 120 days of presence in 2014, 40 days in 2013 (1/3 of 120), and 20 days in 2012 (1/6 of 120).
 - Total for the 3-year period is 180 days, so not considered a resident under the substantial presence test for 2014.

VI. Income Tax Test (cont.)

A. Resident vs. Non-Resident (cont.)

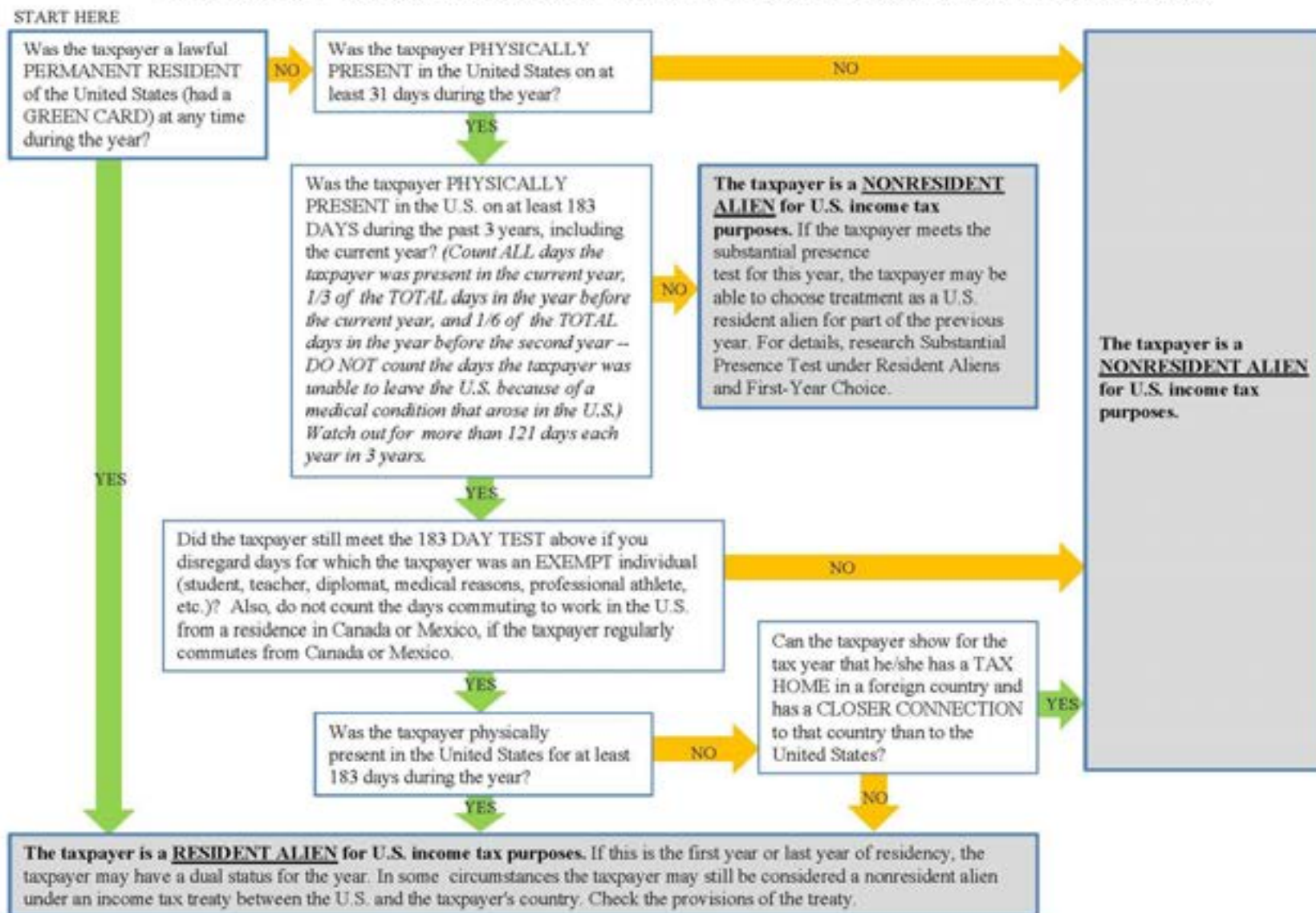
- Exempt individuals from the substantial presence test (IRS Form 8843):
 - A foreign government-related individual (A or G Visa)
 - A teacher or trainee (J or Q Visa)
 - A student (F or M Visa)
 - A professional athlete who is temporarily in the U.S. to compete in a charitable sports event
 - Individuals with a medical condition or medical problem

VI. Income Tax Test (cont.)

A. Resident vs. Non-Resident (cont.)

- Exempt individuals from the substantial presence test:
 - Treaty exception.
 - Days in transit between two foreign countries and present in the U.S. for less than 24 hours (but cannot attend a business meeting, even at airport, or leave airport to visit friends).
 - Regular commuters from Mexico and Canada. A “regular” commuter is defined as more than 75% of the work days during the working period and “commute” is defined to mean daily transit to and from the U.S.
 - Closer Connection Exception.

CHART 2 - U.S. RESIDENCY CHART FOR INCOME TAX PURPOSES



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VI. Income Tax Test (cont.)

B. Income Taxes

- A U.S. Person (U.S. citizen or resident alien) is taxed on world-wide income. IRC §61.
 - Only U.S. and Eritrea tax world-wide income based on citizenship. Other countries tax world-wide income based on residency.
- A NRA with U.S. source income must file a non-resident U.S. income tax return (Form 1040NR). IRC § 871.

VII. Reporting Reqmt's for U.S. Persons

A. FBAR -Report of Foreign Bank and Financial Accounts

- FinCEN Report 114, enforcement was generally ignored until recently. See *Christopher Berg* and *Ty Warner* cases.
- U.S. prosecution of foreign banks (UBS/Swiss) that fail to report foreign accounts of U.S. persons.
- Report required if a U.S. person has financial interest in, or signatory authority over, a foreign account with a balance over \$10,000 at any time during the year.
- A trustee is required to file a FBAR if applicable to the trust.
- Penalties –Civil and criminal (although most are not criminal).
- Three different formal IRS voluntary disclosure initiatives or programs (OVDI or OVDP) – see slide 23.

VII. Reporting Reqmt's for U.S. Persons (cont.)

B. FATCA–Foreign Account Tax Compliance Act 2009

- Requires a Foreign Financial Institution (FFI) to provide information to IRS for accounts held by U.S. persons.
 - IRS negotiating Inter-Governmental Agreements with 50 countries currently to agree on information to be provided.
 - Foreign trusts also may need to be FATCA compliant.
 - If non-compliant, penalty is 30% withholding tax on gross proceeds from sale of U.S. securities.
- Requires U.S. individuals and trusts to provide detailed information on Form 8938 (in addition to FBAR).
 - Applies to foreign accounts with a balance of \$50,000 or more at any time during the year.

VII. Reporting Reqmt's for U.S. Persons (cont.)

C. Additional Reporting Requirements

- Form 3520 (“Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts”).
- Form 3520-A (“Annual Information Return of Foreign Trust With a U.S. Owner”).
- Form 5471 (“Information Return of U.S. Persons with Respect to Certain Foreign Corporations”).
- Form 8865 (“Return of U.S. Persons with Respect to Certain Foreign Partnerships”).
- Form 8621 (“Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund”).

VII. Reporting Reqmt's for U.S. Persons (cont.)

D. Offshore Voluntary Disclosure Initiative (OVDI) or Program (OVDP)

- 27.5% penalty under this amnesty program (reduced from 50%) of highest aggregate balance in undisclosed foreign bank assets during the 8 full tax years before disclosure.
- Virtual assurance that the IRS will forgo criminal prosecution and will not assert other civil penalties, including FBAR penalties.
- If reported on tax return, but not an FBAR, may be able to just file delinquent FBARs.
- If the IRS commences an audit, cannot then elect OVDP.
- People who elect OVDP and later drop out may be able to avoid penalties, if reasonable cause for failure to comply.

VIII. U.S. Source Income for NRAs

- NRAs are subject to U.S. withholding or income tax on two types of U.S. source income:
 - FDAP (Fixed, Determinable, Annual or Periodic income)– flat 30% withholding tax on such income. Generally, investment (passive income) and salary.
 - ECI (Effectively Connected Income) – graduated income tax rates on income that is “effectively connected with a U.S. trade or business.” Reported on annual return.
- A NRA can elect to treat investment real property as a U.S. trade or business for purposes of getting ECI treatment (not have to withhold 30%). IRC 871(d).

VIII. U.S. Source Income for NRAs (cont.)

FDAP – Exceptions to Withholding Tax

- However, generally, withholding and income taxes do not apply to:
 - Capital gains (stocks)
 - Bank deposit interest
 - “Portfolio investment interest:”
 - A foreign investor can invest in “portfolio debt” securities, such as corporate bonds, U.S. government securities, and municipal bonds, and not pay income tax on the interest. See IRC §§871(h), 2104(c), 2105(b)(3)

VIII. U.S. Source Income for NRAs (cont.)

A NRA is a Beneficiary of a U.S. Trust or Estate

- IRC §§ 1441, 1442, and 1443 govern “NRA withholding” (See Publication 515).
- FDAP received by a U.S. estate or trust and distributed to a foreign beneficiary other than a “qualifying foreign organization” is subject to U.S. withholding tax of 30%.
- Definition of withholding agent – “a person that has control, receipt, custody, disposal, or payment of any item of income of a foreign person.” Trustees and executors are included.
- Withholding agents are personally liable for any tax required to be withheld.
- To determine whether a treaty or other exception applies for withholding, work with knowledgeable tax lawyer or accountant.

VIII. U.S. Source Income for NRAs (cont.)

FIRPTA-Foreign Investment in Real Property Tax Act

- IRC § 1445. If a foreign person disposes of appreciated real property, the U.S. purchaser generally must withhold 10% of the amount realized on the disposition. This provision also applies to sales of stock of certain real estate holding companies.
 - Note that there are exceptions from withholding.
- The “amount realized” is generally the amount paid for the property or stock.
- A disposition includes a sale or exchange, liquidation, redemption, etc. Gifts are exempt from withholding because there is no “amount realized.”
- A U.S. purchaser who fails to withhold may be held liable for the tax.

IX. U.S. Domiciliary Test

- Residence means domicile for transfer tax purposes. Treas. Reg. Secs. 20.0-1(b); 25.2501-1(b).
- The residence test for income tax purposes is relatively objective, but the residence test (“domicile” test) for gratuitous transfer tax purposes is subjective.
- Individuals who pass the domicile test are U.S. residents for gratuitous transfer tax purposes and are not NRAs.
- IRC §2001(a) – estate tax is imposed on the worldwide taxable estate of every decedent who is a U.S. citizen or resident.
- IRC § 2501(a) – gift tax is imposed on worldwide gifts by a U.S. citizen or resident.

IX. U.S. Domiciliary Test (cont.)

- No bright-line domicile test.
- Considerations include:
 - Intent to make the U.S. the individual's permanent home.
 - Actual presence in the U.S., at least initially, is required.
 - Location of principal residence.
 - Domicile of individual's family and friends.
 - Written or oral statements of intent are relevant.
 - A green card creates a strong presumption of U.S. domicile.
 - Affidavit of Domicile if intend to make U.S. permanent home.

X. Transfers by U.S. Citizens & Domiciliaries

- Transfers of all assets (during lifetime or at death), wherever situated, are subject to gift, estate, and possibly GST taxes.
- Limited gift and GST tax annual exclusions (\$14,000 per donee in 2014, indexed for inflation).
- Unlimited exclusion for direct medical/tuition payments - do not count against annual exclusions.
- Unlimited gift and estate tax deductions for qualified transfers to spouses and charitable organizations.
- Unlimited income tax deduction for qualified transfers to charities.
- Unified Gift, Estate and GST Exemptions – \$5,340,000 in 2014, indexed for inflation.

XI. Transfers by Non-Resident Aliens (NRAs)

- Only transfers of U.S. situs assets are taxable.
- Limited gift and GST tax annual exclusions and unlimited exclusion for direct medical/tuition payments – the same as for gifts by U.S. Citizens and Domiciliaries.
- Unlimited gift and estate tax deductions for qualified transfers to spouses and charitable organizations – the same as for U.S. Citizens and Domiciliaries.
- No gift tax exemption and only a \$60,000 estate tax exemption amount. GST exemption of 5.34M in 2014, apparently.
- Portability - a NRA generally can neither give nor receive a Deceased Spouse's Unused Exclusion (DSUE) amount.
 - See Chart 3.

**CHART 3 - TRANSFER TAX BASICS
(GIFT, ESTATE, AND GENERATION-SKIPPING TRANSFER TAXES)**

This chart is a general summary of the transfer tax rules (gift, estate, and generation-skipping transfer taxes) for estates of U.S. citizens and domiciliaries and nonresident aliens (NRAs). Tax treaties may modify or replace the general rules.

Summary of Estate & Gift Tax Rules

Type of Tax	U.S. Citizen and Resident (U.S. Domiciliary)	Non-Resident Alien
Gift Tax	Gifts of worldwide assets are subject to U.S. gift tax.	<u>Subject to U.S. gift tax:</u> Gifts of U.S. situs real and tangible personal property. <u>Not subject to U.S. gift tax:</u> Gifts of non-U.S. situs real and tangible personal property and worldwide intangible personal property.
Estate Tax	Bequests of worldwide assets are subject to U.S. estate tax.	<u>Subject to U.S. estate tax:</u> Bequests of U.S. situs real and tangible personal property, some intangible personal property (e.g., stock of U.S. corporations and non-portfolio debt obligations), and revocable transfers (and certain other transfers) of U.S. situs property (IRC § 2104(b)). <u>Not subject to U.S. estate tax:</u> Bequests of other U.S. situs intangible personal property (e.g., bank accounts, "portfolio debt") and non-U.S. situs property.

Specific Gift and Estate Tax Rules Applicable to Non-Resident Aliens

Type of Property	Subject to Gift Tax	Subject to Estate Tax
Real Property	Yes, if located in the U.S.	Yes, if located in the U.S.
Tangible Personal Property	Yes, if physically located in the U.S. NOTE: Cash/currency, whether in U.S. dollars or foreign currency, is considered tangible property.	Yes, if physically located in U.S., but excluding works of art on loan for exhibition purposes to a public gathering or museum. IRC § 2105(c).
Life Insurance Policy on Life of NRA, Others	No. Gifts of life insurance policies are not subject to gift tax or the 3-year estate tax pullback rule.	No. The proceeds (death benefit) are excluded, IRC § 2105(a). But not a policy on life of third-party if issued by U.S. company.
Corporate Stocks	No, shares of stock are considered intangible property.	Yes, if the shares are stock of a U.S. corporation.
Annuities	No	Yes, if payable by U.S. person.
Retirement Plan	No	Yes, if payable by U.S. person.
Bank Deposits and "Portfolio" and Certain Other Debt Obligations	No, contrasted with cash/currency. But beware of 1976 IRS General Counsel Memorandum (G.C.M. 36869) that gift via check is a transfer of U.S. situs tangible personal property (concern is similar for wire transfers). The best practice is to transfer funds from a foreign bank account to a beneficiary's foreign bank account or purchase and transfer intangible property such as T-Bills.	No, if not "effectively connected with conduct of trade or business within U.S." IRC §2105(b). NOTE: Cash in a "brokerage account," however, would be subject to estate tax.

Interests in LLCs and Partnerships	No, but interests in LLCs and partnerships may not be considered intangible property as the IRS may look at the nature of the underlying assets to determine situs.	No, but interests in LLCs and partnerships may not be considered intangible property as the IRS may look at the nature of the underlying assets to determine situs.
Other Intangible Personal Property	No, even if located in the U.S. Intangible personal property includes corporate stocks, LLC interests, mutual funds, bank accounts, and brokerage accounts.	Yes, if issued by or enforceable against a U.S. person and the written evidence of which is not treated as being the property itself (but subject to numerous exceptions). Treas Reg §§ 20.2104-1(a)(4),(7); 20.2105-1(e), (j)-(m)

Generation Skipping Tax (GST): GST tax applies only if gift or estate tax applies. Thus, a NRA can gift stocks to a grandchild and since gift taxes do not apply (stocks are intangible property), the GST tax does not apply either.

Estate & Gift Tax Differences

The transfer taxes imposed on non-resident aliens (NRA) are different from those imposed on U.S.

domiciliaries. For example, NRAs are entitled to an estate tax exemption of only \$60,000 of U.S. property from estate tax, and do not have a gift tax exemption other than the gift tax annual exclusion (\$14,000 in 2014, indexed for inflation); whereas U.S. domiciliaries have a unified estate and gift tax credit, which exempts \$5,340,000 of property from transfer tax in 2014, indexed for inflation.

Summary of Estate & Gift Tax for Married Couple					
Decedent/Surviving Spouse	Decedent's Estate Tax Applicable Exemption Equivalent ¹	Estate Tax Marital Deduction ²	Annual Marital Gift Tax Exclusion ³	Availability of Gift-Splitting to a Third Party	Availability of Gift Tax Annual Exclusion ⁴
U.S. Citizen/U.S. Citizen	\$5,340,000	Unlimited	Unlimited	Available	Available
U.S. Citizen/Resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Available	Available
U.S. Citizen/Non-resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Not Available	Available
Resident Alien/U.S. Citizen	\$5,340,000	Unlimited	Unlimited	Available	Available
Resident Alien/Resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Available	Available
Resident Alien/Non-resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Not Available	Available
Non-resident Alien/U.S. Citizen	\$60,000	Unlimited	Unlimited	Not Available	Available
Non-resident Alien/Resident Alien	\$60,000	Only with a QDOT	\$145,000	Not Available	Available
Non-resident Alien/Non-resident Alien	\$60,000	Only with a QDOT	\$145,000	Not Available	Available

¹ Applicable for 2014, indexed for inflation.

² A NRA apparently can neither give nor receive a DSUE. However, a tax treaty may cause a different result.

³ Applicable for 2014, indexed for inflation.

⁴ Medical/tuition payments do not count against annual exclusions.

XII. Gifts and Bequests to Non-U.S. Citizen Spouse

- No gift tax marital deduction, but \$145,000 gift tax annual exclusion in 2014, indexed for inflation.
- Estate tax marital deduction – qualified domestic trust (QDOT) – see Chart 4 and Chart 5.
 - Net income must be payable to the surviving spouse.
 - Principal must not be payable to anyone other than the surviving spouse during his or her lifetime.
 - Incremental estate tax at settlor’s marginal rates for principal paid to the surviving spouse (subject to a “hardship” exemption) and upon spouse’s death.
 - At least one trustee must be a U.S. citizen with a “tax home” in the U.S. or U.S. corporate trustee.

XII. Gifts and Bequests to Non-U.S. Citizen Spouse (cont.) - QDOT

- If the QDOT has a value in excess of U.S. \$2 million, the trustee must either be a U.S. corporate trustee, or if the trustee is a U.S. citizen, a “bond” must be posted with the IRS.
- If the QDOT is not established by the deceased spouse, it can be established by the surviving spouse before the estate tax return is filed and will be a “grantor trust” for U.S. income tax purposes.
- If the surviving spouse later becomes a U.S. citizen, the QDOT principal thereafter can be distributed to the spouse free of estate tax, and the trust will be treated as a regular QTIP trust or the spouse’s property.
- See *Liftin vs. U.S.* regarding late filing of estate tax return (U.S. Court of Claims, 3/2013)

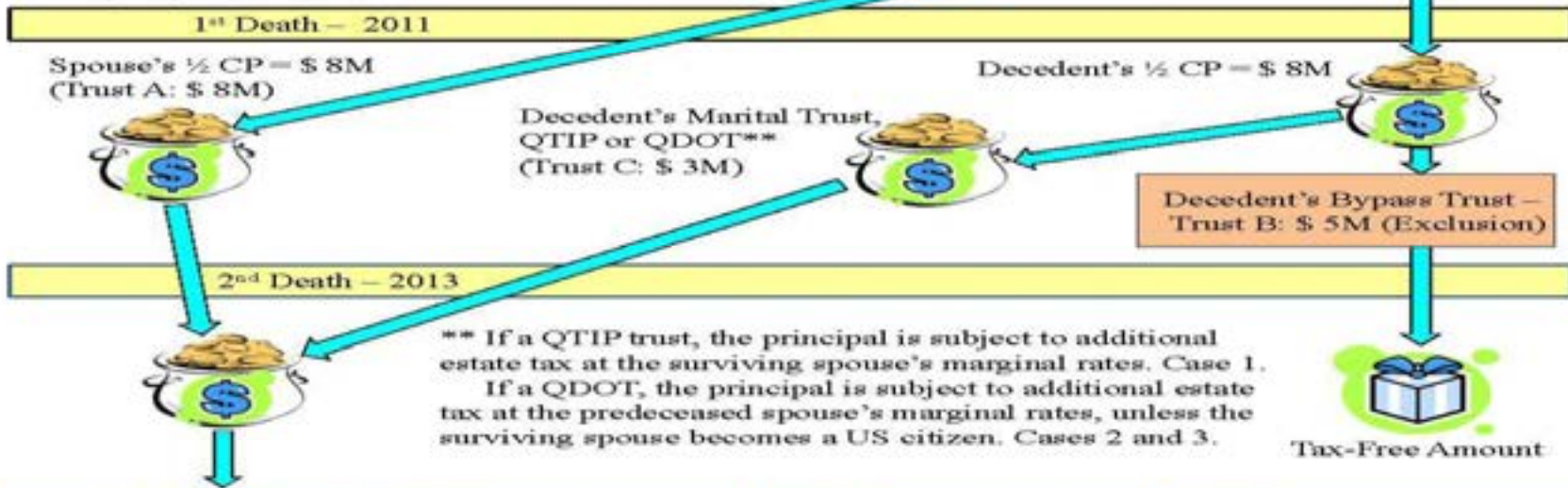
CHART 4 – Community Property (Estate Tax Planning)

Assume: 1st Death (U.S. Citizen or Resident Alien*) – Year 2011
 Applicable Exclusion: \$ 5M with 35% Tax Rate

Family Trust Estate: \$ 16M

Assume: 2nd Death (U.S. Citizen, Resident Alien, or NRA) – Year 2013
 Applicable Exclusion: \$ 5.25M with 40% Tax Rate

* A NRA apparently can neither give nor receive a Deceased Spouse's Unused Exclusion ("DSUE") amount. However, a tax treaty may cause a different result.



TAXABLE AMOUNT	Case 1: Surviving Spouse is a U.S. Citizen	Case 2: Surviving Spouse is a Resident Alien	Case 3: Surviving Spouse is a Non-Resident Alien (NRA)
Estate Tax (Trust A)	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 0.06M) \times .40 = \$ 3.176M$
Estate Tax (Trust C)	QTIP = $\$ 3M \times .40 = \$ 1.20M$	QDOT = $\$ 3M \times .35 = \$ 1.05M$	QDOT = $\$ 3M \times .35 = \$ 1.05M$
Total Estate Tax	$\$ 1.10M + \$ 1.20M = \$ 2.30M$	$\$ 1.10M + \$ 1.05M = \$ 2.15M$	$\$ 3.176M + \$ 1.05M = \$ 4.226M$

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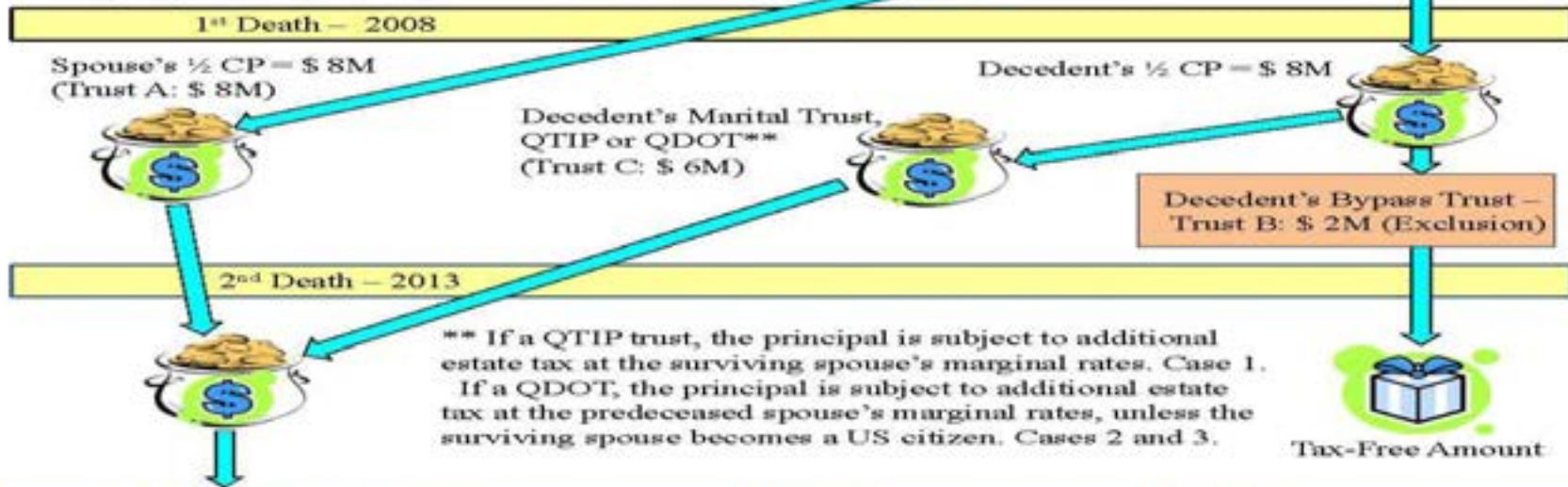
CHART 5 – Community Property (Estate Tax Planning)

Assume: 1st Death (U.S. Citizen or Resident Alien*) – Year 2008
 Applicable Exclusion: \$ 2M with 45% Tax Rate

Family Trust Estate: \$ 16M

Assume: 2nd Death (U.S. Citizen, Resident Alien, or NRA) – Year 2013
 Applicable Exclusion: \$ 5.25M with 40% Tax Rate

* A NRA apparently can neither give nor receive a Deceased Spouse's Unused Exclusion ("DSUE") amount. However, a tax treaty may cause a different result.



TAXABLE AMOUNT	Case 1: Surviving Spouse is a U.S. Citizen	Case 2: Surviving Spouse is a Resident Alien	Case 3: Surviving Spouse is a Non-Resident Alien (NRA)
Estate Tax (Trust A)	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 0.06M) \times .40 = \$ 3.176M$
Estate Tax (Trust C)	QTIP = $\$ 6M \times .40 = \$ 2.40M$	QDOT = $\$ 6M \times .45 = \$ 2.70M$	QDOT = $\$ 6M \times .45 = \$ 2.70M$
Total Estate Tax	$\$ 1.10M + \$ 2.40M = \$ 3.50M$	$\$ 1.10M + \$ 2.70M = \$ 3.80M$	$\$ 3.176M + \$ 2.70M = \$ 5.876M$

XIII. Planning for Permanent NRAs

- If a NRA owns U.S. situs real or tangible personal property through an LLC or corporation:
 - lifetime gifts of LLC interests or shares of corporate stock generally are not subject to U.S. gift or GST taxes because the LLC interests and shares of corporate stock are intangible property, but
 - stock of a U.S. corporation owned by a NRA decedent is subject to U.S. estate and GST taxes without regard to the situs of the assets owned by the corporation.

XIII. Planning for Permanent NRAs (cont.)

- Stock of a foreign corporation transferred by a NRA generally will avoid U.S. estate and GST taxes (as well as U.S. gift tax) even if the corporation owns U.S. situs assets.
 - However, following the NRA's death, the corporation may be treated as a foreign personal holding company (FPHC) unless the corporation is liquidated within 30 days after the date of death (which may be difficult to do).
 - Assets owned by the corporation should be sold periodically before the NRA's death to avoid substantial taxes on capital gains on liquidation of the corporation.

XIII. Planning for Permanent NRAs (cont.)

- Instead of making substantial outright gifts or bequests to a U.S. citizen or resident beneficiary (e.g., a child), a NRA generally should transfer the assets to an irrevocable GST-exempt dynasty trust for the benefit of the child and his or her issue.
- The NRA can transfer an unlimited amount of intangible U.S. situs assets to this trust free of U.S. Gift, Estate, and GST taxes. If the trust is a foreign trust, its undistributed net income also generally will not be subject to U.S. income taxes, at least currently. But see “throwback rule” (IRC §§ 665-669).

XIII. Planning for Permanent NRAs (cont.)

- Initially, a NRA parent might establish a revocable living (grantor) trust f/b/o his or her U.S. citizen or resident adult child and the child's issue, with the child as the trustee.
 - The trust would be a foreign trust and its net income would not be subject to U.S. income tax except for U.S. source income.
 - Payments or distributions of non-U.S. situs trust assets to the child or the child's issue during the NRA's lifetime would not be subject to U.S. gift or GST taxes.
 - Non-U.S. situs trust assets also would not be subject to U.S. estate or GST taxes on the NRA settlor's death, at which time the trust would become a domestic (U.S.) non-grantor GST-exempt dynasty trust.

XIII. Planning for Permanent NRAs (cont.)

- Gifts and bequests of non-U.S. situs assets received by U.S. persons (including domestic trusts) from NRA donors are subject to reporting requirements but are not taxable unless the transferor is a “covered expatriate.”

XIV. Pre-Immigration Planning for NRAs

- A NRA planning to become a U.S. Citizen or Resident should consider giving excess non-U.S. situs assets to an irrevocable GST-exempt dynasty trust f/b/o his or her spouse and/or issue before becoming a U.S. citizen or resident.
- The beneficiaries generally should have special testamentary powers of appointment, exercisable in favor of the settlor as well as others.

XIV. Pre-Immigration Planning for NRAs (cont.)

- Transfers of non-U.S. situs assets to the trust would be exempt from current U.S. gift and GST taxes, and the trust assets would not be subject to future U.S. gift, estate and GST taxes.
- However, trust income might or might not be subject to U.S. income tax, depending on whether the trust has U.S. source income, whether it is a U.S. or foreign trust, and when it was established.

XIV. Pre-Immigration Planning for NRAs (cont.)

- U.S. situs real or tangible personal property generally should be held by a LLC or corporation, and gifts of LLC interests or corporate stock should be made by the NRA before he or she becomes a U.S. citizen or resident.
- An irrevocable foreign trust established by a NRA within 5 years before the NRA becomes a U.S. citizen or resident will be treated as a grantor trust for U.S. income tax purposes if the trust has any U.S. beneficiaries, in which case the trust's income will be taxed to the NRA after he or she becomes a U.S. person. See IRC § 679(a)(4).

XV. Departure Planning

- Departure Planning For U.S. Citizens and Long-Term Permanent Residents (HEART Act). IRC § 877A.
 - Special taxes apply with respect to “covered expatriates” – certain individuals who surrender their U.S. citizenship or long-term permanent resident status (green card holder for at least 8 years during the 15-year period ending with the year of expatriation) after June 16, 2008.
 - A “covered expatriate” is an individual who:
 - Has had an average income tax liability above a minimum threshold (\$157,000 for 2014, indexed for inflation) during the five previous tax years (the “tax liability test”); or
 - Has had a net worth of at least \$2M (the “net worth test”); or
 - Fails to certify, under penalties of perjury, compliance with all U.S. Federal tax obligations for the 5 previous tax years.

XV. Departure Planning (cont.)

- Exit tax – based on a deemed sale of all assets for their fair market values as of the day before the expatriation occurred.
 - 2014 exemption for total net gain below \$680,000, indexed for inflation.
 - The tax is deferred with respect to “eligible deferred compensation” items.
- Unless the expatriate elects otherwise, IRC §877A(f) provides for an automatic deferral of income tax on the value of the expatriate’s “interest in a non-grantor trust,” whether the trust is a domestic trust or a foreign trust, and §877A(f)(4)(A) provides that rules similar to payments of eligible deferred compensation shall apply.

XV. Departure Planning (cont.)

- Thus, the trustee must withhold 30% of the gross amount of the distribution, but §877A(f)(2) appears to limit the withholding to the amount of distributable net income attributable to the distribution. See IRS Notice 2009-85 (2009-45 IRS 598), §7.D).
- The expatriate's ongoing U.S. income tax liability with regard to future distributions from a domestic trust is not limited to the amount on which the expatriate would have been taxed if the value of the expatriate's interest in the trust had been taxed at the time of expatriation.

XV. Departure Planning (cont.)

- There are no provisions for a foreign trust to “elect” to be treated the same as a U.S. trust for withholding tax purposes (in contrast with the rules on how the deferred tax on eligible deferred compensation will be paid by a non-U.S. person). Thus, there is no mechanism for the IRS to directly enforce the requirement that the expatriate must report any tax due with regard to future distributions from a foreign trust.

XV. Departure Planning (cont.)

“Inheritance Tax:”

- New IRC §2801(a) imposes an inheritance tax on the fair market value of gifts or bequests of property situated anywhere in the world received by a U.S. citizen or resident beneficiary from a covered expatriate. The tax is imposed at the highest rate at which the federal estate or gift tax is imposed. The amount subject to tax has no relationship to the expatriate’s net worth at the time of expatriation.
- The new inheritance tax does not apply to property subject to U.S. gift or estate taxes shown on timely filed gift and estate tax returns, or to annual exclusion gifts that are excluded under IRC §2503(b) (and probably under IRC §2503(e), too). It also does not apply to qualifying transfers to a spouse or charitable organization.

XV. Departure Planning (cont.)

- The new inheritance tax also is imposed on a gift or bequest by an expatriate to a domestic trust. A gift or bequest to a foreign trust is deferred until distribution is made from the trust to the U.S. citizen or resident beneficiary, and an income tax deduction is allowed under IRS §164 for the §2801 tax attributable to the portion of the distribution included in gross income. A foreign trust may elect to be treated as a domestic trust for purposes of §2801.
- Section 2801(d) provides for a “reverse foreign tax credit” equal to the amount of any gift or estate tax imposed on the gift or bequest by any foreign country. However, the beneficiary cannot claim the benefit of a reduction or elimination of the tax under an estate or gift tax treaty, because no existing treaty applies to inheritance-type taxes imposed on a U.S. transferee.

XVI. Foreign vs. Domestic Trust

- Definition: A trust is a domestic (U.S.) trust if:
 - (i) a U.S. court is able to exercise primary supervision over the administration of the trust (the “court” test); **and**
 - (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust (the “control” test).
- Must meet both “court” and “control” tests to be a U.S. domestic trust.
- Any other trust is a foreign trust.
- “U.S. person” includes a citizen or resident of the United States, a domestic partnership, and a domestic corporation. IRC 7701(a)(30).
 - Contrasted with an individual trustee of a QDOT who must be a U.S. citizen with a U.S. “tax home.”

XVI. Foreign vs. Domestic Trust (cont.)

- The undistributed net income (UNI), including capital gains, of a foreign trust is not currently subject to U.S. (or state) income taxes, but it is subject to the “throwback rules” of IRC §§ 665 through 668.
- If little or no UNI is likely to be distributed to a U.S. beneficiary, a foreign trust may be preferable, at least from an income tax perspective. Otherwise, a domestic (U.S.) trust may be preferable.
- California has somewhat similar “throwback rules” relating to the income taxation of a foreign or domestic trust’s UNI if not all of the fiduciaries are California residents and not all of the beneficiaries’ interests in the trust are noncontingent (vested).

XVII. Unintended Foreign Trusts

- Examples of failing “control test” and a trust becomes foreign.
 - If a NRA acts as trustee of a U.S. trust.
 - If a NRA is co-trustee of a U.S. trust in which all co-trustees have to act unanimously. Unless the trust provides otherwise, CA Probate Code § 15620 requires co-trustees to act unanimously.
 - If a NRA trust protector has the power to remove and replace the trustee, Treas. Reg. § 301.7701-7 states that this is a “substantial decision” (but the ability to appoint a U.S. trustee in case of vacancy is not a “substantial decision”).
- Examples of “court test:”
 - If both U.S. and foreign courts are able to exercise primary supervision over the administration of the trust, court test satisfied.
 - If there is an automatic migration provision (trust automatically migrates if a certain condition happens), court test fails.

XVII. Unintended Foreign Trusts (cont.)

- Consequences of trustee who is a Canadian citizen with a U.S. beneficiary:
 - Gain recognition – when appreciated property is contributed to a foreign trust, all gain is recognized but not loss, even if property is not sold.
 - Every 21 years, deemed disposition.
 - Withholding – usually 30% unless treaty, ECI or exception.
 - Reporting Obligations:
 - ◆ IRS 3520 (Report of Foreign Trust)
 - ◆ IRS 3520A – if create grantor trust
 - Penalty is percentage of assets in the trust – greater of \$10,000 or 5% of trust corpus
 - ◆ FBAR
 - ◆ FATCA – penalty is 30% withholding tax

XVII. Unintended Foreign Trusts (cont.)

- What to do ?
 - If revocable, amend trust.
 - If irrevocable, modify trust.
 - 1 year grace period if the trust fails the control test (no grace period if it fails the court test).
 - Try reformation of trust – retroactive to the date the trust was established.
 - ◆ Bosch – IRS does not have to respect state court order, and reformation has not been tested in this specific context, although reformations are approved by the IRS regularly.

XVIII. Hypotheticals

#1. A NRA father owns real estate in CA, \$1M value.

- Only has \$60,000 estate tax exemption.
- Only \$14,000 annual gift tax exclusion and would have to pay gift taxes if gift over this amount.
- U.S. Citizen daughter is beneficiary.
- Father sells the property to daughter. Capital gains may have to be paid (installment or all at once). Parent-child exclusion from reassessment of property taxes.
- Daughter gives him a promissory note which meets the requirement for “portfolio debt.”
- Income from note is not taxable and promissory note not estate taxed because it is “portfolio debt.”

XVIII. Hypotheticals

#2. Temporary Executive

- Executive is here on visa.
- \$2M in stock shares and options, \$1M home.
- Wife is citizen of foreign country and U.S. Permanent resident.
- They have 2 children who will be raised here.
- Intends to live in U.S..
- Needs to show that he is U.S. domiciliary and completes an Affidavit of Domicile.

XVIII. Hypotheticals

#3. A NRA has \$4M in brokerage account

- Stocks are intangible property. Can gift without U.S. gift tax consequences.
- If the NRA dies and the account contains U.S. corporate stock, the stock will be subject to U.S. estate tax with only a \$60,000 exemption.
- Create an irrevocable, GST-exempt trust for children and gift stock to this trust.
- Because the gift is not subject to U.S. gift tax, it is not subject to GST tax either.

XVIII. Hypotheticals

#4. Probate of a NRA's bank account - \$300,000

- No will. Family members all in foreign country and are NRAs.
- Non-resident of CA cannot serve as personal representative if not named in will.
- PC § 8465 adds a provision allowing non-resident heirs to nominate a personal representative.
- \$60,000 estate tax exemption but bank accounts not included in estate of a NRA, if the bank account is not “effectively connected to a U.S. trade or business.”

XVIII. Hypotheticals

#5. Revocable trusts and BVI corp for a NRA

- A NRA father, Citizen of Taiwan, foreign and U.S. situs assets. 3 U.S. citizen sons.
- Create 3 separate revocable trusts – foreign grantor trusts.
- The separate revocable trust for each child owns all the shares of a BVI corporation which is used to hold any U.S. situs assets.
- Sons are trustees and cash distributions are made to the son's foreign bank account.
- When father dies, trusts become irrevocable dynasty type trusts. BVI corporation then becomes a foreign personal holding company (FPHC), so should be liquidated within 30 days to avoid adverse income tax consequences.

XVIII. Hypotheticals

#6. Family Investment Company for U.S. Domiciliary

- Wealthy settlor has investment assets (stocks, real estate).
- Consolidate most, if not all, of those assets into one or more investment entities (LLC).
- Required annual distributions of hypothetical trust net income and tax liability.
- Substantial valuation discounts for transfers of minority and fractional interests in closely held business entities.
- Transfers of interests are subject to buy-sell agreement (right of first refusal).
- Annual appraisals and annual accountings.
- Keeps family working together.

Chart 6

2014 FEDERAL UNIFIED ESTATE AND GIFT TAX RATE SCHEDULE

*If the Taxable Estate or
Taxable Gift is:*

The Estate or Gift Tax is:

<i>From</i>	<i>To</i>	<i>Tax</i>	<i>+</i>	<i>%</i>	<i>On Excess Over</i>
\$ -0-	\$ 10,000	\$ -0-		18	\$ -0-
\$ 10,000	\$ 20,000	\$ 1,800		20	\$ 10,000
\$ 20,000	\$ 40,000	\$ 3,800		22	\$ 20,000
\$ 40,000	\$ 60,000	\$ 8,200		24	\$ 40,000
\$ 60,000	\$ 80,000	\$ 13,000		26	\$ 60,000
\$ 80,000	\$ 100,000	\$ 18,200		28	\$ 80,000
\$ 100,000	\$ 150,000	\$ 23,800		30	\$ 100,000
\$ 150,000	\$ 250,000	\$ 38,800		32	\$ 150,000
\$ 250,000	\$ 500,000	\$ 70,800		34	\$ 250,000
\$ 500,000	\$ 750,000	\$ 155,800		37	\$ 500,000
\$ 750,000	\$ 1,000,000	\$ 248,300		39	\$ 750,000
\$ 1,000,000	\$ 5,340,000	\$ 345,800		40	\$ 1,000,000
\$ 5,340,000	∞	\$ 2,081,800		40	\$ 5,340,000 *

*The applicable credit amount available as an offset to the estate and/or gift tax is \$2,081,800, with respect to a U.S. citizen or resident (domiciliary), which is equivalent to the tax on a taxable estate and/or cumulative lifetime taxable gifts of \$5,340,000.

*The applicable credit amount available as an offset to the estate tax with respect to a non-resident alien (“NRA”) of the U.S. is only \$13,000, which is equivalent to the tax on a taxable estate of \$60,000.

*There is no applicable credit amount available as an offset to the gift tax with respect to lifetime taxable gifts made by a NRA .

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Richard Kinyon is a partner in the Family Wealth Planning practice group. He designs and implements complex estate plans for high-net-worth individuals, including the establishment of various sophisticated irrevocable trusts and family investment companies, and he represents fiduciaries and beneficiaries in connection with the administration of estates and trusts, including litigation. Mr. Kinyon advises closely held business owner clients how to pass interests in their businesses to younger-generation family members and others in a tax-advantaged and creditor-protected manner. He also advises wealthy individuals on how to similarly transfer their real estate and other assets to the objects of their bounty.

Mr. Kinyon has lectured for numerous educational institutions, various local estate planning councils and other organizations. He has authored chapters in California CEB treatises on drafting business buyout agreements, tax planning for the prospective retiree, using family partnerships as an estate planning tool, the income tax aspects of estates and trusts, "Dynasty Trusts" (in *Drafting California Irrevocable Trusts*), "Overview of Estate Planning Practice" (in *California Estate Planning*), and "Family Investment Companies" (in *Business Succession Planning*). He also has written a number of articles for the CEB Estate Planning & California Probate Reporter, for which he also has served as guest editor, Estate Planning, Trust & Probate NEWS, and other professional journals.

Mr. Kinyon has been active in a number of professional organizations for which he has served as Chairman, including: the Committee on Tax Legislation & Regulations: Income Taxation of Trusts and Estates, of the Real Property, Probate & Trust Law Section of the American Bar Association; the Subcommittee on State Inheritance and Gift Taxes of the Estate Planning Committee of the Estate Planning, Probate, and Trust Law Section of the State Bar of California; and the Estate Planning, Trust, and Probate Law Section of the San Francisco Bar Association. Mr. Kinyon is also a member of the American Law Institute, the American College of Trust and Estate Counsel, and The International Academy of Estate and Trust Law.

Mr. Kinyon has been a certified Specialist in Taxation Law by the California Board of Legal Specialization since 1973.

Mr. Kinyon is recommended as a leading lawyer by Best Lawyers in America since 1987 and Super Lawyers since 2011.

EDUCATION

University of Minnesota, Minneapolis (B.A., 1961); University of Minnesota Law School (J.D., 1965). Mr. Kinyon served as Editor-in-Chief of the *Minnesota Law Review* from 1964 to 1965.



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E.J. Hong is a Certified Specialist in Estate Planning, Trust and Probate Law by the State Bar of California Board of Legal Specialization. Her law office is based in Palo Alto, CA.

EJ's passion for estate planning comes from her heart. She wants to protect families because her own mother died when she was 17 years old. She knows what it's like not to have an estate plan in her own family. She approaches each client with the same care and compassion she brings to her own family.

E.J. has been practicing law since 1990 and is a member of the State Bar of CA since 2006. She earned her law degree at Washington College of Law, The American University, Washington, DC. E.J.'s professional experience includes: Clerk to the Honorable Stephen M. Daniels, now Chief Judge of the Civilian Board of Contract Appeals; Associate Attorney (civilian attorney) at the Department of the Navy; and Associate Attorney at Brand, Lowell and Ryan (litigation firm). While at the Navy, one of the programs she worked on was the procurement contracts for the presidential helicopters, Marine One. She enjoys estate planning the most of all the different types of law she has practiced.

EJ lives in Palo Alto with her husband, two girls (18 and 15). We used to have hamsters but they all predeceased us, without issue.

EJ can speak French and Korean, but only under duress, menace, or undue influence.

Chart 1 - TAX TREATIES

COUNTRY	INCOME TAX	ESTATE TAX	GIFT TAX TREATIES
Australia	✓	✓	✓
Austria	✓	✓	✓
Barbados	✓		
Belgium	✓		
Bermuda	✓		
Canada	✓	Addressed in Income Tax Treaty	
China	✓		
Cyprus	✓		
Czech Republic	✓		
Denmark	✓	✓	✓
Egypt	✓		
Estonia	✓		
Finland	✓	✓	
France	✓	✓	✓
Germany	✓	✓	✓
Greece	✓	✓	
Hungary	✓		
Iceland	✓		
India	✓		
Indonesia	✓		
Ireland	✓	✓	
Israel	✓		
Italy	✓	✓	
Jamaica	✓		
Japan	✓	✓	✓
Kazakhstan	✓		
Korea	✓		
Latvia	✓		
Lithuania	✓		
Luxembourg	✓		
Mexico	✓		
Morocco	✓		
Netherlands	✓	✓	
New Zealand	✓		
Norway	✓	✓	
Pakistan	✓		
Philippines	✓		
Poland	✓		
Portugal	✓		
Romania	✓		
Russian Federation	✓		
Slovak Republic	✓		
Slovenia	✓		
South Africa	✓	✓	
Spain	✓		
Sri Lanka	✓		
Sweden	✓	✓	✓
Switzerland	✓	✓	
Thailand	✓		
Trinidad and Tobago	✓		
Tunisia	✓		
Turkey	✓		
Ukraine	✓		
USSR	✓		
UK	✓	✓	✓
Venezuela	✓		

Copies of Tax Treaties can be found at the IRS and Department of Treasury websites.

CHART 2 - U.S. RESIDENCY CHART FOR INCOME TAX PURPOSES

START HERE

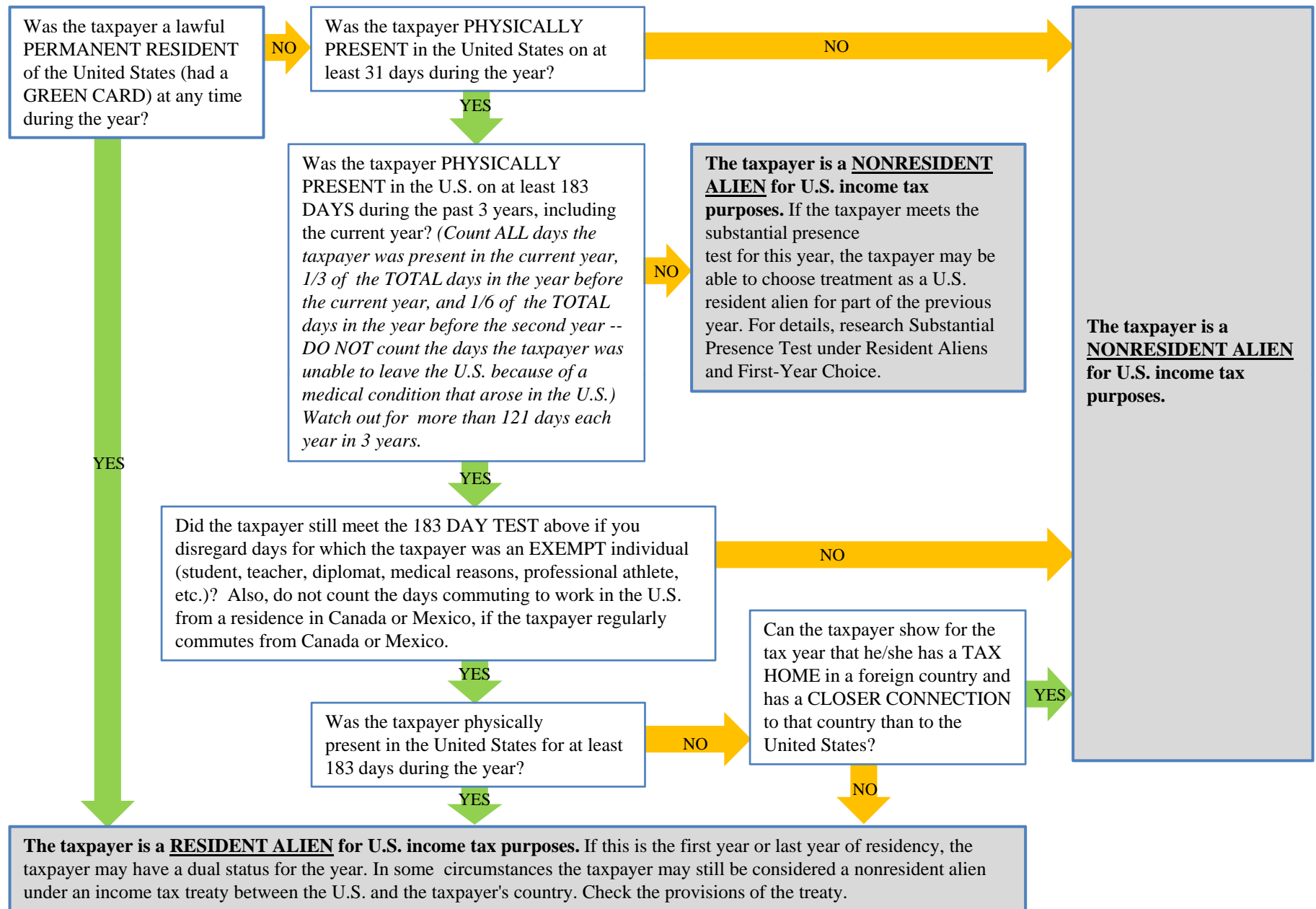


CHART 3 - TRANSFER TAX BASICS (GIFT, ESTATE, AND GENERATION-SKIPPING TRANSFER TAXES)

This chart is a general summary of the transfer tax rules (gift, estate, and generation-skipping transfer taxes) for estates of U.S. citizens and domiciliaries and nonresident aliens (NRAs). Tax treaties may modify or replace the general rules.

Summary of Estate & Gift Tax Rules

Type of Tax	U.S. Citizen and Resident (U.S. Domiciliary)	Non-Resident Alien
Gift Tax	Gifts of worldwide assets are subject to U.S. gift tax.	<p><u>Subject to U.S. gift tax:</u> Gifts of U.S. situs real and tangible personal property.</p> <p><u>Not subject to U.S. gift tax:</u> Gifts of non-U.S. situs real and tangible personal property and worldwide intangible personal property.</p>
Estate Tax	Bequests of worldwide assets are subject to U.S. estate tax.	<p><u>Subject to U.S. estate tax:</u> Bequests of U.S. situs real and tangible personal property, some intangible personal property (e.g., stock of U.S. corporations and non-portfolio debt obligations), and revocable transfers (and certain other transfers) of U.S. situs property (IRC § 2104(b)).</p> <p><u>Not subject to U.S. estate tax:</u> Bequests of other U.S. situs intangible personal property (e.g., bank accounts, “portfolio debt”) and non-U.S. situs property.</p>

Specific Gift and Estate Tax Rules Applicable to Non-Resident Aliens

Type of Property	Subject to Gift Tax	Subject to Estate Tax
Real Property	Yes, if located in the U.S.	Yes, if located in the U.S.
Tangible Personal Property	Yes, if physically located in the U.S. NOTE: Cash/currency, whether in U.S. dollars or foreign currency, is considered tangible property.	Yes, if physically located in U.S, but excluding works of art on loan for exhibition purposes to a public gathering or museum. IRC § 2105(c).
Life Insurance Policy on Life of NRA, Others	No. Gifts of life insurance policies are not subject to gift tax or the 3-year estate tax pullback rule.	No. The proceeds (death benefit) are excluded. IRC § 2105(a). But not a policy on life of third-party if issued by U.S. company.
Corporate Stocks	No, shares of stock are considered intangible property.	Yes, if the shares are stock of a U.S. corporation.
Annuities	No	Yes, if payable by U.S. person.
Retirement Plan	No	Yes, if payable by U.S. person.
Bank Deposits and “Portfolio” and Certain Other Debt Obligations	No, contrasted with cash/currency. But beware of 1976 IRS General counsel Memorandum (G.C.M. 36869) that gift via check is a transfer of U.S. situs tangible personal property (concern is similar for wire transfers). The best practice is to transfer funds from a foreign bank account to a beneficiary’s foreign bank account or purchase and transfer intangible property such as T-Bills.	<p>No, if not “effectively connected with conduct of trade or business within U.S.” IRC §2105(b).</p> <p>NOTE: Cash in a “brokerage account,” however, would be subject to estate tax.</p>

Interests in LLCs and Partnerships	No, but interests in LLCs and partnerships may not be considered intangible property as the IRS may look at the nature of the underlying assets to determine situs.	No, but interests in LLCs and partnerships may not be considered intangible property as the IRS may look at the nature of the underlying assets to determine situs.
Other Intangible Personal Property	No, even if located in the U.S. Intangible personal property includes corporate stocks, LLC interests, mutual funds, bank accounts, and brokerage accounts.	Yes, if issued by or enforceable against a U.S. person and the written evidence of which is not treated as being the property itself (but subject to numerous exceptions). Treas Reg §§ 20.2104-1(a)(4),(7); 20.2105-1(e), (j)-(m)

Generation Skipping Tax (GST): GST tax applies only if gift or estate tax applies. Thus, a NRA can gift stocks to a grandchild and since gift taxes do not apply (stocks are intangible property), the GST tax does not apply either.

Estate & Gift Tax Differences

The transfer taxes imposed on non-resident aliens (NRA) are different from those imposed on U.S.

domiciliaries. For example, NRAs are entitled to an estate tax exemption of only \$60,000 of U.S. property from estate tax, and do not have a gift tax exemption other than the gift tax annual exclusion (\$14,000 in 2014, indexed for inflation); whereas U.S. domiciliaries have a unified estate and gift tax credit, which exempts \$5,340,000 of property from transfer tax in 2014, indexed for inflation.

Summary of Estate & Gift Tax for Married Couple					
Decedent/Surviving Spouse	Decedent's Estate Tax Applicable Exemption Equivalent ¹	Estate Tax Marital Deduction ²	Annual Marital Gift Tax Exclusion ³	Availability of Gift-Splitting to a Third Party	Availability of Gift Tax Annual Exclusion ⁴
U.S. Citizen/U.S. Citizen	\$5,340,000	Unlimited	Unlimited	Available	Available
U.S. Citizen/Resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Available	Available
U.S. Citizen/Non-resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Not Available	Available
Resident Alien/U.S. Citizen	\$5,340,000	Unlimited	Unlimited	Available	Available
Resident Alien/Resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Available	Available
Resident Alien/Non-resident Alien	\$5,340,000	Only with a QDOT	\$145,000	Not Available	Available
Non-resident Alien/U.S. Citizen	\$60,000	Unlimited	Unlimited	Not Available	Available
Non-resident Alien/Resident Alien	\$60,000	Only with a QDOT	\$145,000	Not Available	Available
Non-resident Alien/Non-resident Alien	\$60,000	Only with a QDOT	\$145,000	Not Available	Available

¹ Applicable for 2014, indexed for inflation.

² A NRA apparently can neither give nor receive a DSUE. However, a tax treaty may cause a different result.

³ Applicable for 2014, indexed for inflation.

⁴ Medical/tuition payments do not count against annual exclusions.

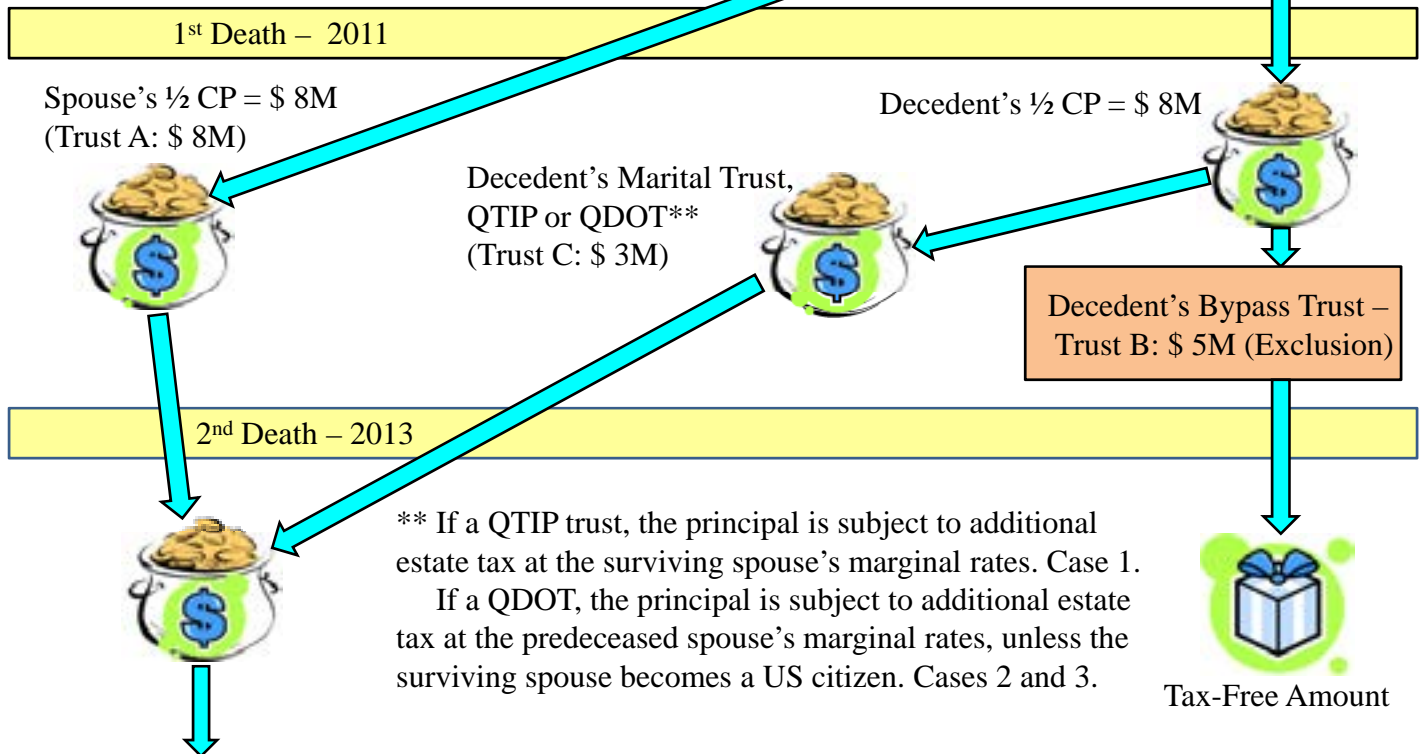
CHART 4 – Community Property (Estate Tax Planning)

Assume: 1st Death (U.S. Citizen or Resident Alien*) – Year 2011
 Applicable Exclusion: \$ 5M with 35% Tax Rate

Family Trust Estate: \$ 16M

Assume: 2nd Death (U.S. Citizen, Resident Alien, or NRA) – Year 2013
 Applicable Exclusion: \$ 5.25M with 40% Tax Rate

* A NRA apparently can neither give nor receive a Deceased Spouse's Unused Exclusion ("DSUE") amount. However, a tax treaty may cause a different result.



TAXABLE AMOUNT	Case 1: Surviving Spouse is a U.S. Citizen	Case 2: Surviving Spouse is a Resident Alien	Case 3: Surviving Spouse is a Non-Resident Alien (NRA)
Estate Tax (Trust A)	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 0.06M) \times .40 = \$ 3.176M$
Estate Tax (Trust C)	QTIP = $\$ 3M \times .40 = \$ 1.20M$	QDOT = $\$ 3M \times .35 = \$ 1.05M$	QDOT = $\$ 3M \times .35 = \$ 1.05M$
Total Estate Tax	$\$ 1.10M + \$ 1.20M = \$ 2.30M$	$\$ 1.10M + \$ 1.05M = \$ 2.15M$	$\$ 3.176M + \$ 1.05M = \$ 4.226M$

CHART 5 – Community Property (Estate Tax Planning)

Assume: 1st Death (U.S. Citizen or Resident Alien*) – Year 2008

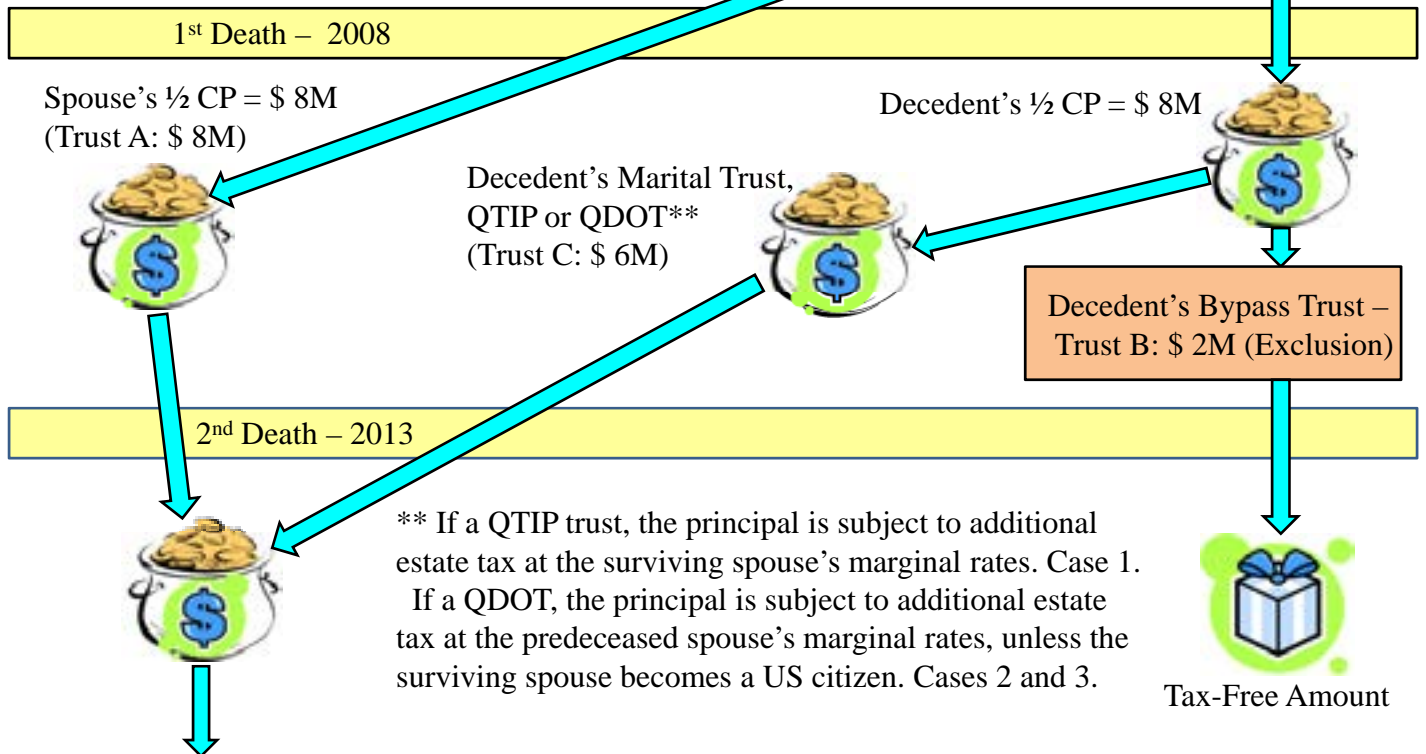
Applicable Exclusion: \$ 2M with 45% Tax Rate

Family Trust Estate: \$ 16M

Assume: 2nd Death (U.S. Citizen, Resident Alien, or NRA) – Year 2013

Applicable Exclusion: \$ 5.25M with 40% Tax Rate

* A NRA apparently can neither give nor receive a Deceased Spouse's Unused Exclusion ("DSUE") amount. However, a tax treaty may cause a different result.



TAXABLE AMOUNT	Case 1: Surviving Spouse is a U.S. Citizen	Case 2: Surviving Spouse is a Resident Alien	Case 3: Surviving Spouse is a Non-Resident Alien (NRA)
Estate Tax (Trust A)	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 5.25M) \times .40 = \$ 1.10M$	$(\$ 8M - \$ 0.06M) \times .40 = \$ 3.176M$
Estate Tax (Trust C)	QTIP = $\$ 6M \times .40 = \$ 2.40M$	QDOT = $\$ 6M \times .45 = \$ 2.70M$	QDOT = $\$ 6M \times .45 = \$ 2.70M$
Total Estate Tax	$\$ 1.10M + \$ 2.40M = \$ 3.50M$	$\$ 1.10M + \$ 2.70M = \$ 3.80M$	$\$ 3.176M + \$ 2.70M = \$ 5.876M$

Chart 6

2014 FEDERAL UNIFIED ESTATE AND GIFT TAX RATE SCHEDULE

*If the Taxable Estate or
Taxable Gift is:*

The Estate or Gift Tax is:

<i>From</i>	<i>To</i>	<i>Tax</i>	+	<i>%</i>	<i>On Excess Over</i>
\$ -0-	\$ 10,000	\$ -0-		18	\$ -0-
\$ 10,000	\$ 20,000	\$ 1,800		20	\$ 10,000
\$ 20,000	\$ 40,000	\$ 3,800		22	\$ 20,000
\$ 40,000	\$ 60,000	\$ 8,200		24	\$ 40,000
\$ 60,000	\$ 80,000	\$ 13,000		26	\$ 60,000
\$ 80,000	\$ 100,000	\$ 18,200		28	\$ 80,000
\$ 100,000	\$ 150,000	\$ 23,800		30	\$ 100,000
\$ 150,000	\$ 250,000	\$ 38,800		32	\$ 150,000
\$ 250,000	\$ 500,000	\$ 70,800		34	\$ 250,000
\$ 500,000	\$ 750,000	\$ 155,800		37	\$ 500,000
\$ 750,000	\$ 1,000,000	\$ 248,300		39	\$ 750,000
\$ 1,000,000	\$ 5,340,000	\$ 345,800		40	\$ 1,000,000
\$ 5,340,000	∞	\$ 2,081,800		40	\$ 5,340,000 *

*The applicable credit amount available as an offset to the estate and/or gift tax is \$2,081,800, with respect to a U.S. citizen or resident (domiciliary), which is equivalent to the tax on a taxable estate and/or cumulative lifetime taxable gifts of \$5,340,000.

*The applicable credit amount available as an offset to the estate tax with respect to a non-resident alien (“NRA”) of the U.S. is only \$13,000, which is equivalent to the tax on a taxable estate of \$60,000.

*There is no applicable credit amount available as an offset to the gift tax with respect to lifetime taxable gifts made by a NRA .