

Foreign Spousal Rights and Investment in the United States

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In several prior editions of Caribbean Today, we have discussed the U.S. tax implications of foreign investment in the U.S. as well as the U.S. tax effects of a U.S. income tax non-resident alien (“NRA”) and/or a U.S. estate and gift tax non-resident alien domiciliary (“NRAD”) becoming a U.S. income tax resident alien (“RA”) and/or a U.S. estate and gift tax resident alien domiciliary (“RAD”). In addition to the U.S. tax implications of any such foreign investment or change in status, there are various issues which arise regarding property ownership rights between spouses, specifically with respect to married couples who own some or all of their property as “community property” under the laws of a foreign jurisdiction. The following highlights some considerations in this regard.

Preliminarily, it should be noted that the vast majority of states in the U.S. are separate property states, although presently ten states have some form of community property. Florida is considered a separate property state which is more common in the U.S., and for purposes of this discussion, we will use the State of Florida as the state into which the community property owning spouses are investing or moving.

Assume a foreign couple (“Husband” and “Wife”) own all of their assets as community property under the laws of their foreign domicile, and that they invest \$1,000,000 in a vacation home in Florida and \$100,000 in a bank account in Florida, both of which are titled in the Husband’s name only. Assume that Husband predeceases Wife and dies intestate. Should this property pass pursuant to the laws of the State of Florida or pursuant to the laws of Husband’s and Wife’s foreign domicile? What would happen if Husband died with a will (Florida or foreign), bequeathing all of his property to Son? Would Husband be able to dispose of 100% of the vacation home and the bank account, or only 50% because of Wife’s community property rights? Further assume that Husband and Wife eventually move their permanent domicile to Florida and acquire new foreign and Florida assets while domiciled in Florida. What would be the status of such assets?

Very generally, if Husband is a foreign domiciliary and dies intestate, Florida law will apply to real property located in Florida, but foreign law will apply to personal property and could potentially apply even to personal property located in Florida. If, however, Husband leaves a Florida will, he may be able to elect that Florida law would apply, instead, to his personal property located in Florida. Florida law would apply various statutory presumptions regarding the status of the couple’s property, which could be rebutted by evidence of contrary intent. Under Florida intestate succession rules, Wife could be entitled to only a portion of the value of the house and the bank account, depending on whether Husband was survived by any children and on the application of any such presumptions. Also, interestingly, because Florida’s “elective share” statute only applies to decedents who are domiciled in Florida at the time of death, it appears possible that Husband could disinherit Wife, at least with respect to his personal property located in Florida, by so providing in a Florida will. Bank accounts may be subject to different rules, specifically bank accounts known as “Totten Trusts” (when an individual opens an account in his own name “in trust for” someone else).

Community property issues need to be considered in connection with determining U.S. income tax (for example, if one spouse is an RA and the other is an NRA), gift tax and estate tax (joint trust and potential loss of step-up/marital deduction) and even U.S. reporting obligations (with respect to ownership interests in foreign companies, trusts, and even foreign bank accounts).

Under some circumstances a couple may wish to sever community property and under some circumstances a couple may wish to confirm the continuing existence of community property rights or its application to newly acquired property. In either case, planning using lifetime trusts, either irrevocable or revocable can be extremely helpful in order to ensure that assets are administered in an optimal manner from both a tax and a non-tax perspective both during life and after death. Furthermore, foreign individuals should consider the use of a Florida Last Will and Testament to specifically dispose of their Florida situs assets.

In summary, there are a myriad of issues which need to be considered in the context of investment in the U.S., or relocation to the U.S., by couples who com from a community property jurisdiction.

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