COUNTRY COMPARATIVE GUIDES 2024

The Legal 500 Country Comparative Guides

United States

PRIVATE CLIENT

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This country-specific Q&A provides an overview of private client laws and regulations applicable in United States.

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UNITED STATES
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1. Which factors bring an individual within the scope of tax on income and capital gains?

The key question for U.S. federal income tax purposes is whether an individual is a "United States Person" ("U.S. Person") or a foreign person. A U.S. Person is any individual who (A) is a U.S. citizen, or (B) is a "resident" of the U.S. To determine residency, there are two tests, the green card test and the substantial presence test. The green card test is straightforward. If a resident has what is known as a green card, they are considered a resident for U.S. tax purposes. The substantial presence test is slightly more complicated and is based on the number of days that an individual spends in the U.S. over a 3-year period. To meet the substantial presence test, an individual must be present in the U.S. for the following:

A. 31 days during the current year, and

B. 183 days during the 3-year period that includes the current year and the 2 years immediately before that. When calculating the 183 days, an individual should include (i) all of the days that the individual was present in the U.S. in the current year, (ii) one-third of the days the individual was present in the U.S. the first year prior to the current year, and (iii) one-sixth of the days the individual was present in the U.S. the second year prior to the current year.

Notwithstanding the foregoing, the substantial presence test has a "closer connection" exception, which permits an individual to be treated as a resident of a different country if that individual has a closer tax connection to that jurisdiction.

2. What are the taxes and rates of tax to which an individual is subject in respect of income and capital gains and, in relation to those taxes, when does the tax year start and end, and when must tax returns be submitted and tax paid?

A. Individual Income Tax Rates: The 2024 income tax rates for individuals are provided below.

Married Individuals Filing Joint Returns and Surviving Spouses

If Taxable Income Is:	The Tax Is:
Not over $23,200	10% of the taxable income
Over $23,200 but not over $94,300	$2,320 plus 12% of the excess over $23,200
Over $94,300 but not over $201,050	$10,852 plus 22% of the excess over $94,300
Over $201,050 but not over $383,900	$34,337 plus 24% of the excess over $201,050
Over $383,900 but not over $487,450	$78,221 plus 32% of the excess over $383,900
Over $487,450 but not over $731,200	$111,357 plus 35% of the excess over $487,450
Over $731,200	$196,669.50 plus 37% of the excess over $731,200

Heads of Households

If Taxable Income Is:	The Tax Is:
Not over $16,550	10% of the taxable income
Over $16,550 but not over $63,100	$1,655 plus 12% of the excess over $16,550
Over $63,100 but not over $100,500	$7,241 plus 22% of the excess over $63,100
Over $100,500 but not over $191,950	$15,469 plus 24% of the excess over $100,500
Over $191,950 but not over $243,700	$37,417 plus 32% of the excess over $191,950
Over $243,700 but not over $609,350	$53,977 plus 35% of the excess over $243,700
Over $609,350	$181,954.50 plus 37% of the excess over $609,350

Unmarried Individuals (other than Surviving Spouses and Heads of Households)

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If Taxable Income Is:	The Tax Is:
Not over $11,600	10% of the taxable income
Over $11,600 but not over $47,150	$1,160 plus 12% of the excess over $11,600
Over $47,150 but not over $100,525	$5,426 plus 22% of the excess over $47,150
Over $100,525 but not over $191,950	$17,168.50 plus 24% of the excess over $100,525
Over $191,950 but not over $243,725	$39,110.50 plus 32% of the excess over $191,950
Over $243,725 but not over $609,350	$55,678.50 plus 35% of the excess over $243,725
Over $609,350	$183,647.25 plus 37% of the excess over $609,350

Married Individuals Filing Separate Returns

If Taxable Income Is:	The Tax Is:
Not over $11,600	10% of the taxable income
Over $11,600 but not over $47,150	$1,160 plus 12% of the excess over $11,600
Over $47,150 but not over $100,525	$5,426 plus 22% of the excess over $47,150
Over $100,525 but not over $191,950	$17,168.50 plus 24% of the excess over $100,525
Over $191,950 but not over $243,725	$39,110.50 plus 32% of the excess over $191,950
Over $243,725 but not over $365,600	$55,678.50 plus 35% of the excess over $243,725
Over $365,600	$98,334.75 plus 37% of the excess over $365,600

B. Capital Gains Tax Rates: Capital gains are divided into short-term capital gains and long-term capital gains. Short-term capital gains are taxed at ordinary income tax rates. Long-term capital gains are taxed at either 0%, 15%, or 20% per the chart below.

Filing Status	Maximum Zero Rate Amount	Maximum 15% Rate Amount
Married Individuals Filing Joint Returns and Surviving Spouse	$94,050	$583,750
Married Individuals Filing Separate Returns	$47,025	$291,850
Heads of Household	$63,000	$551,350
All Other Individuals	$47,025	$518,900

There is a separate tax rate for collectibles, such as artwork, coins, stamps, antiques, etc. These collectibles are taxed at a maximum rate of 28%.

C. Social Security and Medicare Taxes: There are two categories of persons who must pay social security and Medicare taxes or have them withheld (1) U.S. Persons who work as employees and non-residents with U.S. source income; and (2) self employed U.S. Persons and non-residents who have U.S. source self-employment income.

U.S. Persons who work as employees and non-residents with U.S. source income: There is a 6.2% Social Security tax on compensation up to the wage base limit (the amount subject to tax) of $168,600. Medicare is taxed at 1.45% at an unlimited wage base limit. There is an additional 0.9% tax on compensation in excess of $200,000.

Self Employed U.S. person and non-residents who have U.S. source self-employment income. There is 12.4% Social Security tax on the first $168,600 of combined wages, tips, and net earnings. There is 2.9% Medicare tax on all net earnings. Further, there is an additional 0.9% Medicare tax if your wages, compensation, or self-employment income (together with that of your spouse if filing a joint return) exceed the threshold amount for your filing status:

Filing Status	Threshold Amount
Married filing jointly	$250,000
Married filing separate	$125,000
Single	$200,000
Head of household (with qualifying person)	$200,000
Qualifying surviving spouse with dependent child	$200,000

D. Tax Year and Filing Requirements: Individuals are on a calendar tax year running from January 1 to December 31 of each year. Individuals must file their income taxes on April 15th of the year following the tax year, unless they file for an automatic 6-month extension and pay any estimated taxes due at the time of such filing.

3. Are withholding taxes relevant to individuals and, if so, how, in what circumstances and at what rates do they apply?

Withholding from an employee's pay check by an employer is required although there is no set amount that must be withheld other than the requisite Social Security and Medicare taxes discussed above. That said, failing to withhold less than 90% of income taxes due in a particular year will result in a penalty to the taxpayer.

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Self-employed individuals or those with non-salaried income such as rental income, for example, must pay estimated taxes on a quarterly basis. Generally, non-residents have a withholding requirement of 30% subject to some potential exceptions, on most U.S. source income.

4. How does the jurisdiction approach the elimination of double taxation for individuals who would otherwise be taxed in the jurisdiction and in another jurisdiction?

The United States has entered into multiple treaties with various countries which are generally designed to reduce or eliminate double taxation between countries. The rules applicable to each country will vary based on the applicable treaty.

At this time, the U.S. has not adopted the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

5. Is there a wealth tax and, if so, which factors bring an individual within the scope of that tax, at what rate or rates is it charged, and when must tax returns be submitted and tax paid?

The United States does not have a federal wealth tax at this time but it does have an estate tax (see below).

6. Is tax charged on death or on gifts by individuals and, if so, which factors cause the tax to apply, when must a tax return be submitted, and at what rate, by whom and when must the tax be paid?

The U.S. has a federal gift and estate tax as well as a Generation Skipping Transfer Tax. The gift and estate tax regimes are unified such that gifts made during an individual's lifetime will reduce the availability of an exemption on death for estate tax purposes. Each U.S. citizen and domiciliary has a gift and estate tax exemption amount. Up to such amount there is no gift or estate taxes due on a transfer by gift or at death. However, any amount above such exemption is subject to a 40% federal tax, either a gift tax or an estate tax, as may be applicable.

In 2024, the estate tax exemption is $13.61 million for U.S. citizens and domiciliaries. This amount can effectively be doubled as between spouses who are both U.S. citizens through gift splitting and/or the "portability" of the unused exemption from one deceased spouse to a surviving spouse.

Note the test for a domiciliary is whether the individual lives in the U.S. and has no intention of leaving. This is a test for gift and estate tax purposes, and it is different than the residency test for income tax purposes.

Gift Tax: The gift tax is levied on transfers made during one's lifetime if such transfer is a completed gift. U.S. citizens and domiciliaries can make gifts in 2024 other than to a U.S. citizen spouse or a charity in amounts up to $18,000 per donee per year without incurring any gift tax obligations. These gifts must be completed gifts, either to an individual outright or to a trust which contains "crummey" withdrawal powers provided that such withdrawal rights are properly administered. This is referred to as the gift tax annual exclusion, which such gifts are excluded entirely from the gift tax regime. If an individual makes a gift in excess of $18,000 to any donee other than a U.S. citizen spouse or a charity, that individual must file a Form 709 to report the gift to the IRS. The Form 709 is due on April 15 the following year after the gift is made unless an automatic 6-month extension is requested and any estimated gift taxes are paid by the initial due date. Only one U.S. state, Connecticut, has a state level gift tax. For non-residents, gifts of U.S. situs real and tangible personal property are subject to the federal gift tax with no exemption amount other than the $18,000 annual exclusion.

Estate Tax: The estate tax is levied upon the death of an individual who transfers assets to anyone other than a qualified charity or a U.S. citizen spouse over their remaining exemption amount. Any exemption remaining upon an individual's death is first applied against their net taxable estate. If the individual's transfers assets at death to persons other than charities and a U.S. spouse that are less than their remaining exemption amount, then no tax is due. If the individual's transfers assets to persons other than charities and a U.S. spouse that are in excess of their remaining exemption amount, then there is a 40% tax on such transfers over the exemption.

For both the gift and estate tax, transfers to certain charities and to U.S. citizen spouses do not incur gift or estate taxes. This is because, if the charity is qualified or a spouse is a U.S. citizen, the gift is entitled to a 100% charitable or marital deduction. Note this assumes that the gifts or bequests are made outright and not in trust. Special rules apply to gifts in trust.

Non-residents can also be subject to U.S. federal estate taxes on U.S. source assets, such as real property, for example. Unlike U.S. citizens and domiciliaries who have

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a considerable estate tax exemption amount, the estate tax exemption for non-residents is fixed at $60,000.

Some U.S. states also impose a state level estate tax and/or an inheritance tax. Rules for these taxes vary with the jurisdiction.

Generation-Skipping Transfer Tax: There is a third type of transfer tax called the Generation-Skipping Transfer Tax ("GST Tax"). GST taxes are levied on transfers to "skip persons". A skip person is generally a grandchild of a transferor or more remote descendant, but it can also be a person who is 37 ½ or more years younger than the transferor. Each transferor has their own GST Tax exclusion amount which is $13.61 million in 2024 for U.S. citizens and domiciliaries. This exemption is not unified with the gift and estate tax exemptions. If a person makes a transfer to a skip person in excess of the annual GST Tax exclusion amount of $18,000 in 2024, then that transfer will use a portion of his or her GST Tax exemption amount. If the value of the transfer exceeds the GST Tax exemption, then a GST Tax of 40% will be due on all amounts over the exemption. There are also complex rules for determining GST Taxes with respect to transfers in trust.

7. Are tax reliefs available on gifts (either during the donor's lifetime or on death) to a spouse, civil partner, or to any other relation, or of particular kinds of assets (eg business or agricultural assets), and how do any such reliefs apply?

Yes, outright gifts during an individual's lifetime to a U.S. citizen spouse qualify for the unlimited marital deduction and are not subject to gift taxes. If the gift is to a non-U.S. citizen spouse, there is a $185,000 annual exclusion in 2024 before such gifts are subject to gift taxes.

8. Do the tax laws encourage gifts (either during the donor's lifetime or on death) to a charity, public foundation or similar entity, and how do the relevant tax rules apply?

Yes, the tax laws do encourage such gifts during an individual's lifetime or bequests on death. In the U.S., gifts or bequests to charities are potentially subject to a deduction from gift or estate taxes, as may be applicable. Further, an income tax deduction may be available as well. There are different types of charities under the Internal Revenue Code but the two main types are public charities and private foundations. Gifts or bequests to public charities generally receive more favourable tax treatment than gifts or bequests to private foundations.

9. How is real property situated in the jurisdiction taxed, in particular where it is owned by an individual who has no connection with the jurisdiction other than ownership of property there?

Generally, real property taxes are levied at the state and local levels not the federal level in the U.S. Each state and local jurisdiction determines the property taxes levied on real property and rates vary significantly from one jurisdiction to the next. The U.S. does provide a federal deduction for state and local taxes paid on real property up to $10,000 per year for taxpayers who itemize in 2024.

Dispositions of property, including sales or exchanges that do not qualify under Section 1031 of the Internal Revenue Code, are subject to taxation for capital gains, and in some cases as ordinary income, pursuant to the rates outlined above. The rules around federal taxation of real property dispositions are complex.

Further, under the Foreign Investment Real Property Tax Act (FIRPTA) authorizes the U.S. to tax non-residents on dispositions of U.S. real property. Generally, this Act requires a purchaser who buys real property from a non-resident seller to withhold 15% of the amount realized.

10. Does your jurisdiction have any specific rules in relation to the taxation of digital assets?

Digital assets, such as cryptocurrencies, are taxed as a capital asset in the U.S. This means that cryptocurrency dispositions are subject to the capital gains treatment described in Question #2 above.

11. Are taxes other than those described above imposed on individuals and, if so, how do they apply?

In addition to the federal taxes described above (i.e., income and transfer taxes), taxes are also imposed at the state level. For example, all but nine states (Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming) impose an income tax on state residents. The income tax rates for each state vary widely. Most states use a progressive tax rate while others use a flat tax rate. In addition,

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some states also have an estate tax (Washington, Oregon, Minnesota, Illinois, New York, Maine, Vermont, Massachusetts, Rhode Island, and Connecticut) or an inheritance tax (Nebraska, Iowa, Kentucky, Pennsylvania, and New Jersey). The state of Maryland has both an estate tax and an inheritance tax.

Most states also impose property taxes on real property, and some impose taxes on business or personal property. Sales taxes can also be imposed on the purchase of goods and on some services. In addition to a sales tax, excise taxes can also be imposed on the purchase of specific items, such as gasoline, hotel reservations, airfare, cigarettes, and alcohol. State and local taxes can usually be deducted on an individual's federal income tax return; however, the amount of the deduction is capped at $10,000, although the cap on such taxes is set to expire at the end of 2025.

12. Is there an advantageous tax regime for individuals who have recently arrived in or are only partially connected with the jurisdiction?

All "US Persons" are subject to federal income tax. US persons includes those individuals that meet the "substantial presence test," meaning they are physically present in the US for at least 31 days during the calendar year and 183 days during the last three years. The 183 days is counted by adding the 31 days in the present year, one-third (1/3) of the days from the prior year, and one-sixth (1/6) of the days from two years prior.

Individuals who are not domiciled in the US are not subject to US transfer taxes (gift, estate, and GST taxes) at death; however, assets with a US situs are subject to transfer taxes even if the individual is not domiciled in the US. Persons domiciled in the US are subject to US transfer taxes on their worldwide assets. A person living in the US with no present intent of leaving is considered domiciled in the US. The US domiciliary test also considers several factors, including the length of US residence, ties to foreign countries, green card status, and certain lifestyle factors (e.g., voting registration, driver license, and club affiliations).

13. What steps might an individual be advised to consider before establishing residence in (or becoming otherwise connected for tax purposes with) the jurisdiction?

US permanent residents (i.e., green card holders) are subject to US income taxes and US transfer taxes just like US citizens. To avoid application of these taxes on some assets, individuals considering US residence may consider transferring assets to a "foreign trust" prior to establishing residency in the US. A "foreign trust" is a trust that is not subject to the jurisdiction of any US court and has no US persons controlling the "substantial decisions" of the trust. Persons controlling the "substantial decisions" of the trust include, but are not limited to, those persons holding investment and distributions decisions over the trust, and usually includes Trustees, Trust Advisors, and possibly Trust Protectors or beneficiaries. Furthermore, the trust must be established by the non-resident more than 5 years before becoming a permanent resident. If properly set up, a foreign trust is generally not subject to US income tax on non-US source income and will not be included in a US resident's estate for estate tax purposes.

14. What are the main rules of succession, and what are the scope and effect of any rules of forced heirship?

Rules of succession are determined at the state level, not the federal level. Generally, individuals are free to distribute assets to any persons they choose via a Will or living (revocable) trust, which is a form of a Will "substitute". Only one state (Louisiana) has a forced heirship rule. Some common law states have "spousal election" rules, which will protect a surviving spouse from being disinherited. Those statutes usually provide that a surviving spouse has the right to receive a portion (e.g., one-third, one-half) of the deceased spouse's assets, even if the deceased spouse intentionally disinherited the spouse. Community property states (e.g., California, Texas, Washington) generally do not have spousal election statutes, since the surviving spouse already owns half of the community property, which is any property acquired during the marriage that is not received by gift or inheritance. If an individual dies without a valid Will or living trust, then the laws of intestacy govern disposition of the decedent's assets. Under most state's intestacy laws, the spouse and children of the decedent receive most or all of the decedent's assets.

15. Is there a special regime for matrimonial property or the property of a civil partnership, and how does that regime affect succession?

The characterization of property acquired during a marriage is determined by state law. Nine states (Arizona, California, Idaho, Louisiana, Wisconsin, Nevada,

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New Mexico, Texas, and Washington) are community property states. All property acquired during marriage that is not a gift or inheritance is considered "community property" and owned equally by the spouses. All other states are "common law" states. In general, common-law states treat property acquired during a marriage as being owned by the spouse acquiring the property, unless the married persons acquire title in their joint names. Notwithstanding treatment of property in common law states as being owned by the acquiring spouse, in a divorce proceeding a judge will usually divide such property in a manner deemed equitable by the court if the divorcing parties cannot agree to a division.

All states also allow persons to contract around marital property laws. This is known as a "premarital agreement," if entered into prior to marriage, or a "post marital agreement" if entered into after marriage. Most states require that the parties executing a marital agreement fully disclose the nature of their assets and be represented by separate legal counsel. A martial agreement can cover almost any area of property ownership during the marriage, as well as division of property upon death and divorce. Statutory rights such as spousal support upon divorce can also be contracted around or waived entirely.

As described above, spouses are free to leave their assets to anyone they choose at death via Will or Will substitute. In the absence of such a document, state intestacy laws will apply. In community property states, intestacy laws generally provide that the surviving spouse is entitled to all community property and a portion of the decedent's separate property (the remaining portion of the separate property usually passes to the decedent's children). In common law states, the decedent generally cannot completely disinherit a spouse, and "spousal election" statutes will entitle the survivor to a minimum amount of the decedent's assets (e.g., one-third, one-half).

16. What factors cause the succession law of the jurisdiction to apply on the death of an individual?

Succession of a decedent's tangible and intangible property is determined by state law. The major factor in determining whether a particular state's law will apply is the domicile of the decedent. An individual can have only one domicile, which is the place that a person intends to be their permanent home and where they intend to remain indefinitely (i.e., it is not a transitory stay or temporary residence). If the decedent is domiciled in the state, then that state's succession laws will apply. If an individual has a valid will or living trust, that document will generally govern disposition of the decedent's assets regardless of a state's succession laws.

Succession of real property (i.e., land and improvements) is determined by the location (situs) of the real property. In situations where a decedent owns real property in a particular state but was not domiciled in that state, the laws of the situs state will determine succession of the real property. This usually means that a separate proceeding in the situs state (called an "ancillary probate") will be required to dispose of the real property, either according to the terms of the decedent's Will or by the intestacy laws of the situs state.

17. How does the jurisdiction deal with conflict between its succession laws and those of another jurisdiction with which the deceased was connected or in which the deceased owned property?

As mentioned above, succession of property is a matter of state law. The laws of a decedent's domicile state will govern succession of personal property (tangible and intangible) and any real property located within the state. If a decedent dies owning real property located outside of the state of domicile, then the laws of the situs state will govern succession of that real property.

Conflicts of law issues may arise in the context of property characterization, interpretation of a testamentary instrument, or the exercise of a power of appointment. Courts faced with conflicts of law issues can apply the "interest analysis" or "significant interest" theory. These theories look at which state has a greater interest in resolving the issue, and after applying the relevant facts, the court will apply the laws of the state that it determines has the greater interest. Conflicts of law issues are commonly resolved in a person's will or trust. For example, a person executing a Will or a trust can select which state law will govern how the instrument is interpreted. This is known as a "choice of law" provision. Except for certain issues involving marital property characterization (e.g., separate property or community property) or where against public policy, courts will generally follow the state law selected by the decedent.

18. In what circumstances should an individual make a Will, what are the consequences of dying without having

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made a Will, and what are the formal requirements for making a Will?

Any individual who wants their property disposed of in accordance with their specific wishes, and not pursuant to a state's intestacy laws, should make a Will. The Will governs who will receive the decedent's assets upon death, and in what amounts. Alternatively, an individual can make a Will substitute, such as a living (revocable) trust. The living trust holds title to a person's assets during their lifetime and governs disposition of a decedent's assets upon his or her death. An additional benefit of holding assets in a living trust during life is that they will avoid a court supervised probate proceeding at death. Probate is the process by which a court in the decedent's domicile state supervises, administers, and distributes the decedent's assets. Depending on the state, probate proceedings can be time-consuming and expensive (e.g., legal fees and executor fees).

The consequences of not having a Will or living trust are that the decedent's assets will be disposed of in accordance with the intestacy laws of the State where the decedent is domiciled. These laws may provide for disposition of the decedent's assets in a manner that does not reflect the wishes of the decedent. Generally, intestacy laws provide that a decedent's assets pass to the spouse and children.

Formal requirements for making a Will vary by state. Generally, to make a Will a person must be over age 18, of sound mind (i.e., that they have sufficient mental capacity and are not being unduly influenced by anyone to make the Will), and understand the nature of his or her assets and their family. States also require certain formalities in a Will, such as that it be in writing, signed by the testator (i.e., the person making the Will), and witnessed by two disinterested individuals.

Even if an individual's only connection with a particular state is that they own real property in that state, a Will should be considered since the terms of the Will, and not the state's intestacy laws, will govern disposition of the real property upon the individual's death. As mentioned above, the intestacy laws of a state may not reflect the wishes of the decedent regarding how their property should be disposed at death.

19. How is the estate of a deceased individual administered and who is responsible for collecting in assets, paying debts, and distributing to beneficiaries?

The process for administering a decedent's estate is a matter of state law. Generally, a decedent's assets are administered and distributed in a probate proceeding. The probate proceeding is held in the state where the decedent was domiciled. Probate is a court supervised procedure whereby a personal representative of a decedent's estate is appointed (either pursuant to the terms of a decedent's Will, if one exists, or by statute, if no Will exists). The personal representative of the estate is responsible for collecting the decedent's assets, notifying creditors, paying debts and taxes, and distributing the estate to the decedent's beneficiaries. The personal representative and the attorneys for the personal representative are generally entitled to a fee for serving. If a decedent has a Will, then the provisions of the decedent's Will govern how the estate is distributed. If the decedent dies without a Will, then state intestacy laws will determine how the assets are distributed (this is known as dying "intestate").

Because probate can be time consuming and costly in some states, and further because probate proceedings are a matter of public record (meaning information concerning the decedent's family and assets can be viewed by anyone), many individuals wish to avoid probate. To accomplish this, individuals can create living trusts during their lifetimes. The revocable trust is created when the individual, called a "trustor," establishes a trust and transfers all of their assets to the trustee of the trust. The trustor usually also serves as the trustee, but the trustee can be anyone the trustor chooses. The living trust functions as a Will "substitute" and determines how debts and taxes are paid upon death, and how the decedent's assets will be administered and distributed following the decedent's death. Importantly, assets in a living trust are not subject to a probate proceeding, because the trust, and not the individual, owns the assets when the individual dies.

20. Do the laws of your jurisdiction allow individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth and, if so, which structures are most commonly or advantageously used?

Each state has laws allowing individuals to create trusts and other legal entities, such as corporations, general and limited partnerships, and limited liability companies. Legal entities must generally be registered with the Secretary of State of any state in which they transact business. Most states do not require non-charitable

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trusts to be registered; however, charitable trusts must be registered with the state's Attorney General and report activity on a regular basis.

Family companies are almost always structured as a legal entity, which will allow for the family to control the administration of the company and succession of interests in the company upon the death or divorce of its owners. Additionally, most legal entities can offer considerable creditor protection and will protect an owner's personal assets from creditors of the entity.

Interests in a family company can also be owed by a trust, as opposed to the individual family member. The trust can be a living (revocable) trust or an irrevocable trust. Depending on the trust structure, the owner of the family company can retain complete or limited control over the trust during their lifetime. The main advantage of holding the family interest in one or more trusts is that it will control disposition of the company upon its owner's deaths, and usually will keep ownership of the company within the family. Additionally, trusts can offer substantial creditor protection, since the trust, and not the individual transferring property to the trust, owns the assets.

Family wealth succession is regularly conducted through the use of one or more irrevocable trusts. A trust is a legally recognized agreement between the person creating and transferring assets to the trust (known as the grantor, trustor, or settlor) and the person holding those assets (known as the trustee). The trustee holds legal title to the trust assets for the benefit of the trust beneficiaries, who are usually the grantor's descendants. The trust is usually memorialized in a written agreement that provides for how the trustee is to administer and manage the trust assets, and under what terms and conditions the trust assets can be distributed to the beneficiaries. Certain states allow for trusts to exist in perpetuity. If the trust is established in such a state, and the grantor allocates his or her generation-skipping transfer ("GST") exemption to the trust, then under current U.S. law the trust can continue forever and will not be subject to U.S. transfer tax (i.e., gift, estate, and GST tax.)

21. How are these structures constituted and what are the main rules that govern them?

The laws of the different states govern the validity of trusts. All the states except Louisiana follow English common law with respect to trusts, as modified by statutes and court decisions. Louisiana recognizes trusts by statute. A resident of one state may choose to establish a trust governed by the laws of different state, provided the requirements of that state for such choice, generally sufficient contacts between the state and the trust, are met.

The governing law may vary as to the validity of the trust, its administration and its taxation. Different factors will determine each. As these rules are complex, advice from an attorney admitted to practice in each state involved should be consulted as to the foregoing so as to achieve the goals of the settlor.

Different states offer varying rules for the trust administration, such as the maximum permitted length (where the traditional Rule Against Perpetuities –"RAP"- Law has been repealed), different levels of privacy- in some states there is no requirement to advise the beneficiaries of the trust's existence; requirements as to periodic accountings by the trustee; methods of enforcing an in terrorem (no contest) clause versus permitting limited objections to a trust within a safe harbor; and so on.

In general, a trust will require a written instrument, signed and generally notarized by the settlor and the trustee, a res (or property of the trust) and sufficient clarity as to the purpose of the trust to be valid. Some states may recognize an oral trust as to personal property.

Private foundations are also established under state law. They may be formed as a not for profit corporation or a charitable trust. The scope of their permitted activities can be defined in the governing documents, provided it meets the requirements set for forth in the Internal Revenue Code as to its charitable activities.

Similarly, a "split interest trust" such as a charitable remainder trust or a charitable lead trust, which benefit both individuals and charitable organizations, can be established under state law, but the definition of the charitable portion must meet strict guidelines set forth in the Code. Revenue Procedures issued by the US Treasury contain sample forms of such trust for the practitioner to refer to, to ensure such compliance.

Many states still retain the traditional RAP, which generally works out to roughly one hundred years or slightly more for a trust to exist; however, the exact term is often difficult to determine. Other states have adopted the Uniform Statutory Rule Against Perpetuities, (which generally allows trusts to exist for 90 years). However, given the long term nature of the current generation- skipping transfer tax exemption (which exempts assets held in a trust governed by a particular state law to escape the currently 40% transfer tax, otherwise imposed at each generation, for as long as the

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trust may last) it can be very favorable for a settlor to select a state to govern the trust the settlor is establishing which has repealed the traditional RAP and instead permits trusts to last for say 1.000 years or potentially indefinitely. States which have repealed the traditional RAP or permit trusts to last for a longer period now include:

- Alabama
- Alaska
- Arizona
- Colorado
- Delaware
- Idaho
- Illinois
- Kentucky
- Maine
- Maryland
- Michigan
- Missouri
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- North Carolina
- Ohio
- Oklahoma
- Pennsylvania
- Rhode Island
- South Dakota
- Utah
- Virginia
- Washington
- Wisconsin
- Wyoming

22. What are the registration requirements for these structures and what information needs to be made available to the relevant authorities? To what extent is that information publicly available?

Trusts that are set up by Trust Agreement during the life of the Settlor are known as "Inter vivos" trusts. These generally permit more privacy than a trust established under the will of a deceased testator. That is because the will must be admitted to probate by the court having jurisdiction over the county and state of domicile of the testator at the time of death. Accordingly, the will will be part of a public record in that court. For that reason, many individuals have increasingly chosen to establish the substantive aspects of their estate plans in a revocable trust, and use a "pour over" will to simply add to the revocable trust any assets not previously fully transferred before death. This affords more privacy for the testator as to the testator's dispositive wishes.

While a gift tax return must be filed by the donor reporting a gift made to the trust, and the trust must file an income tax return reporting its income (and submitting tax as owed) both of the tax returns are confidential and available to the grantor or trustee and the IRS, respectively.

There is no central registry for trusts. However, under the recent Corporate Transparency Act ("CTA"), discussed below, trusts which have an interest in a "reporting company" will need to report the beneficial ownership of that company. This duty may fall upon the trustee, grantor or even possibly a beneficiary.

Some states permit a trust to be established without requiring disclosure of the beneficial interests to the beneficiaries (for example where a wealthy parent does not want his children to know how large their inheritance is).

Where privacy is desired regarding the ownership of real property for example, one may form an LLC, say under the laws of Delaware which are quite favorable for an LLC, and then have a trust own that LLC. Depending on the requirements of governing state law, it may not be easy for a third party to determine the owners of the LLC. Note, however, that in late 2019, New York State passed legislation requiring the disclosure of the ultimate owners of real property held in a LLC that purchases or sells certain real property interests.

Notably, under legislation passed in 2021 geared to target money laundering the Corporate Transparency Act (CTA), put forth by the Financial Crimes Enforcement Network of the United States Treasury ("FinCEN"), beginning January 1, 2024, newly formed LLC, LPs, and corporations, which are not expressly exempt, will be required to file disclosure forms with the US providing detailed information about beneficial ownership of those entities and regarding a change in such ownership. The definition of a reporting company is broad and vague (including the parameter that it refers to such an entity "registered to do business, by filing a document with the Secretary of State or similar office under the laws of any United States state or Tribal Tribe…") and is likely to need more clarity. An initial beneficial ownership report will be due within 30 days of such formation. (Entities already in existence prior to January 1, 2024 will also need to file such a report but that will be not be due until January 1, 2025). Substantial civil penalties will be imposed for failure to file an accurate report and may attract criminal liability. This legislation does not directly apply to trusts. However, as stated above, should a trust own an interest in a reporting company, the trustee, settlor or individual involved in the administration of the

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trust or possibly a beneficiary could be deemed a beneficial owner and accordingly be required to file a report with FinCEN. The information disclosed in the report will not be available to the public but only to the US Treasury.

Private foundations generally need to register in each state in which they seek a donation and specific requirements vary from state to state. A Foundation may retain the services of a company who can ensure such filings are made properly, given the broad nature of this requirement. In addition, depending on the state of incorporation or which governs the law of the trusts, the Foundation is likely to have to register annually with the State Attorney General's office, Charities Bureau, which represents charities generally in the state, and to file a copy of its federal tax return, generally a Form 990 PF with the AG's office.

23. How are such structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

Both state and federal tax laws apply to trusts and similar structures. Generally property rights are determined under state law, and the taxation of various interests in property is governed both the federal law and one or more state laws that may have a contact with the trusts. As the laws of each state vary as to how to determine the tax on a trust or its settlor or beneficiaries, a careful review of relevant state law must be undertaken prior to creating or administering a trust within the United States.

In general, a trust other than grantor trust, discussed below, must file an income tax return, both state and federal for the income it earns. If a distribution is made to a beneficiary during the trust's tax year (which is generally a calendar year) that distribution will "carry out' "distributable net income" or DNI to the beneficiary. The amount of DNI carried out will be reported to the beneficiary on a Form K-1 prepared as part of the trust's income tax return, Federal form 1041, and sent to the beneficiary . The trust will receive a corresponding distribution deduction for such income carried out (and thus taxable to) the beneficiary. Ordinary income is included in DNI but not capital gain, which is accordingly taxed to the trust, in general. This can lead to lack of matching of taxpayers for purposes of claiming a credit for capital gains income in cases where the treaty country instead taxes the gain as it arises to the beneficiary (see the UK rules which accordingly may not lead to an adequate credit under the US/UK treaty since in the US the gain is taxed to the trust).

A trust which is grantor trust, however, will tax all of its income directly to the grantor. In such case, the trust is not generally required to file its own tax return; its income will be reported on the return of the grantor. Various rules determine when a trust is a grantor trust, including for example one that permits the trust to apply its income to the payment of premiums on insurance on the life of the grantor, or to permit the grantor, in a non-fiduciary capacity, to substitute property for trust assets of equivalent value, the power of the grantor to revoke the trust, or the power of the grantor (or a person who is considered 'related' or "subordinate") to determine the enjoyment of the income or corpus of the trust.

It may be advantageous from a planning perspective to have a grantor trust regime, as the grantor is then required to pay the income tax on the assets of the trust, and while that enhances the value of the trust, such payment of tax is not itself a taxable gift under US law because it is the obligation of the grantor.

Certain states do not have any state income tax. These currently include:

- Alaska
- Florida
- Nevada
- New Hampshire
- South Dakota
- Tennessee
- Texas
- Washington
- Wyoming

Thus, one planning idea is to use a non- grantor trust in one of the foregoing states and avoid state income tax. Care must be taken, however, to not attract tax in another state, such as by appointing a trustee who resides in California, as California will impose state income tax by reason of a California resident trustee.

24. Are foreign trusts, private foundations, etc recognised?

Yes, the laws of the various states in the United States generally recognize the validity of trusts and foundation created by a non-resident alien (non-citizen/ non-resident of the US or "NRA").

25. How are such foreign structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

A trust deemed to be a '"foreign trust" for US federal income tax purposes, as defined below, is generally not

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subject to US reporting requirements or the payment of tax except with respect to income ”effectively connected” to a US trade or business. This is consistent with the rule for an NRA’s own income tax obligations.

A trust is a foreign trust if it does not meet both of the following conditions:

A court within the US is able to exercise primary supervision over the administration of the trust (the ”court test”).; and

One or more US person(s) have the authority to control all the major decisions of the trust (the “control test”). See Code, Section 7701.

Therefore a trust may be deemed a “foreign trust” even where the Settlor is a resident of the US, and all the beneficiaries and trust assets ae located within the US.

Foreign trusts do not in general pay US tax on their income, but a distribution to a US beneficiary will carry out DNI similar to the treatment of a domestic trust. Also if a distribution is deemed to carry undistributed net income or UNI from a prior year’s undistributed income, that will subject the trust to additional tax under the “throwback” rules.

As the rules regarding foreign trusts and their reporting requirements for a US beneficiary are complex, and failure to properly comply can lead to onerous penalties, it is important to obtain advice whenever these rules may apply.

26. To what extent can trusts, private foundations, etc be used to shelter assets from the creditors of a settlor or beneficiary of the structure?

In general, a trust created by a third party is exempt from the claims of the creditors of the beneficiary, except to the extent that the beneficiary is entitled to assets from the trust.

Thus, use of a discretionary trust for planning purposes is quite important to protect the beneficiaries from unforeseen third-party claims. The rights of a spouse in divorce are determined under state law. In most US states, the assets of a trust created by a third party for the benefit of the other spouse (S1) are not subject to division with the spouse (S2) upon divorce, although in certain states the court may take these assets into consideration in the broad discretion of the court, especially if the couple have used the trust assets for their living expenses in the marriage, in determining child support or alimony/ maintenance.

If a trust entitles a beneficiary to a fixed amount, such as the amount necessary to provide for his or her health, support or maintenance, that stream of income may be subject to the claims of his creditors, including a spouse in divorce. For this reason, broad discretion in the trustee as to how much (or none) to pay to the beneficiary is likely to provide more protection from future unknown creditors of the beneficiary.

Most trusts in the US are deemed to be a ‘spendthrift” trust- one that is not allowed to be assigned, transferred, hypothecated or pledged by the beneficiary. Thus, it is protected from the debts of the beneficiary. Most trusts expressly contain a “spendthrift” clause containing such a prohibition but even in the absence of this, most states will presume that an interest in a trust may not be transferred.

Generally, a person may not avoid his own creditors by transferring assets to a trust for his own benefit. This derives from the traditional Statute of Elizabeth, that a transfer made to hinder, delay or avoid creditors is void. These are generally referred to as a fraudulent transfer.

Some states (including Wyoming and Delaware) have enacted statutes providing for a self-settled trust to be valid and delineating the parameters of this. Restrictions include that the assets transferred into the trust may not avoid: existing claims or ones presented within a certain time frame of the trust’s creation- this varies by state; claims for child support; government claims; spousal support claims. Also, the settlor must retain sufficient assets outside the self-settled trust to provide for the settlor’s ongoing needs.

While the use of such a trust may provide some protection, and under the US Constitution, each state must give ‘full faith and credit” to the laws of other states, because of the prevailing fraudulent transfer majority rule, one should proceed with caution in relying upon the strength of such protection.

27. What provision can be made to hold and manage assets for minor children and grandchildren?

The most common approach to providing for minor children and grandchildren is through an inter vivos trust. This is often combined with the goal of maximizing use of credits from the transfer tax, federal rate currently at 40%, by selecting a state which permits long term trusts (see question 21).

In order to provide best protection from the unforeseen future creditors of the child or grandchild (see question 26 above) a discretionary trust is often chosen (where

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income and principal may, but are not required to, be distributed in the discretion of the trustee).

A guardian of the property and of the person of the child (potentially two different functions) may be appointed in the will of a decedent, in accordance with state law.

Some testators and settlors prepare a Guidance Letter to provide non-binding parameters for trust distributions or living arrangements to the trustee and guardians who may be (but are not required to be) the same person.

28. Are individuals advised to create documents or take other steps in view of their possible mental incapacity and, if so, what are the main features of the advisable arrangements?

Yes, the arrangements for protection in case of possible later mental incapacity are governed by state law. A general power of attorney given to one appointee, known as the attorney in fact, and a successor is generally advisable. The powers can be limited (a limited power of attorney) or broad (a general power of attorney). It can be "springing"-coming into effect only upon the disability of the principal, or "durable" effective immediately and surviving beyond the incapacity of the principal. The durable power has the advantage of not requiring a determination of incapacity by a doctor or doctors and possibly a court. Once that determination has been made it can be difficult to reverse, should the principal later recover, and it can be a matter of public record. The US powers of attorney can provide very broad authority so they should be executed with caution and the originals should be maintained securely.

In addition, a separate document(s) is needed to appoint a person to attend to the medical needs of a person who cannot communicate and who is severely ill and separately to make a record of the person's medical preferences in the event the person is terminally ill and cannot communicate. This can be known as a Health Care Power of Attorney, Medical Directive or Living Will.

In addition, when a person has elected to set up the person's estate plan using a revocable trust (see question 21) this will also include the appointment of a successor trustee who can manage the financial affairs of the trust while the settlor is incapacitated. This provides a second method of attending to the trust assets, in addition to the powers granted by the power of attorney.

It is helpful to coordinate the provisions of the revocable trust and the power of attorney, such as for example allowing the attorney in fact to handle the affairs of the settlor as trustee, if desired, and not allowing the attorney in fact to change the terms of the trust, unless that is desired.

29. What forms of charitable trust, charitable company, or philanthropic foundation are commonly established by individuals, and how is this done?

See question 21 above.

State law governs the form of trusts and private foundation as well as the formalities for their formation.

Detailed legal advice should be sought prior to selecting the state of incorporation for a charitable company, for example. Some states have more onerous reporting and filing requirements than others. Filings may need to be made with the Secretary of State and the State Attorney General's Office for a charitable trust or company. Similarly, there may be registration requirements in states where potential donors will be approached.

Trusts for charitable purposes must also comply with federal and state tax rules in order to qualify for a deduction from income and/or estate, gift or generation-skipping transfer tax. In general, these rules are designed to ensure that the amount passing to charity at the time of the initial transfer and over time, may be measured and are sufficiently certain to occur, in order for the deduction to be valid. To achieve this, the federal tax rules require that either the amount gong to charity is a fixed amount or is part of a "qualified split interest trust" such as a charitable lead trust or a charitable reminder trust. Precise rules to qualify as such a trust may be found in the Treasury Regulations and a sample of each of such a qualifying trust is set forth in Revenue Procedures.

30. What is the jurisdiction's approach to information sharing with other jurisdictions?

Most trusts are private, except to the extent they are testamentary (see question 21). Most states will give full faith and credit to the finding of a court in another state. Accordingly, information may be shared between states in accordance with such constitutional principles.

As between the US and other countries, the US has entered into treaties with numerous other countries to reduce double taxation on its citizens and residents. (See question 4). These treaties also encompass

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information sharing for these and related purposes.

In addition, the US has entered into tax information sharing arrangements with certain other countries.

Under the US Foreign Account Tax Compliance Act (FATCA) a non- US financial institution which maintains a financial account for a US person must report related information to the US tax authorities. Many foreign jurisdictions have agreed to assist with the implementation of FATCA with the US.

31. What important legislative changes do you anticipate so far as they affect your advice to private clients?

The US will be holding its Presidential election in 2024. Whether the Republicans or Democrats win, there is likely to be substantial change in the economic and tax policy status of the US in the coming year.

One important change that is already scheduled to occur is the reduction of the one-time cumulative exemption from estate, gift and GST tax from its current high amount of $13.61 million per donor to its former (pre-2017 Tax Cuts and Jobs Act) level of $5.49 million, adjusted for inflation, at midnight on Dec. 31, 2025. Thus many individuals are seeking to take advantage of the current high exemption amount to maximize tax savings opportunities while the current high credit is still in place.

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