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Private Client

in USA

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USA

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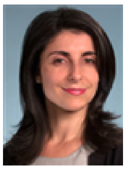

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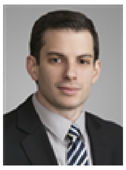

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Recent developments

Have there been any notable recent developments in the provision of private client and offshore services in your jurisdiction, including any regulatory changes or case law?

The most significant development has been the enactment of the Tax Cuts and Jobs Act (TCJA) on 22 December 2017, which made significant changes to US federal tax laws that affect US and US-connected taxpayers. Among other important changes affecting private clients, the TCJA:

- lowers the corporate tax rate from 35% to 21%;
- lowers the top ordinary income tax rate on individuals from 39.6% to 37% until 2026;
- doubles the lifetime federal estate and gift tax exemption for US individuals to $11.18 million in 2018 (as indexed for inflation) until 2026;
- caps a US individual's deduction for state and local taxes at $10,000 until 2026; and
- eliminates the 30-day grace period before a non-US corporation may be considered a controlled foreign corporation, which may affect 'check-the-box' strategies for existing ownership structures.

Individual taxation

Residence and domicile

How is residence/domicile determined for tax liability purposes in your jurisdiction?

US citizens and resident aliens are subject to federal income taxation on their worldwide income, whereas non-US persons are generally subject to income tax only on certain types of income from US sources.

A non-US citizen will be subject to tax as a resident alien for any calendar year in which they:

- are a lawful permanent resident of the United States at any time during the calendar year (ie, hold a certificate of permanent residence, known as a 'green card'); or
- are 'substantially present' in the United States.

The substantial presence test is generally satisfied if a non-US citizen is physically present in the United States for a period of 183 days or more in a calendar year. The test is also satisfied if:

- an individual is physically present in the United States for at least 31 days during that calendar year; and
- the individual's presence in that year and the two preceding years equals a weighted aggregate of 183 days or more (counting each day of the present year as a full day, each day of the preceding year as one-third of a day and each day of the next preceding year as one-sixth of a day).

Generally, an individual can spend up to 121 days each year in the United States without becoming a resident under the substantial presence test.

Many US states and some localities impose income tax.

For purposes of the federal transfer taxes (ie, estate tax, gift tax and the generation-skipping transfer (GST) tax), US citizens and residents are subject to tax on transfers of property, wherever it is located, whereas non-US persons are generally taxed only on transfers of certain types of US situs property.

A non-US citizen will be subject to federal transfer tax as a resident if they are domiciled in the United States. Domicile is established by living in the United States, even for a brief period, with no definite present intention of later moving away.

These federal tax rules may be modified by applicable US income and estate tax treaties.

Income

Describe the income tax regime in your jurisdiction (including tax base, rates, filing formalities and any exemptions, reliefs or deductions).

US citizens and resident aliens are subject to federal income taxation on their worldwide income, generally on a net basis, although the Tax Cuts and Jobs Act (TCJA) has eliminated many deductions until 2025. Most personal, business and investment income is taxed at rates ranging from 10% to 37%. Gains from the sale of capital assets held for more than one year – and dividends paid by US corporations and certain non-US corporations – are generally taxed at 20%. Net investment income of US persons is generally subject to a 3.8% Medicare surtax.

Non-resident aliens are subject to federal income tax only on certain types of US source income. Income that is effectively connected with a US trade or business is generally taxed on a net basis in the same manner as income earned by a US person. Certain US source 'fixed and determinable income' (eg, dividends, rents and some forms of interest) is generally subject to a flat 30% withholding tax, although this rate is reduced or eliminated by some US tax treaties. Non-resident aliens are generally not subject to:

- federal income tax on interest from US bank accounts;
- 'portfolio interest' on US debt obligations; or
- gains from the sale of capital assets (other than gains arising from US real estate).

State and local income taxes may also apply.

Capital gains

Describe the capital gains tax regime in your jurisdiction (including tax base, rates, filing formalities and any exemptions, reliefs or deductions).

US citizens and resident aliens are subject to federal income taxation on their worldwide income, including gain from the sale of capital assets. Gain on the sale of capital assets held for more than one year is generally taxed at a maximum rate of 20%, while gain from assets held for one year or less is taxed at rates ranging from 10% to 37%. Net investment income is also generally subject to a 3.8% Medicare surtax and may be subject to state and local income tax.

Non-resident aliens present in the United States for 183 days or more during the tax year are subject to a flat 30% capital gains tax on US source gains; this may apply to individuals who are not resident aliens due to their visa status (eg, non-US students).

Generally, non-resident aliens are not subject to federal income tax on capital gains, unless the gains are effectively connected with the conduct of a US trade or business or arise from the disposition of certain direct and indirect interests in US real property.

Inheritance and lifetime gifts

Describe the inheritance and gift tax regime in your jurisdiction (including tax base, rates, filing formalities and any exemptions, reliefs or deductions).

Three federal transfer taxes – gift tax, estate tax and the GST tax – may apply to gratuitous transfers of assets by donors and decedents. Many states also impose transfer taxes.

US citizens and residents are subject to federal gift tax on certain gratuitous transfers of property (real and personal, tangible and intangible), wherever situated, direct or indirect, and whether in trust or otherwise. Non-resident aliens are subject to federal gift tax on transfers of real and tangible property situated in the United States, but not on intangible property (eg, shares of stock of US corporations). The donor is primarily liable for paying the tax, which is imposed at rates from 18% to 40%.

US citizens and residents have a lifetime gift tax exemption of $10 million ($11.18 million in 2018 as indexed for inflation, although after 2025 this amount will revert to $5 million as indexed for inflation). Non-residents do not have a lifetime gift tax exemption.

All donors – whether US persons or not – may give annually, to an unlimited number of individuals, $10,000 ($15,000 in 2018 as indexed for inflation) per donee, and may also pay qualified medical and educational expenses on behalf of donees. In addition, gifts to a US citizen spouse (outright or in a trust that meets certain requirements) are not subject to federal gift tax by reason of the marital deduction. Gifts to a non-US citizen spouse do not qualify for the marital deduction, but outright gifts of up to $100,000 ($152,000 in 2018 as indexed for inflation) may be made to such a spouse annually without tax.

US citizens and residents are subject to federal estate tax at death on their worldwide assets at rates from 18% to 40%. They are entitled to an estate tax exemption of $10 million ($11.18 million in 2018 as indexed for inflation, although after 2025 this amount will revert to $5 million as indexed for inflation). The estate tax exemption is reduced by the amount of gift tax exemption used by a decedent during their lifetime.

Non-residents are subject to federal estate tax on certain types of US situs assets (eg, real and tangible personal property located in the United States and shares of US corporations). US bank accounts and US debt instruments that pay 'portfolio interest' are generally exempt from estate tax. Non-resident aliens are eligible for a credit that effectively exempts only $60,000 in taxable US situs property.

Bequests to a US citizen spouse (outright or in a trust that meets certain requirements) are not subject to federal estate tax by reason of the marital deduction. Although bequests to a non-US citizen spouse do not qualify for the marital deduction, the deduction is available if the bequest is made to a 'qualified domestic trust' for the non-US citizen spouse.

These rules may be modified by certain US estate tax treaties.

The GST tax applies to certain lifetime and testamentary transfers of property, whether direct or indirect, to or for the benefit of persons at least two generations (or, if the transferee is not a family member, more than 37.5 years) younger than the transferor. The tax rate is presently 40%. Each donor, including a non-resident, has a GST tax exemption equal to $10 million ($11.18 million in 2018 as indexed for inflation, although after 2025 this amount will revert to $5 million as indexed for inflation), which may be used with respect to transfers during life or at death. In addition, the GST tax does not apply to any transfer in any amount by a non-resident, if the transfer is not otherwise subject to the federal gift or estate tax. This presents a planning opportunity for non-resident transferors with US beneficiaries. Depending on which of three possible events triggers the GST tax, the tax must be paid either by:

- the transferor;
- the transferee; or
- the trustee of the trust with respect to which a taxable transfer has occurred.

Real estate

What taxes apply to individuals' acquisition and disposal of real estate in your jurisdiction?

Many states and some localities impose a transfer tax on transfers of interests in real property. Other taxes may also apply, such as mortgage recording taxes.

Gain on the sale of real estate is subject to federal income tax at a maximum rate of 20% (if the real estate had been held for more than one year) or at rates ranging from 10% to 37% (if the property had been held for a year or less).

The sale of a direct (and in some cases, an indirect) interest in US real property by a non-resident alien is subject to federal income tax under the US Foreign Investment in Real Property Tax Act. The tax is generally collected by requiring the transferee to withhold 15% of the purchase price and to remit such amount to the US Internal Revenue Service. If the amount withheld exceeds the amount of tax actually due the non-resident alien may apply for a refund of the overpayment.

Additional state and local income taxes may apply.

Non-real estate assets

Do any taxes apply to the acquisition and disposal of other assets apart from real estate?

The United States does not have a value added tax. Most states and many localities impose a sales tax on goods purchased within them. Generally, there are no taxes on the acquisition of investment property in the United States.

US citizens and resident aliens generally recognise gain (or loss) for federal income tax purposes on the sale or other disposition of an asset. Gain on the sale of capital assets held for more than one year are taxed at a maximum rate of 20%, while assets held for one year or less are taxed at rates ranging from 10% to 37%. There is an additional 3.8% federal Medicare tax which is imposed on the net investment income applicable to US persons who meet certain income thresholds. This tax is not applicable to non-resident aliens.

Non-resident aliens present in the United States for 183 days or more during the tax year are subject to a flat 30% capital gains tax on US source gains. This may apply to individuals who are not resident aliens due to their visa status (eg, non-US students).

Generally, non-resident aliens are not subject to federal income tax on capital gains unless the gains:

- are effectively connected with the conduct of a US trade or business; or
- arise from the disposition of certain direct and indirect interests in US real property.

Additional state and local taxes may apply.

Other applicable tax regimes

Are any other direct or indirect tax regimes relevant to individuals?

The United States taxes workers and employers to fund social security and Medicare programmes through payroll taxes. At the federal level, social security taxes are generally imposed on an employee's wages (up to $128,400 in 2018) at a rate of 6.2% payable by the employee and 6.2% payable by the employer.

Medicare taxes are generally imposed at the federal level on all of an employee's wages at 1.45% (with a surcharge of 0.9% for compensation in excess of $200,000) payable by the employee and 1.45% payable by the employer. Many states and some localities also impose payroll taxes.

The United States does not have a value added tax. Most states and many localities impose a sales tax on goods purchased, or services provided, within them. In addition, many states impose a 'use tax' on goods or services purchased outside the state if they are to be used within the state.

Specific goods may be subject to federal or state excise taxes. Excise taxes apply to such items as gasoline, alcohol, airline tickets and tobacco.

Planning considerations

Are there any special tax planning considerations for individuals with a link to your jurisdiction?

The United States imposes transfer taxes on certain transfers during life or at death which apply differently depending on whether the donor or decedent is a US or non-US person. The difference in tax treatment between these two categories offers opportunities for non-US individuals before moving to the United States.

A non-US individual may make gifts of intangible property, wherever located (eg, shares of US and non-US corporations) and real and tangible personal property (eg, artwork) located outside the United States before moving to the United States without any US gift tax liability. Such gifts may be made directly to other beneficiaries or to an irrevocable trust for other beneficiaries. It may be possible in certain circumstances for the donor to also be a discretionary beneficiary of such a trust. These gifts reduce the donor's estate subject to US estate tax, and if properly structured, transfers to an irrevocable trust may be protected from US estate tax on the death of any trust beneficiary.

To protect US real property from federal estate tax, non-resident aliens often acquire such property through non-US corporations. Assuming the company is properly organised and maintained, the non-resident alien shareholder will be treated at death as owning shares of the non-US company, which is a non-US situs asset and not subject to federal estate tax.

Trusts, foundations and charities

Trusts

Are trusts legally recognised in your jurisdiction? If so, what types are available and most commonly used?

Yes, trusts are recognised under US law. Trusts in the United States are generally governed by state (not federal) law. Trust laws vary from state to state.

What rules and procedures govern the establishment and maintenance of trusts?

While rules and procedures vary from state to state, more than half of the states have enacted (with variations) the Uniform Trust Code, which is intended to create uniformity in trust laws among the states.

How are trusts taxed in your jurisdiction?

For federal tax purposes, a trust is classified as a domestic (US) trust or a foreign trust.

A trust is 'foreign' if it fails to satisfy either the 'court test' or the 'control test'. A trust will fail the court test if no US court can exercise primary supervision over the trust's administration. A trust will fail the control test if US persons do not have the authority to control all substantial decisions of the trust. If a trust satisfies both tests, it is a domestic trust.

Federal income tax rules distinguish between 'grantor' and 'non-grantor' trusts. A grantor trust is not treated as a separate taxable entity. Instead, the settlor (or grantor) of the trust is treated as the direct owner of all of the trust's assets for federal income tax purposes. Distributions from a grantor trust to beneficiaries other than the grantor are generally treated as gifts by the grantor to the beneficiaries, who are not taxed on the amount received (but in the case of a distribution received from a foreign trust, only if they comply with certain US tax reporting requirements).

Generally, a non-grantor trust is treated as a separate taxable entity and is subject to the same ordinary income tax rates as individuals (10% to 37%, although trusts will reach the maximum tax rate at only $12,500 of taxable income). The US tax rules for non-grantor trusts (US or foreign) are designed to:

- allocate the taxable income of the trust between the trust and its beneficiaries; and
- ensure that such income is taxed only once.

These objectives are achieved through the concept of 'distributable net income' (DNI). For US trusts, DNI is similar to the trust's fiduciary accounting income and includes (among other things) interest and dividends, but usually not gains allocable to corpus. However, DNI for foreign trusts includes such gains.

US beneficiaries receiving a distribution from a non-grantor trust will generally include the amount of the trust's DNI that is distributed (or required to be distributed) to them in their taxable income. Additionally, the character of the DNI received by the trust (eg, interest or dividends or tax-exempt income) passes through to the beneficiary. DNI attributable to interest and dividends is taxable to an individual US beneficiary at ordinary income at rates up to 37%, whereas long-term capital gains are generally taxable at a flat 20% rate (with the additional 3.8% Medicare tax on net investment income). If and to the extent that a non-grantor trust does not (and is not required to) distribute DNI, such DNI is taxable to the trust.

Foundations and charities

Are foundations and charities legally recognised in your jurisdiction? If so, what forms can they take?

In the United States, 'foundation' generally refers to a trust or corporation that is organised under state law and operated exclusively for charitable purposes. These foundations typically apply for exemption from federal and – if appropriate – state income taxes.

Private non-charitable foundations are not generally created in the United States. However, private non-charitable foundations properly formed in other jurisdictions will be recognised in the United States.

What rules and procedures govern the establishment and maintenance of foundations and charities?

In addition to state laws regulating the formation and operation of charitable organisations, tax-exempt charitable organisations are subject to strict federal tax laws to ensure that the organisation's funds are used for religious, charitable, scientific or educational purposes and not for the private benefit of individuals or organisations. Most exempt organisations are classified as public charities or private foundations. Public charities and private foundations may not intervene or campaign for or against a candidate for public office. In addition, private foundations are subject to special federal excise taxes (eg, a tax against self-dealing) which are designed to inhibit foundations from engaging in abusive transactions.

Other than qualifying charities established for religious purposes, most charities are subject to annual federal tax reporting requirements and, in many cases, state reporting requirements.

How are foundations and charities taxed?

In the United States, 'foundation' generally refers to a trust or corporation that is organised under state law and operated exclusively for charitable purposes.

Charitable organisations in the United States may apply for exemption from federal income tax and, in many cases, state income tax. However, charitable organisations are subject to federal income tax on income from certain business activities that are unrelated to their charitable purposes.

Contributions to exempt charitable organisations may – subject to certain limitations – qualify for a federal income tax deduction to the donor.

Compliance issues

Anti-avoidance and anti-abuse provisions

What anti-avoidance and anti-abuse tax provisions apply in the context of private client wealth management?

The Controlled Foreign Corporation (CFC) and Passive Foreign Investment Company (PFIC) rules seek to eliminate the advantages of deferral by US persons of federal income taxes on certain passive income of foreign holdings. These rules do not apply to non-resident aliens.

A CFC is a foreign corporation in which US persons owning 10% or more of the voting power or value of the corporation's stock ('US shareholders') hold, in the aggregate, more than 50% of the voting power or value of the corporation's stock on any day during the corporation's taxable year. If a foreign corporation is a CFC for even one day, US shareholders of the CFC are subject to federal income tax on certain types of income at rates ranging from 10% to 37% based on their proportionate ownership of the CFC, regardless of whether they receive any distributions from the CFC.

A PFIC is a foreign corporation that, in a taxable year, derives 75% or more of its gross income from passive income or 50% or more of its assets produce passive income or are held for the production of passive income. All US shareholders of a PFIC, regardless of their percentage of direct or indirect stock ownership, are generally subject to federal income tax at rates ranging from 10% to 37%, with respect to gains from the disposition of stock in a PFIC and on certain 'excess distributions' from a PFIC. The amount of tax may also be subject to an interest charge.

To avoid the overlapping of these anti-deferral rules, a US shareholder of a foreign corporation that is both a CFC and a PFIC will generally be subject to tax only under the CFC rules.

The 'throwback tax rules' are designed to prevent the tax-free accumulation of income within non-US trusts. This tax applies to US beneficiaries of a foreign non-grantor trust who receive distributions of income accumulated by the trust from a previous year. Generally, these rules tax distributions of accumulated income at a rate equal to that which the US beneficiary would have paid had the income been distributed to such beneficiary in the year that it was earned by the trust. The amount of tax is also subject to an interest charge.

If a US person transfers property to a non-US trust and the trust has or may have one or more US beneficiaries, the US grantor will be subject to federal income tax on the trust's income as if the grantor had realised such income directly. Income accumulated in such a trust is not subject to the throwback tax because the income has already been taxed.

The same result applies if a non-US individual transfers property to a non-US trust with one or more US beneficiaries, and the grantor becomes a US person within five years of such transfer to the trust.

If a US person transfers appreciated property to a non-US, non-grantor trust, the grantor will be subject to federal income tax as if the grantor had sold the property for its fair market value. The same rule applies if a US trust becomes a foreign trust (for tax purposes) or if a non-US grantor trust for which a US person is treated as an owner ceases to be a grantor trust.

Anti-money laundering provisions

What anti-money laundering provisions apply in the context of private client wealth management (eg, beneficial ownership registers)?

There are several reporting requirements designed to target money laundering and tax evasion activities. The primary reporting obligations are as follows:

- FinCEN Report 114 - Report of Foreign Bank and Financial Accounts (FBAR) – for US persons with foreign bank accounts or other foreign financial assets with an aggregate value in excess of $10,000 in a calendar year;
- Internal Revenue Service (IRS) Form 8938 – for US individuals holding interests in "specified foreign financial assets" with an aggregate value over a specific threshold, beginning at $50,000;
- IRS Form 3520 – for US beneficiaries that directly or indirectly receive any distribution from a non-US trust during any taxable year;
- IRS Form 3520-A – for a foreign grantor trust with a US owner;
- IRS Form 8621 – for US persons with a direct or indirect interest in a PFIC;
- IRS Form 5471 – for US persons who are officers, directors or shareholders in certain foreign corporations; and
- IRS Form 5472 – for 25% foreign-owned US corporations and foreign corporations engaged in a US business to report certain transactions with related parties. US limited liability companies (LLCs) that have a single foreign owner and are 'disregarded entities' for US federal tax purposes must obtain a US taxpayer identification number and file Form 5472 to disclose any reportable events between the LLC and the foreign owner.

The US Foreign Account Tax Compliance Act (FATCA) imposes certain automatic US tax reporting requirements on foreign financial institutions that maintain accounts for US customers. Foreign financial institutions that fail to comply are subject to a 30% withholding tax on US source passive income, including dividends and the gross proceeds of sales of assets that produce US source income. Withholding may be imposed on US source income of accounts maintained by certain passive non-financial foreign entities unless the entity certifies that it has no substantial US owners or else identifies such owners.

The United States has entered into intergovernmental agreements with many other countries to facilitate the implementation of FATCA in a manner that conforms to local law.

The United States has not yet agreed to participate in the Organisation for Economic Cooperation and Development's Common Reporting Standard framework for the automatic exchange of information.

Neither the federal government nor individual states require the maintenance of a public or private register of persons with a beneficial interest in, or significant control over, private trusts and companies. However, there have been legislative proposals to require that private lists be maintained by local authorities.

Wills and probate

Succession rules

What rules and restrictions (if any) govern the disposition of and succession to an individual's property and assets in your jurisdiction?

Rules vary depending on the state.

Generally, the two main choice of law principles in a testamentary context – including with respect to validity, testamentary capacity, revocation and construction of the instrument – are that the law of:

- the situs of real property governs the validity and effect of a disposition of real property; and
- the testator's last domicile governs the validity and effect of the disposition of personal property, tangible and intangible, wherever situated.

US courts in the jurisdictions of domicile and situs will generally apply their own local law to the respective disposition of personal and real property, unless another jurisdiction clearly has a stronger interest in the matter.

Intestacy

What rules and procedures govern intestacy?

Each state has its own laws governing intestacy.

The distribution of intestate property is generally administered by the court with jurisdiction over the property (generally the situs of the property for realty and the decedent's last domicile for tangible and intangible personalty). Intestate property will generally pass to the decedent's spouse and lineal descendants, if any, as provided by state statute.

Governing law

What rules and restrictions (if any) apply to the governing law of a will?

Each state has its own laws governing wills. Generally, a will is validly executed if it is:

- in writing;
- signed by a mentally capable testator; and
- witnessed by a specified number of individuals as provided by state statute.

Formalities

What are the formal and procedural requirements to make a will? Are wills and other estate documents publicly available?

Requirements vary depending on the state.

Generally, a will is validly executed if it is:

- in writing;
- signed by a mentally capable testator; and
- witnessed by a specified number of individuals as provided by state statute.

Some states recognise holographic wills (ie, where the instrument is unwitnessed but validly executed in the testator's handwriting). Codicils, which are amendments to the will, are generally recognised if they observe the same formalities and procedural requirements for will execution.

Wills and codicils generally become publicly available once probated.

Validity and amendment

How can the validity of a will be challenged? Can the will be amended after the decedent's death?

There are various mechanisms under state law for challenging the validity of a will. The most common is a challenge to the testator's mental capacity when they executed the testamentary instrument. Testators must be:

- capable of knowing and understanding:
  - the nature and extent of their property;
  - the natural objects of their bounty; and
  - the disposition they are making; and
- be able to connect these elements to one another when executing a testamentary instrument.

Other common challenges include duress, fraud, mistake, revocation or undue influence when executing the testamentary instrument. Generally, the burden of proof falls on the challenger to the validity of the will.

Generally, courts can reform a will if the reformation conforms the text to the donor's intention and if it is established by clear and convincing evidence:

- that there was a mistake of fact or law affecting the terms of the instrument; and
- what the donor's intent was.

In certain circumstances, a will may be modified (which is different from reformation) in order to achieve the testator's tax objectives, provided it does not violate the testator's intent.

How is the validity of a will established in your jurisdiction?

This varies depending on the state.

Generally, a person named in the will can petition the relevant court for probate as a fiduciary (generally the nominated executor). It is incumbent on the proponent to establish the validity of the will by proving to the satisfaction of the court that it was duly executed by the testator while possessing testamentary capacity and without fraud, duress or undue influence. Although the court will usually require the testimony of the witnesses to the will, many courts will accept a 'self-proving' affidavit signed by the witnesses contemporaneously with the execution of the will and attesting to the validity of the will in lieu of such testimony.

To what extent are foreign wills recognised? Do any special rules and procedures apply to establishing their validity in your jurisdiction?

This varies depending on the state.

For the most part, US courts will not accept jurisdiction over the estates of non-domiciliaries. However, a court may accept jurisdiction – usually in the context of an ancillary probate proceeding – where the decedent died leaving realty in the subject jurisdiction. In such cases, courts will generally accept the validity of a foreign will if it was successfully probated without contest in the decedent's domicile. Nevertheless, if the court is unsatisfied with the validity of the probate proceedings in the domicile jurisdiction, it may assume original jurisdiction and conduct its own analysis regarding the validity of the foreign will.

It is recommended that US non-resident aliens holding realty in the United States execute a will valid in the jurisdiction where the property is located.

Estate administration

What rules and procedures govern:

(a) The appointment of estate administrators?

This is governed by state law and varies from state to state.

Generally, a court will issue letters testamentary to any individual (usually one who is named in the will) who is otherwise not an infant, incompetent, felon or who does not qualify by virtue of substance abuse, dishonesty, improvidence, want of understanding or is otherwise unfit for office, as determined by the court. In some cases, a state may require a fiduciary to be a resident of that state.

(b) Consolidation and administration of the estate?

This is governed by state law and varies from state to state.

Generally, the relevant probate court oversees the consolidation and administration of the estate, which is usually the court in the jurisdiction of the testator's last domicile for personalty and the situs of real property for realty. US courts in the jurisdictions of domicile and situs will generally apply their own local law to the respective disposition of personal and real property unless another jurisdiction clearly has a stronger interest in the matter.

(c) Distribution of the estate to heirs?

This varies depending on the state. However, the executor who is granted letters testamentary by the probate court is generally responsible for making distributions to the decedent's heirs and ultimately providing an accounting of such distributions to the court.

(d) Settlement of the decedent's debts and payment of any taxes and fees?

This varies depending on the state. However, the executor who is granted letters testamentary by the probate court is generally responsible for settling debts of the estate and making payments of taxes and fees. The executor may be required to provide an accounting to the probate court showing that all estate liabilities have been settled.

Planning considerations

Are there any special considerations specific to your jurisdiction that individuals should bear in mind during succession planning?

As the probate process can be time consuming, costly and sometimes contentious, many testators execute a revocable trust agreement contemporaneously with the will.

Assets transferred to a revocable trust during the testator's lifetime are not subject to probate at their death, and such assets will be distributed or retained by the trustee according to the terms of the trust. Any assets not transferred to the revocable trust during the testator's lifetime may be transferred to the trust by the terms of the testator's will.

Capacity and power of attorney

Loss of capacity

What rules, restrictions and procedures govern the management of an individual's affairs where he or she loses capacity and the grant of power of attorney in such cases?

These vary depending on the state.

An individual can plan for their incapacity by designating an individual under a power of attorney to act as their agent and make decisions on their behalf should the grantor of the power become incapacitated.

Generally, a power of attorney must:

- use specific language;
- be executed by the principal and the agent; and
- be notarised by a notary public.

Other documents typically used in planning for incapacity are:

- healthcare proxies, which allow an agent to make medical decisions on the principal's behalf; and
- advance directives for medical care ('living wills'), which direct medical professionals regarding the use of life-sustaining treatment.

Minors

What rules, restrictions and procedures govern the holding and management of a minor's assets until the minor reaches the age of capacity?

All states have adopted the Uniform Transfer to Minors Act (or the preceding Uniform Gift to Minors Act), under which a donor can give property to a minor by transferring it to a custodian until the minor reaches 18 or 21 years of age (depending on the state and the nature of the gift). The custodian has all of the rights, powers and authorities that an adult would enjoy over such property and can make payments to the minor or for the minor's benefit.

Family links

Marriage and civil partnerships

What matrimonial property regimes are recognised in your jurisdiction?

The common law property system applies in 42 of the US states and the District of Columbia. The three most important forms of common law joint ownership in the United States are:

- joint tenancy with right of survivorship;
- tenancy in common; and
- (as between spouses only) tenancy by the entirety.

Eight US states and Puerto Rico recognise the system of community property. Under community property law, all property acquired by a spouse during the marriage (other than inheritances and gifts) is owned jointly by the spouses and would be divided between them in the event of divorce.

Are same-sex marriages and/or civil partnerships recognised in your jurisdiction?

Since 26 June 2015, same-sex marriage has been legalised nationwide in the United States and same-sex married couples now have the same legal rights as heterosexual married couples.

Children

Is there a legal distinction between legitimate and illegitimate children in terms of estate and succession planning?

Except for certain statutory restrictions in a few states, there is no distinction between legitimate and illegitimate children under state law.

Is there a legal distinction between natural and adopted children in terms of estate and succession planning?

This varies depending on the state.

In a few states, the adopted status may affect the child's rights to intestate succession or the determination of who is considered the testator's child under a will. States have nevertheless sought to eliminate the distinction between biological and adopted children and adopted children enjoy the same rights as natural children in most states.