Part 1: US–Australia tax and estate planning: "big picture" considerations

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Estate planning for clients with US and Australian connections is complex and requires consideration of Australian and US federal and state income; estate, gift and inheritance tax considerations; as well as citizenship, residency and domicile. Factors such as prior year compliance, variously structured inter vivos trusts, incomplete gifts and claw back provisions, along with the need to accurately identify, value and preserve the estate while ensuring efficient distribution in each jurisdiction, create a complex maze that practitioners need to be aware of and manage.

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

Introduction

In this article, the author discusses the "big picture" tax and estate planning considerations relevant to clients with ties to the United States (US) and Australia. This article is an update to the article published in this journal in 2020. Part 1 delves into key tax considerations relevant to most Australians with ties to the US, and aims to provide a practical guide to estate planning in this arena for practitioners.[2] Select issues with US and Australian trusts are addressed in Part 2 (to be published in a future issue of the journal).

Based on the most recent statistics, there were 101,309 US-born citizens living in Australia,[3] and 97,250 Australian-born nationals living in the US.[4] Often, these expats have, or acquire, sizeable assets, and business, family and financial interests in both countries. Typically, they are:

- dual citizens living in either country;
- US citizens now living in Australia;
- US citizens/green card holders married to Australian citizens and who may be living in either country;
- an Australian citizen and resident who was born in the US or born in Australia to a US citizen parent (an "accidental Americans");
- Australians who have arrived in the US on the E-3 "specialty occupation" visa only available to Australians;[5]
- an Australian citizen living in Australia (a "non-resident alien" of the US or "NRA") who has invested in US assets (commonly, tech stocks and/or real estate);
- a US citizen living in the US who has invested in Australian assets; or
- families whose members live and operate businesses in both countries and hold multiple citizenships.

Such scenarios typically require bespoke estate planning, considering the specific legal requirements of each jurisdiction for the creation and execution of valid wills, and/or bypassing probate; cross-border income, estate and inheritance tax planning; and appropriate succession planning and the structuring of privately controlled investment and business vehicles. Structures and estate planning strategies that may work well in one country require closer scrutiny in the other.

This article introduces:

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

Unless otherwise stated, all references to monetary values are to US dollar amounts, and references to the IRC are to the US *Internal Revenue Code 1986*.

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

The complexity of estate planning in the US–Australia context is predicated by several factors, each of which needs to be considered when developing an appropriate estate planning structure—these factors are *in addition* to the usual considerations of a client's marital and financial circumstances, and the needs of their beneficiaries:

1. An estate can be subject to tax as the US imposes federal estate, gift and other "transfer" taxes on US domiciles, citizens and lawful permanent residents ("green card" holders), and the ability to utilise applicable exemptions with respect to such taxes may be constrained by citizenship and necessitate additional planning. In contrast, Australia's version of an estate or "death" tax is limited to distributions of superannuation proceeds to a non-dependent beneficiary.[6]
2. US citizens and green card holders are presently taxed on worldwide income regardless of where they live, and have ongoing Internal Revenue Service (IRS) disclosure obligations with respect to foreign accounts, financial assets, investments and controlled trusts, and corporations (these obligations may change in the future

under proposed legislation[7]). Non-compliance with such US tax and disclosure obligations carries heavy penalties. Discovery of such non-compliance may occur when an executor files a decedent's final income tax return and estate tax return, discloses the assets of the estate and requests an IRS transfer certificate as proof of taxes having been discharged.

3. Some US states impose estate tax where there is a nexus between the estate and that state. Where a decedent has an ownership interest in an entity, the entity's federal income tax classification can determine whether its underlying assets are also exposed to state estate tax.
4. Some states impose inheritance taxes on beneficiaries who are not immediate family members.
5. Common US estate planning techniques, such as the use of revocable living trusts during life that crystallise into irrevocable beneficiary trusts on the death of the "grantor" (the settlor or notional settlor), can create significant tax issues for Australian beneficiaries under s 99B of the *Income Tax Assessment Act 1936* (Cth) (ITAA36). These issues are examined in Part 2.
6. Common Australian estate planning techniques involving testamentary trust will trigger significant US tax and reporting obligations where such trusts have US beneficiaries. These issues are also examined in Part 2.
7. Ceasing Australian residency or becoming an Australian resident can cause CGT implications for non-taxable Australian property (TAP) assets.[8]
8. An inheritance from an Australian decedent can have different tax consequences for a beneficiary who is a "US person" (US citizen, green card holder, or tax resident)[9] and if they are an Australian resident or non-resident.

US federal estate and gift tax: the current law[10]

If an individual is a US citizen or resident, their estate may be subject to federal estate tax if the value of the estate exceeds the federal estate and gift tax exclusion, taking into consideration the value of the gifts that they made during their lifetime (see Table 1).[11]

The US Treasury Regulations state: "A 'resident' decedent is one who, at the time of death, had his domicile in the United States."[12]

The IRS states in its Internal Revenue Manual: "An alien who has a green card may be presumed to be domiciled in the U.S., unless evidence shows the contrary."[13] It is important to note that if an individual has been issued a green card, their US residency status is *retained* for federal tax purposes, unless they voluntarily renounced and abandoned this status in writing to the United States Citizenship and Immigration Service (USCIS), their immigrant status was administratively terminated by the USCIS or their immigrant status was judicially terminated by a US federal court.[14]

An individual is "domiciled" in the US for estate and gift tax purposes if they live in the US and have no present intention of leaving. They can be tax residents of the US without being domiciled there—if, for example, if they are living and working in the US for a period on a non-immigrant visa and intend to eventually return to their "home" country.

The US Treasury Regulations state:[15]

> "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 and require careful consideration in each case:[16]

- 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.

Where an individual is a US citizen or resident for federal estate and gift tax purposes, the tax liability is calculated by applying the rate schedule in the 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.[17] For 2025, the applicable exclusion amount is $13.99m per individual, and is doubled to $27.98m for married couples where *both* spouses, or at least the *surviving* spouse, is a US citizen, and elects "portability" or to utilise the "marital deduction" on the death of the first spouse.[18]

Additionally, 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.[19]

Non-resident aliens

For a non-US person (an NRA), the situation is different. An NRA who owns "US situs" assets, such as real estate located in the US, stock in a US corporation, limited liability

company (LLC) membership interests, US bank accounts, or tangible personal property located in the US, will generate a US estate. They have federal estate tax exposure where the value of the US situs assets and property gifted or transferred to an irrevocable trust within three years of death[20] exceeds $60,000.[21] Treaty relief must be specifically invoked when filing an NRA estate tax return.[22]

US–Australia estate and gift tax treaty

The US and Australia have entered into a bilateral estate and gift tax treaty,[23] under which, the federal estate tax exemption applicable to US persons is applied to the *US situs assets* of Australian NRAs as a proportion of their worldwide assets.[24] The significant benefit to Australians with assets in the US is illustrated in the example below.

Example

Sally, an Australian (NRA), held stock in a US-listed corporation valued at $100,000 on the date of her death on 2 January 2025. Her tentative US federal estate tax liability is $23,800 ($18,200 ($20,000 x 28%)).[25]

As her Australian assets were valued at $500,000, her US situs assets were 16.67% of her worldwide assets ($100,000/$600,000).

If Sally's executor invokes the treaty, *the estate will pay zero estate tax* since Sally's tentative estate tax liability (of $23,800) is less than her applicable "unified credit" (being the effective tax savings of the estate tax exemption) of $923,500.

Sally's proportion of the 2025 federal estate tax exemption available to US persons = $13,990,000 x 16.67% = $2,331,667.

Sally's applicable unified credit[26] = $923,500 ($345,000 + ($12,990,000 x 40%) x 16.67%).

Non-compliance with US taxes can affect the estate

An executor must ensure that a decedent has paid all state and federal income and estate taxes prior to the distribution of the estate. Delinquent tax and international information return filing obligations for US citizens and green card holders with foreign financial assets, superannuation accounts, managed funds (classified as "passive foreign investment companies" (PFICs)), and interests in foreign trusts and companies can cause delays and result in the imposition of significant penalties and interest charges for each year that there was a failure to file (see Table 2). *There is no statute of limitations for years in which there has been a failure to file or comply with foreign information filing and reporting obligations.* Consequently, prior year non-compliance with IRS reporting obligations can cause significant erosion of even a sizeable estate.

Changes under the Trump administration

President Trump signed the *One Big Beautiful Bill Act* (US) (OBBBA) on 4 July 2025, which (among other measures) permanently increased the federal estate and lifetime gift tax exemption to $15m (for single filers) and $30m (for joint filers), indexed for inflation, from 1 January 2026.[27]

Prior to the enactment of the OBBBA, the federal estate tax exemption was set to revert to the pre-*Tax Cuts and Jobs Act* 2017 (US) (TCJA) level of approximately $7m for an individual and approximately $14m for spouses (claiming portability/marital deduction) from 1 January 2026. There was uncertainty for many months as to whether this change would take effect, as the Trump administration had previously proposed the repeal of the federal estate tax in its entirety with the reintroduction of the *Death Tax Repeal Act* (US) in the House of

Table 1. Federal estate and gift taxes

Tax	Gift tax	Estate tax	Inheritance tax
Exemption: donor is a US person (USP)	Unlimited gift tax exclusion for US citizen spouses. 2025 annual marital gift tax exclusion (where donee is a non-US citizen spouse): $190,000.[9] 2025 annual gift tax exclusion for all others: $19,000 for each recipient. Gifts above this amount must be reported on IRS Form 709 even if not taxable, to reduce the lifetime estate and gift tax lifetime exemption.	To US citizen spouse: unlimited tax-free bequests (marital deduction). Otherwise: $13.99m ($15m in 2026) lifetime estate, gift tax and GSTT exemption (individual). $27.98m ($30m in 2026) exclusion for married couples where both spouses are US citizens and if the legal personal representative elects 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 not a USP	Gifts are subject to gift tax and GSTT: • gifts of tangible property situated in the US—any gifts of future interests • gifts of a present interest to a donee (except a spouse) exceeding the annual exclusion amount ($19,000 for 2025) • gifts to a non-US citizen spouse exceeding $190,000.[10]	$60,000 unless the "estate tax treaty" is invoked. The US federal estate tax exemption applicable to USPs is applied to the US situs assets of Australian NRAs as a proportion of their worldwide assets.[11]	n/a

Table 2. IRS penalties for common non-compliance

Common foreign information reporting requirements	Penalty (per year)
ss 6038 and 6046 IRC: Failure to report information relating to controlled foreign corporations and partnerships (IRS Forms 5471, 5472, 8865)	$10,000 for each failure to file required information returns + additional penalties for continued non-compliance.
s 6038D IRC: Failure to disclose foreign financial assets (IRS Form 8938)	$10,000
S 6048 IRC: Foreign trust reporting (IRS Forms 3520, 3520-A)	The greater of $10,000 or 35% of gross reportable amount. + 5% penalty for owners who fail to ensure timely filing of annual returns by the trust (s 6677(b) IRC).
Failure to file international forms or substantially comply with filing requirements: Form 8621 – Passive foreign investment company (PFIC) reporting Form 5471 – Controlled foreign corporations Form 8865 – Foreign partnership disclosure Form 8938 – Specified foreign financial assets Form 3520 – Foreign trusts Form 3520A – Grantor trusts	S 6501(c) IRC: no statute of limitations.
31 U.S.C. s 5321: failing to file a Report of Foreign Bank and Financial Accounts (FBAR)	Up to $10,000 for *non-wilful* violations. The greater of $100,000 or 50% of the account balance for wilful violations. 6-year statute of limitations.

Representatives in January 2025[28] and a counterpart Bill in the Senate in February 2025.[29] Alternative proposals to tax wealth, including taxing unrealised gains on death or eliminating the "step up in basis" of inherited assets (which currently allows beneficiaries to receive inherited assets at market value on the date of the decedent's death), were also canvassed.

State estate and inheritance taxes

Estate and inheritance taxes may also be imposed by individual states where there is a nexus with that state, such as the location of property, or the decedent's residency or domicile in that state. The laws and exemptions can vary from state to state, with the state estate tax exemptions in most states being significantly *lower than* the current federal exemption (see Table 3).

For an NRA, their exposure to state estate tax can occur with respect to tangible real property and personal property located in that state, but not intangible personal property. Appropriate planning and structuring can be critical in such instances, especially as a federal income tax entity classification election can determine state estate tax exposure. For example, in New York, a non-resident individual's interest in an entity (such as a corporation, partnership or trust) that holds real estate in New York is considered *intangible* personal property, and is exempt from New York estate tax.[30] If the individual holds New York real estate in a *single* member LLC (SMLLC)—which is a "disregarded entity" for federal income tax purposes in the absence of an election to be treated otherwise—the SMLLC interest would be New York real estate for New York state tax purposes and its value taxable.[31]

Table 3. States that impose estate and inheritance taxes (2025)

State/district	Estate tax (and exemption)	Max. estate tax %	Inheritance tax (and exemption)	Max. inheritance tax %
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	($13.99m)	12%	n/a	
Delaware	n/a		n/a	

Table 3. Continued

State/district	Estate tax (and exemption)	Max. estate tax %	Inheritance tax (and exemption)	Max. inheritance tax %
Florida	n/a		n/a	
Georgia	n/a		n/a	
Hawaii	($5.49m)	20%	n/a	
Idaho	n/a		n/a	
Illinois	($4m)	16%	n/a	
Indiana	n/a		n/a	
Iowa	n/a		n/a (repealed 1 January 2025)	
Kansas	n/a		n/a	
Kentucky	n/a		(n/a if immediate family, otherwise $500–$1,000)	16%
Louisiana	n/a		n/a	
Maine	($7m)	12%	n/a	
Maryland	($5m)	16%	(n/a to close relatives and charities, otherwise $1,000)	10%
Massachusetts	($2m)	16%	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 spouse and charities, otherwise from $10,000 onwards)	15%
Nevada	n/a		n/a	
New Hampshire	n/a		n/a	
New Jersey	n/a		($25,000, close relatives are exempt)	16%
New Mexico	n/a		n/a	
New York	($7.16m). Estates valued at over $7.518m are wholly subject to estate tax	16%	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	($1m)	16%	n/a	
Pennsylvania	n/a		(n/a for spouses and minor children, varying rates for other beneficiaries)	15%
Rhode Island	($1.802m)	16%	n/a	
South Carolina	n/a		n/a	
South Dakota	n/a		n/a	
Tennessee	n/a		n/a	

State/district	Estate tax (and exemption)	Max. estate tax %	Inheritance tax (and exemption)	Max. inheritance tax %
Texas	n/a		n/a	
Utah	n/a		n/a	
Vermont	($5m)	16%	n/a	
Virginia	n/a		n/a	
Washington	($2.193m)	20%	n/a	
Washington DC	($4.87m)	16%	n/a	
West Virginia	n/a		n/a	
Wisconsin	n/a		n/a	
Wyoming	n/a		n/a	

Australian estates – implications for US persons

Although there is no direct "estate tax" as such in Australia, there are both US and Australian tax consequences for a US person who is a beneficiary of an Australian estate, and/or who succeeds in controlling an Australian company or trust. The Australian tax implications can vary depending on whether the beneficiary is a resident or a non-resident of Australia, and the nature of the asset they inherit. Often, being a US person can result in the beneficiary being at a tax disadvantage and creates significant additional tax and reporting obligations for them, as illustrated in Table 4.

Table 4.1. Comparative tax implications: Australian beneficiaries vs US person beneficiaries

Australian decedent's assets	Potential Australian tax implications		Potential US tax implications	
	Australian resident	US resident (non-resident of Australia)	Australian resident (Non-US person)	US person
Australian real estate: decedent's primary residence (taxable Australian property)	Exempt from Australian CGT if the decedent qualified for the main residence exemption and the property is sold by the executor or beneficiary within 2 years of the death.[32]		N/a unless US person	Beneficiary inherits the asset at the fair market value (FMV) of the property on the decedent's date of death—beneficiary receives assets with a "step up" in basis.[33]
Australian real estate: investment property (taxable Australian property)	Beneficiary inherits at decedent's cost base.[34] Can access the 50% CGT discount.[35]	Beneficiary inherits at decedent's cost base.[36] ⚑ No 50% CGT discount for non-residents on eventual sale.[37]		
Share portfolio: *Australian or foreign shares[38] "Non-TAP" assets (absent direct/indirect interests in Australian real property).	Inherits at decedent's cost base and can apply 50% CGT discount on an eventual sale.[39] Australian resident beneficiaries inherit the asset with the unrealised gains.	⚑ CGT event K3 is triggered.[40] No CGT in Australia on subsequent disposal of non-TAP assets by non-resident.[41]		
Superannuation	Distributions to tax-dependents are tax-free (income stream or lump sum).[42] Distributions to non-tax dependent:[43] • can only be lump sum distributions • subject to tax on the taxable component of the benefit at 15% for the taxed element; 30% for any untaxed element; plus 2% Medicare levy • any tax-free component is not subject to tax.			⚑ Death benefit distributions may be taxable in the US.[44]
Life insurance proceeds	Generally not assessable. ⚑ If held in super: • tax free if lump sum death payment to death benefits dependent[45] • may be subject to tax on the taxable component of the benefit at 15% for the taxed element; 30% for any untaxed element if fund has deducted the costs; plus 2% Medicare levy[46]		N/a unless US person	Life insurance proceeds are generally not taxable to the beneficiary.[47] ⚑ However, is the distribution a death benefit distribution paid out of super?

Table 4.2. Succession planning: Australian private companies and trusts

Decedent's assets/role	Australian tax implications		US tax implications	
	Australian resident*	US resident	Australian resident*	US person
Privately held company shares	Tax deferred until shares are sold by beneficiary, or unrealised gains are realised and dividends are paid to shareholders.	⚐ Are the shares TAP or non-TAP assets (CGT event K3)? (See Table 4.1 above.) ⚐ Residency: What is the residency of the directors and shareholders – where is the central management and control of the company? ⚐ Control: Is there a change of control of a corporate trustee? Who controls the trust? Where is the trust resident?	N/a unless US person	Generally, beneficiary inherits shares at FMV at decedent's date of death, receiving a 'step up' in basis: i.e. at "market value cost base".[48] Additional considerations: ⚐ Is the company a controlled foreign corporation for US purposes? • Is more than 50% of the vote or value of the company owned by US shareholders, each of whom also owns at least 10%?[49] • IRS reporting obligations apply.[50] ⚐ Is the company a passive foreign investment company (PFIC)?[51] • Is at least 75% of the company's gross income derived from investments or sources unrelated to regular business operations? OR • Are at least 50% of the foreign company's assets income-producing investments earning interest, dividends, capital gains, distributions? • Does the company hold managed investments? • Is the company a corporate beneficiary ("bucket company") of an Australian trust? • IRS reporting, tax obligations and penalties may apply.[52] • There is no step-up in basis on PFIC inherited shares.[53]
Appointors/ trustee succession	N/a unless US person	⚐ Residency of trustee? (See above for control of corporate trustee.)	N/a unless US person	⚐ US grantor trust considerations:[54] • Is the US person a beneficiary of the trust? • Have they made loans or gratuitous transfers to the trust? • Does the trust have unpaid present entitlements owing to them? • Are they a trustee or appointor of the trust? • Do they have the power to vest trust capital in themselves by virtue of their role as trustee/appointor/ beneficiary? • US grantor trust income tax and reporting obligations follow.[55] ⚐ Is the trustee a corporate trustee? CFC reporting may apply (see above). ⚐ What assets are held by the trust? Does the trust hold interests in PFICs? If so, the PFIC rules can apply (see above). ⚐ Is the trust a foreign trust with a US beneficiary? US trust anti-deferral rules can apply.[56]

Part B. Preparing the cross-border estate plan

The following processes and the strategies relevant to each state can be utilised to address specific client needs:

- Stage 1: understand the client's situation;
- Stage 2: identify the estate;
- Stage 3: implement mechanisms to preserve the estate;
- Stage 4: plan for incapacity; and
- Stage 5: ensure efficient distribution.

Stage 1: understand the client's situation

As is apparent, cross-border planning creates additional layers of complexity to the usual "life events" relevant to estate planning (marriage, divorce, remarriage, blended families, and the births and deaths of beneficiaries). Consideration must also be given to:

- the citizenship and residency of the client and their beneficiaries;
- relocations plans;
- location of assets; and
- structuring of assets.

An estate plan that is specifically drafted for a particular jurisdiction may be limited in its effectiveness or even detrimental when considering these factors. Common (and problematic) scenarios that arise include:

1. Cultural and legal differences: in Australia, de facto spouses have similar rights to married spouses on intestacy, where the existence and nature of the relationship can be proven. In the US, few states recognise "common law marriage", and the concept and extent of recognition varies from state to state, often requiring an express intention of the parties *to be married* and act as a married couple, public recognition of being married and cohabitation for a significant period of time.[57] 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) could be to the next of kin, even in a long-term relationship, and contrary to the true intentions of the decedent.

   For Australian estate planning purposes, it is common to have the succession of control of an inter vivos trust specified in a will, or to have testamentary trust wills, with the testator's child nominated as the primary beneficiary, trustee and/or appointor. Such planning mechanisms require review for US tax purposes and are discussed in detail in Part 2:

   - if the primary beneficiary is a US person and is seen to "own" or control a "foreign" (Australian) inter vivos trust or testamentary trust, the income and assets of the trust can be attributed to that beneficiary and become reportable for both income tax and estate tax purposes under the US "grantor trust rules" (discussed below);[58]
   - additional reporting obligations apply with respect to the foreign trust and its assets. For example, where the trust holds managed funds or interests in companies, the beneficiary could be treated as a shareholder of a PFIC, with tax and reporting obligations and elections being required under the PFIC rules;[59] and
   - where the trustee can accumulate trust income, accumulations tax and interest surcharge rules may also apply to distributions to a beneficiary who is a US person.[60]

2. If an individual has US trusts, LLCs or corporations, and relocates to Australia, the tax attributes, residency and associated reporting obligations require consideration under both US and Australian tax law.
3. If a US trust has Australian resident beneficiaries, distributions of capital gains to those beneficiaries are taxed as ordinary income, with the beneficiary being precluded from accessing the 50% CGT discount or carry forward capital losses.[61]
4. If an Australian trust has foreign beneficiaries, distributions to those beneficiaries are taxed first at the trustee level,[62] with foreign beneficiaries being precluded from accessing the 50% CGT discount when preparing their Australian tax return, and claiming a credit for the tax paid by the trustee.[63]

Stage 2: identify what assets form (or would form) part of the estate

Identifying which assets presently, or in the future, could form part of the estate and where helps ascertain which assets could be subject to probate and/or estate taxes, in the relevant jurisdictions. The use of irrevocable trusts and appropriate gifting can, with careful tax planning, serve to exclude assets forming part of an estate and/or the need for probate.

Grantor trust interests

In the US, trusts are included in many estate plans. Assets are often titled in, or transferred to, a "revocable living trust" (RLT). An RLT is created by a "trust agreement" (trust deed) pursuant to which the grantor can place their assets into a trust during their lifetime and manage them as trustee, in the manner that the grantor wishes. The grantor may modify or revoke the trust at any time while the grantor is alive and mentally competent (or the nominated successor trustee may do so if the grantor is incapacitated).

The RLT is a "grantor trust" and disregarded for US tax purposes, with the income of the trust being attributed to the grantor and reported to the IRS on the grantor's personal tax return using the grantor's social security number (SSN). On the grantor's death, the assets of the RLT are attributed to their estate for federal estate and gift tax, GSTT and state estate tax purposes. Grantor trust status is established where the individual who settled or funded the trust has retained certain powers over the trust's income and property, and/or retains the power to vest trust assets in themselves.[64]

An interest in an Australian trust can be a grantor trust interest. In Australia, an inter vivos trust provides flexibility in the distribution of income and assets to eligible beneficiaries and can be an effective tool for succession planning by providing for the succession of the appointor and trustee (or directors of corporate trustee). If, however, an Australian individual relocates to the US, that trust could be considered a grantor trust for US income tax and estate tax where that individual has made transfers to the trust less than market value consideration in the 5 years prior to relocation (including loans/unpaid present entitlements that are owing to them), is a beneficiary of the trust and/or has retained certain powers over

trust assets, or has the power to vest trust assets in themselves.[65]

Nongrantor trusts

Trusts that are structured as irrevocable "nongrantor" trusts (without the defining characteristics of a grantor trust) are outside of the grantor trust rules. An "irrevocable trust" cannot be changed, amended or revoked by the person who created it (the grantor) once it is established and funded, and the assets of the irrevocable trust are permanently removed from the grantor's estate. The trust is treated as a separate taxpayer from the grantor for income tax purposes, and the income of the trust is taxed to the trust itself if retained, or to the beneficiaries if distributed.[66] For estate tax purposes, if a decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, the value of which could otherwise have been included in their gross estate, in the 3-year period ending on the date of their death, the value of the property/interest subject to the transfer is included in their gross estate ("3-year" claw-back rule).[67]

Intentionally defective grantor trusts

Intentionally defective grantor trusts (IDGTs) are essentially a hybrid, or a combination of the grantor trust and nongrantor trust. It is a grantor trust for income tax purposes (so that trust income is attributed to the grantor during their lifetime) and a nongrantor trust for estate tax purposes, with the assets of the IDGT being held for the benefit of the grantor's descendants.

Since the IRS has challenged a step-up in basis (cost base) to market value with respect to assets in an IDGT on the grantor's death (as IDGT assets are excluded from the grantor's estate), the basis of the IDGT assets is (likely to be) the grantor's basis adjusted by the amount of gain or loss recognised to the grantor on the transfer.[68]

Spousal lifetime access trusts

Spousal lifetime access trusts (SLATs) are irrevocable trusts that can be established by each spouse naming the other as the income beneficiary and their descendants as remaindermen.[69] SLATs allow spouses to transfer assets out of their estates while still providing indirect access to income and assets, through their spouse. The assets transferred to a SLAT are treated as a completed gift for federal gift tax purposes, with gift tax being offset by the grantor's gift tax exclusion amount and lifetime exemption amounts (see below), thereby avoiding gift tax liability on transfer.[70]

Lifetime gifts

Where property is transferred for less than "adequate and full consideration in money or money's worth", the amount by which the value of the property exceeds the value of the consideration is deemed a gift.[71] Gift tax is imposed on such transfers where they exceed the applicable annual exclusion amount.

A gift must be a completed gift to be excluded from a donor's estate—the donor must not retain any power to revoke the gift or control the economic benefits of the property transferred (such as a power to designate new beneficiaries of a trust, or the amounts received by beneficiaries).[72]

Generally, a US person may gift amounts up to the annual gift tax exclusion ($19,000 for 2025) to *each* recipient without that amount being counted towards their lifetime gift tax exemption.[73] The lifetime gift tax exemption being the total value of gifts an individual can make during their lifetime without incurring gift and estate tax liability—$13.99m per individual ($27.98m for married couples).

Payments for tuition and medical expenses above the annual exclusion can be made tax-free if paid *directly* to the relevant institution.[74]

Gifts to spouses

Gifts of unlimited amounts may be made to a *US citizen spouse*—these qualify for the "unlimited marital deduction", which allows for tax-free transfers of property between spouses, and for a surviving spouse to elect to defer an estate tax liability until their death.[75] Where both spouses are US citizens, this can lead to the deferral or the avoidance of estate tax altogether, owing to the unused portion of the decedent spouse's lifetime gift and estate tax exemption being added to that of the surviving spouse.

Bequests to a non-citizen spouse (*even if they have a green card*) are not eligible for the unlimited marital deduction. The following rules apply where both spouses are not US citizens:

- a US person may give up to $190,000 annually tax-free to a non-citizen spouse;[76] and
- an NRA spouse may make unlimited gifts to a citizen spouse, but is subject to gift tax on gifts of US situs assets (such as real and personal property located in the US, shares in US corporations, life insurance proceeds, deposits in bank accounts located in the US) over the annual exclusion.[77]

This means that the taxing event can occur earlier if a US citizen spouse dies first, although their individual lifetime exemption ($13.99m for 2025) would apply to their estate. Where the surviving spouse is not a US citizen (such as a an Australian with a green card), the use of a qualified domestic trust (QDOT) can allow for the distribution of trust income to the surviving spouse during their lifetime, and the distribution of trust assets to the decedent US citizen spouse's beneficiaries on the death of the non-citizen spouse, thereby deferring the citizen spouse's estate tax liability with respect to the QDOT assets.[78] QDOTs must be carefully drafted to ensure eligibility for tax concessions, since the surviving spouse must have the effective use, possession or enjoyment of the assets during life, and retain no control over the

distribution of assets on their death.[79] If the surviving spouse is an Australian resident (NRA), consideration also needs to be given to Australian tax laws with respect to foreign trusts, and the effects of s 99B on QDOT distributions to them.

An alternative to the QDOT, or where the value of the surviving spouse's estate exceeds the combined lifetime gift and estate tax exemption for both spouses, is the purchase of life insurance (discussed further at Stage 3 below) within an irrevocable life insurance trust (ILIT), which would provide the estate with the liquidity to pay the estate tax on the death of the surviving 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" over the policy, which would result in the proceeds of the policy being included in their estate and subject to both federal and state estate taxes.[80] An insurance policy should be purchased within the ILIT rather than being transferred by the person whose life is insured to ensure that the proceeds are not clawed back into the estate under the "3-year rule" discussed above.[81]

Qualifying charitable gifts

A decedent's estate is entitled to an unlimited deduction for money or assets transferred to federal, state or local government entities, s 501(c)(3) IRC organisations operated and organised exclusively for religious, charitable, scientific, literary or educational purposes, and fraternal and veterans' organisations.[82]

Charitable gifts may be made during life and/or on death, through variously structured charitable trusts, private foundations and donor-advised funds, which distribute to registered s 501(c)(3) organisations.[83]

Additionally, transfers of interests in property can also qualify for a charitable deduction where the transfer is to an appropriately structured trust such as a charitable remainder trust[84] or a pooled income fund.[85]

Stage 3: preserving the estate

Having the liquidity to pay estate taxes can preserve the estate from having to be liquidated to cover estate and other tax liabilities. Here, cash and life insurance proceeds can play a pivotal role.

If an estate will potentially be subject to US federal estate tax, it is 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, since 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 an estate has a federal estate tax exposure, 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. In addition, the accumulation may be subject to income taxation during life and to estate taxation at death.
- *Liquidate*—the deceased's family may sell assets to pay taxes and costs. The first to be sold would likely be stocks and bonds, and similar liquid assets. However, these may have been intended to be the surviving spouse's source of income, and may also be subject to market fluctuation and CGT. Although other assets, such as real estate, could be sold, forced sale prices usually bring only a fraction of fair market value. Business interests are more difficult interests from which to derive cash liquidity.
- *Borrow*—borrowing requires collateral and can be costly when factoring in interest charges.
- *Insure*—one of the most efficient and practical methods of providing liquidity for the payment of estate taxes in the US 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 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;
  - 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. As discussed above, 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 the unlimited marital deduction is to defer tax until the death of the surviving spouse. If the recipient spouse is *not* a US citizen however (and regardless of whether they are a US resident), additional planning is required. 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 $753,800 payable on the death of the surviving spouse.[86]
- 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.
- 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 $6,349,800 payable on the death of the first spouse.[87]
- 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.
- 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 coverage where the insured resides outside of Australia at the time of death. The policy should be reviewed to ensure that it provides appropriate coverage.
- In Australia, the proceeds of 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.[88] Proceeds paid out of superannuation funds may also be taxable in the US if the recipient beneficiary is a US person.[89]
- In Australia, 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.[90] In the US, amounts received (in a single sum or otherwise) under a life insurance contract are not included in gross income if paid "by reason of the death of the insured".[91]

Stage 4: planning for incapacity

For assets held in an RLT, the trust deed can provide for a trustee to act in relation to RLT assets where the grantor is incapacitated. For assets held by an individual personally, it is imperative that they have an enduring/durable power of attorney (POA) prepared in *each* jurisdiction in which they hold assets.

Many states in the US do not recognise a POA that has not been prepared and witnessed in accordance with their specific state laws, and some states do not allow next of kin to act in the absence of a durable POA, with family members being required to petition the courts for guardianship or conservatorship.[42] This can make the use of an Australian ("foreign") POA problematic, and can lead to delays and the lost opportunities to act in relation to an individual'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 executed;
- the POA would be sufficient in the foreign jurisdiction to effect the type of transaction that is sought to be effected in the US; that is, the POA must allow the "attorney-in-fact" (the attorney/agent appointed under POA) to act and achieve the same objective in the foreign jurisdiction as that sought to be achieved in the US. For example, if the Australian attorney-in-fact is seeking to sell real estate in the US, they would need to prove that the POA was effective for that purpose in the foreign jurisdiction (Australian state); and
- the donor is still living.

Stage 5: ensuring efficient distribution following death

There are several strategies that can be implemented to ensure that an estate is distributed effectively and efficiently following death, with no delays in probate, or assets being subject to intestacy or IRS clearance requirements.

Avoiding probate

Probate can be costly, time-consuming and complex (especially in states such as California, New York and Florida). When a will is submitted for probate, it becomes part of the public court record, meaning that the will, the value of the estate, the inventory of assets, disputes and creditor's claims, and beneficiary details all become publicly available information. Consequently, implementing strategies to bypass probate is preferred in US estate planning.

Probate can be avoided using:

- trusts (grantor and nongrantor);
- "payable on death"/"beneficiary designations" for the transfer of financial assets, such as bank account balances, investment accounts, retirement accounts and life insurance proceeds, directly to nominated beneficiaries (similar to the Australian superannuation binding death benefit nominations); and
- "transfer on death deeds" (TODDs), which are beneficiary designations that allow for the transfer of real estate in certain states.[92] There are limitations with TODDs because only *surviving* beneficiaries can inherit, and all beneficiaries inherit equally, rather than "per stirpes". Therefore, a deceased beneficiary's children will not inherit in place of their parent—instead, their share is reallocated equally among the surviving beneficiaries.

Wills

Where probate cannot be avoided, a will that has been appropriately drafted and executed by the testator, and witnessed in accordance with state law, can direct the executor (LPR) as to the disposition of the testator's assets. Where the testator has an RLT or irrevocable trusts in place, a "pour-over" will is also used as a safety net to direct the distribution of any assets that may not have been appropriately addressed, or that may have been forgotten or newly acquired, or not titled to the trusts. The "pour-over" will directs the distribution of such remaining assets into the RLT or another inter vivos trust.

If the testator has assets in another jurisdiction, consideration needs to be given to how (and whether) their will could also be probated in the other jurisdiction through an ancillary probate proceeding. An ancillary estate is required for real estate located in a state other than the deceased's state of domicile. Each state in the US has different requirements for admitting a "foreign" will (from outside of that state or overseas) for probate, and some states require the personal representative filing for probate to be a resident of that state.

Appointing an executor or administrator who is qualified and acting within the US (or relevant state) will remove the need for IRS transfer certificate filing requirements for non-resident citizens and NRAs with taxable US estates. A transfer certificate is issued by the IRS when it is satisfied that any tax imposed on the estate has been paid after an estate tax return has been filed.[93]

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.[94] 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.[95] The formalities are specified in the Annex to the Convention and require:[96]

- testamentary dispositions to be made by one person in one instrument only;
- the will to be made in writing;
- 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;
- all signatures to be placed at the end of the will;
- each page of the will (if the will exceeds one page) to be signed by the testator and each page numbered; if the testator is unable to sign the will, the reason is to be noted in the will;
- the date of the will to be the date of the signature of the authorised person and noted at the end of the will; and
- the attachment of a certificate to the end of the will, 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]

In the US, several states and territories have adopted the *Uniform Wills Recognition Act 1977* to recognise international wills.[97]

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, since a will prepared later in time that purports to cover assets in a particular jurisdiction only (eg "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; 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".[98]

Table 5. Cross-border estate planning process and strategies

Estate planning mechanisms	Considerations in the US–Australia context			Strategy
	Factor	US federal	US state	
Stage 1: understand the client's situation				
• family circumstances • citizenship, residency, domicile • relocation plans • location of assets • how assets are structured				
Stage 2: identify the estate				
Foreign and US inter vivos trusts	• Where do the settlor/grantor and trustee/appointor reside? • Where is the tax residency of the trust? • What is the citizenship/residency of trust beneficiaries? • Transfers to trusts—Australian CGT and US gift tax considerations.	• Is the trust a "grantor" trust (who controls the trust)? • What are the tax implications and disclosure obligations for the "grantor"?	• Bypass probate? • Where is the tax residency of beneficiaries of the trust? • Location of assets?	• Can the assets be structured in nongrantor irrevocable trusts, IDGTs or SLATs? • 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)	• Value of gross estate includes all property held as a joint tenant with right of survivorship as tenants by the entirety with a spouse. Unless: for property acquired by all tenants by gift/inheritance, only the value of the deceased's fractional share is included.[99]	• Depending on contributions—maybe included or excluded.	• State law governs property interests. • Bypass probate.	• The property passes by right of survivorship.
Gifts	• Transfer taxes in both countries. • CGT in Australia.	• Gift tax implications where exclusions are exceeded (Table 1).	• No gift taxes at the state level.	• Plan your gifts.
Stage 3: preserving the estate				
Liquidity	• How would the estate fund an estate tax liability?	• Federal estate taxes could apply if the lifetime exemption is exceeded (Table 1). • Possible deferral with marital deduction.	• State estate taxes may apply where the exemption threshold is exceeded (Table 1).	• Consider insurance—"second to die" (if both spouses are US citizens) or a single life policy on the life of the US citizen. • The insured should not own the policy.
Stage 4: planning for incapacity				
Powers of attorney (POA)	• Essential for dealing with assets if the principal/donor is incapacitated (POA ceases on death).		• State laws govern validity. • Some states do not allow "next of kin" to act without court orders.	• Ensure durable/enduring POA is prepared for each jurisdiction where assets are held. • Certain institutions require their own form of POA, in the absence of which, it may be challenging and cause delays when dealing with such institutions.

Estate planning mechanisms	Considerations in the US–Australia context			Strategy
	Factor	US federal	US state	
Stage 5: ensuring efficient distribution				
Wills	• Jurisdictionally specific. • Estate taxes are n/a in Australia; however, distribution of superannuation (retirement) proceeds to non-tax defendants are subject to tax in Australia.	• Estate tax where lifetime exemption is exceeded (Table 1).	• Varies from state to state. • Probate required in each state in which real property is located. • Delays with distribution of estate where a single will covers worldwide assets. • State estate and inheritance taxes (Table 3).	• International will vs separate wills? • Caution required for both. • Bypass probate altogether—beneficiary designations, TODDs, RLTs, nongrantor/inter vivos trusts.
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?		• IDGTs. • How are beneficiaries assessed when they reside or are domiciled outside of the jurisdiction in which the trust is resident?
Intestacy	• Jurisdictionally specific.		• State law applies. • Can cause delays with administration.	• Address common law/de facto spouses, blended/"modern family" expectations.

Conclusion

Cross-border circumstances add complexity to a client's estate planning needs. Factors such as US citizenship and the residency/domicile of a testator, their spouse and beneficiaries; the location and nature of their assets; how assets are structured; and the 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 beneficiaries, in both countries.

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References

1 Benjamin Franklin, in a letter to Jean-Baptiste Le Roy, 1789.

2 R Somers and L Epstein, "International Estate Planning for US–Australia cross-border clients", (2020) 23(4) *The Tax Specialist* 193.

3 ABS, *People in Australia who were born in the United States of America: 2021 census country of birth QuickStats*. Available at www.abs.gov.au/census/find-census-data/quickstats/2021/8104_AUS.

4 US Census Bureau, *Place of birth for the foreign-born population in the United States, 2022*. Available at https://data.census.gov/table/ACSDT1Y2022.B05006?t=Place+of+Birth.

5 See United States Citizenship and Immigration Services, *E-3 specialty occupation workers from Australia*. Available at www.uscis.gov/working-in-the-united-states/temporary-workers/e-3-specialty-occupation-workers-from-australia.

6 Ss 302-10 and 302-145 ITAA97.

7 The *Residence-Based Taxation for Americans Abroad Act*, which was introduced in the House of Representatives in December 2024 and proposed an elective residency-based income tax for non-resident US citizens under new s 899 IRC, was not passed by Congress earlier this year. A revised version of the Bill is expected to be reintroduced into Congress later this year.

8 For example, CGT event I1 occurs on ceasing residency: (ss 104-60 and 104-65 ITAA97); if you become an Australian resident, the cost base of non-TAP assets is reset to market value.

9 S 7701(a)(30) of the *Internal Revenue Code* (US) (IRC).

10 As of the date of publication.

11 Ss 2001 to 2801 IRC.

12 Treas. Regs. § 20.0-1(b)(1).

13 Section 4.25.4.2.1 of the *Internal Revenue Manual*.

14 See *U.S. tax residency—green card test*. Available at www.irs.gov/individuals/international-taxpayers/us-tax-residency-green-card-test.

15 26 CFR 20.01(b) (*Code of Federal Regulations*).

16 *Estate of Dorrance*, 298 U.S. 678 (1936). Revenue Ruling 80-363, Revenue Ruling 74-364.

17 S 2001(a) IRC.

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

19 Ss 2601–2644.

20 S 2035 IRC.

21 Ss 2101–2108 IRC.

22 In Form 8833 filed with Form 706-NA.

23 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.*

24 Art IV(2) of the *Estate Duty Convention (United States of America*).

25 Calculated under s 2001(c) IRC for assets valued at over $80,000 but not over $100,000, being $18,200 + 28% of the excess of such amount over $80,000.

26 Current year basic exclusion amount x s 2001(c) IRC rate.

27 https://www.congress.gov/bill/119th-congress/house-bill/1/text.

28 https://us-tax.org/wp-content/uploads/2025/02/death-tax-repeal-act-text.pdf.

29 https://senatorkevincramer.app.box.com/s/mkpnj3zcgubxxs71uee3f4cpapgx0hyo.

30 *In re Estate of Havemeyer*, 17 N.Y.2d 216 (1966); *In re Estate of Finkelstein*, 40 Misc.2d 910 (N.Y. Surr. Ct. Rockland County 1963). N.Y. Tax. Law §960(a) imposes an estate tax on real or tangible personal property located in New York State transferred by a non-resident decedent's estate. Article 16 of the New York State Constitution prohibits the state from imposing an estate tax on a non-resident decedent's intangible personal property.

31 TSB-A-15(1)M, May 29, 2015.

32 S 128-15 item 3 ITAA97.

33 S 1014 IRC.

34 S128-15 item 1 ITAA97.

35 S 115.105 ITAA97.

36 S 128-15 item 1 ITAA97.

37 S 115.105 ITAA97.

38 S 108-5 ITAA97 definition of "CGT asset" does not distinguish between Australian and foreign portfolios.

39 S128-15 item 1 and s 115-30(1) item 4 ITAA97. Pre-CGT assets are taken to have been acquired at the time deceased died (s 115-30(1) item 6 ITAA97).

40 S 104-215 ITAA97.

41 S 855-10 ITAA97.

42 S 855-10 ITAA97.

43 S 302.145 ITAA97.

44 IRS Memorandum No. 200604023.

45 S 302-60 ITAA97.

46 S 307-290 ITAA97.

47 S 2042 IRC.

48 S 1014 IRC.

49 S 957 IRC.

50 IRS Form 5471.

51 S 1297 IRC.

52 IRS Form 8621.

53 S 1291(e) IRC.

54 Ss 671–679 IRC.

55 IRS Forms 3520 and 3520-A.

56 Ss 643(a)(6)(C) and 668 IRC.

57 Colorado, Washington D.C., Iowa, Kansas, Montana, Oklahoma, Rhode Island and Texas have full recognition of common law marriage.

58 Ss 671–679 IRC.

59 Part IV IRC, IRS Form 8621.

60 Ss 643(a)(6)(C) and 668 IRC.

61 TD 2017/23 and TD 2024/9.

62 S 98(3) ITAA36.

63 Ss 98A(2), 115-220 and 115-222 ITAA97.

64 Ss 671–679 IRC.

65 Ss 671–679 IRC.

66 Subchapter J IRC; ss 641–685 IRC.

67 S 2035 IRC claws back property includible under s 2036 IRC (transfers with retained life estates), s 2037 (transfers taking effect at death), s 2038 (revocable transfers), and s 2042 (life insurance proceeds under policies over which the decedent retained "incidents of ownership").

68 S 1015(b) IRC; Revenue Ruling 2023-2.

69 SLATs must be carefully drafted as they can be subject to the risks of divorce and/or being voided under the Reciprocal Trust Doctrine if not sufficiently different from each other.

70 S 2503(b) IRC.

71 S 2512(b) IRC.

72 26 CFR 25.2511-2(c).

73 S 2503(b) IRC.

74 S 2503(e) IRC.

75 S 2523(a) IRC.

76 S 2523(i) IRC.

77 S 2523(i), s 2511(a) IRC.

78 S 2056(d)(2) s 2056(A); 20.2056A-1 IRC.

79 S 2056(b)(1) IRC.

80 IRS Revenue Ruling 79-129.

81 Ss 2035 and 2042 IRC.

82 S 2055 IRC.

83 S 2055(e)(5) IRC.

84 S 664(d)(1), (2) IRC, which allow the grantor to receive an annual fixed sum or percentage of between 5% to 50% of the initial principal funded into the trust either for life or a specified period, with the remainder being distributed to a charity.

85 S 642(C)(5) IRC—trust established by a charity where donors contribute property and retain the income rights, with the remainder being left to the charity).

86 Based on the 2025 federal estate tax exclusion of $13,99m. 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.

87 Based on the 2025 federal estate tax exclusion of $13,99m. 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.

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

89 IRS Memorandum No. 200604023.

90 S 118-300 ITAA97.

91 S 101(a)(1) IRC.

92 Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming and District of Columbia.

93 IRS Form 706: Estate tax return and IRS Form 706-NA: US Nonresident alien estate tax return.

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

95 Australia, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, Ecuador, France, Holy See, Iran, Italy, Laos, Libya, Niger, Portugal, Russia, Sierra Leone, Slovenia, United Kingdom and the United States (in 23 states and the District of Columbia). Available at www.unidroit.org/instruments/international-will/status/. Entered into force in Australia from 10 March 2015 onwards, with all states and territories passing legislation to give effect to it.

96 In Articles 2–13 of the Annex.

97 Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Vermont, Virginia and the District of Columbia. Available at www.uniformlaws.org/committees/community-home?CommunityKey=e0a2332d-5263-4fab-880f-1607fc5affba#LegBillTrackingAnchor.

98 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.

99 S 2040(a) IRC and 26 CFR 20.2040-1(a)(1).

