# International estate planning for US–Australia cross-border clients

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**Abstract:** Cross-border private clients have very specific estate planning needs, requiring consideration of not just their individual circumstances, but also their domicile (which can differ to their country of citizenship) and the differing income, estate, gift and inheritance taxes of two or more countries. Add to that, the interplay of factors such as international tax treaties, foreign tax credits, and the need to identify, preserve and distribute the estate in each jurisdiction, which can create a complex maze that practitioners need to guide their clients through.

"… but in this world, nothing can be said to be certain, except death and taxes."[1]

## Introduction

In this article, the authors discuss estate planning strategies specific to the needs of cross-border private clients, with a particular focus on US-Australian clients.

Such a client would (typically) have a net worth in excess of $5m, have business, family and personal interests in two or more countries, and could be:

- a family of US citizens living in Australia (an "expat family");
- a US citizen or green card holder who is married to an Australian citizen;
- an Australian citizen who holds assets in the US; or
- a family whose members live, and operate businesses, in two (or more) countries, including Australia and the US.

Such clients typically require bespoke planning for their cross-border estates, personal and business succession, and tax and investments.

This article introduces:

- in Part A: the estate planning, tax, insurance and investment considerations specific to such clients; and
- in Part B: the distinct strategies that can be implemented to successfully address these considerations.

All references to monetary values are to US dollar amounts.

## Part A. US–Australia international estate planning – why is it so complex?

In general, international estate planning is exceedingly complex, due to a number of factors:

- the US imposes federal (and in some cases, state) estate, gift and other "transfer" taxes;
- some US states impose inheritance taxes;
- an estate could be subject to taxes in one or more jurisdictions, depending on:
  - the decedent's country of citizenship, residency and domicile (which could all differ); and
  - the nature, and location, of the assets;
- the interaction between international tax treaties (if any); and
- the availability (or not) of foreign tax credits (in Australia, referred to as "foreign income tax offsets").

These factors and the context they provide, are discussed below.

## US federal estate and gift taxes

The US imposes gift and estate taxes on "US persons" (US citizens and "green card" holders)[2] *regardless of where they live* — if you are a US citizen or green card holder, both the gifts you make during your lifetime, and on your death, your estate, are subject to tax in the US if the value of the gift or the estate exceeds a specific exemption threshold (see Table 1). In addition, estate, gift and inheritance taxes may also be imposed by individual states where a nexus, such as the location of property or the decedent's residency or domicile, is satisfied. The laws and exemptions can vary from state to state and from state to federal levels.

Further, obtaining probate in the US requires that the decedent have been compliant with all US tax filing and reporting obligations. Delinquency with any tax filing can cause delays and result in the imposition of penalties and interest (and consequently, the erosion of the estate).[3]

Estate tax is imposed at a federal level on the transfer of a decedent's taxable estate on death. The federal gift and estates taxes are calculated by applying the rate schedule in the US *Internal Revenue Code* (IRC) to the taxable value of the gifts and estate, to calculate a "net tentative tax" which is then reduced by the applicable exclusion amount.[4] For 2020, the applicable exclusion amount is $11.58m ($11.4m in 2019) per individual, or $23.16m ($22.8m in 2019) for a married couple (if both spouses are US citizens and the "marital deduction" has been elected on the death of the first spouse).[5] Beginning on 1 January 2026, the exemptions are to revert to the 2017 rates of $5.49m (single) and $10.98m (spouses), indexed for inflation.[6]

Subject to any applicable estate tax treaties, a non-US person who owns US real estate, US corporation stocks, and tangible personal property (such as collectibles) that remain in the US will generate a US estate, with the applicable tax exemption being just $60,000. Direct ownership of such assets also triggers ongoing disclosure obligations.[7]

Additionally, a 40% generation-skipping transfer tax (GSTT) is imposed at the federal level as an estate tax anti-avoidance measure when there is a transfer of property by gift or inheritance to a beneficiary (other than a spouse) who is at least 37½ years younger than the donor, and the transferred amount exceeds the estate tax exclusion threshold.[8]

## US state taxes

Individual states within the US may also impose estate and inheritance taxes which need to be considered when the testator/donor and the beneficiary/donee reside in the US or where property is located in an applicable state (see Table 2).

## Citizenship, residency and domicile – how do they affect you?

These concepts are critical factors in determining tax liability in a particular jurisdiction.

A US citizen or resident is subject to estate and gift taxes on their *worldwide* assets.[12]

The estate and gift tax implications for a non-US person's property will depend on the type of property, its location, the application of a treaty, the donor's residency, domicile and/or citizenship, and tax credits. A non-resident alien (NRA) (ie someone living outside of the US, and who is not a "US person" by virtue of being a US citizen or green card holder) is subject to these taxes only on assets that are situated in the US.[13] Generally, these rules apply to real and personal property located in the US, property transferred to a revocable trust within three years of death and stock in US corporations.[14]

### Domicile

You are considered to be "domiciled" in the US for estate and gift tax purposes if you live in the US and have no present intention of leaving. You can be a tax resident of a jurisdiction without being domiciled there — if, for example, you are living and working there for a period of time and intend to eventually return to your home country. The US Treasury Regulations[15] state:

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

The following factors have been identified by the US courts as being relevant to determining domicile[16] and require careful consideration in each case:

- place of birth and citizenship;
- green card status;
- intention (to live in the US);
- time spent in the US;
- family ties;
- statements in legal documents (such as wills and trusts);
- location of residential property;
- ties to other countries;
- location of business interests;
- address listed on tax returns and whether the tax return is filed as a "resident" or "non-resident";
- location of clubs, church affiliations, bank accounts and pets; and
- the address used for voter registration, car registration, driver's licences and newspaper subscriptions.

## Tax treaties and legal systems

The US and Australia have bilateral estate and gift tax treaties as well as an income tax treaty,[17] which provide guidance on the allocation of taxing rights between the IRS and the Australian Taxation Office (ATO). In addition, as both the US and Australian legal systems are derived from the English common law, the courts have the authority to analyse and apply the laws in each jurisdiction to specific situations, but this is not always the case with other jurisdictions.

**Table 1. Federal estate and gift taxes**

| Tax | Gift tax | Estate tax | Inheritance tax |
|---|---|---|---|
| Imposition of tax at federal level? | ✓ | ✓ | × |
| Exemption: where the donor is a US person (US citizen or green card holder) | Annual marital gift tax exclusion (US citizen spouse): unlimited tax-free gifts may be made to a US citizen spouse.<br>Annual marital gift tax exclusion (non-US citizen spouse): $157,000 per year.[9]<br>Other persons:<br>$15,000 exemption per recipient each year. Gifts above this amount must be reported on IRS Form 709 even if not taxed, so that the use of the lifetime exclusion amount can be tracked. | To US citizen spouse: unlimited tax-free bequests may be made to a US citizen spouse.<br>Otherwise:<br>$11.58m ($11.4m in 2019) lifetime estate and gift tax exclusion (individual).<br>$23.16m ($22.8m in 2019) exclusion for married couples where both spouses are US citizens and if the legal representative elected the marital deduction on the estate tax return of the first spouse to die (even if no tax was due). | n/a |
| Where a donor is a non-US person | Subject to gift and GSTT taxes for gifts of tangible property situated in the US, any gifts of future interests, and gifts of present interests to any donee (except a spouse) exceeding $15,000.<br>Gifts to a non-US citizen spouse exceeding $157,000.[10] | $60,000 unless an estate tax treaty applies.<br>For example, the US–Australia estate tax treaty, applies the same estate tax threshold to Australian non-resident aliens that would have applied had they been domiciled in the US, and excludes non-US situs property from that threshold.[11] | n/a |

Table 2. States that impose estate and inheritance taxes (2020)

| State / District | Estate tax (and threshold) | Inheritance tax (and threshold) |
|---|---|---|
| Alabama | n/a | n/a |
| Alaska | n/a | n/a |
| Arizona | n/a | n/a |
| Arkansas | n/a | n/a |
| California | n/a | n/a |
| Colorado | n/a | n/a |
| Connecticut | ✓ ($5.1m) | n/a |
| Delaware | n/a | n/a |
| Florida | n/a | n/a |
| Georgia | n/a | n/a |
| Hawaii | ✓ ($5.49m) | n/a |
| Idaho | n/a | n/a |
| Illinois | ✓ ($4m) | n/a |
| Indiana | n/a | n/a |
| Iowa | n/a | ✓ ($25,000) (inheritances received by a spouse or lineal ascendants and descendants are exempt) |
| Kansas | n/a | n/a |
| Kentucky | n/a | ✓ (n/a if immediate family, otherwise $500–$1,000) |
| Louisiana | n/a | n/a |
| Maine | ✓ ($5.7m) | n/a |
| Maryland | ✓ ($5m) | ✓ (n/a to close relatives and charities, otherwise $1,000) |
| Massachusetts | ✓ ($1m) | n/a |
| Michigan | n/a | n/a |
| Minnesota | ✓ ($3m) | n/a |
| Mississippi | n/a | n/a |
| Missouri | n/a | n/a |
| Montana | n/a | n/a |
| Nebraska | n/a | ✓ (n/a for surviving spouses and charities, otherwise from $10,000 onwards) |
| Nevada | n/a | n/a |
| New Hampshire | n/a | n/a |
| New Jersey | n/a | ✓ (depends on class of beneficiary – close relatives are exempt) |
| New Mexico | n/a | n/a |
| New York | ✓ ($5.85m) | n/a |
| North Carolina | n/a | n/a |
| North Dakota | n/a | n/a |
| Ohio | n/a | n/a |
| Oklahoma | n/a | n/a |
| Oregon | ✓ ($1.05m) | n/a |
| Pennsylvania | n/a | ✓ (n/a for spouses, varying rates apply for other beneficiaries). All gifts made in the 12 months preceding the decedent's date of death are included for PA inheritance tax purposes |
| Rhode Island | ✓ ($1.579m) | n/a |
| South Carolina | n/a | n/a |
| South Dakota | n/a | n/a |
| Tennessee | n/a | n/a |
| Texas | n/a | n/a |
| Utah | n/a | n/a |
| Vermont | ✓ ($4.25m) | n/a |
| Virginia | n/a | n/a |
| Washington | ✓ ($2.193m) | n/a |
| Washington DC | ✓ ($5.6m) | n/a |
| West Virginia | n/a | n/a |
| Wisconsin | n/a | n/a |
| Wyoming | n/a | n/a |

The US has entered into estate and gift treaties with just 15 other foreign jurisdictions (in mostly Northern and Western Europe, Canada, Japan and South Africa).[18]

The US does not have treaties with Eastern European, Middle Eastern, African (except South Africa) or Latin American countries, a factor that is further complicated by different legal systems (such as civil law and religious law) which can mandate the distribution of assets and the ensuing tax consequences in those countries.

Under the US–Australia Estate Duty Convention, the US applies the same estate tax threshold to an Australian NRA of the US that would have applied had that person been domiciled in the US (presently $11.58m), and excludes non-US situs property (generally property considered to be outside of the US) from that threshold.[19] This is of significant benefit to Australians with assets in the US.

## Foreign tax credits

Estate tax treaties prevent double taxation by allocating taxing rights between countries based on the testator's/donor's domicile and the country in which the property is located. When filing taxes in the US, it is necessary to specify the treaty-based position taken in order to obtain the benefit of the treaty.[20]

Where there is a treaty in place, it could generally provide for:

- the application of the marital deduction for non-citizen spouses of US citizen decedents;[21]
- the (non-domiciliary) country in which real property is located having priority in taxing rights, with the domiciliary country providing a corresponding tax credit if it imposes estate taxes;[22] and
- personal property being taxed by the decedent's domiciliary country only.[23]

## What should you do?

You should review your existing estate plan if you are in a cross-border situation, and whenever a major life event occurs — for example, marriage, divorce, blending families, death, births of children (especially in different countries) and relocation.

What the discussion above highlights is that an estate plan that is specifically drafted for one particular jurisdiction may be limited in its effectiveness (at best) and even detrimental when considering the testator's (and their spouse's) citizenship, residency and domicile, and the composition and geographical location of their assets.

Common (and problematic) scenarios that arise include:

- for Australian estate planning purposes, having the succession of control of an inter vivos trust specified in a will, or having a testamentary trust established by will, with the testator's child being the specified primary beneficiary, trustee and/or appointor. Such planning mechanisms require review. If the trust has a diverse asset portfolio of Australian and foreign investments, this could trigger unfavorable tax outcomes for a beneficiary living outside of Australia as foreign beneficiaries are now taxable in Australia on income from all sources following the recent release of ATO draft tax determinations regarding the taxation of capital gains of attributed to a foreign resident beneficiary of an Australian resident trust;[24]
- if the primary beneficiary is a "US person" (being US citizen or a green card holder) and is seen to "own" or control the Australian inter vivos trust or testamentary trust, the income and assets of the trust being attributed to that beneficiary, and reportable in the US under the US "grantor trust rules";[25] and
- many states in the US not recognising common law/de facto marriages.[26] Unless the testator (or testatrix) specifically provides for their de facto wife or husband by will, the distribution of their assets in an intestacy (or deemed intestacy) would be to their next-of-kin, even in a long-term common law marriage, and contrary to the true intentions of the decedent.

The factors discussed in this section therefore require careful consideration and reconciliation in order to create an effective estate plan in a cross-border situation.

## Part B. Preparing your cross-border estate plan: some effective strategies

The following process and the strategies relevant to each can be utilised to address specific client needs in cross-border estate planning (see Table 3):

- **stage 1: identifying the estate** — identifying which assets presently, or in future, would form part of the estate, and where, helps establish which assets would be subject to probate and estate taxes and which would not, in each relevant jurisdiction;
- **stage 2: preserving the estate** — having sufficient life insurance to provide the liquidity to pay any estate tax liability can preserve the estate from having to be liquidated to cover estate and other tax liabilities;[27]
- **stage 3: planning for incapacity** — ensuring that assets can be dealt with in the event of incapacity; and
- **stage 4: ensuring efficient distribution** — ensuring that the estate can be distributed effectively and efficiently following death, with no delays in probate or assets being subject to intestacy.

## Stage 1: identifying what assets form (or would form) part of the estate

The use of inter vivos trusts, inter vivos gifts, the joint titling of assets owned by a married couple,[28] and optimising the allocation of investments (so that the right type of investment is held in the appropriate type of account and in respect of the right owner) can all be done beforehand (subject to careful tax planning) and could (in some cases) serve to reduce the value of the assets forming part of an estate.

### Moving overseas with an Australia trust

A change of residency can trigger tax implications both personally and with regards to structures you control in another jurisdiction.[29]

In the US, trusts are included in many estate plans. The assets of a US trust would not be excluded from US estate and gift taxes and GSTT unless the trust is structured as an irrevocable non-grantor trust.[30]

A "grantor trust" is considered a "disregarded entity" for US income tax purposes, with the income and deductions of the trust being attributed to the grantor and reported to the IRS on the grantor's tax return, where the grantor (being the person who established the trust by gift or grant) retains the power to vest trust assets in themselves.[31]

In Australia, an inter vivos trust provides flexibility in the distribution of income and assets to eligible beneficiaries and, subject to Australian trust tax residency considerations, could also be an effective tool for succession planning in passing on the control of the trust by providing for the succession of the appointor and trustee (or directors of corporate trustee).[32] If a "foreign grantor" relocates to the US, the inter vivos trust could be considered

Table 3. Cross-border estate planning process and strategies

| Estate planning mechanisms | Considerations in the US–Australia context | | | Strategy |
|---|---|---|---|---|
| | Factor | US federal | US state | |
| **Stage 1: identifying the estate** | | | | |
| **Foreign and US inter vivos trusts** | ■ Where does the settlor/trustee/appointor reside?<br>■ Where is the tax residency of the trust?<br>■ Where is the tax residency of beneficiaries of the trust?<br>■ Australian capital gains tax may apply on transfers to trusts. | ■ Is the trust a "grantor" trust (who controls the trust)?<br>■ What are the tax implications and disclosure obligations for the "grantor"? | ■ Bypasses probate if the trust is a non-grantor/irrevocable trust.<br>■ Where is the tax residency of beneficiaries of the trust? | ■ Can the trust be structured as a non-grantor irrevocable trust?<br>■ Clearly identify and document who controls the trust, which jurisdiction they are a tax resident of, and what the filing and disclosure obligations are. |
| **Joint titling with right of survivorship (married couples)** | ■ Tax deferral (50%). | ■ Tax deferral (50%). | ■ Tax deferral (50%). | ■ The property passes by right of survivorship. |
| **Gifts** | ■ Transfer taxes/state duties taxes.<br>■ Australian capital gains tax may apply on transfers to trusts. | ■ Gift taxes apply where exemption threshold is exceeded (see Table 1 above). | ■ Varies from state to state – gift taxes apply where the exemption threshold is exceeded (see Table 2 above). | ■ Plan your gifts. |
| **Stage 2: preserving the estate** | | | | |
| **Liquidity** | ■ How would the estate fund an estate tax liability? | ■ Federal estate taxes could apply if the exemption threshold is exceeded (see Table 1 above).<br>■ Timing of the tax payment would depend on whether the surviving spouse was a US citizen or not. | ■ State estate taxes may apply where the exemption threshold is exceeded (see Table 2 above). | ■ Consider insurance – "second to die" (if both spouses are US citizens) or a single life policy on the life of the US citizen.<br>■ The insured should not be the owner of the policy. |
| **Stage 3: planning for incapacity** | | | | |
| **Powers of attorney (POA)** | ■ Essential for dealing with assets if the principal/donor is incapacitated (the POA ceases on death). | | ■ Relevant state POA are essential for dealing with assets in that state (especially if the state is not a "next of kin" state) and the donor is incapacitated. | ■ Ensure a "durable"/"enduring" POA is prepared in respect of each foreign jurisdiction/US state in which assets are held. Further, certain institutions require their own form POA, in the absence of which, it may be challenging and cause delays when dealing with such institutions. |
| **Stage 4: ensuring efficient distribution** | | | | |
| **Wills** | ■ Jurisdictionally specific.<br>■ Estate taxes are n/a in Australia, however, distribution of superannuation (retirement) proceeds to non-tax dependants are subject to tax in Australia. | ■ Estate taxes where exclusion limit is exceeded (see Table 1 above). | ■ Varies from state to state.<br>■ Probate required in each state for assets situated in the US (in addition to probate of assets located in foreign jurisdiction).<br>■ Consequent delays where a single/"international" will covers worldwide assets.<br>■ State estate, gift and inheritance taxes see Table 2 above). | ■ International will vs separate wills for assets in each jurisdiction?<br>■ With the latter, particular care needs to be given to the wording of each will in order to ensure that it:<br>(1) covers only those assets located in that jurisdiction; and<br>(2) does not inadvertently revoke an earlier will in another jurisdiction. |

Table 3. Continued

| Estate planning mechanisms | Considerations in the US–Australia context | | | Strategy |
|---|---|---|---|---|
| | Factor | US federal | US state | |
| **Foreign testamentary trusts** | ■ Where is the tax residency of trustee, appointors and primary beneficiaries? | ■ Is the trust a "foreign grantor trust" for US tax purposes? | | ■ How are beneficiaries to be assessed when they reside or are domiciled outside of the jurisdiction in which the trust is resident? |
| **Intestacy** | ■ Jurisdictionally specific.<br>■ State laws apply for the distribution of assets. | | ■ State laws apply for the distribution of assets.<br>■ Can cause delays with probate. | ■ Address common law/ de facto spouses, and the challenges of "modern family" expectations. |

to be a foreign grantor trust if the trustee/appointor is also a beneficiary and has the power to vest trust assets in themselves.[33]

### Gifts and bequests

Gifts and bequests to a non-citizen spouse (even if they have a green card) are not eligible for the unlimited marital deduction.[34] This means that the taxing trigger point occurs earlier if the US citizen spouse dies first, although the individual lifetime exemption amount (currently $11.58m) would apply. A US citizen spouse may only gift up to $157,000[35] annually tax-free to a non-citizen spouse (whereas they could gift unlimited assets to a citizen spouse during their lifetime).

Joint ownership of assets by spouses or the use of a qualified domestic trust (QDOT) can allow for the marital deduction on estate taxes (and deferral of estate taxes) to apply for assets in the trust, and allow income distributions to the surviving non-citizen spouse during their lifetime (distributions of principal from the QDOT are subject to estate taxes). The QDOT can be created by will or by election within 27 months of the death of the citizen spouse, and allows for the distribution of assets to the decedent US citizen spouse's beneficiaries on the death of the non-citizen spouse[36] (at which time those assets would be subject to estate tax).

An alternative to the QDOT would be to purchase life insurance within an irrevocable life insurance trust (ILIT), which would then have the liquidity to help the estate pay the estate tax on the death of the insured (citizen) spouse. The trusteeship of the ILIT should be carefully structured as an insured acting as trustee may be seen to retain control over the policy and have "incidents of ownership", thus allowing for the proceeds of the policy to be included in their estate and subject to both federal and state estate taxes.

### Gifts/inheritances from foreigners

Special disclosure rules apply to gifts or bequests received from foreign persons (or entities) above $15,000 (2020) from a foreign corporation or partnership, or aggregate gifts or bequests from an NRA or foreign estate exceeding $157,000.[37]

## Stage 2: preserving the estate

Having sufficient insurance to preserve the estate from having to be liquidated to cover estate tax liabilities should be given careful consideration.

If your estate will potentially be subject to the US federal estate tax, it's important to understand that, generally, those taxes are due in cash, within nine months after death. Consideration must be given as to how best to fund this unfunded liability. *The IRS wants cash.* This can, and often does, result in a real cash bind for a decedent's heirs because wealthy people rarely keep large amounts of cash on hand — their wealth is derived by reinvesting their funds in businesses, real estate or other investments. Avoiding a forced sale of these assets or expensive borrowing is paramount, as the transfer of these specific assets to heirs (either directly or indirectly) is likely an integral part of a testator's estate plan, and a forced sale of assets could prevent the achievement of their unique estate planning goals and objectives.

Therefore, if your estate is going to be subject to federal estate taxes, it is essential to ensure that it has the cash needed to pay any tax due. Funding for this estate tax liquidity can be a serious challenge for many. The options that are typically considered include the following.

- **Save** — one way to handle the tax is to set aside or accumulate enough cash to pay it when it comes due. However, one may die before enough cash is accumulated. Also, the accumulation may be subject to income taxation during life and to estate taxation at death. This technique is therefore not usually the best use of money.
- **Liquidate** — another way would be for the deceased's family to sell assets to pay taxes and costs. The first to be sold would likely be stocks and bonds and similar liquid assets. But this may be the surviving spouse's source of income and these assets may be subject to market fluctuation. Other assets, such as real estate, could be sold. Forced sale prices, however, usually bring only a fraction of fair market value. Business interests are the most difficult assets from which to derive cash liquidity.
- **Borrow** — your heirs *might* be able to borrow the money needed from a bank. However, what would they put up as collateral? Would the bank be willing to lend to them? This would be very costly since they would have to pay interest on the amount borrowed.
- **Insure** — one of the most efficient and practical methods of providing liquidity for the payment of estate taxes is through the use of life insurance. If set up properly, life insurance can provide the cash needed untaxed, untouched and on time. Life insurance is intended and designed to pay cash on the insured's death, at a time when the potential estate tax bill, as well as other estate tax liabilities, may be due, and could be an economical means of funding the unfunded estate tax liability":

- for US tax purposes, if the insured is the owner of the policy, the proceeds would form part of their estate. Further, the life insurance proceeds that a beneficiary receives due to the death of the insured is generally not subject to tax; and
- for married couples, the timing of when the tax is due, and the specific type of life insurance policy needed to provide estate tax liquidity, can depend on the citizenship and/or residency status of each spouse. With married individuals, there is "generally" an unlimited marital deduction — if a US citizen passes away, leaving an estate of $300m to their US citizen spouse, the surviving spouse would inherit it all, without any federal estate tax being due at that time. The goal of this unlimited marital deduction was not to avoid tax, but to defer tax until the death of the surviving spouse. About 35 years ago, the law was amended — no longer is there an unlimited marital deduction if the recipient spouse is *not* a US citizen, regardless of whether they are a US resident — residency is irrelevant in this context.

  So, let's see how this might play out in particular factual scenarios.

**Example 1. The death of a US citizen/ resident with a US citizen spouse**

- 45 y/o couple, both US citizens, with a combined $30m estate.
- Unlimited marital deduction available.
- Potential tax liability of $2,825,800 payable on the death of the surviving spouse.[38]
- Life insurance can provide liquidity for this tax liability:
  - since the tax is due after the death of both spouses, a "second-to-die" life insurance policy may be appropriate. Such a policy insures both spouses and pays a death benefit after both have died; and
  - to ensure that the death benefit of the new policy does not add to the size of the estate, *the policy should be owned by a third party such as an irrevocable trust or the couple's adult children.*

**Example 2. The death of a US citizen/ resident with a non-US citizen spouse**

- 45 y/o couple, with a combined $30m estate.
- Unlimited marital deduction *not* available.
- Potential tax liability of $7,313,800 payable on the death of the first spouse.[39]
- Life insurance can provide liquidity for this tax liability:
  - since the tax is due at the death of the first spouse, a "second-to-die" life insurance policy would *not* be appropriate. Instead, a single life policy insuring the US citizen spouse would be needed; and
  - again, to ensure that the death benefit of the new policy does not add to the size of the estate, *the policy should be owned by a third party such as an irrevocable trust or the couple's adult children.*

- Australia-specific considerations:
  - life insurance policies held in Australian superannuation funds may not extend to situations where the insured resides outside of Australia at the time of death. Check the policy and ensure it provides appropriate coverage;
  - for Australian tax purposes, the proceeds of a life insurance held in a superannuation fund would form part of the member's "death benefits" and would be subject to tax if paid to a "non-tax dependant". A "death benefits" dependant is defined as the deceased's spouse, former spouse, minor child, a person with whom the deceased had an interdependency relationship just before death, or a person who was financially dependent on the deceased just before death; and[40]
  - life insurance proceeds from policies held outside of superannuation are generally tax-free if distributed to the original beneficial owner of the policy and if the person receiving the proceeds did not pay any fees or provide any consideration for the purchase of the policy.[41]

## Stage 3: planning for incapacity

It is imperative that a donor have an enduring/durable POA prepared in each jurisdiction in which they hold assets. For example, many states in the US do not recognise a POA that has not been prepared and witnessed in accordance with their specific laws, and some states do not allow next-of-kin to act in the absence of an effective POA.[42]

This can make the use of a "foreign" POA problematic and can often lead to delays and the loss of opportunity to act in relation to the donor's assets.[43] Recognition of a foreign POA generally requires proof from a lawyer in the foreign jurisdiction that:

- the POA is valid in the foreign jurisdiction in which it was signed;
- the POA would be sufficient in the foreign jurisdiction to effect the type of transaction that is sought to be effected in the US, ie the POA must allow the "attorney-in-fact" (being the agent appointed under the terms of the POA) to act and achieve the same objective in the foreign jurisdiction as is sought to be achieved in the US. For example, if the foreign attorney-in-fact is seeking to effect the transfer of real estate in the US, they would need to prove that the POA was effective for that purpose in the foreign jurisdiction; and
- the donor is still living.

## Stage 4: ensuring efficient distribution following death – wills in international estate planning

A will that has been appropriately drafted, executed by the testator and witnessed in accordance with the laws of the relevant jurisdiction can direct the executors ("personal representatives") as to the disposition of the testator's assets.

### International wills

An "international will" refers to one that has been drafted in accordance with the International Institute for the Unification of Private Law (UNIDROIT) Convention.[44] The Convention's objective is to make estate planning with international repercussions less complex by creating a simplified and uniform set of formalities that, when adhered to, make the "international will" valid in each jurisdiction that is a signatory to, or has ratified or acceded to, the

Convention.[45] The formalities are specified in the Annex to the Convention and require:

- testamentary dispositions to be made by one person in one instrument only;[46]
- the will to be made in writing;[47]
- the will to be signed in the presence of, and signed by, two witnesses and a person authorised to act in connection with international wills;[48]
- all signatures to be placed at the end of the will;[49]
- each page of the will (if the will exceeds one page) to be signed by the testator and each page to be numbered; and if the testator is unable to sign the will, the reason to be noted in the will;[50]
- the date of the will to be the date of the signature of the authorised person, and noted at the end of the will;[51] and
- the attachment of a certificate to the end of the will, which is signed by the authorised person, verifying that the procedural requirements for the drafting and execution of the will as an international will have been satisfied.[52]

### Jurisdictionally specific wills

Having jurisdictionally specific wills (a will in each country in which property is located) may allow for a more efficient administration of an estate, with each will being subject to probate faster. However:

- each will must be carefully worded, as a will prepared later in time which purports to cover assets in a particular jurisdiction only (for example, "will B" for assets in "jurisdiction B") could otherwise revoke an earlier one ("will A" which purports to cover assets in "jurisdiction A"), while not covering the assets in "jurisdiction A". This could result in the intestacy rules applying to the assets in jurisdiction A;[53] and
- ideally, each will should cover all assets located in that specific jurisdiction as at the date of death, and account for assets:
  - purchased after the execution of the will, the distribution of which has not been addressed by codicil. This could be done by including a "residuary" clause if specific bequests have been made to individual beneficiaries under the terms of the will; or
  - disposed of, or destroyed, after the execution of the will — depending on the testator's wishes, the will could provide for the bequest to be extinguished, or for the beneficiary to be provided with the sale or insurance proceeds from the disposal/destruction (or the asset subsequently purchased with such proceeds), or a specified sum or percentage of the residuary estate. This is especially important where the relevant jurisdiction in which the asset is located does not have adequate legislation addressing a full or partial "ademption by extinction".[54]

## Conclusion

Cross-border situations add complexity to the estate planning needs of private clients. Factors such as the citizenship, domicile or residency of the testator and their spouse, the location and nature of their assets, the application of tax treaties and availability of foreign tax credits, and the availability (and tax effectiveness) of specific estate planning mechanisms must all be considered. Further, the ability to preserve wealth by ensuring that the estate has the liquidity to pay for estate and other taxes is crucial. These factors must all be evaluated in designing and implementing an estate plan that is effective for the personal, financial and business needs of a testator and their family.

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4 S 2001(a) IRC.

5 S 2010(c)(3) and (4) IRC.

6 Available at www.irs.gov/pub/irs-drop/rp-16-55.pdf.

7 IRS Form 1040-NR and state tax returns, and *Foreign Investment in Real Property Tax Act* (US) (FIRPTA) disclosure.

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9 2020 rate.

10 2020 rate.

11 Art IV of the *Convention between the Government of the Commonwealth of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on the Estates of Deceased Persons,* Australian Treaty Series 1953 no. 4 (Estate Duty Convention (United States of America). Available at www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/8C0E2D8FA544A50FCA256B6D00042524.

12 S 2001 IRC.

13 S 2103 IRC; and see Asena Advisors, *International estate planning: what are the US estate tax implications for non-resident aliens holding US assets?* Available at https://asenaadvisors.com/blog/1-international-estate-planning-what-are-the-u-s-estate-tax-implications-for-non-resident-aliens-holding-u-s-assets/.

14 S 2104 IRC.

15 S 20.0-1(b)(1) of the Treasury Regulations (US).

16 *Matter of Gregory Blatt*, DTA No. 826504 (N.Y.S. Div. of Tax App., Feb. 2, 2017).

17 The 1953 Australia Treaty Series: *Estate Duty Convention (United States of America); Convention between the Government of the Commonwealth of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Gifts; Convention between the Government of the Commonwealth of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.*

18 See list of treaties at www.irs.gov/businesses/small-businesses-self-employed/estate-gift-tax-treaties-international – Australia, Austria, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, Norway, South Africa, Switzerland, and the United Kingdom.

19 Art IV(2) of the Estate Duty Convention (United States of America). For further information, see Asena Advisors, *International estate planning: the US-Australia estate tax treaty explained.* Available at https://asenaadvisors.com/blog/international-estate-planning-the-u-s-australia-estate-tax-treaty-explained/.

20 IRS Form 8833.

21 For example, see art IV of the Estate Duty Convention (United States of America); s 2056 IRC.

22 For example, see art V of the Estate Duty Convention (United States of America).

23 For example, see arts III and V of the Estate Duty Convention (United States of America).

24 TD 2019/D6 and TD 2019/D7. See Asena Advisors, *CGT and foreign resident beneficiaries: TD 2019/D6 and TD 2019/D7.* Available at https://asenaadvisors.com/blog/cgt-and-foreign-resident-beneficiaries-td-2019-d6-and-td-2019-d7/.

25 Ss 671-679 IRC.

26 Common law/de facto marriage is recognised in Alabama, Colorado, DC, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas and Utah.

27 If life insurance is earmarked to pay estate taxes, it could be a part of the estate.

28 See Asena Advisors, *International estate planning: issues with jointly held assets.* Available at https://asenaadvisors.com/blog/international-estate-planning-issues-with-jointly-held-assets/.

29 For example, leaving Australia could trigger CGT event I1 in respect of certain assets — see ss 104-60 and 104-65 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

30 Subpart E, ss 671-679 IRC.

31 Subpart E, ss 671-679 IRC.

32 See Asena Advisors, *International estate planning: U.S. tax implications with Australian inter vivos and testamentary trusts*. Available at https://asenaadvisors.com/blog/international-estate-planning-u-s-tax-implications-with-australian-inter-vivos-and-testamentary-trusts/.

33 See Asena Advisors, *Is your Australian trust a grantor trust for U.S. tax purposes?* Available at https://asenaadvisors.com/blog/is-your-australian-trust-a-grantor-trust-for-us-tax-purposes/.

34 See further Asena Advisors, *International estate planning: U.S. citizens with non-U.S. citizen spouses*. Available at https://asenaadvisors.com/blog/international-estate-planning-u-s-citizens-with-non-u-s-citizen-spouses/.

35 S 2523 IRC, IRS, Rev. Proc. 2017-58 on Tax forms and instructions.

36 S 2056A IRC.

37 IRS Form 3520.

38 Estimated federal estate tax liability and excluding any applicable state estate tax liability. The specific calculation of the amount of tax due will vary and depend on the law that is in effect on the date of death.

39 Estimated federal estate tax liability and excluding any applicable state estate tax liability. The specific calculation of the amount of tax due will vary and depend on the law that is in effect on the date of death.

40 Ss 301-195 and 995-1(1) ITAA97.

41 S 118-300 ITAA97.

42 For example, Asena Advisors recently dealt with such a situation in Wisconsin and Texas.

43 See Asena Advisors, *International estate planning: Incapacity in a cross-border context – who would manage your interests in two (or more) countries?* Available at https://asenaadvisors.com/blog/international-estate-planning-incapacity-in-a-cross-border-context-who-would-manage-your-interests-in-two-or-more-countries/.

44 *Convention Providing a Uniform Law on the Form of an International Will* (Washington, D.C., 1973). Available at www.unidroit.org/instruments/international-will.

See also Asena Advisors, *International estate planning: should you have an "international will"?*. Available at https://asenaadvisors.com/blog/international-estate-planning-should-you-have-an-international-will/.

45 Australia, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, Ecuador, France, Holy See, Iran, Italy, Laos, Libya, Niger, Portugal, Russian Federation, Sierra Leone, Slovenia, United Kingdom, United States (in 23 states and the District of Columbia). Available at www.unidroit.org/status-successions.

Entered into force in Australia from 10 March 2015 onwards, with all states and territories passing legislation to give effect to it.

46 Ibid, art 2 of the Annex.

47 Ibid, art 3 of the Annex.

48 Ibid, arts 4 and 5 of the Annex.

49 Ibid, art 6 of the Annex.

50 Ibid art 6 of the Annex.

51 Ibid, art 7 of the Annex.

52 Ibid, arts 9-13 of the Annex.

53 See Asena Advisors, *International estate planning: intestacy in a cross-border context – how would your estate be distributed?* Available at https://asenaadvisors.com/blog/international-estate-planning-intestacy-in-a-cross-border-context-how-would-your-estate-be-distributed/.

54 For example, the *Wills Act 1997* in Victoria, Australia, does not address ademption, so a bequest of a specific gift that is adeemed would fail under the application of Victorian common law principles. Compare s 3-4.2 of the New York Code *Estates, Powers and Trust Law (EPTL)* which provides for a beneficiary to assume the rights created by a testator prior to death in an agreement for the disposal of the property that was subject to the bequest.