Estate Planning Considerations When One Spouse is a Resident Alien

by M. Anthony Vaida

This article addresses estate planning for a resident alien–U.S. citizen couple, provides an analysis of the applicable law, and makes recommendations for drafting the couple's estate plan.

Colorado is home to a diverse population that includes many individuals who are not U.S. citizens. Thus, it is not unexpected that an estate planner (planner) may be asked to prepare an estate plan for a married couple, one of whom is U.S. citizen (USC) and the other a resident alien (RA).

When faced with such a request, the planner's first inquiry should focus on the circumstances under which the RA became a resident of the United States. Without integrating family history, citizenship, residence, and domicile information into the tax-sensitive provisions of the plan, the plan may have significant adverse tax consequences at the death of the USC spouse. The planner also must have a thorough understanding of Colorado law regarding residency and domicile, as well as federal transfer tax rules applicable to an RA.[1]

This article focuses on the basic information a planner should accumulate during or after the initial meeting with a USC-RA couple. It also discusses Internal Revenue Code (Code) provisions applicable to USC-RA couples regarding lifetime and testamentary gifts.

Gathering the Information

In addition to the usual family history, the planner should obtain sufficient information to determine the country of citizenship and the residence and domicile of the USC and RA spouses. The following is a nonexclusive list of information to be gathered:

1) family history, such as the citizenship of the RA's parents, the RA's parents' country of residence at the RA's birth, and all countries in which the RA has lived since birth;
2) location of current and past residences;
3) current visa, passport, or residency permitand any other information the RA has regarding the RA's immigration status;
4) the RA's property, both real and personal, owned either individually or jointly with anyone, and the property's physical location, whether in the United States or elsewhere;
5) country of citizenship of both spouses; and
6) homes not owned, but maintained and sometimes occupied, by the RA spouse outside the United States.

Clients should be made aware that USCs and RAs generally are treated the same for transfer tax purposes, except when applying the marital deduction provisions of the Code. For instance, as is the case for a USC, the entire estate of an RA is subject to U.S. transfer tax rules, no matter where located worldwide. This is not the case for nonresident alien spouses.[2]

The planner should explain the meaning of the terms "residency" and "domicile" under Colorado law and the Code. This is particularly important because those terms may have a different meaning under the law of the RA's home country. Under CRS § 1-2-102, residence essentially is synonymous with domicile. The Code provides that a "resident" of the United States is subject to transfer taxes, but it does not define the term "resident." The Code does provide a definition of the term "domicile," which generally is in accordance with the common law definition. These definitions are discussed in more detail below.

It should be noted that residence for federal income tax purposes is not necessarily residence for transfer tax purposes. A "green card" holder who is temporarily in the United States is subject to federal income tax, but may not be subject to federal transfer taxes. Residency for transfer tax purposes results only if the individual is a "domiciliary" of the United States. As explained below, for federal transfer tax purposes, the term U.S. "residence" is defined by the Code as U.S. "domicile."[3]

The planner also should explain the concept of property title ownership under Colorado law; a similar real property ownership

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scenario may not exist in the RA's home country. If the RA does not have an understanding of the U.S. system of property ownership, the information the planner receives from the RA regarding property matters may not be accurate. This could lead to the design of a plan that will result in unintended consequences, such as adverse transfer tax consequences when the plan is later implemented.

Citizenship

In the initial interview, the planner should review the somewhat complex rules that apply to the determination of whether the RA is a USC.[4] It is not unusual for an RA to have misunderstandings regarding U.S. citizenship. Depending on where and when the RA was born and the citizenship status of the RA's parents, the RA may be a USC and not know it. For example, the RA may not know that a child born in the United States, to noncitizen parents who were residing temporarily in the United States at the time, is considered a USC.[5] Also, as a general rule, if the RA was born to USC parents while the parents were residents of a foreign country, the RA will be a USC, even if the RA never resided in the United States before marrying the USC spouse.[6]

Another common misassumption is that marriage to a USC, whether native-born or naturalized, automatically confers citizenship on the RA spouse. Although the naturalization process for an RA spouse is not as challenging as it is for other aliens, the RA spouse is required to complete the naturalization process to obtain U.S. citizenship.

Residence

After determining that the RA client is not a USC, the question of residency for transfer tax purposes becomes relevant. The Treasury Regulations (Regulations) do not provide a precise definition of residence; they define "residence" as the RA's domicile at the time of death.[7] Therefore, local law likely will be a factor in determining whether an RA is a resident or nonresident alien for transfer tax purposes. Under Colorado law,[8] "residence" is defined as the principal or primary home or place of abode and the place where the person "habitates" and to which that person, whenever absent, has the present intention of returning after a departure or absence.[9] Further, Colorado law provides:

> A person shall not be considered to have gained a residence in this state, or in any county or municipality in this state while retaining a home or domicile elsewhere.[10]

Thus, residence and domicile essentially are synonymous under Colorado law. These terms should be applied to determine whether a person has the requisite intent to designate Colorado as his or her domicile for federal transfer tax purposes. If the RA is a U.S. domiciliary, he or she is considered a resident and the transfer tax provision of the Code applies to any of the RA's property wherever located anywhere in the world.

Domicile

As noted above, the Regulations define "residence" as the RA's domicile at the time of death. The Code provides "a tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States."[11] The Regulations direct the planner to apply the term "domicile" when making this assessment.[12] The Regulations then provide that an RA:

> 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.[13]

No other guidance is given; thus, local law is used to determine whether the RA's evidence of domestic habitation in the United States and present intention to make the United States his or her home are sufficient to establish domicile under the Code. It should be noted that a similar definition of residency can be found in the gift tax Regulations.[14] Specific guidance is provided by Colorado statute, which lists factors for consideration in determining whether a person has demonstrated the requisite intent to reside in a particular home as his or her domicile.[15]

Applying the Estate and Gift Tax Rules

Many transfer tax rules that apply to a USC also apply to an RA. For instance, an RA's estate is eligible for the same unified gift and estate tax credit as the USC's estate.[16] As with other lifetime gifts to a nonspouse, a USC spouse may use his or her available lifetime gift tax exemption[17] to make gifts to the RA spouse and avoid generating a gift tax.[18] Gifts from an RA to his or her USC spouse qualify for the unlimited marital deduction. The reverse is not the case. A gift to an RA spouse by the USC spouse is governed by special annual gift tax exclusion rules that will be discussed below.[19]

Though the unlimited marital deduction rules are not available for a bequest to a surviving RA spouse, the estate tax applicable exclusion amount, currently the first $2 million of an estate's net taxable assets, is available for a bequest by a USC to the surviving RA spouse.[20] Deductions for debts, expenses, and charitable transfers are treated the same in the estate of an RA as they are in the estate of the USC spouse, and the same tax rates apply.

For lifetime or testamentary gifts from the USC spouse to the RA spouse, the Code contains special rules that qualify, reduce, or eliminate the unlimited marital deduction. Additionally, lifetime or testamentary interspousal gifts and transfers between a USC-RA couple and third parties also are subject to special rules that do not apply to couples where both spouses are U.S. Citizens (USC couples).

TAMRA

The Technical and Miscellaneous Revenue Act of 1988 (TAMRA)[21] qualifies and restricts the estate and gift tax marital deduction for gifts to an RA spouse. Although TAMRA provides that testamentary and lifetime gifts between USC spouses are fully covered by the unlimited marital deduction provisions and no transfer tax is incurred for a lifetime or testamentary gift between USC spouses, those provisions do not apply to gifts from a USC to an RA spouse.

Among the provisions intended to offer some relief from the loss of the unlimited marital deduction, TAMRA provides for increased annual gift tax exemption for gifts by a USC to an RA spouse. Currently, a USC spouse can gift assets having a value not exceeding $125,000 annually to the RA spouse without incurring a gift tax.[22]

When designing a plan for USC couples, the availability of the unlimited marital deduction frequently is used to make estate tax free testamentary gifts to the surviving USC spouse. A bequest to a USC spouse is not included in the estate of the first USC spouse to die, but is deducted from the amount on which an estate tax is assessed. If still owned by the surviving USC spouse at death, the property is included in the surviving USC spouse's estate.

Regarding transfers at death to an RA spouse, TAMRA requires that the property be passed to a Qualified Domestic Trust (QDOT)[23] if the property is to qualify for some of the advantages of the marital deduction. However, the QDOT election for a bequest to a surviving RA spouse is not an unlimited marital deduction vehicle, as will be explained below.

Using a QDOT

A QDOT can be included in a plan for the USC-RA couple to defer estate taxes if the USC spouse dies first. For purposes of this discussion, it is assumed that the assets left to the surviving RA spouse exceed the applicable exclusion amount or the USC spouse does not choose to use the exclusion for a bequest to the surviving RA spouse.

If a QDOT is included in the USC spouse's will or trust, the USC spouse's estate is entitled to a marital deduction for the fair market value (FMV) determined at death for all property placed in the QDOT.[24] An estate tax later will be imposed on the distributions of principal from the QDOT, and the tax will be based on the FMV of the property at the time the property was placed in the QDOT. If the property is not distributed to the RA during the RA's lifetime, the property will be included in the RA's estate. In this situation, the estate tax imposed will be based on the FMV and tax rate that would have been applied if the property had been included in the USC's estate.[25]

Thus, the QDOT is a tax deferral mechanism that postpones the imposition of the estate tax until the asset is distributed to or otherwise consumed by the surviving RA spouse.[26] The purpose of this restriction was to prevent the RA spouse from leaving the country without paying the estate tax on the QDOT assets.[27]

To qualify for the marital deduction, the property left by the USC spouse to the RA spouse must pass directly from the USC's estate to the QDOT with two exceptions. If the transfer instrument does not contain a QDOT provision, the surviving RA spouse may create a QDOT. The RA, the USC's personal representative, or the RA's agent under a power of attorney may elect to transfer property left to the RA to a QDOT. This is done by making a timely[28] QDOT election after creating a QDOT and subsequently irrevocably transferring the property to the QDOT.[29] If a disclaimer provision is included in the will or trust permitting the surviving RA spouse to disclaim an inheritance, the disclaimer may be used to exercise the QDOT election even though there are no QDOT provisions in the instrument.[30] However, the surviving RA must first create a QDOT prior to exercising the disclaimer and transferring the property to be disclaimed into the QDOT.[31] Thus, even though a QDOT was not included in the testamentary instrument, the surviving spouse can create a post-mortem QDOT and transfer the property to it.[32] The second exception allows for QDOT treatment of special types of property, such as retirement plans assigned to a QDOT.[33]

Change of Status

If the RA becomes a USC and either: (1) has been a U.S. domiciliary at all times after the decedent's death until obtaining citizenship; or (2) has not been a U.S. domiciliary during that time but has received no taxable distributions, the trust ceases to be treated as a QDOT for transfer tax purposes on the spouse's acquisition of citizenship, and is treated for tax purposes as a domestic marital trust. However, to be effective, the trustee must notify the Internal Revenue Service (IRS) of the RA's change of status from RA to USC. Thereafter, any distributions to the surviving RA spouse from the QDOT will not be subject to the § 2056A tax.[34]

Drafting Tips

When drafting the QDOT, in addition to including the usual provisions required for a standard marital deduction trust, the planner must include provisions to meet the QDOT requirements found in the Regulations.[35] For example, the trust must name an individual U.S. citizen or a U.S. domestic corporation as trustee or co-trustee (the trustee). No distribution of trust *corpus* may be made from the trust unless the trustee has the right to withhold from such distribution the deferred tax accrued as a result of the withdrawal from the *corpus* and the trust meets all other regulatory requirements intended to ensure the collection of the deferred estate tax.

For a QDOT with assets that exceed $2 million, the Regulations require the posting of a bond or other security.[36] For a QDOT with assets of less that $2 million, which may include the RA's home if its value is less than $600,000, no bond or security is required.[37] As with a standard marital deduction, a QDOT may also include a testamentary power of appointment.[38]

The planner should consider recommending the use of the USC's available unified credit for a non-QDOT testamentary gift to the surviving spouse to provide transfer tax free, unrestricted funds to the RA spouse and surviving family.[39]

Hardship Provision

Should the USC settlor wish to limit the class of beneficiaries to whom the RA spouse may leave any trust principal remainder at the RA's death, the planner should be aware of the "hardship provision,"[40] which provides that there will be no transfer tax on any principal distribution from the QDOT to the surviving RA spouse made on account of hardship. Such a distribution would qualify for the exemption if the distribution was:

> in response to an immediate and substantial financial need relating to the spouse's health, maintenance, education or support, or the health maintenance or support of any person that the surviving spouse is legally obligated to support.[41]

Persons a surviving spouse is legally obligated to support under Colorado law are any natural or adopted children under the age of 21 or a new spouse.[42]

There is no procedure for obtaining advanced rulings on hardship distributions; therefore, such distributions are made at the fiduciary's risk. Substantial evidence should be assembled to support the hardship before making a distribution under this exception.

Jointly Held Property

The most common form of jointly held property (JHP) acquired by a couple during their marriage is real estate. In this article, JHP refers to jointly held interests in real property acquired after November 10, 1988, the effective date of TAMRA.

"JHP" is defined in the Regulations as property held "as joint tenants with right of survivorship, or as tenants by the entirety."[43] In Colorado, the terms "joint tenancy with right of survivorship" and "tenants by the entirety" have been eliminated and replaced by the single term "joint tenancy."[44] Jointly held property acquired before the adoption of this new definition or located in another state, or community property located in community property states owned by Colorado residents, is recognized and treated as jointly held property in Colorado, even though the terms "tenants by the entirety" and "joint tenancy with right of survivorship" no longer are recognized for the ownership of jointly held Colorado real estate.[45] For the purposes of this article, JHP is defined as joint tenancy property under Colorado law.

The planner should determine when and how—whether by purchase or gift, including an interspousal gift—the JHP was acquired. This information is relevant when determining whether a transfer tax later will be imposed.

JHP Subject to Estate Tax at Death of the First Spouse

The marital deduction rules that apply to a testamentary transfer of JHP owned by a USC couple differ substantially from the rules that apply to a USC-RA couple. Because of the unlimited marital deduction rules applicable when both spouses are USCs, only one-half of the FMV of JHP is included in the estate of the first spouse to die, regardless of whether the survivor, the decedent, or both provided the assets used to acquire the JHP.[46] Under TAMRA, the transfer is an interspousal gift, and gifts between USC spouses qualify for the unlimited marital deduction.[47]

Those rules do not apply if the surviving spouse is an RA.[48] If the USC spouse is the first to die, 100 percent of the value of the JHP will be included in the decedent's gross estate, unless the personal representative can submit facts to the IRS sufficient to substantiate that, when acquired, the property was not paid for with consideration furnished by the decedent or was not acquired by the decedent and decedent's RA spouse by gift, bequest, devise, or inheritance. To be excluded from the decedent's estate, the estate must show that the JHP was acquired by the decedent and the RA with assets contributed by both spouses. To the extent that the JHP was acquired with RA assets, the RA's "contribution" to the FMV of the JHP will not be included in the USC spouse's gross estate.[49]

The following IRS example provides guidance on how the transfer tax calculation will be made:

> X, a U.S. citizen, is married to Y, a resident alien. X and Y own their residence as tenants by the entirety. X dies and Y becomes sole owner of the residence through survivorship. It is determined that X contributed all but 10 percent of the cost of acquiring the residence. Y may transfer 90 percent of her interest in the property to a QDOT and X's estate may claim a marital deduction for the date of death (or alternated valuation date) value of that 90 percent interest.[50]

Lifetime Transfers of JHP

As with testamentary disposition of JHP, the rules that apply to the creation and termination of spousal ownership in JHP for a USC-RA couple yield substantially different results on sale or transfer than is the case for a USC couple. These rules are discussed below.

USC couples. Lifetime acquisition of JHP by USC couples and interspousal transfers of property between USC couples qualify for the unlimited marital deduction and no gift tax is imposed as a consequence of such transactions. For USC couples, the proportion of assets contributed by each spouse to the acquisition or re-titling of property also has no gift tax consequences.[51] When a USC couple creates JHP, to the extent that one spouse does not contribute or contributes less than the other spouse and acquires a joint property interest in the property, a gift will be deemed to have been made by the USC spouse contributing the consideration to the non- or less-contributing USC spouse. However, the unlimited marital deduction applies to offset the gift and no gift tax is imposed.

The same rule applies to contributions by either USC spouse for any improvements made to the JHP. If the USC couple later sells the JHP, no gift tax will be assessed as a result of the transaction, regardless of whether some or all of the proceeds are distributed to the non- or less-contributing USC spouse, again because of the unlimited marital deduction available to USC couples.

USC-RA couples. Since the adoption of TAMRA, the gift and unlimited marital deduction rules described above do not apply when a USC-RA couple acquires JHP. The applicable Regulation[52] provides that if a USC-RA couple creates a joint tenancy in real property, the election to treat the creation of the JHP as an interspousal gift is not available. Because the election is not available, the unlimited marital deduction rules do not apply.[53]

For a USC-RA couple, the creation of a joint tenancy, as well as any additions to the value of the tenancy property, such as im-

Jointly Held Property and Gift Taxes

The following is an example of the application of the gift tax rules to jointly held property (JHP) owned by a U.S. citizen (USC) and a resident alien (RA) couple.

The USC spouse owns real estate acquired solely with USC funds for $500,000. Later, the USC spouse re-titles the property in the USC and RA as JHP. No gift is deemed to have occurred for transfer tax purposes as a result of the transfer.[1] Thereafter, the RA spouse does not contribute any consideration to the JHP. Five years later, the couple sells the JHP for $1 million. The proceeds of sale are divided evenly between the spouses. The USC spouse will be deemed to have made a gift of $500,000 to the RA spouse and a gift tax is incurred on the $500,000 received by the RA spouse. On the other hand, if the USC spouse had made annual gifts to the RA spouse of USC spouse's interest in the property in amounts the value of which did not exceed the annual exclusion amount, and the gifts totaled $500,000 over the years of ownership, no gift tax would be triggered by the sale of the JHP and distribution of $500,000 of the proceeds to the RA spouse.

1. Treas. Reg. § 25.2523(i)-2(b)(1).

provements or reductions of indebtedness, are not deemed to be a transfer of property for gift tax purposes. This is so regardless of the proportion of the consideration furnished by each spouse, if the creation of the tenancy otherwise would be a gift because one spouse is a noncitizen.[54] If during the lifetime of both spouses, the JHP is later sold or gifted and the joint tenancy status is terminated, the USC spouse will be deemed to have made a gift to the extent that the proportion of the total consideration furnished by the RA spouse, multiplied by the proceeds of the termination, exceeds the value of the proceeds of termination received by the RA spouse.[55] Thus, at the time of transfer of JHP during the lifetime of a USC-RA couple, to the extent that the RA spouse receives more than his or her proportionate share of the proceeds, based on the percentage of consideration each spouse contributed toward the original purchase price, plus contributions toward any improvements or reductions in indebtedness, the USC spouse will be deemed to have made a taxable gift to the RA spouse.[56]

No gift tax is triggered at the time of acquisition of JHP by the USC-RA couple, because the acquisition of an interest by a noncontributing or less contributing RA spouse is a not recognized as a "gift" as is the case when JHP is acquired by a USC couple. However, a gift tax will be imposed when the property is sold or otherwise transferred, to the extent that the RA spouse receives pro-rata proceeds that exceed the RA spouse's original or subsequent contribution.[57] The planner should advise the USC-RA couple considering the sale of JHP that a gift tax can be avoided by dividing the proceeds in accordance with each spouse's pro-rata contributions to the JHP. JHP originally acquired by gift, bequest, or re-titling is treated in the same manner as a purchased property. If the JHP is later sold, to the extent that the RA spouse receives more than his or her contributed consideration, a gift tax is incurred on the amount received in excess of the RA spouse's proportionate share.[58] (*See* accompanying sidebar entitled "JHP and Gift Taxes" for an application of the gift tax rules.)

Practical Tips

The planner should consider recommending that during ownership of the JHP a long-term plan be employed to transfer annually to the RA spouse USC interests in the JHP, of up to the maximum annual exclusion amount, to set off the gift tax that otherwise will be imposed on sale. If such a plan is not in place, when the JHP is sold, the USC spouse still can reduce or eliminate the imposition of a gift tax by using the annual exclusion available in the year of sale and also using some portion of the USC's remaining lifetime gift tax exemption to offset any gift tax generated.

Conclusion

When preparing a plan for a USC-RA couple, complete information regarding citizenship, residence, domicile, and property ownership must be obtained at the commencement of the planning process. Particular care must be taken to include in the plan the most tax efficient provisions available for disposition of JHP. A carefully drafted plan can take advantage of the tax provisions favorable to USC-RA couples.

The taxing scheme imposed by the Code on an RA spouse limits the use of the marital deduction as an estate planning tool. A QDOT allows for a partial use of the marital deduction to defer the imposition of estate taxes on assets left to the surviving RA spouse.

Because a gift tax will be generated on the sale of JHP, to the extent that the RA spouse receives proceeds that exceed the RA's contribution, consideration should be given to whether the USC spouse should receive all of the proceeds of the sale. If the RA spouse receives more than the RA's proportionate share, the couple should consider using the USC's annual exclusion and, if necessary, the USC's lifetime gift tax credit to offset the transfer tax.

Notes

1. It should be noted at the outset that Colorado no longer has an estate, an inheritance, or a gift tax. Prior to the adoption of The Economic Growth and Tax Relief Reconciliation Act of 2001, Colorado, like most states, had a "pick-up" estate tax, picking up the first $60,000 of federal estate tax of federally taxable estates. Congress phased out the pick-up exception to the states over a three-year period ending in 2004. The Colorado gift tax was repealed effective May 22, 2003.

2. IRC § 2103 provides that the gross estate of a nonresident alien includes only property situated within the United States at the time of death. IRC § 2511(a) provides that gifts of property by nonresident aliens are subject to gift tax only if the property is located in the United States.

3. IRC § 2001(a).

4. *See* Heimos, "Non-Citizens—Estate, Gift and Generation-Skipping Taxation," 837 *Tax Management: Estates, Gifts, and Trusts Portfolio* A-15 (Aug. 22, 2005).

5. U.S.C. § 1430(a) and (b).

6. U.S.C. § 1401(c).

7. Treas. Reg. § 20.0-1(b)(1) and (2).

8. CRS §1-2-102(1)(a) (I).

9. CRS § 1-2-102(1)(a)(I) defines "residence" as follows:

> The residence of a person is the principal or primary home or place of abode of a person. A principal or primary home or place of abode is that home or place in which a person's habitation is fixed and to which that person, whenever absent, has the present intention of returning after a departure or absence, regardless of the duration of the absence. A residence is a permanent building or part of a building and may include a house, condominium, apartment, room in a house, or mobile home. No vacant lot or business address shall be considered a residence.

The Colorado courts have defined "domicile" as the place of residence where an individual intends to reside and has no present intention of residing elsewhere on a permanent basis. *Theobald v. Byrns*, 579 P.2d 609 (Colo. 1978); *Gordon v. Blackburn*, 618 P.2d 668 (Colo. 1980).

10. CRS § 1-2-102(1)(a)(II)(d).

11. IRC § 2001(a).

12. Treas. Reg. § 20.0-1(b)(1).

13. *Id.*

14. Treas. Reg. § 25.2501-1(b).

15. CRS § 1-2-102(b) states:

> In determining what is the principal or primary place of abode of a person, the following circumstances relating to the person shall be taken into account: Business pursuits, employment, income sources, residence for income or other tax purposes, age, marital status, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, existence of any other residences and the amount of time spent at each residence, and motor vehicle registration.

16. IRC § 2001(a).

17. IRC §§ 2505 to 2009. The lifetime gift tax exemption is $1 million.

18. IRC § 2501(a)(1).

19. *See* IRC § 2523(i) when the gift is to an RA.

20. IRC §§ 2010(a) and 2056A.

21. The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) added IRC §§ 2523(i), 2056(d), and 2056A.

22. IRC §§ 2523(i) and 2503(b).

23. IRC § 2056A(a).

24. Treas. Reg. § 20.2056A-2(a) (the valuation will be made at or within nine months of the date of death).

25. IRC § 2056A(b)(2).

26. *Id.*

27. Brodsky, "Handling Joint Tenancies in Real Estate When One Spouse is a Noncitizen," 32 *Estate Planning* 29 (Aug. 2005), *quoting* House Report 100-795.

28. IRC § 2056A(a)(3). For a qualified domestic trust (QDOT) election to be timely made, it must be filed before the due date (including extensions actually granted) for filing the decedent's estate tax return; currently, a return must be filed within nine months of the date of death unless an extension is granted. *But see* Treas. Reg. § 20.2056A-3 (permitting a QDOT election to be made on the first "untimely" return).

29. IRC § 20.2056A-4(b)(1).

30. If QDOT provisions are missing from the marital trust, reformation to comply with QDOT requirements may be available post-mortem, if the instrument permits or by court order. *See* IRC § 20.2056A-4 (a).

31. Treas. Reg. § 20.2056A-1(a).

32. Property can be treated as passing to the surviving spouse in a QDOT if the property interest either is actually transferred to a QDOT before the estate tax return is filed or is transferred on or before the last date prescribed by law that the QDOT election must be made. Treas. Reg. § 20.2056A-4(b)(1).

33. Treas. Reg. § 20.2056A-4(b)(7) provides the rules under which retirement assets and annuities may be assigned to QDOT and are not discussed in this article.

34. IRC § 2056A(b)(12); Treas. Reg. § 20.2056A-10.

35. Most of the requirements are set forth in Treas. Reg. § 20.2056 A-2(b)(1).

36. Treas. Reg. § 20.2056A-2(b).

37. Treas. Reg. § 20.2056A-2(d)(iv)(A).

38. IRC § 2056(b)(5).

39. IRC § 2056A(b)(3).

40. IRC § 2056A(b)(3)(B).

41. Treas. Reg. § 20.2056A-5(c)(1).

42. CRS §§ 19-4-101 *et seq.*; CRS §§ 14-5-101 *et seq. See also In re Marriage of Weaver*, 571 P.2d 307, 310 (Colo.App. 1977).

43. Treas. Reg. § 20.2056A-8(a)(1).

44. CRS § 38-31-103 provides in part:

> No conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real property, it is declared that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants.

CRS §§ 38-31-101 *et seq.* also includes the definition of "joint tenancy with right of survivorship" and abolishes "tenancy by the entireties," replacing it with "joint tenancy."

45. CRS §§ 38-31-101 *et seq.*

46. Treas. Reg. § 20.2056A-8(a)(1) provides:

> General rule. If property is held by the decedent and the surviving spouse of the decedent as joint tenants . . . and the surviving spouse is not a United States citizen . . . at the time of the decedent's death, the property is subject to inclusion in the decedent's gross estate in accordance with the rules of section 2040(a). . . .

47. IRC § 2040(b).

48. IRC § 2056(d)(1)(B).

49. IRC § 2040(a) and (b).

50. Treas. Reg. § 20.2056A-8(a)(3).

51. IRC § 2523(a).

52. Treas. Reg. § 25.2523(i)-2(b)(1).

53. IRC § 2523(i) provides:

> If the spouse of the donor is not a citizen of the United States—
> (1) no deduction shall be allowed under this section . . .
> (3) the principles of sections 2515 and 2515A [26 USCS §§ 2515 and 2515A] (as such sections were in effect before their repeal by the Economic Recovery Tax Act of 1981) shall apply, except that the provisions of such section 2515 [26 USCS § 2515] providing for an election shall not apply.

54. *Id.*

55. Treas. Reg.§ 25.2523(i)-2(b)(2)(i).

56. Treas. Reg. § 25.2523(i)-2(b)(1).

57. Treas. Reg.§ 25.2523(i)-2(b)(1) and 25.2523(i)-2(b)(2)(i).

58. Treas. Reg. § 25.2523(i)-2(b)(2)(i). ■