Vanderbilt Journal of Transnational Law

Volume 21
Issue 3 *Issue 3 - 1988*

Article 8

1988

Case Digest

Law Review Staff

Common Problems in the Disposition of a Deceased Alien's United States Situs Estate: A Viable Approach

TABLE OF CONTENTS

I. INTRODUCTION

Every year over a half-million aliens immigrate to the United States.[1] Not surprisingly, the amount of wealth held by aliens in this country is

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES:

increasing each year. This alien possession of United States situs assets has raised a wide range of concerns among the federal[2] and state governments[3] and, in response, among the aliens themselves. The flip side to this increase of alien-held wealth is the need for its orderly disposition. While there have been numerous works dedicated to the estate planning needs of wealthy aliens,[4] the disposition problems facing the vast majority of aliens—those without the benefit of, or need for, complex estate planning—have been largely overlooked.

This Note focuses on the potential problems a practitioner may encounter serving the needs of a client with interests in a deceased alien's United States situs assets,[5] and suggests a method with which to approach this process. Because of the vast array of issues involved in the probate of an alien's estate in the United States, an attorney must utilize a comprehensive approach to avoid prejudicing a client's interests. Without such an approach, vital concerns may be overlooked and unnecessary conflicts may arise. This Note proposes a method that seeks to minimize these risks. It proceeds on the assumption that, even after an alien has died, decisions may be made which can profoundly affect the disposition of the estate. Thus, the proposed method utilizes approaches analogous to estate planning strategies to secure the most favorable forum and substantive law possible for the administration of a deceased alien's estate.

This method begins with an evaluation of the client's interest in the estate and the formulation of objectives to meet the needs of that client. Next, a determination of possible venues for the administration of the estate is made. The third, and last, step involves an evaluation of the

---

1988, at 11 (108th ed. 1987).

2. *See, e.g.*, Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974); International Investment Survey Act of 1976, Pub. L. No. 94-472, 90 Stat. 2059 (1976); Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263 (1978).

3. *See, e.g.*, ALASKA STAT. § 38.05.190 (1984) (restricting alien acquisition of exploration and mining rights); MINN. STAT. ANN. § 500.221 (West Supp. 1988) (restricting alien acquisition of agricultural land).

4. *See, e.g.*, 1 J. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING (1982); Lawrence, *International Tax and Estate Planning*, TR. & EST., Feb. 1984, at 51.

5. Problems arising from the distribution of a deceased nonresident alien's United States situs assets are excluded from the scope of this Note due to the complexity of the federal restrictions and tax consequences. For a discussion of the estate planning considerations in such a situation, see 1 J. SCHOENBLUM, *supra* note 4; Charwat, *Factors to Consider When Planning the Estates of Clients who are Nonresident Citizens*, 10 EST. PLAN. 98 (1983); Hendrickson, *American Trusts For Non-Resident Aliens*, TR. & EST., Feb. 1984, at 40.

pros and cons of administration in each of the available venues. Such an evaluation considers:

(1) the choice of substantive probate law to be applied;
(2) restrictions on the appointment of an alien fiduciary;
(3) tax consequences,[6] and
(4) restrictions on the transfer of assets.

This Note is organized in three major sections: (1) Pre-Administration; (2) Administration of the Estate; and (3) Post-Administration. The Pre-Administration section discusses the evaluation of client objectives and possible venue choices. The next section, Administration of the Estate, examines choice of substantive law, restrictions on the selection of an alien fiduciary, and the application of the substantive law. Finally, the section on Post-Administration explores various restrictions on the disposition of an alien's estate. Additionally, hypothetical situations will be presented at the end of each section to demonstrate how the proposed method handles the various issues as they arise.

II. PRE-ADMINISTRATION

A. *Client Interests and Objectives*

Before strategies can be formulated or venues chosen, the practitioner must understand the client's relation to the deceased alien's estate. In the case of an alien who died testate, the client might be a bank or other financial institution acting in the role of executor of the estate. In other situations, the same client may be a creditor seeking to protect its own interests. Additionally, persons naturally related to the deceased may seek representation as an interested beneficiary or may wish to secure an attorney to contest the will. Obviously, the interests of these clients differ substantially. So too, then, must the practitioner adjust his or her view of the probate process in order to perceive potential advantages and pitfalls peculiar to that client's interests. Once in this framework, practitioners should set objectives for each step of the probate process, from choice of

6. The possible tax consequences resulting from the administration of a deceased alien's United States situs assets are beyond the scope of this Note due to the highly complex nature of this topic and its limited application to aliens of modest income. For a detailed discussion of this topic, see Lawrence, *supra* note 4. *See also* Povell & Chopin, *Pre-Immigration Tax Planning: Income, Estate, and Gift Tax Planning for the Nonresident Alien Moving to the United States*, 1 INT'L TAX & BUS. LAW. 47, 80 (1983); M. HENNER, A COMPENDIUM OF STATE STATUTES AND INTERNATIONAL TREATIES IN TRUST AND ESTATE LAW 18, 39-62 (1985); 1 J. SCHOENBLUM, *supra* note 4; Lawrence, *supra* note 4.

venue forward. With these objectives and the client's interests fully in mind, the practitioner will be equipped to carefully evaluate the options open to that client as the process of administering the estate unfolds.

B. *Determining the Venues Available for Administering the Estate*

After establishing objectives, the practitioner should determine which venues are available for probating the alien's United States situs assets. The options available will depend upon two broad factual findings: the location of the decedent's property and the jurisdictions to which the decedent had personal ties.[7] The most common place to institute probate is in the jurisdiction of the decedent's domicile.[8] In the case of an alien, it is not possible simply to state that probate should be brought in the place where the decedent was domiciled at the time of death. First, for reasons discussed later in this Note,[9] it is often unclear in which jurisdiction the alien was domiciled. Furthermore, the legal determination of the decedent's domicile is made by the court in which probate is brought and in accordance with that jurisdiction's laws.[10] This is not to say that an alien's estate should not be submitted for probate in the jurisdiction suspected of being the decedent's domicile, but rather that the probate court may reasonably find that the decedent was domiciled elsewhere.

Other forums where the decedent alien's estate may be administered are those in which real property is located,[11] or where the bulk of the decedent's assets are situated.[12] While, technically, probate may be brought anywhere assets are located,[13] as a practical matter most courts would use their discretion and reject an offer for probate if the decedent's assets in the jurisdiction are insubstantial.[14] A practitioner should, however, consider such venues as the location of intangible property, such as

---

7. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS 2d §§ 314, 315 (1969) [hereinafter RESTATEMENT].

8. E. TOMLINSON, ADMINISTRATION OF DECEDENTS' ESTATES § 5.4-1 (1972); *see also* HENNER, *supra* note 6; RESTATEMENT, *supra* note 7, § 314, at comment e. The concept of domicile will be discussed in more detail in the following section.

9. *See infra* section III, A, 2.

10. RESTATEMENT, *supra* note 7, § 13. *But see* E. TOMLINSON, *supra* note 8, § 5.4-1, at 35 (as a preliminary matter, "the executor must determine the domicile of the testator, regardless of the place of probate").

11. *See* E. TOMLINSON, *supra* note 8, § 5.5-1.

12. *In re* Will of Heller-Baghero, 26 N.Y.2d 337, 345, 258 N.E.2d 717, 722, 310 N.Y.S.2d 313, 319 (1970); *see also In re* Estate of Brunner, 72 Misc. 2d 826, 827, 339 N.Y.S.2d 506, 507 (Sup. Ct. 1973).

13. *See* RESTATEMENT, *supra* note 7, § 314, at comment i.

14. *See* E. TOMLINSON, *supra* note 8, § 5.5-1.

bank accounts and securities, in addition to the locus of the decedent's tangible assets. More remote possibilities exist for probating the decedent's estate in a forum in which the deceased had no property but where interested parties to the estate reside.[15]

C. *Application of the Method*

> Maria, the decedent, was a Mexican citizen at the time of her death. She died in southern California, where she had lived for the past five years with her daughter, a resident alien. Maria had come to the United States to seek medical treatment and died owing $40,000 in hospital bills to Health Company, which has its corporate headquarters in New York. Her assets consist of personal belongings, a joint bank account with her daughter, located in California, and a private residence located in Mexico currently occupied by her son. Maria died intestate.

The attorney must first determine what the client's interests are in Maria's estate. Obviously, her daughter has an interest in seeing that the administration takes place in California, since that would be the most convenient location. Her son likewise may wish probate to take place in Mexico for the purpose of convenience and with the thought that he may receive a more favorable settlement there. The interest of the third concerned party, Health Company, is in receiving satisfaction on the $40,000 debt owed by the estate. The choices of venue in this hypothetical are fairly straightforward. California is a possibility since it was the jurisdiction in which Maria resided for the five years prior to her death. Additionally, one of her heirs, her personal property and her intangible assets all are located in that state. Mexico may also be a possible venue for probate because Maria was a citizen of that country, it is the home jurisdiction of one of her heirs, and her real property is located there. New York, while technically a possible choice of venue given that it is the location of a major creditor, probably is not an available venue as a practical matter because it has no other ties with the decedent or the estate.

Once all the possible forums are "on the table," the practitioner is prepared to make a selection based upon the following considerations: (1) applicable substantive law; (2) restrictions on the selection of an administrator; (3) tax consequences;[16] and (4) restrictions on the distribution of assets.

---

15. *See id.*
16. *See supra* note 6.

III. ADMINISTERING THE ESTATE

A. *Determining the Substantive Law to be Applied*

The law of the domicile governs intestate succession and testamentary disposition.[17] Thus, administering the estate of a deceased alien in a particular forum does not necessarily mean that its laws will govern the disposition of that estate. This will be the case only where the chosen venue is also the jurisdiction of the decedent's domicile. The laws of the forum state are, however, used to determine the domicile of the alien decedent.[18]

1. What is "Domicile"?

It must be noted from the outset that "domicile" is not defined consistently in all jurisdictions,[19] or for all purposes.[20] Traditionally, domicile was defined as "residence in fact plus an intention to remain permanently or indefinitely."[21] Due to the mobile nature of modern society, however, a more flexible standard has emerged. This standard for domicile requires only the intent to establish a home within a particular jurisdiction without a present intention to depart.[22] Due to the lack of uniformity, it is not unheard of for two or more courts to reach conflicting conclusions as to the domicile of the same person.[23]

---

17. *See* RESTATEMENT, *supra* note 7, §§ 260, 263; *see also* State v. American Sugar Refining Co., 20 N.J. 286, 302, 119 A.2d 767, 775-76 (1956); *In re* Estate of Bulova, 14 A.D.2d 249, 254, 220 N.Y.S.2d 541, 545 (App. Div. 1961).

18. RESTATEMENT, *supra* note 7, § 13.

19. *See generally* Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955).

20. *Id.* at 592.

21. Comment, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. CHI. L. REV. 771, 775 n.22 (1980); *cf.* Lok v. INS, 681 F.2d 107, 109 (2d Cir. 1982); Anwo v. INS, 607 F.2d 435, 437 (D.C. Cir. 1979) (per curiam); Seren v. Douglas, 30 Colo. App. 110, 112, 489 P.2d 601, 602 (1971).

22. 1 J. SCHOENBLUM, *supra* note 4, § 7.07, at 121; *see also* RESTATEMENT, *supra* note 7, § 18, at comment b (phrasing the test as "the state to which the person is most closely related at the time").

23. Reese, *supra* note 19, at 591. For example, the former head of Campbell Soup Company was found by the courts of New Jersey and Pennsylvania to be a domiciliary of both states at the time of his death for purposes of imposing an inheritance tax. *In re* Dorrance, 115 N.J. Eq. 268, 170 A. 601 (Perog Ct. 1934), *supp. op.*, 116 N.J. Eq. 204, 172 A. 503 (Perog. Ct. 1934), *aff'd sub nom.* Dorrance v. Martin, 13 N.J. Misc. 168, 176 A. 902 (Super. Ct. App. Div. 1934), *aff'd per curiam*, 116 N.J.L. 362, 184 A. 743 (1936) *cert. denied*, 298 U.S. 678 (1936); *In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932) *cert. denied*, 287 U.S. 660 (1932), *decision adhered to*, 172 A. 900 (Pa. 1933), *cert. denied*, 288 U.S. 617 (1933); *see also Reese, supra* note 19, at 591 n.15.

Although the definition of domicile carries with it the concept of physical presence, it should not be confused with the term "residence."[24] As with "domicile," "residence" has been subject to a variety of definitions.[25] A fairly standard definition, however, is that found in the Immigration and Naturalization Act[26] which defines "residence" as "the place of general abode . . . principal, actual dwelling place in fact, without regard to intent."[27] Since the definition of residence lacks a requirement of intent to remain, it implies a more transitory or attenuated relationship with a jurisdiction than does domicile. For example, a student may establish residence in the state where he or she attends school but, absent other ties, the student probably would not be considered a domiciliary of that state. Conversely, that same student would be a domiciliary upon accepting a permanent job in that state because such an act would fulfill the "intent to remain" requirement. It must be cautioned, however, that, despite these distinctions, residence has been equated with domicile quite frequently.[28] As a result, the practitioner should always use care in determining the intended meanings of these words when encountering them in statutes and court opinions.

Another term with which domicile is sometimes confused is "nationality." While nationality is not considered as a controlling factor for choice of law in the United States,[29] it is the "primary law-determining affiliation" in countries with civil law traditions.[30] Thus, nationality, as opposed to domicile, may be relevant in determining what law to apply

---

24. Kirk v. Bd. of Regents, 273 Cal. App. 2d 430, 434-35, 78 Cal. Rptr. 260, 263 (1969), *appeal dismissed*, 396 U.S. 554 (1970) ("residence is not a synonym for domicile, and its meaning in particular statutes is subject to differing construction, depending on the context and purpose of the statute in which it is used"); *see also* Intermountain Health Care, Inc. v. Bd. of Comm'rs, 109 Idaho 412, 415, 707 P.2d 1051, 1054 (1985); *In re* Kowalke, 232 Minn. 292, 297, 46 N.W.2d 275, 279 (1950).

25. *In re* Duren, 355 Mo. 1222, 1232, 200 S.W.2d 343, 350 (1947) (en banc) ("the place where one resides, or sits down or settles himself"); *In re* Kowalke, 232 Minn. at 297, 46 N.W.2d at 279 ("bodily presence as an inhabitant in a given place"); Bd. of Medical Registration and Examination v. Turner, 241 Ind. 73, 86, 168 N.E.2d 193, 197 (1960) (the physical home in which a person lives).

26. 8 U.S.C. §§ 1101-1525 (1982).

27. *Id.* § 1101(a)(33).

28. 1 J. SCHOENBLUM, *supra* note 4, § 1.08.7, at 145; *see, e.g.*, St. Joseph's Hospital and Medical Center v. Maricopa County, 142 Ariz. 94, 99, 688 P.2d 986, 991 (1984) (en banc); Illingworth v. State Bd. of Control, 161 Cal. App. 3d 274, 278, 207 Cal. Rptr. 471, 473-74 (1984); Perez v. Perez, 164 So. 2d 561, 563 (Fla. Dist. Ct. App. 1964); Irvin v. Irvin, 182 Kan. 563, 322 P.2d 794 (1958); Frame v. Residency Appeals Comm., 675 P.2d 1157, 1161-62 (Utah 1983).

29. 1 J. SCHOENBLUM, *supra* note 4, § 3.02, at 18.

30. *Id.*

if the forum state deems the decedent's domicile to be in a civil law country.

2. Factors Used in Determining Domicile

As previously stated, physical presence and intent to remain are the two broad requirements used to establish a person's domicile. Thus, factors which tend to prove or disprove either or both of these requirements are relevant in determining a deceased alien's domicile. The most obvious evidence of an alien's physical presence in a jurisdiction is the ownership of a residence there.[31] Ownership, however, is not essential to establishing a physical presence in a jurisdiction. Persons have been found to be domiciliaries of jurisdictions in which they had no ownership interest at all.[32] Common examples of such situations involve living with relatives, rental of an apartment, or residence in a nursing home. Furthermore, ownership of a residence in a particular jurisdiction does not necessarily establish domicile there. The fact that a person owns a home in one jurisdiction certainly does not preclude the ownership of other property in a different jurisdiction. In fact, it is quite common for some people to own two residences in different countries and to spend nearly equal time in each.[33] Despite these considerations, ownership and regular occupation of a home certainly establish not only a physical presence but also provide a strong indication of the person's intent to remain in that jurisdiction.[34]

In addition to ownership or interest in real property, the location of the deceased alien's personal property in a jurisdiction is also regarded as physical presence and evidence in favor of finding that jurisdiction to be the place of the alien's domicile. Thus, a practitioner should determine the full extent of the decedent's personal property in a jurisdiction in building an argument that the alien had been domiciled there at the time of death. Due to their value, the location of intangible assets such as

---

31. *See, e.g.,* Everett v. Brief, No. 82-3153 (S.D.N.Y. Nov. 1, 1985) (LEXIS, Genfed library, Dist file); *cf.* Citizens Bank and Trust Co. v. Glaser, 70 N.J. 72, 76, 357 A.2d 753, 755 (1976).

32. *See, e.g.,* O'Hara v. Glaser, 60 N.J. 239, 248-49, 288 A.2d 1, 15-16 (1972).

33. An example of such a situation would be a Canadian who spends winters in Florida. In that circumstance there is a good chance that both jurisdictions would claim the person as a domiciliary.

34. *See* Computer People, Inc. v. Computer Dimensions Int'l, Inc., 638 F. Supp. 1293, 1295 (M.D. La. 1986); United States v. Scott, 472 F. Supp. 1073, 1079 (N.D. Ill. 1979), *aff'd*, 618 F.2d 109 (7th Cir. 1980), *cert. denied*, 445 U.S. 962 (1980); *cf.* Townsend Rabinowitz Pantaleoni & Valente, P.C. v. Holland Industries, Inc., 109 F.R.D. 671, 672 (S.D.N.Y. 1986).

stocks, bonds, bank accounts, and partnership interests is viewed as especially persuasive by some courts[35] and should not be overlooked. Closely related to these intangible items are objects that the decedent stored in a bank safe deposit box. The presence of such items as birth certificates, the decedent's will, jewelry, and stamp and coin collections not only help to establish a physical link to the jurisdiction in which they are located, but also are persuasive evidence of the person's intent to remain in the jurisdiction, given the highly personal nature of these effects.[36]

Unlike physical presence, of which there is usually concrete evidence, determining whether the decedent possessed the requisite intent to remain in a specific jurisdiction while alive is, by its nature, a highly subjective question. In fact, one commentator suggests that courts have used the "intent to remain" prong of the domicile standard in order to justify the desired result.[37] However speculative and subject to judicial manipulation this standard may be, competent evidence usually is available and should be brought to the attention of the probate court. Examples of such evidence include those discussed previously with regard to physical presence. Home ownership and the location of valuable tangible and intangible property in a jurisdiction certainly evidence some desire of the decedent to remain in that jurisdiction, at least for an indefinite period of time.

In addition to the decedent alien's residence, tangible and intangible assets, family ties and personal affairs are considered to be important evidence of a person's intent to remain in a jurisdiction. Such commonplace things as the decedent's mailing address,[38] telephone listing,[39] and

---

35. For a thorough discussion of intangible property interests and their relation to the determination of a person's domicile, see 1 J. SCHOENBLUM, *supra* note 4, § 8.03.

36. *E.g., In re* Estate of McCalmont, 16 Ill. App. 2d 246, 252-53, 148 N.E.2d 23, 27 (1958); Chapman v. Superior Ct., 162 Cal. App. 2d 421, 426, 328 P.2d 23, 26 (1958); Knapp v. Comptroller of the Treasury, 269 Md. 697, 700, 309 A.2d 635, 638 (1973); *O'Hara*, 60 N.J. at 244, 288 A.2d at 4 (1972). *But see* Hall v. Morris, 213 Md. 396, 405, 132 A.2d 113, 117-18 (1957) (federal income tax returns unconvincing evidence of domicile).

37. Reese, *supra* note 19, at 596.

38. 1 J. SCHOENBLUM, *supra* note 4, § 8.04, at 161; *cf.* Dairyland Ins. Co. v. Auto-Owners Ins. Co. 123 Mich. App. 675, 682, 333 N.W.2d 322, 325 (1983); *In re Jones*, 102 Pa. Commw. 103, 109, 516 A.2d 778, 781 (1984). *But see* Succession of Guitar, 242 So. 2d 641, 642 (La. Ct. App. 1970).

39. *See, e.g.*, Allen v. McDermott, 110 Ga. App. 536, 139 S.E.2d 143, 144 (1964); Cottakis v. Pezas, 12 Misc. 2d 215, 215, 176 N.Y.S.2d 495, 495 (Sup. Ct. 1958); *In re Jones*, 102 Pa Commw. at 109, 516 A.2d at 781 (1984); Shaw v. Shaw, 155 W.Va. 712, 717, 187 S.E.2d 124, 127 (1972). *But see In re* Rials, 220 La. 484, 487; 56 So. 2d 844, 845-46 (1952); Lauricella v. Lauricella, 14 Misc. 2d 625, 629, 178 N.Y.S.2d 561, 565

driver's license[40] are usually afforded significant weight by the courts. The value of such evidence, however, has recently been called into question.[41] Similarly, the decedent's place of employment at the time of death,[42] and the residence of the decedent's spouse and children in a jurisdiction[43] are also given great weight by the courts as proof of the alien's intent to remain. In many cases, most or all of these factors will point to the same conclusions. The closer cases, however, afford the attorney some room to argue for or against a finding that the deceased alien was domiciled in a certain jurisdiction. This may be a crucial determination since the law of the domicile governs the substantive rights of the parties to claim shares of the estate. A wise attorney, therefore, will determine which of the possible domiciles has the substantive law most favorable to his or her client, and will use the factors discussed to make an argument that the decedent alien was in fact a domiciliary of that jurisdiction.

B. *Restrictions on the Selection of an Alien Fiduciary*

In addition to deciding which jurisdiction's substantive probate law will apply through a determination of the deceased alien's domicile, the laws of the forum and, at times, the court itself may impose restrictions on an alien's ability to serve as a fiduciary of the estate. The common law places no restrictions on the ability of an alien to qualify as an administrator[44] or executor[45] of a decedent's estate. Surprisingly, this is

---

(Sup. Ct. 1958); Melendez v. Mount Sinai Hospital, 2 Misc. 2d 911, 913, 148 N.Y.S.2d 817, 820 (Sup. Ct. 1956).

40. *See* Shady v. Shady, 10 Ill. App. 3d 801, 805-06, 295 N.E.2d 130, 133-34 (1973); *In re* Estate of Gadway, 123 A.D.2d 83, 86, 510 N.Y.S.2d 737, 739 (Sup. Ct. 1987); Everett v. Brief, No. 82-3153 (S.D.N.Y. Nov. 1, 1985) (LEXIS, Genfed library, Dist file).

41. *See* D'Amnico v. Pennsylvania Millers Mutual Ins. Co., 72 A.D.2d 783, 786, 421 N.Y.S.2d 605, 609 (Sup. Ct. 1979) ("[s]o-called 'formal declarations' of domicile, such as motor vehicle registration, voter registration and mailing addresses have lost their importance in recent years as courts have recognized their self-serving nature. . .").

42. *Cf.*, Everett v. Brief, No. 82-3153 (S.D.N.Y. Nov. 1, 1985) (LEXIS, Genfed Library, Dist file); Adams v. Adams, 136 A.2d 866, 867 (D.C. Mun. Ct. App. 1957).

43. National Wire Fabric Corp. v. Nelson, 563 F. Supp. 303, 304 (E.D. Ark. 1983); Zenatello v. Pons, 235 A.D. 221, 223, 256 N.Y.S. 763, 765 (Sup. Ct. 1932); *In re* Estate of Nikiporez, 19 Wash. App. 213, 237-38 n.7, 574 P.2d 1204, 1209 n.7 (1978).

44. 33 C.J.S. *Executors and Administrators* § 46(f)(2) (1942).

45. *Rights and Restrictions on Interests of Aliens in U.S. Estates: Federal and State Laws Affecting Administration and Distribution of U.S. Estates in Which Aliens Hold Interests*, 15 REAL PROP., PROB. & TR. J. 659, 662 (1980) (Rep. Comm. Int'l Prop., Est. & Tr. L.) [hereinafter *Rights and Restrictions*]; *see also* Moran v. Firemen's

true even if the alien is not a resident of the forum state.[46] There are, however, three ways in which an alien may be prevented from being appointed as the fiduciary of an estate. First, a court may exercise its discretion to refuse appointment to an alien.[47] Second, state statutes may prohibit or in some manner restrict an alien's service as administrator or executor.[48] Third, treaties may impose some restrictions on which persons are eligible to serve as administrators absent appointment by the decedent.[49] The interaction of these various restrictions will be examined in two settings: (1) the appointment of a consular official in the absence of a specified executor or administrator, and (2) appointment of an alien by the decedent as executor or administrator.

1. Appointment of a Consular Official

According to standard treaty provisions, if an alien dies in the United States without heirs or a named executor, the "local authorities" must notify the consul of the decedent's nationality.[50] Such a provision ensures that nonresident heirs and executors will be given adequate notice so that they may act upon their rights. It has been suggested, however, that in practice these treaty "notice provisions" are insufficient to realize their purpose because of the failure to define "competent local authorities,"[51] and the reluctance of some probate courts to recognize insufficient notice as a jurisdictional defect.[52] Some states have been more aggressive in attempting to guarantee proper notice by enacting statutes that specifically require that notice be given either directly to the interested foreign party[53] or indirectly through the consul.[54] Except in the absence of a treaty with the country of the alien's nationality, such state provisions

---

and Policemen's Pension Fund Comm'n, 23 N.J. Misc. 10, 11-12, 40 A.2d 199, 200 (Cir. Ct. 1944).

46. 33 C.J.S. *Executors and Administrators* § 46(f)(2) (1942); *see also In re* Estate of Rugh, 211 Iowa 722, 234 N.W. 278 (1931).

47. *Rights and Restrictions, supra* note 45, at 662; *see, e.g., In re* Estate of Lode, 135 Misc. 2d 218, 220, 514 N.Y.S.2d 881, 882 (Sur. Ct. 1987).

48. *Rights and Restrictions, supra* note 45, at 662-63.

49. *See generally* Boyd, *The Administration in the United States of Alien Connected Decedents' Estates*, 2 INT'L LAW. 601, 629-40 (1967-68).

50. *Id.* at 602.

51. *Id.* at 602-03.

52. *See* Rizzotto v. Grima, 164 La. 2, 113 So. 658 (1927); *see also* Boyd, *supra* note 49, at 603.

53. *See* IND. CODE ANN. § 6-112 (1966); MODEL PROBATE CODE § 16 (Simes 1946).

54. *See* OHIO REV. CODE ANN. § 2113.11 (Page 1976).

add little legal effect because such treaties are self-executing. State provisions may, however, make probate courts more conscious of their duty to notify nonresident aliens who have an interest in the estate.[55]

The mere notification of a consul does not grant that official the right to serve as administrator of the estate. As with any other alien applying for the right to administer an estate, a consul may (1) be barred from fiduciary service at the discretion of the probate court,[56] (2) be limited by the forum state's statutory provisions,[57] or (3) have restricted rights under the applicable treaty provision.[58] Although state law is normally subordinate to the authority of treaties,[59] most treaties dealing with consular functions expressly allow for state regulation and judicial discretion regarding the appointment of a consul to a fiduciary post.[60] Typical treaty provisions grant a consul a qualified right to serve as administrator and to represent foreign nationals in local estate proceedings.[61]

Relatively few states have actually undertaken the task of regulating the consul's role in probate proceedings. Those states that address this issue do so by regulating the consul's ability to receive distributive shares on behalf of foreign heirs.[62] Only Alabama[63] and Minnesota[64] have adopted statutes specifically enabling consuls to accept derivative shares for transmission to foreign heirs. Both states also require the probate court to give the property to a consul when an heir is not represented by an attorney.

In summary, if an alien dies without heirs or a named administrator

---

55. *See* Boyd, *supra* note 49, at 614.

56. *Cf.* Schneider v. Hawkins, 179 Md. 21, 24, 16 A.2d 861, 863 (1940) ("[T]he Orphans' Court has the undoubted right to use its discretion in appointing an administrator, and its discretion is not reviewable by [an appellate court].").

57. *See generally* Boyd, *supra* note 49, at 640-49.

58. *Id.* at 629. For a complete outline of the various treaty provisions and analysis thereof, see *id.* at 629-40.

59. The supremacy clause of the United States Constitution mandates this result absent a treaty provision to the contrary. U.S. CONST. art. VI, cl. 2.

60. For example, the relevant section of the American Bar Association's Model Consular Convention provides, "A consular officer of the sending state may, within the discretion of the appropriate judicial authorities and if permissible under the then-existing applicable local law in the receiving state [administer an estate]. . . ." *Proceedings of the House of Delegates St. Louis, Mo., August 7-11, 1961,* 47 A.B.A. J. 1041-42 (1961) (American Bar Association proceedings).

61. Boyd, *supra* note 49, at 640.

62. *Id.* at 640, 644-49. Statutes restricting a counsul's ability to accept property in a representative capacity and the rights of alien beneficiaries to receive property are discussed *infra* at Section IV, A, 2.

63. ALA. CODE § 6-8-20 (1975).

64. MINN. STAT. ANN. § 525.484 (West 1975 & Supp. 1988).

in the United States, it is the function of a consul from the country of which the decedent was a national to protect the interests of the alien's estate. Such activity is usually authorized by treaty but, in the absence of a treaty, is left to regulation by the forum state and the discretion of the probate court. These procedures may be inadequate to protect the rights of foreign parties with interests in the decedent's estate. Therefore, a practitioner representing such a party should not rely on a consular official to protect the rights of interested foreign parties.

2. Appointment of an Alien as Executor or Administrator

Even if the alien died with heirs or a named fiduciary in the United States and thus avoided the need for a consular official to become directly involved, there is no guarantee that the court will appoint an heir or named fiduciary. An alien may be denied appointment as administrator or letters testamentary either on the basis of a state statute or at the discretion of the probate court.[65] These restrictions, however, are subject to the overriding principles of the equal protection clause of the fourteenth amendment.[66]

State restrictions on alien executors and administrators are varied in form but fall within two broad categories: direct prohibitions and general restrictions on nonresidents. Currently, only the following three United States jurisdictions have statutes that directly prohibit an alien from serving as a personal representative: District of Columbia,[67] Georgia,[68] and Maryland.[69] Similarly, New York statutorily disqualifies aliens from serving in a fiduciary post, but only if such alien is not a New York domiciliary.[70] North Carolina also has a direct prohibition, but only

---

65. *Rights and Restrictions, supra* note 45, at 662-63.

66. U.S. CONST. amend. XIV, § 1, cl. 4.

67. D.C. CODE ANN. § 20-303(b) (1981) ("Letters shall not be granted to a person who, at the time any determination of priority is made . . . is an alien who has not been lawfully admitted for permanent residence; . . . .").

68. Ga. Code Ann. § 53-6-23 (1982) ("Only citizens of the United States residing in this state . . . are qualified to be made administrators. . . .").

69. MD. EST. & TRUSTS CODE ANN. § 5-105(b)(4) (Supp. 1987) ("Letters may not be granted to a person who, at the time a determination of priority is made, . . . is . . . . [n]ot a citizen of the United States . . . .").

70. N.Y. SURR. CT. PROC. ACT § 707(1)(c) (1967 & Supp. 1988). This provision as amended in 1986 to allow letters to be issued to:

> [a] natural person (A) who is the spouse of a decedent, a grandparent or descendant of a grandparent of a decedent, a grandparent or descendant of a grandparent of a decedent's spouse, or the spouse of any such grandparent or descendant of a grandparent of decedent or decedent's spouse and (B) who shall serve with one or more co-fiduciaries, at least one of whom is resident in this state.

against aliens "disqualified by law."[71] This "exception," if indeed it is one, has evaded clear definition.[72]

The second type of state restriction statutorily bans nonresidents of that state from serving in the capacity of executor or administrator. While this kind of statute obviously excludes a large number of potential alien fiduciaries, it does permit aliens who reside in the state to serve. These statutes appear in a variety of formats, with some states flatly disallowing nonresidents from service[73] and others conditioning such service on either the appointment of a resident cofiduciary,[74] or on the condition that the nonresident be related to the decedent.[75] Additionally, most states require the posting of a bond by a nonresident fiduciary at an amount set at the court's discretion.[76] Thus, even if an alien is able to meet one of the exceptions or conditions, he or she may be stymied by a high bond requirement. It must be remembered also that the final decision of an alien's eligibility to serve lies not with the fulfillment of statutory criteria but solely in the discretion of the probate court. Furthermore, it has been suggested that some such courts will routinely look for any excuse to disqualify a nominated alien.[77]

3. Constitutional Protections

The ability of states to prevent aliens from serving in fiduciary capacities is certainly not left unchecked. Both types of statutes discussed, those prohibiting aliens as a group and those imposing a residency requirement, have been struck down as unconstitutional either on their face or in application. In *In re Estate of Fernandez*,[78] the Florida Supreme Court held that the state's statutory requirement of United States citizenship as a prerequisite to appointment as administrator was inconsistent with Florida's constitutional guarantee of equal protection under the

---

Id. at § 707(1)(c)(ii). The effect of this amendment is to allow nondomiciliary alien relative to serve as a cofiduciary with a resident.

71. N.C. GEN. STAT. § 28A-4-2 (6) (1984).

72. *See Rights and Restrictions, supra* note 45, at 663 n.28. One possible problem with the exception is that an alien may be "disqualified by law" if he or she is found to be unsuitable for the position. This determination is left to the discretion of the probate court. *See* 33 C.J.S. *Executors and Administrators* § 46 (1942).

73. *E.g.*, HAWAII REV. STAT. § 560:3-601(a)(1) (1985).

74. *E.g.*, TENN. CODE ANN. § 35-50-107(a)(1) (Supp. 1988).

75. *E.g.*, FLA. STAT. ANN. § 733.304 (West Supp. 1988).

76. *Rights and Restrictions, supra* note 45, at 663.

77. *Id.* at 665.

78. 335 So. 2d 829 (Fla. 1976).

law.[79] The court in *Fernandez* based its holding on a finding that the combination of a bond requirement and a "long-arm" statute for service of process outside the state eliminated any "substantial and real difference between resident aliens and resident citizens."[80] The court further noted that the United States Supreme Court had found that classifications based on alienage were "inherently suspect," and indicated in dictum that nothing in the administration of an intestate's estate would justify such a classification.[81]

The due process clause was similarly used to strike down statutes which automatically disqualified nonresidents unrelated to the decedent from serving as personal representatives.[82] In *Fain v. Hall*, the Circuit Court for the Middle District of Florida held that a hearing is required before a nonresident, chosen by the decedent as his or her personal representative, may be disqualified.[83] The court found that the interest of the testator in choosing a personal representative was so important that it could be overcome only by the existence of a "compelling state interest."[84] Because it was found that the alien petitioner would be required to post a bond and would be amenable to service of process, the court

---

79. The statute in question provided in relevant part: "Subject to the limitations in this part, any person sui juris who is a citizen of the United States and a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as personal representative in Florida." FLA. STAT. ANN. § 733.302 (West Supp. 1988). The statute was subsequently amended to eliminate the requirement of United States citizenship. 1979 Fla. Laws 79-343. Shortly thereafter, the Florida Supreme Court upheld the constitutionality of Section 733.302, as amended, against a challenge that the statute violated the due process clause, the privileges and immunities clause, and the equal protection clause of the United States Constitution. *In re* Estate of Greenberg, 390 So. 2d 40 (Fla. 1980), *appeal dismissed*, 450 U.S. 961 (1981).

80. *Estate of Fernandez*, 335 So. 2d at 830.

81. *Id.* at 831 (citing Graham v. Richardson, 403 U.S. 365 (1971)).

82. The challenged provisions were contained in Florida Statutes §§ 733.302, 733.304. The latter statute states:

> A person who is not domiciled in the state cannot qualify as personal representative unless the person is:
>
> (1) A legally adopted child or adoptive parent of the decedent;
>
> (2) Related by lineal consanguinity to the decedent;
>
> (3) A spouse or brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
>
> (4) The spouse of a person otherwise qualified under this section.

FLA. STAT. ANN. § 733.304 (West Supp. 1988).

83. 463 F. Supp. 661, 666 (M.D. Fla. 1979).

84. *Id.* at 664. *But see In re* Estate of Greenberg, 390 So. 2d 40, 48-49 (Fla. 1980) (rejecting the use of the "compelling state interest" test and upholding the validity of Florida Statutes §§ 733.302 and 733.304 under a "reasonableness" test).

determined that the state's interest was insufficient to survive the strict standard of scrutiny.[85] Thus, state statutes seeking to prohibit aliens from serving as administrators or executors are vulnerable to constitutional challenges. This is especially true when the state also imposes a bond requirement and has a "long-arm" statute for extra-jurisdictional service of process.

C. *Other Considerations*

In addition to determining the domicile of the alien decedent and evaluating the restrictions imposed by the possible forums, a number of other factors obviously must be considered by an attorney who is representing a party interested in the administration of an alien's estate. Once the domicile of the decedent is established, that jurisdiction's probate laws will control and determine the rights of the various parties interested in the estate.[86]

D. *Application of the Method*

The issues discussed above will now be examined within the framework of the proposed method in two hypothetical situations, the first of which was introduced earlier.

> 1. Maria, the decedent, was a Mexican citizen at the time of her death. She died in southern California where she had lived with her daughter, a resident alien, for the past five years. Maria was an undocumented alien who came to the United States seeking medical treatment. Maria and her daughter shared an apartment and a joint account in a local bank. Maria died intestate and without naming a personal representative for her estate, which consists of a home in Mexico (occupied by her son since her departure for California), and personal belongings (clothes, jewelry and the family Bible) located in California. Since arriving in California, Maria had not returned to Mexico because of the treatment she was undergoing. The only known interested parties are her two children and Health Company, who immediately filed probate proceedings in a local California probate court.

As the forum state, California's laws will determine where Maria was

---

85. *Fain*, 463 F. Supp. at 664-65.

86. RESTATEMENT, *supra* note 7, § 13, at comment b, illustration 4. Since the application of these substantive provisions does not produce problems or situations in an alien's estate that are different from that of a citizen, this topic will not be discussed in this Note. For an excellent step-by-step treatment of the process of administering a decedent's estate, see E. TOMLINSON, *supra* note 8.

domiciled at the time of her death.[87] The California Probate Code determines applicable law according to the decedent's "residence," however, not "domicile."[88] The case law demonstrates that California courts equate the term "residence" in the probate code with a traditional definition of domicile.[89] Given that California applies a traditional concept of domicile, the particular facts tending to support a finding that Maria was a domiciliary of Mexico or California must be ferreted out. Factors that would support a finding that Maria was domiciled in Mexico at the time of her death include: (1) Mexican citizenship,[90] (2) ownership of a residence in Mexico,[91] (3) status as an undocumented alien,[92] and (4) medical treatment as her purpose for residing in California.[93] Conversely, the following facts would support a finding that Maria was actually a California domiciliary: (1) continuous residence in California for

87. *See* RESTATEMENT, *supra* note 7, § 13.

88. CAL. PROB. CODE § 301 (West 1956).

89. *E.g., In re* Estate of Phillips, 269 Cal. App. 2d 656, 659, 75 Cal. Rptr. 301, 303 (1969) ("[W]e note that the word resident as used in [the California Probate Code] connotes a 'residence' which is synonymous with 'domicile.' " (citations omitted)); Estate of Glassford, 114 Cal. App. 2d 181, 186, 249 P.2d 908, 911 (1952) ("[I]t is plain that residence as used in section 301, Probate Code, is synonymous with domicile. The concept of domicile involves the concurrence of physical presence in a particular place with the intention to make that place one's home . . .[,] 'either permanently or for an indefinite time. . . .' " (citations omitted)).

90. While the citizenship of an alien in one country certainly does not preclude a finding that the alien was domiciled in another, citizenship is a factor considered by California courts. *See, e.g.,* Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 594, 88 Cal. Rptr. 443, 446 (1970) (Mexican citizens found to be domiciliaries of California); *cf.* Jong v. General Motor Corp., 359 F. Supp. 223, 225 (N.D. Cal. 1973) (determining federal diversity jurisdiction).

91. *See supra* notes 31-34 and accompanying text.

92. *See* Illingworth v. State Bd. of Control, 161 Cal. App. 3d 274, 283, 207 Cal. Rptr. 471, 476 (1984); *see also* Cabral v. State Bd. of Control, 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1980). California's consideration of status in determining an alien's domicile changed drastically with the *Cabral* decision. Previously, some courts held that, for some purposes, an alien must be able to remain legally within a jurisdiction to be a domiciliary. *See generally* Wildes & Grunblatt, *Domicile for Immigration and Federal Gift and Estate Tax Purposes—Is A Harmonious Rule Possible?,* 21 SAN DIEGO L. REV. 113 (1983). This approach, however, was expressly rejected in *Cabral* which held, that there is "no such limitation upon the legal capacity of any person to change his or her domicile." *Cabral,* 169 Cal. Rptr. at 607, 112 Cal. App. 3d at 1016 (citations omitted).

93. *Cf. Glassford,* 114 Cal. App. 2d at 1877, 249 P.2d at 912 (domicile not established if decedent's stay was for "temporary and limited purpose" of receiving medical treatment).

five years,[94] (2) cohabitation with her daughter who is a resident alien,[95] (3) being a joint owner of a bank account located in California,[96] and (4) the situation of all personal property with the state of California.[97]

Each of the above-listed factors would be considered by a California court in determining Maria's domicile. Citizenship would probably carry a significant amount of weight since, although it does not establish physical presence, it is a strong indication of intent.[98] Conversely, although ownership of a residence normally is given great weight by the courts,[99] this weight diminishes in proportion to the time spent away from that residence, or if it is not the principal residence.[100] Some weight would be given to Maria's undocumented status in establishing intent but it would probably not be persuasive.[101] The most significant evidence that could preclude a finding that California was Maria's domicile is that she went there for medical treatment because it is a strong showing that she lacked an intent to remain. Taken together, these four factors make a reasonably persuasive case, demonstrating both physical presence and intent to remain, that Maria should be found to have been a domiciliary of

---

94. One could reasonably argue that the longer a person has lived in a jurisdiction, the more clear their intent to remain "indefinitely." *Cf. Illingworth*, 169 Cal. Rptr. at 472, 161 Cal. App. 3d at 276.

95. *See, e.g.*, O'Hara v. Glaser, 60 N.J. 239, 248, 288 A.2d 1, 6 (1972). *See generally*, 1 J. SCHOENBLUM, *supra* note 4, § 8.04.

96. *See, e.g.*, Corbett v. Franchise Tax Board, 213 Cal. Rptr. 893, 902 (1985); *In re* Lantos, 89 Cal. App. 3d 61, 68, 152 Cal. Rptr. 271, 275 (1979); *In re* Estate of Phillips, 269 Cal. App. 2d 656, 658, 75 Cal. Rptr. 301, 302.

97. The location of personal property establishes both a physical presence in a jurisdiction as well as evidence of intent to remain indefinitely, and therefore is relevant for purposes of establishing domicile. *See, e.g.*, Walters v. Weed, 45 Cal. 3d 1, 752 P.2d 443, 246 Cal. Rptr. 5 (1988) (Eagleson, J., dissenting).

98. Rosenshine v. Rosenshine, 60 Ill. App. 3d 514, 518, 377 N.E.2d 132, 136 (1978) ("The fact that [the] plaintiff applied for status as a permanent resident or as a new immigrant, which would lead to automatic citizenship of Israel, is evidence of an intent to remain in Israel permanently and to abandon residence in Illinois."); Dickey v. Bagby, 574 S.W.2d 922, 923 (Ky. Ct. App. 1978) ("The term 'citizen' . . . is substantially synonymous with the term 'domicile'." (quoting Delaware, L. & W. R. Co. v. Petrowsky, 250 F. 554, 557 (2d Cir. 1918))).

99. *See supra* notes 31-34 and accompanying text.

100. *See generally* 1 J. SCHOENBLUM, *supra* note 4, § 8.02.

101. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 14 (1982); Nagaraja v. Comm'r of Revenue, 352 N.W.2d 373, 378 (Minn. 1984) (realtors intent to establish domicile not negated by their visa status); *In re* Marriage of Pirouzkar, 51 Or. App. 519, 524, 626 P.2d 380, 383 (1981) (federal immigration law does not prohibit states from allowing a nonimmigrant alien to establish domicile for purpose of personal jurisdiction); Bustamante v. Bustamante, 645 P.2d 40, 42 (Utah 1982) (visa status not controlling for purpose of establishing domicile for divorce).

Mexico.

Conversely, the fact that Maria resided continuously in California for the five years prior to her death is persuasive as evidence of both physical presence and intent to remain in California. It is clear, however, that "mere residence in a state is not enough to show domicile."[102] What is needed beyond "mere residence" is intent to remain, which is evidenced by the presence of relatives living in the jurisdiction. Therefore, the fact that Maria was living with her daughter is strong evidence of her intent to remain indefinitely.[103] Similarly, the joint bank account is also evidence of an intent to remain indefinitely. If, however, the account was a mere convenience, it would not carry much weight.[104] Another factor evincing Maria's intent to establish a domicile in California is the fact that she brought all of her personal possessions with her. This is likely to be viewed as persuasive by the court because it also represents assets in the jurisdiction. Because Maria died with an heir who resides in the United States and within the forum state, the notification of a consular official would not be necessary. Furthermore, California does not impose any restrictions on the ability of an alien to serve as administrator, so either Maria's son or daughter would be eligible for service. The probate court could, however, disqualify her son as a matter of discretion or cause him to post a bond due to the fact that he may not be amenable to service of process.

2. Carlos died testate in Florida where he had lived since fleeing Cuba in 1961. He managed to bring a portion of his assets with him, but left the bulk of his net worth behind. After being admitted under refugee status, Carlos opened a restaurant in equal partnership with a friend. He owned a house in Florida and paid income taxes, but he always referred to Cuba as "home." Carlos often stated that he would return to Cuba as soon as capitalism returned. His will named his wife as executor of his estate and primary beneficiary. Relatives in both Cuba and the United States were also named beneficiaries. Carlos' wife submitted the will for probate in a Florida court.

Since Florida is the forum state, its law will be used to determine where Carlos was domiciled at the time of his death.[105] A consideration of particular concern in this case is Carlos' status as a refugee. It is clear

---

102. Jong v. General Motors Corp., 359 F. Supp. 223, 225 (N.D. Cal. 1973); *see also* Mantin v. Broadcast Music, 244 F.2d 204 (9th Cir. 1957).

103. *See supra* note 95.

104. Estate of Glassford, 144 Cal. App. 2d 181, 186, 249 P.2d 908, 911 (1952).

105. See RESTATEMENT, *supra* note 7, § 13; *see also* Quintana v. Ordono, 195 So. 2d 577, 579 (Fla. Dist. Ct. App. 1967).

that, although such status does not constitute authorization to reside permanently,[106] a refugee may become a domiciliary of his country of asylum.[107] Courts that have so held have reasoned that, even if a refugee lacks the intent to remain permanently, the intent to remain indefinitely is sufficient to become a domiciliary.[108] Thus, despite the fact that a refugee may harbor a desire to return "home" if the political situation there changes, the refugee may still possess the requisite intent to be a domiciliary of the asylum jurisdiction since the return to his or her native land is only speculative.[109]

Although there is ample authority to support the proposition that intent to remain indefinitely is adequate for establishing domicile, the United States Court of Appeals for the Eleventh Circuit recently held to the contrary. In *McDougald v. Jenson*,[110] the court held that, in order "[t]o establish a new domicile, one must physically reside in a new location with an intent to make his home there permanently."[111] The departure from the "remain indefinitely" standard may be explained by the fact that the case involved the kidnapping of a child and the court was reluctant to remove the case from Florida where proceedings had begun.[112] Nonetheless, this case demonstrates that courts are willing to in-

---

106. *See* Juarrero v. McNayr, 157 So. 2d 79, 80 (Fla. 1963).

107. RESTATEMENT, *supra* note 7, § 17, at comment g; *see also* Stifel v. Hopkins, 477 F.2d 1116, 1123 (6th Cir. 1973) ("Refugees or fugitives, who leave their homes because of unhappiness with existing political conditions, fear of physical harm, or apprehension of prosecution, can establish domiciles within the jurisdictions in which they seek asylum."); Moreno v. Univ. of Maryland, 420 F. Supp. 541, 558 (D. Md. 1976), *aff'd sub nom.* Moreno v. Elkins, 556 F.2d 573 (4th Cir. 1977), *cert. granted*, 434 U.S. 888 (1977), 435 U.S. 647 (1978) (question certified to Maryland Court of Appeals), *sub nom.* Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979) (answer to certified question); McKenna v. McKenna, 282 Pa. Super. 45, 49, 422 A.2d 668, 670 (1980) ("[R]efugees, mental incompetents, and other institutionalized persons, have been able to establish domicile within their new jurisdictions even when compelled by circumstances beyond their control to relocate there."); Note, *Domicil of Refugees*, 42 COLUM. L. REV. 640 (1942).

108. *See, e.g.*, Perez v. Perez, 164 So. 2d 561, 562 (Fla. Dist. Ct. App. 1964) (Cuban refugee held to be a domiciliary of Florida for purpose of divorce); *cf.* Lew v. Moss, 797 F.2d 747, 750 (9th Cir. 1986); Scoggins v. Pollock, 727 F.2d 1025, 1026 (11th Cir. 1984); Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983); Holmes v. Sopuch, 639 F.2d 431, 433 (8th Cir. 1981); Perito v. Perito, 795 P.2d 895 (Alaska 1988).

109. *Perez*, 164 So. 2d at 563-64; *see also* 1 BEALE, THE CONFLICT OF LAWS § 21.1 (1955). *But see Juarrero*, 157 So. 2d at 81 (refugee cannot possess the requisite intent to establish, in good faith, a permanent home for purposes of a homestead exemption).

110. 786 F.2d 1465 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 207 (1986).

111. *Id.* at 1483.

112. *See id.* "[T]o construe the statute's residency requirement to refer to actual resi-

terpret domicile and residence requirements to achieve a particular result.[113] Furthermore, it puts practitioners on notice that domicile, and especially the intent of an alien to remain in a jurisdiction, may be hotly contested. Therefore, an attorney must be diligent in creating a solid record on which to base an appeal in an effort to protect the rights of the client.

In contrast to the difficulty of determining whether a court will find that a refugee possesses the requisite intent to become a domiciliary of the place of asylum, all the other factors would clearly support a finding that Carlos was domiciled in Florida. Furthermore, his wife would be able to serve as executor of the estate since Florida's statutory restrictions on the ability of an alien to serve as a personal representative only apply to nonresident aliens who are unrelated to the decedent.[114] It is important to note, however, that final authority in determining an alien decedent's domicile, and in appointing an alien to administer the estate, lies in the discretion of the probate court.

IV. POST-ADMINISTRATION

A. *Restrictions on Disposition to Aliens*

1. Historical and Background Information

At common law, aliens could not take title to real property through intestate succession, and title taken by purchase or devise was subject to forfeiture to the sovereign.[115] Furthermore, if an alien died owning land,

---

dence, no matter how transitory or temporary, 'would encourage forum shopping for child custody modification . . . .'" *Id.* at 1483 n.10 (quoting McDougald v. Jenson, 596 F. Supp. 680, 687 (N.D. Fla. 1984)).

113. *See* Reese, *supra* note 19, at 595-96 ("It is submitted that the term [domicile] is sometimes attributed various meanings within the framework of a single legal purpose so as to permit the attainment of what the court believes to be the correct result in the individual case."); *Rights and Restrictions, supra* note 45, at 665 ("It can be expected that courts may be prone to find ways to disqualify aliens [from appointment as executor or administrator], nevertheless, and will rely on evidence that the particular applicant cannot, for one reason or another, perform his fiduciary duties in an acceptable fashion.").

114. *See supra* notes 78-85 and accompanying text.

115. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 602, 614-16 (1813); *see also* Webb v. O'Brien, 263 U.S. 313, 321 (1923); Note, *Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents*, 25 SYRACUSE L. REV. 597, 598 (1974).

title would automatically vest in the jurisdiction where the property was located, without so much as an adjudication of escheat.[116] Even at common law, however, the inheritance of personal property was free of restrictions.[117] Although the states followed the common law rules during the colonial period, the vast majority of states have modified those principles by statute.[118] Aside from avoiding conflict with the federal constitution, statutes and treaties, the power of the states to restrict an alien heir's inheritance was very broad.[119] An example of this virtually unfettered power is *Mager v. Grima*,[120] in which the Supreme Court upheld the validity of discriminatory state restrictions on alien inheritance. The Court held that a special tax imposed on property and wealth inherited by aliens was within the proper scope of state regulation and nonviolative of the Constitution. This finding was consistent with international law which views rights of succession as matters properly governed exclusively by local law.[121]

Many states utilized their power to regulate alien inheritance in reaction to the hostilities toward the Axis nations during World War II and its aftermath. These statutes were further expanded in the cold war period which followed and became known as "Iron Curtain" statutes because of their blatant focus on aliens from Communist Bloc countries.[122] Most of the statutes conditioned the alien heir's right to receive his or her share of the decedent's estate on a showing that the beneficiary's country extended reciprocal rights to United States citizens. Other statutes required an additional assurance that the alien beneficiary would in fact receive the benefit, use and control of the inheritance, uninhibited by the beneficiary's government.

The zeal with which these statutes were enforced by state probate courts increased dramatically after the Supreme Court upheld the validity of California's reciprocal inheritance statute in *Clark v. Allen*.[123]

---

116. Taylor v. Benham, 46 U.S. (5 How.) 232, 260 (1847).

117. Craig v. Leslie, 16 U.S. (3 Wheat.) 563, 576 (1818). *See generally* 3A AM. JUR. 2d *Aliens and Citizens* § 2010 (1973).

118. *See* Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 TEMP. L.Q. 15, 17 (1962).

119. *See, e.g.*, Irving Trust Co. v. Day, 314 U.S. 556 (1942).

120. 49 U.S. (8 How.) 490 (1850).

121. Fallwell, *State Probate Laws and Alien Heirs—The Zschernig Legacy*, 21 BAYLOR L. REV. 450, 450-51 (1969).

122. *Id.* at 455. *See generally* Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 NW. U.L. REV. 221 (1957); Note, *supra* note 115, at 599.

123. 331 U.S. 503 (1947).

The California statute was challenged on the ground that it unconstitutionally intruded into the federal realm of foreign affairs; the crux of the argument being that the statute's purpose was to create reciprocal rights for United States citizens who were beneficiaries of foreign estates. The Court rejected this argument stating that, while the California statute "will have some incidental or indirect effect in foreign countries," such an impact would not be sufficient to "cross the forbidden line."[124] Twenty-one years later, Justice Douglas, who wrote for the majority in *Clark v. Allen*, held in *Zschernig v. Miller*[125] that the application of a similar statute which "affect[ed] international relations in a persistent and subtle way," unconstitutionally intruded on the federal domain.[126] Justice Douglas distinguished *Clark v. Allen*, stating that the California statute was examined on its face,[127] while the challenge to the Oregon statute in *Zschernig* was based on its effect as applied by that state's probate courts.[128] Thus, the rationale for the decision in *Zschernig* was that the structure of the Oregon alien inheritance statute required that the state's probate courts evaluate the administration of a foreign government's laws and pass judgment on them, and that this behavior as a practical matter had the potential to intrude into the foreign policy domain.[129] It is important to note that the Court was very clear in stressing that alien inheritance statutes are not per se unconstitutional since some states still employ such restrictions.[130]

In addition to state alien inheritance statutes, the rights of beneficiaries have also been subjected to federal statutory regulation. Federal regulations have been promulgated under the Trading with the Enemy Act[131] that may affect the rights of alien heirs. The Foreign Assets Control Regulations[132] prescribe that the United States Treasury Department must provide prior approval and clearance through a licensing pro-

---

124. *Id.* at 517.

125. 389 U.S. 429.

126. *Id.* at 440-41.

127. *Id.* at 433.

128. *Id.* at 437. In a lengthy footnote, Justice Douglas quoted language from a variety of state probate cases to illustrate the "foreign policy attitudes" which the Court found to be problematic in conjunction with reciprocity statutes. *Id.* at 437 n.8; *see also* Fallwell, *supra* note 121, at 457-61.

129. Fallwell, *supra* note 121, at 459.

130. *See, e.g.*, IOWA CODE ANN. § 567.2 (West Supp. 1988); MONT. CODE ANN. § 72-2-214 (1987); N.C. GEN. STAT. §§ 64-3 to -5 (1985); OKLA. STAT. ANN. tit. 60, § 121 (West 1971); WYO. STAT. §§ 2-4-105, 34-15-101 (1977).

131. 50 U.S.C. app. §§ 1-44 (1982).

132. 31 C.F.R. §§ 500.101-.901 (1987).

cedure for all property transactions by aliens who are nationals of countries on the "blocked list." Currently there are five nations whose citizens are subject to these regulations: (1) Cambodia, (2) Cuba, (3) North Korea, (4) North Vietnam, and (5) South Vietnam.[133]

2. State Statutory Restrictions

State statutory restrictions on alien inheritance have two basic formats: "reciprocity" statutes, and "benefit, use and control" statutes.[134] Reciprocity statutes are typically found in the Western states[135] and, as previously noted, condition the ability of a nonresident heir to inherit from a United States situs estate upon the existence of a reciprocal right permitting a United States citizen to inherit from an estate located in the country of the heir's nationality. "Benefit, use and control" statutes require an heir to demonstrate that his or her government will entitle the heir to the "benefit, use and control" of the inheritance, and are chiefly used by the Northeastern states.[136] Both types of statutes place the burden of proof on the alien heir to show that either "reciprocity" exists, or that he or she will be entitled to "benefit, use and control" of the inheritance.[137]

There is, however, a major difference between these two statutory schemes. Under a reciprocity statute, failure to meet the burden of proof results in the forfeiture of that heir's share of the estate to other eligible beneficiaries or, in the absence thereof, to the situs state.[138] The share of a nonresident alien heir who is unable to prove entitlement to "benefit, use and control" of that property, however, is not forfeited. Instead, the probate court will hold the claimant's share interest until the nonresident alien can prove that the conditions of the statute are met.[139]

The purposes of these statutes—keeping property out of the control of unfriendly governments and inducing all countries to grant United States citizens liberal inheritance rights—are readily apparent. What is less clear is whether these goals are actually furthered by such legislation. At least one commentator has suggested that, since reciprocity is judged at the time of the decedent's death rather than upon the distribution, anom-

---

133. *Id.* § 500.201. Cuba is covered separately by the Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-.901 (1987).

134. *See* Note, *supra* note 115, at 599.

135. North Carolina is an exception. N.C. GEN. STAT. § 64-3 to -5 (1985).

136. *See, e.g.*, N.Y. SURR. CT. PROC. ACT LAW 2218(2) (McKinney Supp. 1988).

137. *See* Note, *supra* note 115, at 600.

138. *See, e.g.*, N.C. GEN. STAT. § 64-3 to -5 (1985).

139. *See, e.g.*, N.Y. SURR. CT. PROC. ACT LAW 2218 (2) (McKinney Supp. 1988).

alous results may occur.[140] Likewise, the burden of meeting the proof required to be eligible under the "benefit, use and control" statutes for an alien residing in a Communist Bloc country may be so insurmountable that it amounts to an "irrebuttable presumption" against eligibility.[141] Thus, in *Daniunas v. Simutis*,[142] the court held that beneficiaries in Lithuania did not meet the burden of proof required by New York's statute, despite the fact that it was shown that Lithuanian heirs had been entitled to "benefit, use and control" in the past. Furthermore, the court stated that the heirs would have to prove a "continuation of this practice or that it will be applied to these Lithuanian plaintiffs."[143]

To avoid the lengthy and cumbersome process of factfinding in cases involving these statutes,[144] a number of courts have relied on a United States Treasury Department Regulation that lists countries in which government checks probably would not reach the payee if sent.[145] The countries currently listed are Albania, Cuba, Kampuchea, East Germany, North Korea, and North Vietnam.[146] Reliance on this list, however, is not well-founded in light of repeated State Department statements that the distribution of United States estates to heirs in Communist countries is not restricted by federal law.[147]

In addition to the two types of statutory schemes utilized by some states to restrict inheritance by nonresident aliens,[148] certain states re-

---

140. Note, *supra* note 115, at 601; *see also* Estate of Nepogodin, 134 Cal. App. 2d 161, 285 P.2d 672 (1955).

141. Note, *supra* note 115, at 602.

142. 481 F. Supp. 132 (S.D.N.Y. 1978).

143. *Id.* at 136.

144. It is well settled that whether reciprocity is present, and whether an alien heir will be entitled to "benefit, use and control" of an inheritance are questions of fact, not law. *See Daniunas*, 481 F. Supp. at 136. Three California courts arrived at seemingly anomalous results in determining whether and when reciprocity existed with Germany in the 1940s. *Compare* Estate of Schlutting, 36 Cal. 2d 416, 224 P.2d 695 (1950) (reciprocity did not exist as of April, 1945) *with* Estate of Miller, 104 Cal. App. 2d 1, 20, 230 P.2d 667, 679 (1951) (reciprocity existed as of April 1942) (court noted split of authority) *and* Estate of Rihs, 102 Cal. App. 2d 20, 227 P.2d 564 (1951) *appeal dismissed sub nom.* Weinmann v. McGrath, 320 U.S. 804 (1951) (per curiam) (reciprocity exited as of November 1946).

145. Treas. Reg. § 211.1(a) (1987).

146. *Id.*

147. *See* Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-.901 (1987).

148. Currently, ten states expressly restrict the inheritance of property by nonresident aliens as distinguished from resident aliens. IOWA CODE ANN. § 567.2 (West Supp. 1988), MISS. CODE ANN. § 89-1-23 (1972), MO. ANN. STAT. § 442.586 (Vernon 1986), MONT. CODE ANN. § 72-2-215 (1987), NEB. REV. STAT. § 4-107 (1987), N.H. REV. STAT. ANN. § 477:20 (1983), N.C. GEN. STAT. § 64-3 (1985), N.D. CENT. CODE § 43-

strict alien inheritance based on other classifications. Four states prohibit the inheritance of real property by "enemy aliens" whether resident or nonresident,[149] and Kansas does not allow aliens who are ineligible for citizenship to inherit real estate except when provided for by treaty.[150] Additionally, Illinois and Indiana allow "aliens" to inherit land, but require such property to be disposed of within a specified number of years.[151] It is up to the practitioner, then, to investigate whether the beneficiary in each instance is included under a restricted category in the scheme of the situs state.[152]

3. Federal Statutory Restrictions

As noted previously,[153] the Trading with the Enemy Act[154] authorizes the "blocking" or "freezing" of United States situs assets destined for aliens who are nationals of countries designated by the Act. This Act may prove a formidable barrier to alien beneficiaries who are nationals of countries which are designated on the "blocked list,"[155] although there are administrative procedures set forth in the Foreign Assets Control Regulations by which an alien who is a citizen of a country on the "blocked list" may apply to the Treasury Department for a license.[156]

The practitioner must understand the Foreign Assets Control Regulations in order to determine the client's rights. The regulations define

---

2A-3 (1983), OKLA. STAT. ANN. tit. 60 § 121 (West 1971), WYO. STAT. § 34-15-102 (1987). New York employs the "benefit, use and control" standard without explicit reference to nonresident aliens. *See supra* note 139. It may be inferred, however, that all other classes of aliens would meet this requirement.

149. GA. CODE ANN. § 1-2-11(b) (1982); MD. REAL PROP. CODE ANN. § 14-101 (1988); N.J. STAT. ANN. § 46:3-18 (West Supp. 1988); VA. CODE ANN. § 55-1 (1986). Such state statutes may be superfluous in light of the Trading with the Enemy Act and associated regulations.

150. KAN. STAT. ANN. § 59-511 (1983).

151. ILL. ANN. STAT. ch. 6, para. 2 (Smith-Hurd. Supp. 1988) (real estate inherited by alien must be disposed of within six years unless alien becomes United States citizen in the interim); IND. CODE ANN. § 32-1-8-2 (Burns Supp. 1988) (alien inheriting real property in excess of 320 acres must dispose of excess within five years).

152. If the alien heir is a nonresident unable to be represented by counsel, Alabama and Minnesota expressly provide that payment may be made to the consular official for transmission to the heir. ALA. CODE § 6-8-20 (1977); MINN. STAT. ANN. § 525.484 (West 1975).

153. *See supra* notes 131-33 and accompanying text.

154. 50 U.S.C. app. §§ 1-44 (1982).

155. Currently, the list includes: Cambodia, Cuba, North Korea, North Vietnam, and South Vietnam. *See supra* note 133 and accompanying text.

156. 31 C.F.R. § 500.201(b) (1987).

"blocked estate of a decedent" as: "any decedent's estate in which a designated national has an interest. A person shall be deemed to have an interest in a decedent's estate if he: (a) Was the decedent; (b) Is a personal representative; or (c) Is a creditor, heir, legatee, devisee, distributee, or beneficiary."[157] Although this regulation seems to state that any estate of a deceased national of a designated country could be blocked on the ground that the decedent has an interest, this view has been rejected.[158] In *Real v. Simon*,[159] the Fifth Circuit relied on the statements of the Senate Foreign Affairs Committee,[160] and the House Report on the subject of unblocking the Cuban assets of American residents[161] in concluding that "there is no intent on the part of Congress to require the Treasury to continue blocking funds lawfully claimed by American citizens where there is no Cuban interest in the assets."[162] Thus, for the estate of the decedent to be blocked under the regulations, a "designated national" other than the decedent must have an interest.

This principle has been defined further in two subsequent cases. In *Ferrera v. United States*,[163] the court addressed the issue of whether assigning a resident alien all interests in the blocked estate of a Cuban national would eliminate the existence of a Cuban interest for purposes of the Cuban Assets Control Regulations.[164] In holding that assignment

---

157. *Id.* § 500.327.

158. *See* Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975) (holding such an interpretation "is arbitrary and without basis in either the language or the purpose of the Trading with the Enemy Act."); *see also* Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).

159. 510 F.2d 557.

160.

> [T]he Committee on Foreign Relations recommends that upon application the Department of the Treasury examine with particular care each case *involving Cuban assets beneficially owned by American citizens* to determine whether those assets should continue to be blocked. . . . *if the assets are wholly or substantially owned by citizens and residents of the United States they should be unblocked* . . . .

Real, 510 F.2d at 563-64 (quoting S. REP. No. 701, 89th Cong., 1st Sess. *reprinted in* 1965, U.S. CODE CONG. & ADMIN. NEWS 3581, 3585) (emphasis added by court).

161.

> While the committee does not recommend wholesale unblocking of all U.S. owned assets, it does recommend that a thorough examination be made by the Department of the Treasury on a case-by-case basis to determine from the evidence and the equities involved in each case the proper disposition of U.S. national owned blocked assets. . . .

Real, 510 F.2d at 564 (quoting H.R. REP. No. 706, 89th Cong., 1st Sess. 7 (1965)).

162. *Real*, 510 F.2d at 564.

163. 424 F. Supp. 888 (S.D. Fla. 1976).

164. 31 C.F.R. §§ 515.101-.209 (1987). The Cuban Assets Control Regulations are

was ineffective, the court concluded that the assignments from Cuban nationals were themselves "transfers" of property and therefore proscribed by the regulations.[165] The court reasoned that the prerequisite for unblocking the estate as set forth in *Real*, namely the absence of Cuban interests, was not met.[166]

The Fifth Circuit answered a question in *Tagle v. Regan*[167] which it had left open in *Real* six years earlier—whether an estate could be partially unblocked for the benefit of United States residents while the interests of Cuban nationals continued to be blocked. The court answered the question in the affirmative, but with qualifications. First, relying on an earlier version of the regulations, the court implied an exception for intestate succession in the word "transfer."[168] Next, having determined that the transfer was exempted, the court held that the shares of the United States residents[169] were divisible from that of the Cuban national.[170] Finally, the court held that the heirs petitioning the Treasury Department for a license to unblock a "designated national's" estate bore the "burden of showing that they are essentially innocent recipients of property rights before a license need be granted."[171] Thus, the holding in *Tagle*—that the interests of heirs residing in the United States were divisible from those of a Cuban national—greatly expanded the ability of resident alien beneficiaries to receive intestate shares from alien decedents whose estates are blocked under the Foreign Assets Control Regulations.[172] Thus, all that need be shown by a resident alien seeking a license to unblock assets is that (1) the petitioners are entitled to an intestate share of the estate, (2) such share is divisible from the rest of the assets as a practical matter, and (3) the petitioner is an "innocent recipient" of the share.

---

a sub-section of the Foreign Assets Control Regulations. *Id.*

165. 424 F. Supp. at 889-90.

166. *Id.* at 898.

167. 643 F.2d 1058 (5th Cir. Unit B, Apr. 1981).

168. *Id.* at 1064.

169. One heir was a permanent resident alien and the other was a naturalized citizen. *Id.* at 1058.

170. *Id.* at 1064.

171. *Id.* at 1068 (footnote omitted).

172. Presumably, this holding also has important estate planning implications given that shares in such an estate can only be unblocked if passing by intestate succession.

4. Impact of Treaties

The federal government, by virtue of its treaty making power,[173] has the authority to regulate the right of aliens to inherit both real and personal property.[174] When state laws of succession conflict with federal regulation, state law must give way to the supremacy of the treaty.[175] Before such a conflict will be recognized, however, it must be shown that the treaty was in effect and governed the rights of the parties,[176] and that the terms of the treaty are inconsistent with the state law in question.[177] It should also be noted that most states regulating alien inheritance do so more stringently than do treaties. Therefore, the treaties act more as a floor below which a state may not deny rights than as a ceiling beyond which a state may not extend them.[178]

Since a number of states predicate the ability of a nonresident alien to inherit an estate within its jurisdiction upon the granting of reciprocal rights by the nation of the alien's citizenship,[179] it is necessary to interpret treaties with the alien beneficiary's government. In *Kolovrat v. Oregon*,[180] the Supreme Court, in an opinion written by Justice Black, liberally construed an 1881 treaty between the United States and Serbia in order to find the reciprocity required by Oregon's alien inheritance statute. Not only did the Court hold that the 1881 treaty was still in effect, it also interpreted the language in that treaty in a way that can best be described as contortion.[181] Thus, the Supreme Court demonstrated a

---

173. U.S. CONST. art. 6, cl. 2.

174. *See* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931). *See generally* 3A AM. JUR. 2d *Aliens and Citizens* § 2012 (1973).

175. U.S. CONST. art. 6, cl. 2. ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Kolovrat v. Oregon, 366 U.S. 187, 190 (1961); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817).

176. *See* Sullivan v. Kidd, 254 U.S. 433 (1921); Geofroy v. Riggs, 133 U.S. 258 (1890); Haver v. Yaker, 76, U.S. (9 Wall) 32 (1870).

177. Clark v. Allen, 331 U.S. 503 (1947).

178. *See* 3A AM. JUR. 2d, *Aliens and Citizens*, § 2012 (1973).

179. *See supra* notes 134-39 and accompanying text.

180. 366 U.S. 187 (1961).

181. Article II of the Treaty provided as follows:

> In all that concerns the right of acquiring, possessing or, disposing of every kind of property. . .citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant. . .in each of these states to the subjects of the most favored nation.

Id. at 191 n.6 (quoting Treaty of 1881, United States—Serbia, art. II, 22 Stat. 963, 964 T.S. No. 319).

great willingness to interpret the treaty so as to find the grant of reciprocal rights between the United States and the nation of the alien's citizenship. This propensity for liberal treaty construction has also been adopted by state courts to achieve the same purpose.[182] Therefore, a practitioner seeking to protect the interests of an alien beneficiary should not only search out treaties between the United States and the alien's country, he or she should also argue aggressively for a liberal interpretation of provisions within any such treaty.

B. *Application of the Method*

Due to the highly specific, jurisdictionally intensive nature of restrictions placed on an alien heir's ability to receive the benefit of his or her inheritance, the method will be set out step-by-step in the abstract rather than by use of a hypothetical situation. The first step in applying the method is to determine whether the decedent's estate will be blocked by the Treasury Department pursuant to the Trading with the Enemy Act. Such an occurrence will take place if any interested party in that estate is a national from a country on the "blocked list."[183] If there is such an interested party, the practitioner should determine whether the client has an intestate interest in the estate.[184] If so, there is case law to support the proposition that the "transfer" to the client is exempted and therefore not blocked.[185] Even if the "transfer" is found to be exempted, however, it must be divisible from any interest held by a nonresident national of the designated country or by any party not having an intestate interest. If the client's share is so divisible, that party then must demonstrate that he or she is an "innocent recipient" of the property. It is unclear what is meant by the term "innocent recipient," but presumably it requires that there be no contrivance to avoid the blocking of the share as was the case in *Ferrera*.[186] If all of these contingencies are met, the client's share should not be blocked.

The Supreme Court then interpreted the Treaty as meaning "that 'in Serbia' all citizens of the United States shall enjoy inheritance rights and 'in the United States' all Serbian subjects shall enjoy inheritance rights." *Kolovrat*, 366 U.S. at 192-93.

182. *See, e.g., In re* Chicherna, 16 Cal. 2d 83, 424 P.2d 687, 57 Cal. Rptr. 135 (1967).

183. *See supra* note 155.

184. It is important to note that it may be in a client's best interest to contest the validity of a will of a decedent whose estate was blocked regardless of the share to be received under that will. Otherwise, the estate will remain blocked and the client's interests will not be realized. *Cf.* Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).

185. *See supra* note 168 and accompanying text.

186. *See supra* note 162-66 and accompanying text.

The next step is to determine if there are any state prohibitions or restrictions on the client's inheritance. If the client resides within the United States, only restrictions on the inheritance of real property may constitutionally be imposed. If the client is to receive such property, the practitioner should determine whether the state where the property is located imposes a prohibition or restriction on alien inheritance. If the state does not, the client will receive his or her interest in the estate.

If, however, the client is a nonresident alien, restrictions on any form of inheritance may be imposed. Thus, both the laws of the forum state, and the laws of the state where real property in which the client has an interest is located, should be examined to determine what restrictions, if any, exist. Furthermore, if the state has an alien inheritance statute requiring a nonresident alien heir to prove "reciprocity" or "benefit, use and control," the practitioner must evaluate treaties between the United States and the country of the alien heir.

V. CONCLUSION

Due to the constantly increasing number of aliens living in the United States, more and more practitioners will be faced with clients who have interests in alien estates located in this country. Because of the complexities arising in such cases, attorneys should be armed with a method to aid in the orderly and thorough analysis of the issues with which they may be confronted. This Note proposes such a method. Through the discussion of the various concepts and issues in the context of the proposed method, it is hoped that the practitioner faced with a client having interests in an alien's United States situs estate will be provided with a starting point. It is further hoped that, through the use of the method, such an attorney will be able to adapt the method to the special needs of the client and the laws of the particular jurisdiction. If these goals are achieved, not only the client but also the attorney and court system will benefit from a more efficient and thorough disposition of the decedent alien's estate.

Richard Edson Fee