



THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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**GLOBAL CONSIDERATIONS
FOR ESTATE PLANNING**

ROBINS  KAPLAN^{LLP}

REWRITING THE ODDS

WELCOME TO THE SPOTLIGHT

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The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of the Spotlight? Let us know at SPosthumus@RobinsKaplan.com.

- Denise S. Rahne and Steve A. Brand

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INTERNATIONAL PRIVACY PROTECTIONS: CLOSER TO HOME THAN YOU MIGHT THINK

BY MICHAEL REIF AND TIM BILLION

In an era in which hundreds of millions of people have voluntarily disclosed some of their most sensitive personal data to tech behemoths like Facebook, Google, and Amazon in exchange for free access to social networking or email, it feels almost quaint for privacy concerns to play a role in decision-making these days. Yet precisely because of such oversharing, privacy is arguably more valuable today than at any time in history.

Increased privacy concerns may cause some families and their wealth planners to consider international trusts. International trusts are perhaps best known in popular culture because of their perceived tax benefits, protections from creditors, and association with criminal schemes. And while it is true that when used properly, international trusts may offer a risk-mitigation and estate-planning strategy for high-asset individuals interested in protecting their wealth and personal privacy, for many, South Dakota trusts can provide very similar appeal while at the same time avoiding some of the drawbacks inherent with international trusts.

UNIVERSAL TRUST CONCEPTS APPLY

International trusts and domestic asset protection trusts such as those available in South Dakota share many features with garden-variety trusts. In each, a creating party (the settlor) transfers complete legal ownership of assets (the trust property) to a trustee to administer, invest, and distribute for the benefit of a person or class of people (the beneficiaries). The settlor generally sets the terms and rules upon which the trustee holds the trust assets in a document called the trust instrument or trust deed. This document clearly explains the respective rights, duties, and powers of the trustee and the beneficiaries. While a settlor may be a trust beneficiary and may retain some control over the trust by reserving certain powers—such as the ability to approve distributions and appoint or remove trustees—it is vital that the settlor actually transfers ownership of the trust assets to the trust. The settlor may create a revocable trust, which she can alter or terminate at any time or after a particular date, or an irrevocable trust, which the settlor cannot change or terminate at any time.

BOTH FOREIGN JURISDICTIONS AS WELL AS SOUTH DAKOTA CAN OFFER ADDED PRIVACY BENEFITS

Beyond standard trust features, the extent to which a trust can offer a settlor her desired level of privacy and other benefits will depend on the laws of the jurisdiction in which the trust is established. Famed offshore banking and trust locale the Cayman Islands, for example, do not require the filing of financial statements or audits for non-investment-fund entities. Other jurisdictions offer similar benefits. Nevis, a small Caribbean island, has neither a public registry nor a database of corporate records accessible to the public. And trusts set up in the Cook Islands—a tiny nation in the Pacific with political ties to New Zealand—benefit from local laws that make it illegal to identify who owns a trust or to provide any information about them.

Closer to home, South Dakota presents an appealing option for many who may otherwise consider international trusts. The state has adopted robust and easily accessible privacy laws. Specifically, South Dakota Code § 21-22-28 requires only a simple petition to permanently seal court filings and orders related to a trust. In addition, South Dakota is appealing when evaluating the price settlors are willing to pay for privacy. When compared to South Dakota, setting up and maintaining international trusts will almost always be a more expensive proposition.

And there can be other issues that are not directly monetary—although they may result in increased expense. Establishing a trust in South Dakota eliminates the need to worry about IRS international trust reporting rules, including Form 3520, Form 1040 sched. B part III, FinCEN Form 114, or Form 709. In addition, there can be financial, economic, and political uncertainty associated with the jurisdictions in which most international trusts are located as well as concerns about the reliability of locally based trustees and infrastructure. Not to mention the fact that domestic trusts do not raise the same kind of eyebrows as transactions involving offshore activity. For all of these reasons, individuals seeking a combination of financial security and privacy protection should consider domestic alternatives to offshore trusts.

KEY TAKEAWAYS

Experienced wealth management counsel can help clients who are concerned about privacy in evaluating the best jurisdiction for a particular trust. Such counselors are also the best means of navigating the byzantine U.S. tax and reporting requirements that accompany the establishment and use of either an international trust or a South Dakota trust, and they can ensure that privacy-focused settlors can stay in the good graces of the IRS while staying out of the headlines.



INTERNATIONAL ESTATE PLANNING: USING A QUALIFIED DOMESTIC TRUST (QDOT) FOR NON-U.S. CITIZEN SPOUSES

BY MATTHEW J. FRERICHS

Wealth planning professionals know that succession planning for clients is often multi-layered and highly nuanced, particularly for intricacies of tax planning. Working with individuals who are not U.S. citizens adds yet another layer of complexity. When assisting a married couple where one or both spouses is not a U.S. citizen, estate planning attorneys can employ certain common techniques, including a qualified domestic trust (QDOT).

For the majority of married couples, estate planning involves use of the so-called estate tax “marital deduction.” The practice has grown even further given the recent increases in the federal estate tax exemption amount. Generally, under current law, assets passing to a surviving spouse who is a U.S. citizen are not subject to estate tax—regardless of the value of the assets.¹ This phenomenon is referred to as the “marital deduction” in estate planning. However, a surviving spouse who is not a U.S. citizen is not entitled to the marital deduction regardless of the citizenship of the decedent.² For non-citizen, non-resident spouses, the estate tax laws are even more stringent.³

Depending upon the value of the estate and the couples’ planning goals and objectives, when one or both spouses in a married couple is a non-citizen, the couple should consider utilizing a QDOT in their estate planning. A QDOT is a special type of trust that is designed to allow the assets of a deceased spouse that pass to a non-citizen spouse to: 1) be available for the benefit of the surviving spouse; and 2) qualify for the marital deduction.

To qualify as a QDOT, a trust must satisfy the following requirements:

- 1) At least one trustee must be a U.S. citizen or a domestic corporation;
- 2) The U.S. citizen or domestic corporation trustee must have the discretion to withhold estate tax from any distribution of principal;
- 3) The property transferred to the trust must qualify for the federal estate tax marital deduction;
- 4) The trust must meet the requirements of treasury regulations ensuring collection of any tax imposed on the trust; and
- 5) The personal representative must elect to treat the trust as a QDOT.⁴

A QDOT can be created during life or after a person’s death by the personal representative or the surviving spouse (transfer must be made within nine months of date of death).⁵ In general, estate tax is paid on distributions of principal from the trust to the surviving spouse.⁶ However, distributions of trust income⁷ to the surviving spouse are not subject to the 2056A estate tax, nor are distributions to the surviving spouse on account of “hardship.”⁸ Additionally, the assets remaining in the trust are taxable on the death of the surviving spouse.⁹

A QDOT is a relatively complex trust, and there are several other applicable rules, restrictions, and considerations involved in drafting, implementing, and administering this type of trust. There are also many other estate, tax, and gift planning strategies and techniques that practitioners can utilize in conjunction with, or independent of, a QDOT when working with individuals who are not U.S. citizens. As we move increasingly toward a more global society, it is possible that our estate tax laws will evolve with our changing culture. Until then, careful and thoughtful planning can go a long way toward minimizing the potentially negative estate and tax impact of living, and dying, in the United States without citizenship.

¹ See I.R.C. §§ 2056 and 2106(a)(3).

² I.R.C. § 2056(d)(1).

³ Resident aliens receive the same lifetime estate tax exemption that U.S. citizens receive; non-resident, non-citizens receive a much smaller estate tax exemption.

⁴ I.R.C. § 2056A(a); Treas. Reg. § 20.2056A-2(b)(1).

⁵ I.R.C. § 2056(d)(2)(B).

⁶ *Id.* at § 2056A(b).

⁷ See Treas. Reg. § 20.2056A-5(c)(2) and I.R.C. § 643(b) for meaning of “income.”

⁸ *Id.* at § 2056A(b)(3)(B).

⁹ *Id.* at § 2056A(b)(1)(B).

THE DAY “LA MUSIQUE” DIED. LET THE LITIGATION ROLL.

BY SHIRA SHAPIRO

When French rock-and-roll legend Johnny Hallyday died in 2017 at age 74, 1 million people lined the Champs-Élysées for his funeral, and “Merci Johnny” lit up the Eiffel Tower. Fifteen million people later watched his hero’s tribute in Paris. Known as the “French Elvis,” Hallyday, born Jean-Philippe Smet, is credited for bringing rock-and-roll to France. In his remarkable six-decade career, he rubbed elbows with industry legends Jimi Hendrix, Keith Richards, Fats Domino, and Jimmy Page, to name a few.

American media once described Hallyday as “the greatest rock star you never heard of.”¹ Despite extraordinary fame overseas, Hallyday never achieved the same success in the U.S. His 1962 Ed Sullivan appearance did not spark an international invasion like when the Beatles appeared only two years later, sweeping America off her feet. After moving his family to California in 2010, despite over a half-century of fame, Hallyday enjoyed relative anonymity in Los Angeles, even while living among celebrities in the Pacific Palisades.

At his death, Hallyday’s estate was estimated around \$112 million, or around 92 million euros. In a California will, Hallyday named his widowed wife, Laeticia, as his sole heir. Hallyday left Laeticia his entire estate, including his artistic rights. The couple’s two adopted daughters, Joy and Jade (ages 11 and 15), will likely share in their mother’s inheritance.

Under U.S. inheritance laws, Hallyday’s California will fully disinherited his two other adult children, David Hallyday (age 52) and Laura Smet (age 35). Married five times (twice to Laeticia, who was 31 years his junior), Hallyday had his son David with his first wife, Bulgarian-French singer Sylvie Vartan. He and his ex-wife Nathalie Baye, a French movie star, had Laura in 1983.

Shortly after Hallyday’s death, his first children, David and Laura, contested their father’s will. Their 2018 lawsuit initiated a cross-cultural jurisdiction fight between French and American estate laws. The children contend the California will violates French laws that expressly prevent—and protect children from—disinheritance. These “forced heirship” laws derive from the French civil code and require a person’s estate to set aside a “réserve.”² A sole child must receive 50% of the estate, two children receive 66.6%, and three or more receive 75%, divided equally. All descendants are entitled to a share of the réserve, regardless of age or legitimacy, a concept referred to in French law as “children of another bed.” If there are no children, the spouse receives 25% of the estate. After the réserve, a person may freely distribute the disposable portion, “quotité disponible,” as set forth in a valid French will.

In the U.S., Louisiana is the only state with forced heirship laws, dating back to when French settlers colonized the state in the 18th century.³ A common practice in civil law countries, forced heirship is popular throughout Europe. For example, Greek law forbids a testator’s will from disposing of property reserved for the heirs’ forced share.⁴ Germany’s civil code strictly enforces forced heirship laws for “first degree descendants,” the surviving spouse and children.⁵ Swiss law provides a decedent’s children a “legitieme portie” or “statutory share.”⁶

In 2018, the French court froze several of Hallyday’s estates in France, pending the jurisdictional fight. For French forced heirship law to apply, Hallyday’s children must prove their father was domiciled in France. To receive the benefit of centuries-old heirship laws, David and Laura relied on modern-day social media. Using Hallyday’s Instagram posts, the children persuaded the court that their father spent at least 151 days in France in 2015, 168 days in 2016, and eight months before his death in France in 2017. Based on the social media evidence, in May 2019 the French court ruled that it has jurisdiction over the Hallyday estate, subjecting it to French inheritance law. Hallyday’s widow appealed, and court will resume in France in November 2019.

Like his art, Hallyday’s estate battle mirrors his life. As the “French Elvis,” he was a contradiction of American and French music and culture. He acknowledged, “I’m French, but I do rock ‘n’ roll.”⁷ He used an American stage name and deeply loved a country that never embraced his successful career. The French and American courts must now fight over which country’s estate laws will win this legal battle of the bands. Notably, if U.S. jurisdiction applies and the California will is deemed valid, the French government will lose significant inheritance taxes from Hallyday’s estate.

The Hallyday estate litigation underscores that different heirship laws around the world (or even in Louisiana) may significantly impact individuals with cross-cultural families, residences, or estate holdings. The testamentary freedom largely enjoyed in America may not translate to an international, civil law court. For such clients, celebrity or not,

domicile strictly matters, and each estate must be examined case by case for potential international challenges. Astonishingly, in Hallyday's case, social media posts—which lack international boundaries—have prevailed so far over a valid U.S. will. Counsel should advise clients that use of such technology may invalidate the choice of law in one's estate plan. In today's social-media-driven society, estate law is not a-changin', but has already changed.

¹ France Mourns Its Favorite Rock Star, Johnny Hallyday, NPR, Dec. 6, 2017.

² C. Civ. art. 913 (Fr.).

³ See La. C. Civ. art. 1493.

⁴ Greek Civil Code, articles 1710 to 2035, regulate Greek inheritance law.

⁵ German inheritance law derives from its Civil Code, Book 5, §§ 1922-2385.

⁶ Swiss succession laws are found in its Civil Code, articles 457 to 640.

⁷ Johnny Hallyday Interview (2014), CBC Radio (Canada).



MEET OUR ISSUE EDITOR:



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