I. Introduction

A. The purpose of this outline is to help you identify and solve estate planning issues for noncitizens of the U.S. who reside in the U.S. The length of the outline should tip you off that this is not a subject given to simple maxims and easy to apply advice. Working in this area is complicated because of the involvement of multiple jurisdictions and the resulting conflicts of law. Both tax laws and property or succession laws come into play and those laws often conflict with one another. Treaties sometimes solve the conflict between tax laws, but treaties rarely solve conflicts related to succession law.

B. This outline addresses both tax law and succession law issues raised by noncitizen clients who live in the U.S. The outline considers these topics:

1. Basic U.S. estate and gift tax rules for noncitizens. This part of the outline addresses both the rules under the Internal Revenue Code and U.S. bilateral estate and gift tax treaties. The information in this section should help you determine the extent to which your client will be subject to the U.S. estate and gift tax.

2. Succession law issues you will encounter with noncitizens and the relevant choice of law rules. The section starts out with a detailed discussion of the nontax law of domicile. The section then addresses choice of law rules related to:
   a. Marital property rights.
   b. Intestate succession to property.
   c. Wills.
   d. Trusts
   e. Jointly owned property.
   f. Bank accounts.

3. Practical advice for noncitizens who are domiciled in the U.S. The topics addressed in this section of the outline are:
a. Marital property issues.
b. Forced heirship issues.
c. Advising a client who is domiciled in the U.S. for succession law purposes but who is a resident of another country for estate and gift tax purposes.
d. The pitfalls of naming fiduciaries who live in other countries.
e. Issues that arise when the client has beneficiaries who live in other countries.
f. Advising clients who may receive gifts from nonresident aliens or clients who are beneficiaries of foreign trusts.
g. Planning for U.S. estate and gift taxes when the client’s spouse is not a U.S. citizen.
h. Clients who may move out of the U.S. at some later point.

4. Practical advice for noncitizens who are not domiciled in the U.S. even though they temporarily reside in the U.S. The issues covered in this section are:
   b. U.S. estate tax planning.
   c. The advisability of preparing U.S. estate planning documents for these clients and how to prepare those documents.

C. Proper planning for noncitizens usually requires an understanding of the tax laws, succession laws, and choice of law rules of other countries. Throughout this outline I use examples of issues that arise when advising clients with connections to specific countries. In many instances the examples reflect actual experiences I have had with clients with connections to those countries. For this reason, the examples that I use represent only a limited sample of countries. I did not deliberately exclude certain countries because of lack of interest or because those countries were not important. Rather, it is very difficult to provide specific information about the laws of other countries without having had a real project on which to work with lawyers in tax advisers in those countries. Even if a country publishes its laws in English, you can rarely develop a proper understanding of how those laws operate without the assistance of local lawyers and tax advisers.

D. Many of my colleagues and friends helped me out with bits and pieces of this outline. Nicole Mann of the McDermott Chicago office provided a helpful second set of eyes in reviewing this outline, Jonathan Lurie of our firm’s Los
Angeles office and I have worked together on the issues described in this outline for many years and the outline reflects his wisdom and experience. My partner Gilberto Comi and my associate Mario Ippolito of our firm’s Milan office, my partner Peter Nias of our firm’s London office, and my partners Ralf Eckert and Dirk Pohl and my associate Christian Gebhardt of our firm’s Munich office have all been helpful. In the United States, Kevin Matz, formerly an associate in our firm’s New York office and now an associate in the New York office of White & Case provided valuable assistance on IRC § 877 and qualified domestic trust matters. Jason Trenton of our firm’s Los Angeles helped on the Canadian tax issues. Charles Pike, Penelope Williams, and Naomi O’Higgins of the London office of Withers LLP have graciously tolerated my inquiries into U.K. tax issues over the years. Michael Wachtel and Peter Janetzki of Ernst & Young in Melbourne and Andrew Stevenson of Corrs Chambers Westgarth in Sydney have helped me better understand Australian tax laws. Heini Ruedisuehli of Lenz & Staehelin in Zurich and Toshio Miyatake of Adachi, Henderson, Miyatake & Fujita in Tokyo have also indulged my interests in Swiss and Japanese tax law.

II. U.S. Estate and Gift Taxation of Noncitizens Who Reside in the U.S.

A. Resident Aliens

1. A resident alien is subject to the U.S. gift tax on lifetime transfers of assets wherever located and is subject to U.S. estate tax on his or her worldwide assets. IRC §§ 2001(a), 2031(a). A resident alien has the same applicable credit and GST exemption as a U.S. citizen. IRC §§ 2010(a), 2505(a), 2631. A resident alien also may take advantage of the varied annual exclusions from the gift tax. See IRC § 2503. In addition, a resident alien can split gifts with his or her spouse as long as that spouse is a U.S. citizen or resident alien. IRC § 2513.

2. In contrast to the income tax statutes, there is no statutory definition of residency for estate and gift tax purposes. The Treasury Regulations, however, provide that for estate tax purposes an alien is a resident of the U.S. if he or she resides in the U.S. with intent to remain in the U.S. permanently. Treas. Reg. § 20.0-1(b). See, e.g., Estate of Edouard H. Paquette v. Commissioner, T.C. Memo. ¶ 83,571 (1983).

3. Commentators have suggested that the following are appropriate indicia of domicile in this context:

   a. Duration of stay in the U.S. and other countries and the frequency of travel both between the U.S. and other countries and between places abroad;

   b. The size, cost, and nature of the decedent’s houses or other dwelling places and whether the decedent owned or rented them;
c. The area in which the houses are located (e.g., transitory resort areas);

d. The location of important and valuable personal possessions;

e. The location of the decedent’s family and close friends;

f. Places where the decedent maintained church and club memberships;

g. Location of business interests; and

h. Motivations in choosing where to live.


4. A noncitizen who holds a green card is a “permanent resident” of the U.S. under federal immigration law. One consequence of having a green card is that the holder is subject to U.S. income tax on his or her worldwide income. See IRC § 7701(a)(30)(A); Treas. Reg. § 301.7701(b)-1(b)(1). The immigration laws, however, do not require a green card holder to intend to remain permanently in the U.S. In fact, many noncitizens obtain green cards to remain in the U.S. following the expiration of nonimmigrant visas, such as “L” intracompany transfer visas for managers and executives, which are valid for a maximum of seven years. Because the gift tax and estate tax definition of residency focuses on intent, a green card holder may very well not be domiciled in the U.S. and therefore may not be a U.S. resident for gift and estate tax purposes.

5. The corollary to the “intent” rule for estate and gift tax purposes is that an individual who is present in the U.S. on a nonimmigrant visa can be treated as a resident for estate and gift tax purposes if the individual wants to permanently remain in the U.S. even though his or her visa does not allow permanent residence. In Estate of Jack v. United States, 2002 TNT 232-16 (Ct. Fed. Cl. Nov. 27, 2002), for example, the Court of Federal Claims allowed the government’s claim that a Canadian citizen present in the U.S. under a “TN Temporary Professional” visa had a U.S. domicile for estate tax purposes to proceed to trial. The court allowed the government to proceed even though the decedent would have been in violation of his visa and thus deportable if had he developed an intent to make the U.S. his permanent home. Although Congress can prohibit immigrants from establishing domicile in the U.S., some other classes of nonimmigrant visas do not prohibit a noncitizen from doing so for immigration purposes. E.g., Toll v. Moreno, 458 U.S. 1 (1982); Elkins v. Moreno, 435 U.S. 647 (1978). Individuals with nonimmigrant visas could
also meet the estate and gift tax domicile test despite their nonimmigrant status.

B. Nonresident Aliens

1. Estate and Gift Tax Rules

a. Any noncitizen who is not domiciled in the U.S. is a nonresident alien for estate and gift tax purposes.

b. A nonresident alien is subject to U.S. gift tax only on gifts of interests in U.S. real estate and tangible personal property located in the U.S. A nonresident alien is not subject to U.S. gift tax on gifts of intangible personal property even if that property has a connection to the United States. See generally IRC § 2501.

c. The federal estate tax applies more broadly to the estates of nonresident aliens. IRC § 2103.

(i) A nonresident alien’s estate is subject to federal estate tax on property located in the United States. Property located in the U.S. and subject to estate tax includes real property and tangible personal property located in the U.S., shares of stock in a corporation incorporated in the U.S., and debt obligations of U.S. persons or political subdivisions. See IRC § 2104; Treas. Reg. § 20.2104-1(a). Property located in the U.S. also may include interests in partnerships and limited liability companies that conduct business in the U.S., although the law on this matter is unclear.

(ii) A nonresident alien’s U.S. estate will not include proceeds of insurance on the decedent’s life, certain bank accounts, and portfolio debt the income from which would have been exempt from U.S. income tax. See IRC § 2105. The “portfolio” debt exception effectively exempts most publicly traded debt securities of U.S. companies and most U.S. governmental obligations owned by nonresident aliens from U.S. estate tax.

(iii) Under IRC § 2103, the value of a nonresident alien’s “gross estate” which at the time of his or her death is “situated in the United States” is subject to U.S. estate tax. According to Treasury Regulation § 20.2103-1, the gross estate of a nonresident alien “is made up in the same way as the ‘gross estate’ of a citizen or resident of the United States.” Under IRC § 2031, a U.S. citizen or resident decedent’s gross estate is determined “by including to the extent provided for in this part, the value at the time of his death all