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The Use of Trusts, Wills, and Estate Planning For Non-U.S. Domiciliaries

There are many foreigners who hold assets in the United States and who have not made adequate arrangements for their transfer upon death. This is particularly crucial for the international client since the laws of his domicile and the laws of where his assets are located and the nature of these assets may conflict as to the disposition to the decedent's heirs. The general rule is that a will should be probated at the place of the decedent's domicile. However, if real property is involved, the country of situs has jurisdiction over the disposition of the realty. In the case of personal property, the country of domicile generally possesses jurisdiction over the asset (this involves shares of BVI Company held in a safe deposit box in the U.S.).

A decedent may have owned property situated in a number of different jurisdictions. These may be based on either common or civil law and may include both the jurisdiction of domicile or situs jurisdiction apart from domicile but where the decedent's assets are located. In either event, any jurisdiction in which the decedent's assets are located at death, whether domiciliary or situs, has full and complete control over those assets for purposes of probate and administration. A jurisdiction may voluntarily refrain from exercising the full authority over assets otherwise entitled. This voluntary reduction of the level of authority is based on the principle of comity.

A situs jurisdiction may authorize original probate of a decedent's will despite separate probate in the jurisdiction of domicile. A will in respect of realty must be executed in accordance with formalities of situs. A will in respect of personal property must be executed in accordance with formalities of decedent's domicile. Any will, executed by a non-domiciliary of Florida, is valid only if executed in conformity with:

- (A) Florida law; or
- (B) The law of the place of execution.

However, Florida law does allow a foreigner to provide in his will that disposition of property having status in Florida is to be governed and regulated by Florida law regardless of the laws of the decedent's domicile and spousal inheritance rights of the country of domicile. When situs assets exist and the will at issue designates local substantive laws as controlling especially if a local statute exists which provides for designation of controlling substantive law, the original situs probate will prevail. At this

time, if a decedent is not domiciled in Florida, there are no forced inheritance rights available to the spouses under Florida Law for Florida situs assets.

An excellent method to avoid the effects of forced heirship, community property and creditor claims is the formation of an offshore trust in jurisdictions such as Bahamas or the British Virgin Islands. We attached hereto more detailed information of the definition and use of Trusts.

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Trust

The circumstances in which the Trust most frequently will be used are illustrated by the following example: No testamentary documents have been executed relating to the shares. Non-resident alien and Non-U.S. domiciliary ("NR") does not want, on his death, the shares to be subject to probate in his home country, the country in which the underlying assets are located, or in the jurisdiction in which the holding company has been incorporated. NR also wants the shares to be protected from any estate taxes or forced heirship provisions, which may exist in his home country. NR is reluctant to confer discretionary authority over the shares and the underlying assets to a third party. Nevertheless, NR is aware that he requires an independent entity to own the shares and to provide a method for the orderly disposition of the shares on his death or at a subsequent date.

Why a Revocable Trust?

Traditionally most international offshore trusts have been irrevocable discretionary trusts pursuant to which a Settler divests himself fully of control over the assets settled on the trust. Despite its significant advantages, many potential Settlers from civil law jurisdictions have been reluctant to divest themselves of control over assets settled on such trusts. This reluctance has been reinforced by the fact that trust administration fees in many offshore jurisdictions are based on the value of assets under the Trustees' control. Consequently, many potential Settlers have viewed the costs of using a trust as too high.

The Trust addresses these concerns in the following ways:

- During the Settler's lifetime, the Trust is revocable by the Settler; accordingly, at any time, the Settler can revoke (terminate) the trust and have the assets settled on the Trust distributed to the Settler.
- The sole asset of Trust will be the shares in an underlying company with the board of directors (and persons with power to bind the company through a power of attorney) consisting of the Settler or representatives of the Settler.

- On the death or total disability of the Settler (or if the trust becomes irrevocable during the Settler's lifetime) a Protector appointed in terms of the Trust will exercise a veto power over a broad range of trustee powers.
- Provision exists for the orderly disposition of the Trust's assets either at the time of the Settler's death or when the trust terminates.
- Special reduced acceptance and annual fees apply to these Trusts. These special fees are not based on the value of assets under the control of the Trustee.

Limitations on Trust Use

Advisors considering the use of the Trust for their clients should take into account the following important factors:

- The Trust is intended principally for use in situations where the assets of the Trust consist of shares in an underlying company. If it is anticipated that the Trust assets will consist of other properties, such as the ownership of real estate in the Trust's name, care should be taken to ensure that the Trust provisions accommodate the trusteeship of such assets.

The Trust Protector

A Trust Protector is frequently used in the structuring of offshore trusts to ensure that a third party, familiar with the Settler and his personal circumstances, has a veto over certain actions of the trustees. The Trust documentation provides that the Protector assumes office on the death or permanent disability of the Settler.

Letter of Wishes

It is customary in the case of offshore trusts for a non-binding letter addressed to trustees, commonly known as a "Letter of Wishes," to be executed contemporaneously with the trust agreement. The Letter of Wishes will normally describe the Settler's preferences with regard to the Trustee's exercise of its discretion, for example, the priority the Trustees should give to the different beneficiaries. Accordingly, advisors may wish to consider the use of a Letter of Wishes in conjunction with the Trust if the Trust Period is to extend beyond the lifetime of the Settler.