

# GOLDSMITH & GUYMON

*A Professional Law Corporation*

Dara J. Goldsmith, Esq.★  
Marjorie A. Guymon, Esq.★★  
Laura A. Deeter, Esq.  
Nedda Ghandi, Esq.  
Peter Co, Esq.  
Kendal L. Davis, Esq.

Also admitted in Arizona, California & Hawaii ★  
Also admitted in Utah ★★

---

---

## Estate Planning for Non-US Citizens

If you or your spouse are non-U.S. citizens, then there are special rules to consider in your estate planning. Whether the non-citizen is a resident alien or non-resident alien is an important distinction for estate tax purposes.

### Resident Aliens

Resident Aliens benefit from the same exemption amounts for estate and gift taxes as US citizens. For 2011 to 2012, the unified exemption amount is \$5 million. Thus, a resident alien is not subject to estate or gift tax if the resident alien's lifetime gifts and her estate at death do not exceed \$5 million on worldwide assets.

For estate tax purposes an alien is considered a resident alien based on the alien's domicile [an intent to remain in a place indefinitely and no intention to move away]. This should not be confused with the substantial presence test or green card test used for federal income tax purposes. Even though an alien meets the substantial presence test and is subject to federal income tax, she may not be considered domiciled in the US and therefore would not benefit from the same exemption amounts as US citizens.

The IRS uses a facts and circumstances test to determine the domicile of an alien. The factors that the IRS considers are the alien's visa status, the locations and values of other residences, where her family members and close friends live, the location of the alien's personal property, especially valuable items like fine art, currency, and cash, stocks, and bank accounts, the location of the alien's business interests, where the alien is registered to vote and licensed to drive, where the alien has her primary residence, and where the alien's burial plot is located or where she intends to be buried. An alien that has been issued a permanent resident card ("green card") would likely be considered a resident alien, while an alien with an H1B visa would most likely be considered a non-resident alien.

### Non-Resident Aliens

A non-resident alien is subject to U.S. estate tax on their taxable estate assets situated in the U.S. and is limited only to a \$60,000 exemption. Non-resident aliens do benefit from the annual gift exclusion (\$13,000 for 2011), therefore a non-resident alien may make gifts of up to \$13,000 per donee and such gifts would not be subject to gift tax. If the gift is to a non-citizen spouse then the annual exclusion amount is increased to \$136,000 for 2011.

### The Marital Deduction does not apply for transfers to a Non-Citizen Donee Spouse

Normally if a transfer is made to a spouse the marital deduction is applicable, therefore gifts or transfers at death to a spouse are not subject to estate or gift taxes. However, if a transfer is made to a Non-Citizen donee spouse, the marital deduction does not apply. The status of the Non-Citizen

Spouse as a Resident Alien or Non-Resident Alien does not matter, what matters is whether the donee spouse is a U.S. citizen. A U.S. citizen donee spouse can use the marital deduction for transfers from the non-U.S. citizen spouse. Although the marital deduction does not apply, as mentioned above there is an annual gift exclusion of \$136,000 for gifts to a non-citizen spouse.

Because the marital deduction does not apply, Qualified Domestic Trusts (QDOTs) are used when the surviving spouse is a non-citizen. A QDOT delays the estate taxes until the death of the surviving non-citizen spouse. Distributions of principal due to hardship or distributions of income of the QDOT to the surviving spouse are tax free. Distributions of principal not due to hardship are subject to taxes. Upon the death of the surviving spouse the assets of the QDOT are then taxed as part of the taxable estate of the first spouse that died. A QDOT may be created under the terms of the deceased spouse's will or trust. If the decedent's will or trust does not provide for a QDOT then either the surviving spouse or the executor of the decedent's estate may elect to create a QDOT.

There are two basic requirements for a QDOT:

1. The trust must require that at least one trustee of the trust be a U.S. citizen or a domestic corporation. Therefore the surviving non-citizen spouse may be a co-trustee.
2. The trust must provide that no distribution, other than a distribution of income, or of principal in case of hardship, may be paid from the trust unless a trustee who is a U.S. citizen or domestic corporation has the right to withhold from that distribution the taxes due.

If the QDOT has assets exceeding \$2 million, then either:

1. The trustee must be a U.S. bank; or
2. The U.S. citizen trustee must post a bond or letter of credit to the IRS in the amount of 65 percent of the value of the trust assets to secure payment of taxes.

W:\DJG\FM\Ep\EP Article for non-citizens.wpd