

# International Estate Planning

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Domestic and International Estate Law

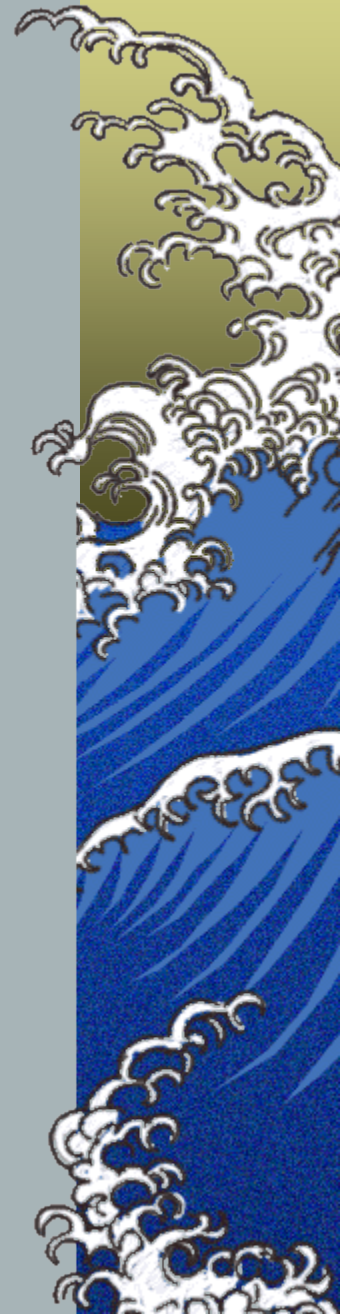
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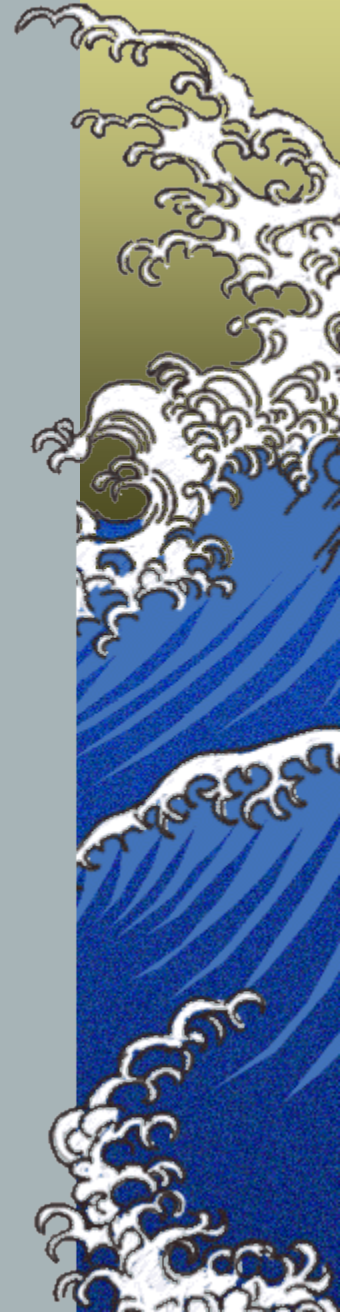
# International Travel Statistics

- ▶ *In 1996, 19.7 million people traveled overseas, 40 million in 2008, 68 million in 2014; leading areas are Mexico, Canada, UK, Dominican Republic*
- ▶ *In 1996, 46.4 million people visited the U.S., 58 million visited in 2008; 75 million in 2014; leading countries are Canada, Mexico, UK and Japan*
- ▶ *Average airline ticket fell 33% in price (adjusted for inflation) between 1976 and 1993*



# Immigration Statistics - Residents

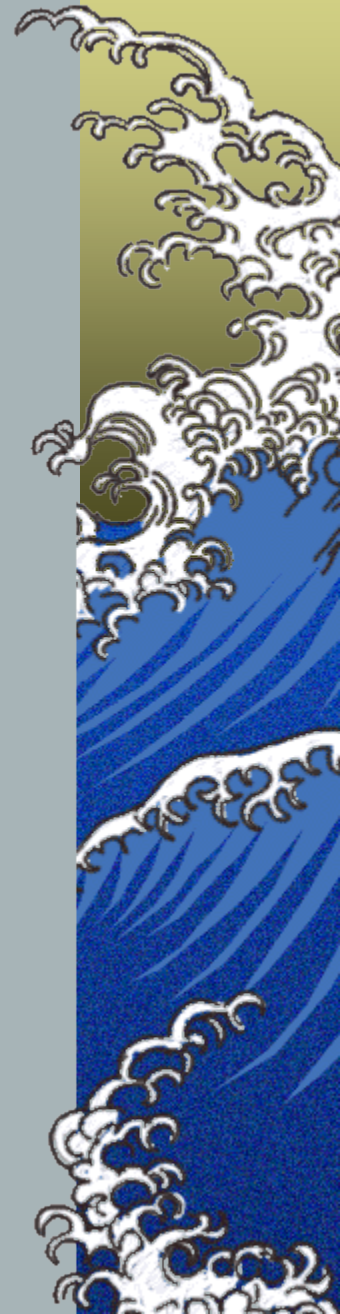
- ▶ *In 2016, over 1.1 million people became legal permanent residents of the U.S.*
- ▶ *800,000 based on family*
- ▶ *137,000 based on employment*
- ▶ *157,000 refugees/asylum seekers*
- ▶ *42% from Mexico, Canada and Caribbean, 37% come from Asia (China, India, Vietnam and Philippines), 8% from Europe, 9% Africa*
- ▶ *Most immigrants are headed to NY-NJ-PA area, Los Angeles area, Miami area, DC area and Chicago area*



# Immigration Statistics - Citizens

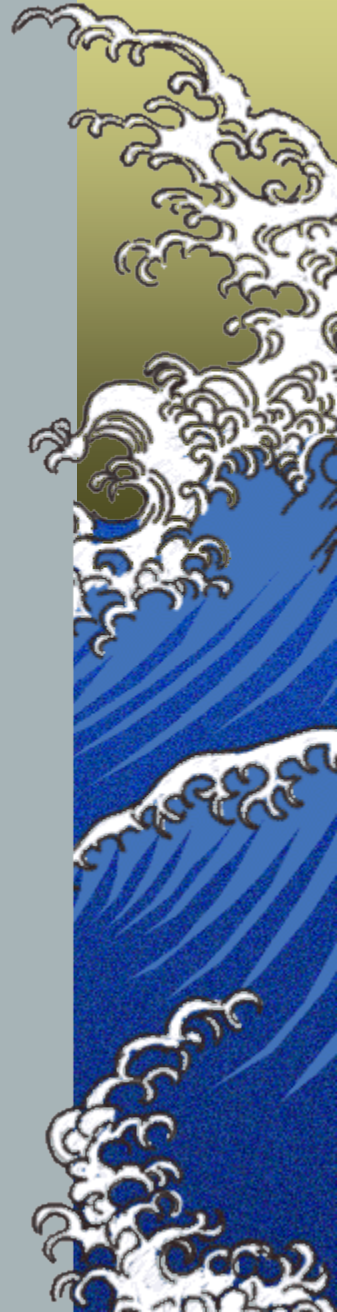
- ▶ *Between 1908 – 1990 each year had under 300,000 naturalization except two*
- ▶ *Since 1990, naturalizations have exceeded 300,000 every year*
- ▶ *In 2008, over 1 million people became citizens of the U.S. - a record*
- ▶ *In 2016, 753,000 became citizens*
- ▶ *Most of those live in CA, FL, TX and NY-NJ-PA*
- ▶ *Leading countries for naturalization are Mexico, India, Philippines, China, Dominican Republic and Vietnam*

▶ *\* 2016 Yearbook of Statistics, U.S. Office of Immigration Statistics. Department of Homeland Security*



# Immigration Statistics

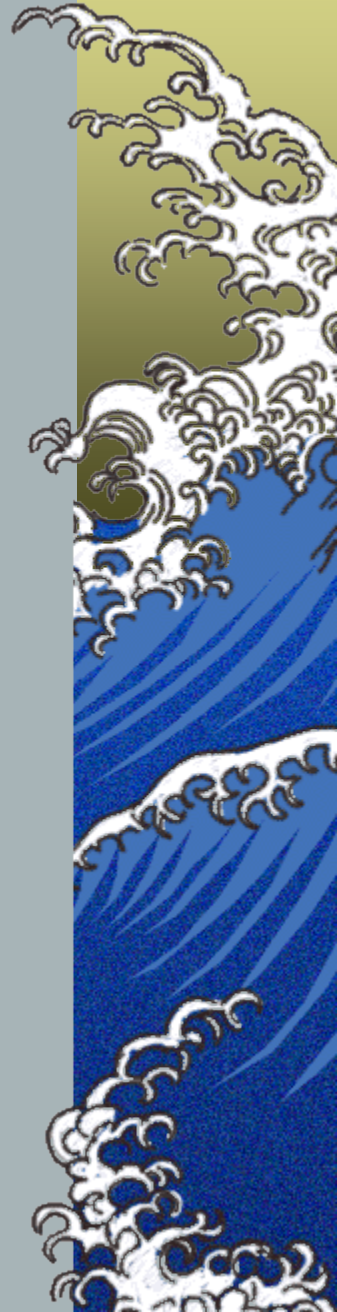
- ▶ *6,800 citizenships renounced in 2017, 26% higher than 2016 and 56% higher than 2015*



# Immigration Statistics

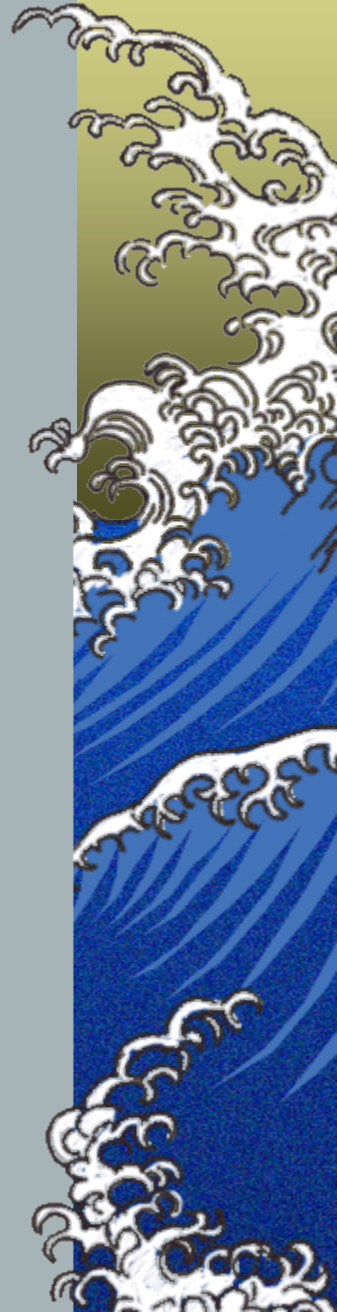
- ▶ *Immigration is not at an all-time high but it's getting close - 14% of the population is foreign-born in 2015\* compared with 14.7% in 1910*
- ▶ *Immigrants decrease unemployment. States with high immigration experience low unemployment. Immigrants create job opportunities for others.*
- ▶ *Immigrants pay taxes*

*\*Pew Research Center*



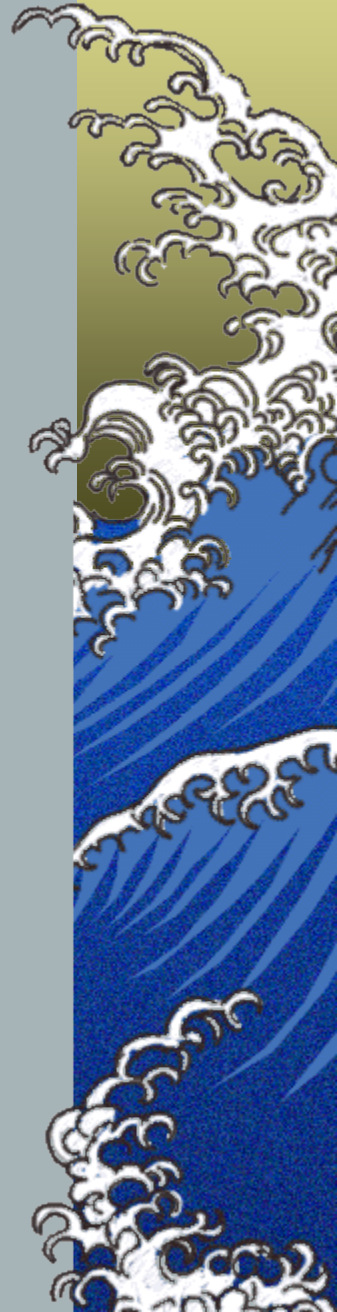
# Immigration Statistics

- ▶ *Immigrants speak English. 6% of long-term immigrants report not speaking English well*
- ▶ *Immigrants are educated. Immigrants have one full year of education more than the average native-born.*
- ▶ *Immigrants aid research and development. Immigrants make up 28% of PhDs in the U.S. in research and development in science and engineering and 24% of STEM workforce.*
- ▶ *Immigrants are entrepreneurs. 12% of the fastest growing companies in the U.S. are started by immigrants.*



# Ethical Issues

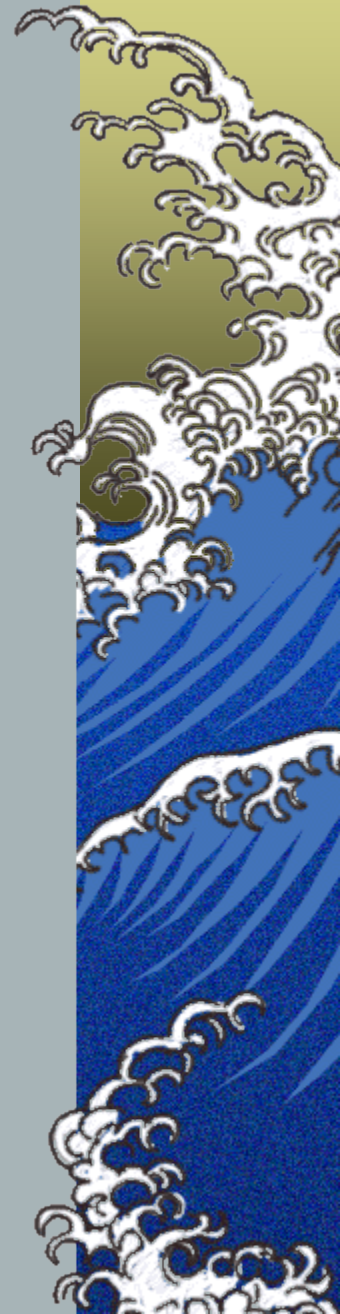
- ▶ *Unauthorized practice of law*
- ▶ *Disclosure of Assets*
- ▶ *Cultural Attitudes*
- ▶ *Legal Capacity Issues*





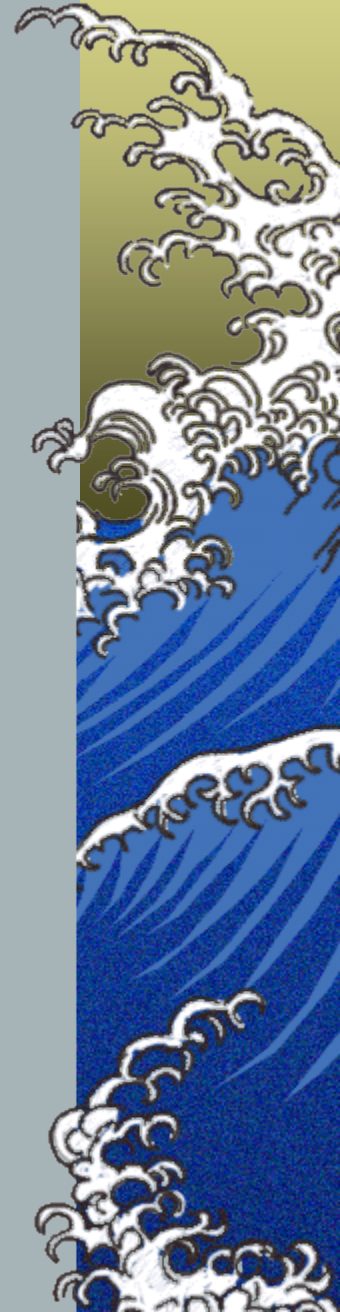
# Client Management Issues

- ▶ *Citizenship, residency status*
- ▶ *Income tax status*
- ▶ *Status of family members*
- ▶ *Location of assets*
- ▶ *Conversion of value to US currency*
- ▶ *Estate/income tax advice deductible*



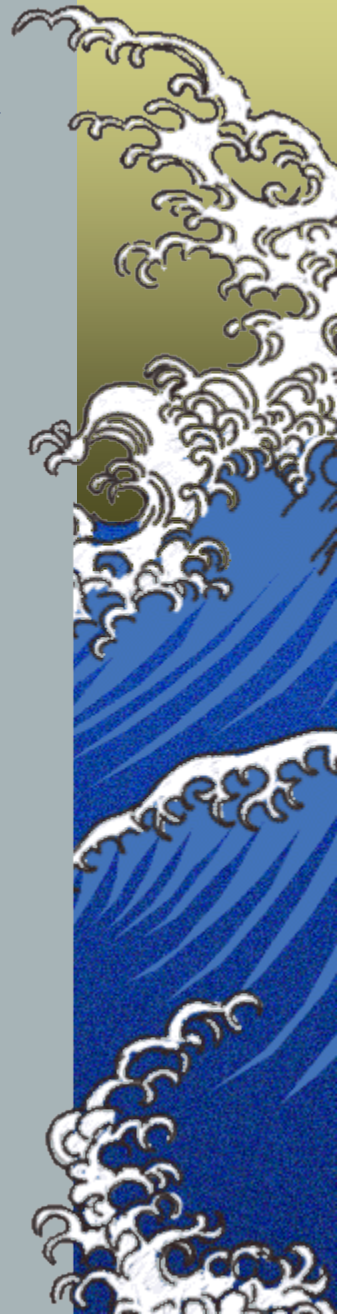
# Basis for Estate and Gift Taxation in the U.S.

- ▶ *U.S. citizenship - gross estate, wherever situated*
- ▶ *U.S. residency - gross estate, wherever situated*
- ▶ *U.S. situs property*
- ▶ *Expatriates and former U.S. residents prior to June 17, 2008*
- ▶ *Expatriates and former U.S. residents after June 16, 2008*



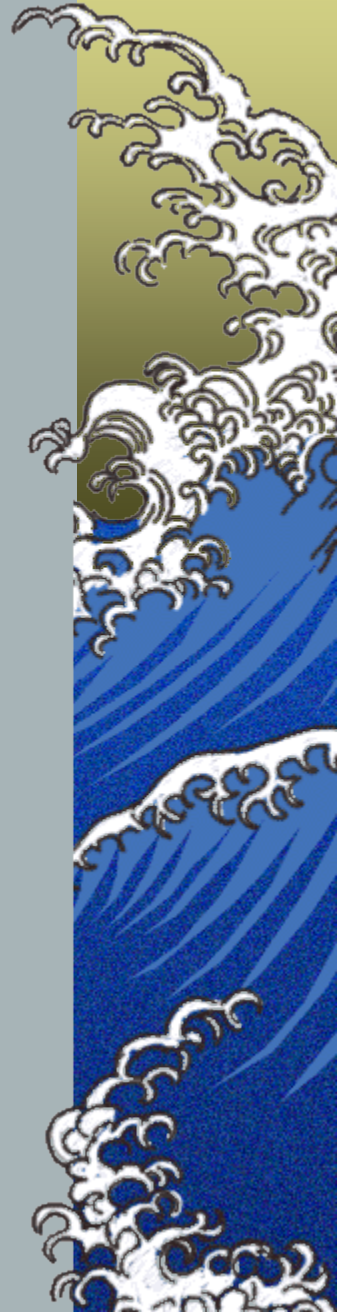
# Citizenship and Residency

- ▶ *Federal estate and gift tax exemption amount of \$11.2 million in 2018*



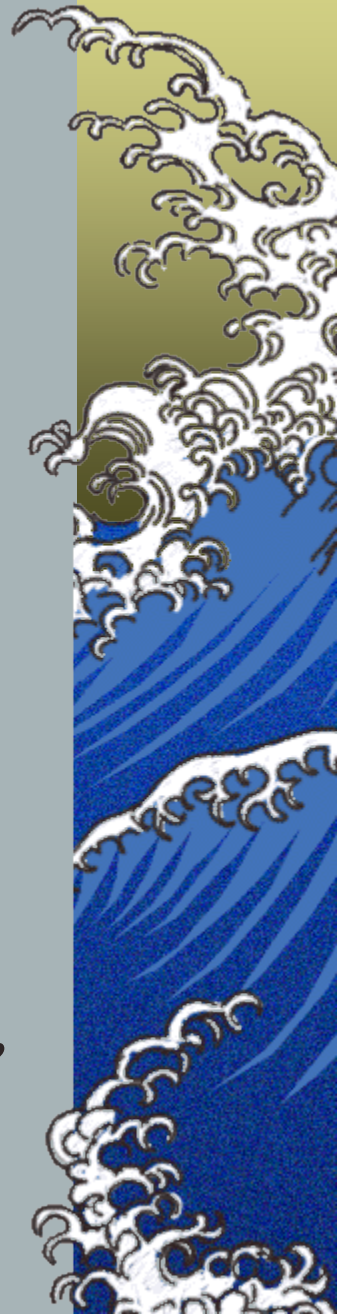
# Non-Resident Aliens

- ▶ *Any non-resident alien with an estate over \$60K must file Form 706-NA*
- ▶ *Beware of overlooking non-wealthy non-resident aliens for federal estate tax purposes*
  - ▶ *Gross estate of \$300,000, \$100,000 located in the U.S.*
  - ▶ *\$100,000 is over \$60,000 exemption amount and Form 706-NA must be filed*



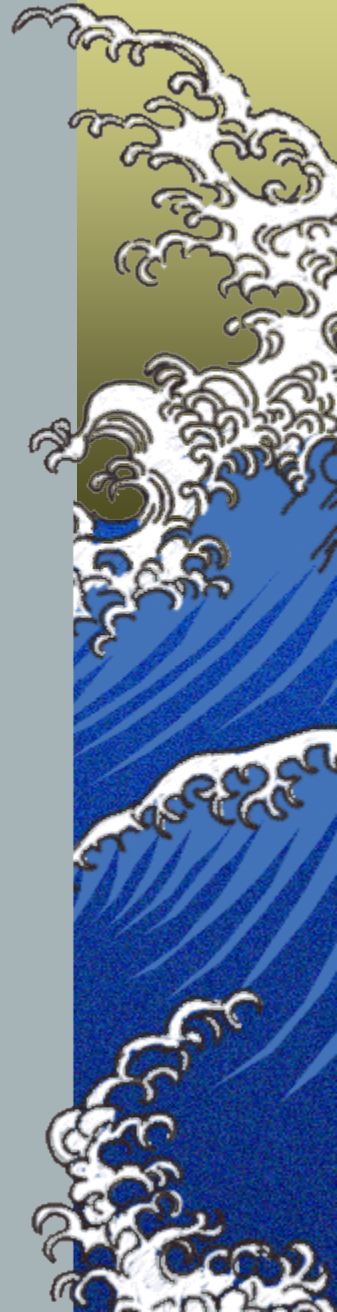
# Residency for Estate and Gift Tax Purposes

- ▶ *A resident is a decedent, who at the time of death, was domiciled in the United States*
- ▶ *Domiciles of the U.S. are those who live there with no definite present intention of leaving*
- ▶ *Lack of intent to leave evidenced by own home, personal ties, burial site, passport, tax return filed, legal documents listing domicile, etc.*



# Residency Illustrations

- ▶ *Paquette v. Commissioner*
- ▶ *Khan Case*
- ▶ *Various PLRs*



# Revenue Ruling 80-363, 1980-52

- ▶ *Decedent was an employee of an international organization and a citizen of a foreign country*
- ▶ *If found to be U.S. resident, all property wherever situated is subject to FET*
- ▶ *If found to be nonresident alien, only property physically located in U.S. is subject to FET*



# Revenue Ruling 80-363, 1980-52

- ▶ *Decedent entered the U.S. on temporary work assignment visa*
- ▶ *Found to have formed the intent to remain indefinitely in the U.S.*
- ▶ *Found to have met the definition of U.S. resident notwithstanding his visa and immigration status*





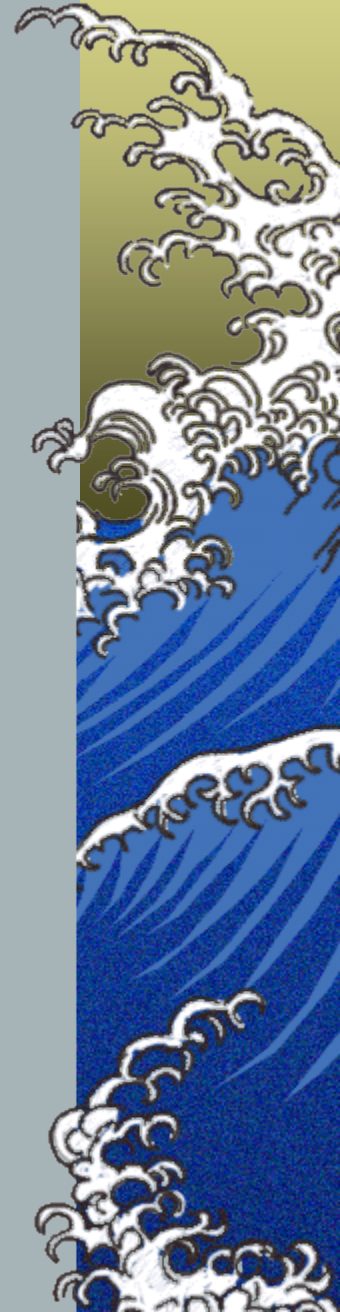
# Revenue Ruling 80-209, 1980-31

- ▶ *Illegal alien found to be a U.S. resident*
- ▶ *Entered the U.S. illegally, purchased a home and remained in the U.S. until death 15 years later*
- ▶ *Continued to purchase real estate and rented out as investments*
- ▶ *Legal capacity to acquire domicile has been found to exist even when an individual is subject to transfer to another domicile at the direction of others*



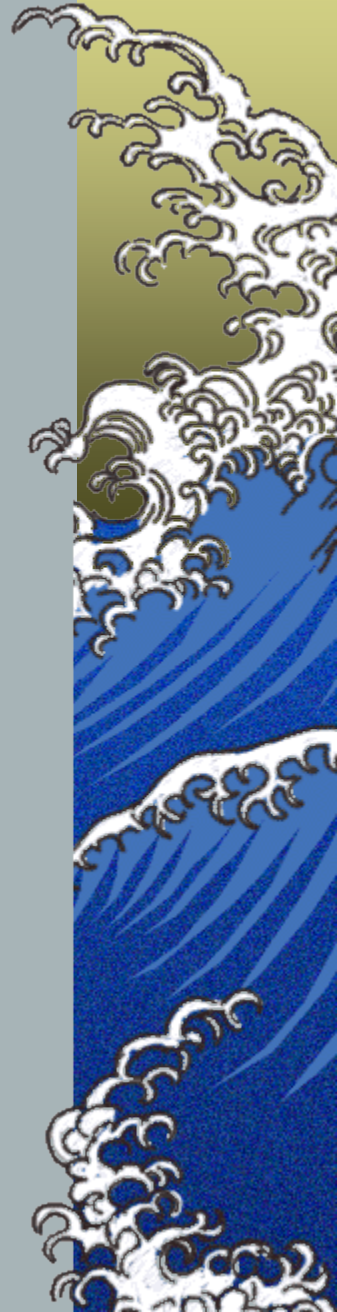
# Basis for Income Taxation in the U.S.

- ▶ *U.S. citizenship – worldwide income, wherever individual located*
- ▶ *U.S. residency – worldwide income, wherever individual located*
- ▶ *Non-U.S. residency – U.S. source income*



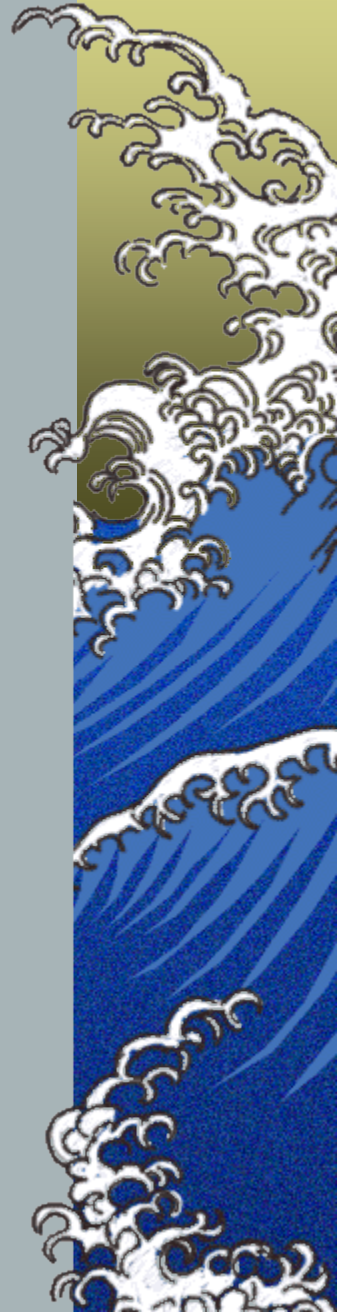
# Residency for Income Taxation in the U.S.

- ▶ *Lawful Permanent Residents – anyone with a green card is a U.S. income tax resident*
- ▶ *Substantial Presence Test – presence totals 183 days over 3 year period. (100% of days in current year + 1/3 of days last year + 1/6 of days in preceding year = 183)*
- ▶ *Closer Connection – even if you meet the substantial presence test, but are present less than 183 days in the current year and tax home, center of vital interest, etc. are in another country*
- ▶ *Treaty Provisions*



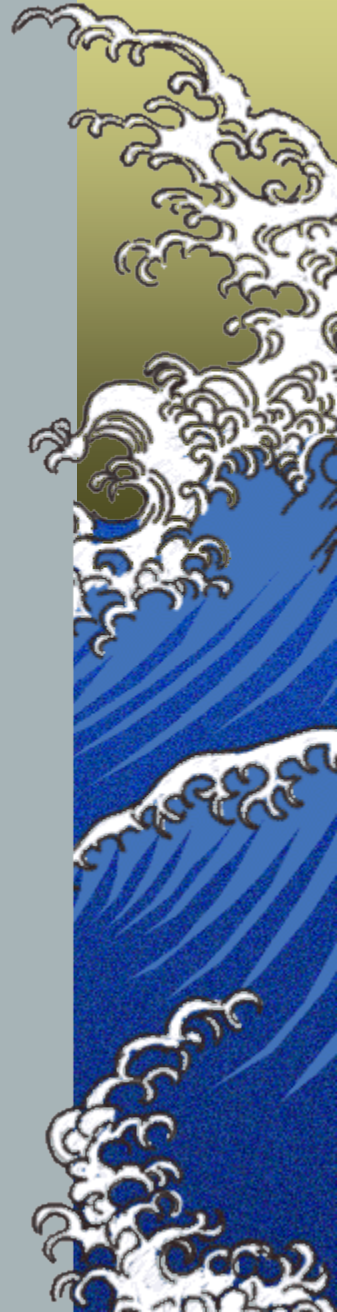
# Marital Deduction

- ▶ *IRC 2056 and IRC 2056A*
- ▶ *U.S. estate tax marital deduction is NOT allowed where property passes to a surviving spouse who is not a U.S. citizen*
- ▶ *Same limitation where deceased spouse is a resident or NRA transferring to a non-U.S. citizen spouse*
- ▶ *Limited marital deduction is \$152,000 (in 2018)*



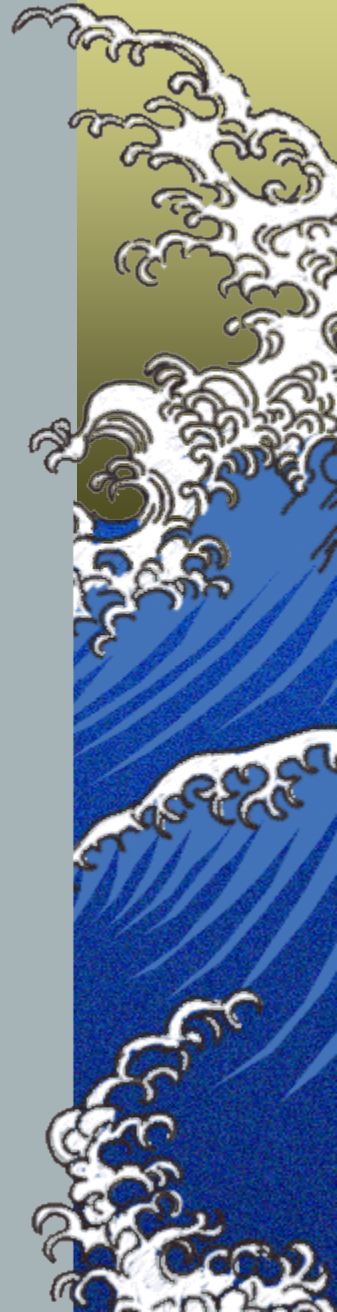
# Marital Deduction

- ▶ *Creation of a Qualified Domestic Trust, or QDOT will afford non-citizen spouse marital deduction*
- ▶ *Philosophy is to retain the taxing authority in the U.S. in the event surviving non-citizens spouse leaves the country*



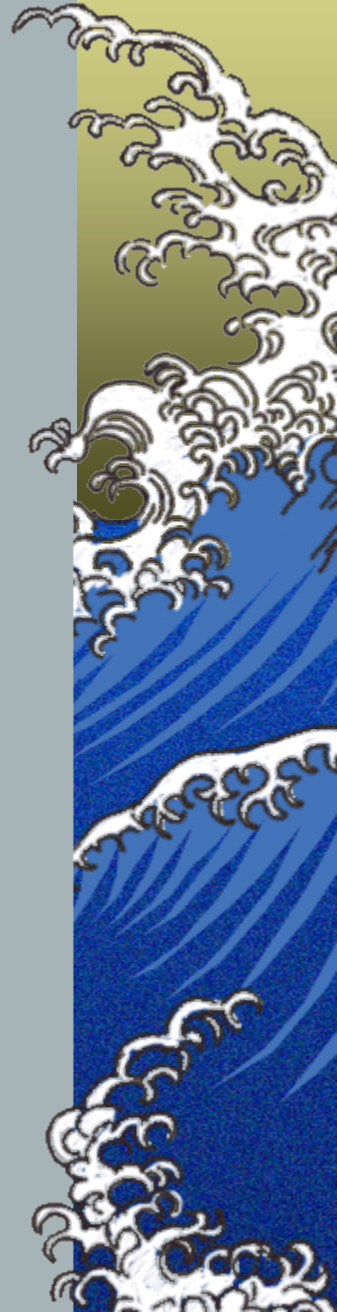
# Qualified Domestic Trust (“QDOT”)

- ▶ *One trustee must be U.S. citizen or U.S. domestic corporation*
- ▶ *Income from trust taxable to spouse beneficiary*
- ▶ *Distributions from trust will be subject to federal estate tax*
- ▶ *Property remaining in trust upon spouse’s death will be subject to federal estate tax*



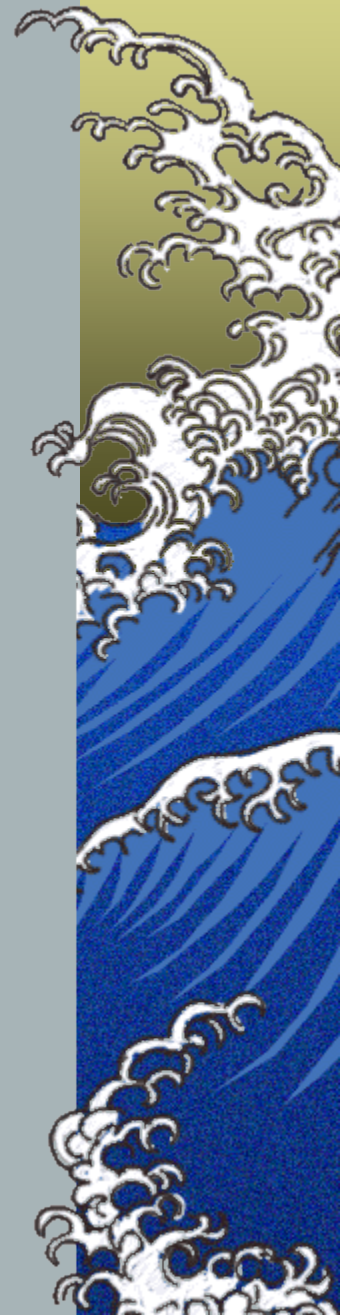
# Qualified Domestic Trust ("QDOT")

- ▶ *QDOT election must be made*
- ▶ *Must always have a U.S. situs*



# U.S. Citizenship Option

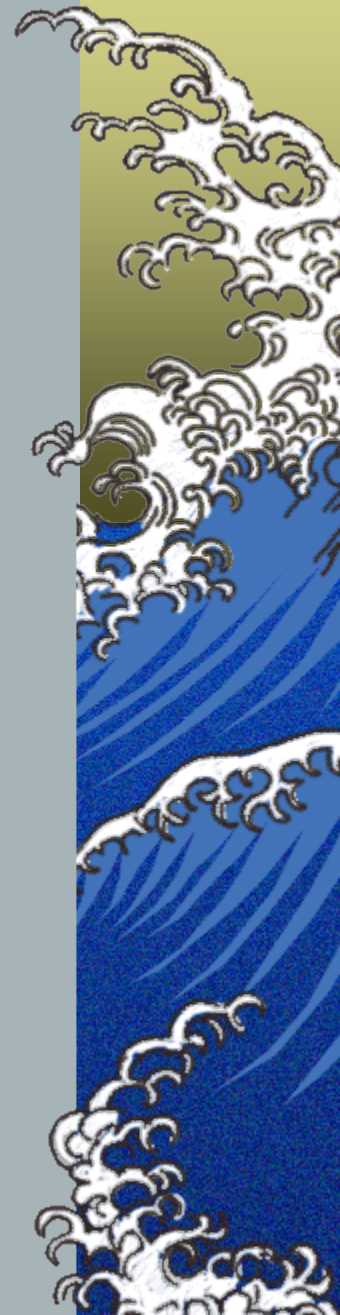
- ▶ *Spouse can become U.S. citizen after death of decedent spouse*
- ▶ *Timing of citizenship –*
  - ▶ *Prior to filing of Form 706 AND spouse is resident of the U.S. at all times from spouse's date of death*
  - ▶ *9 months to file Form 706 and may take longer to become U.S. citizen*





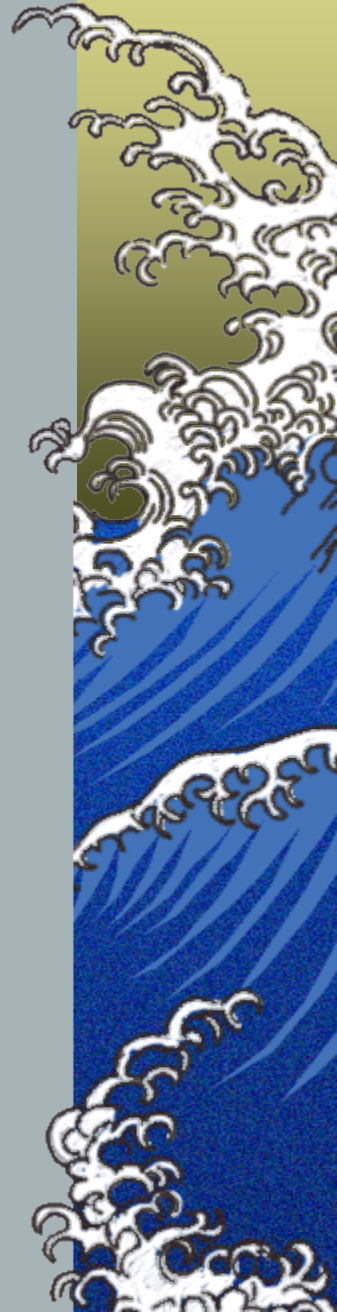
# U.S. Citizenship Option

- ▶ *QDOT may cease if:*
  - ▶ *Spouse beneficiary becomes U.S. citizen*
  - ▶ *Spouse must have been U.S. resident at all times during trust term*



# Post-Mortem QDOT

- ▶ *Set up QDOT after death*
- ▶ *Large QDOT requirements:*
  - ▶ *\$2 million + QDOTs*
  - ▶ *One U.S. trustee must be a bank*
  - ▶ *U.S. trustee must furnish bond of 65% of trust principal*



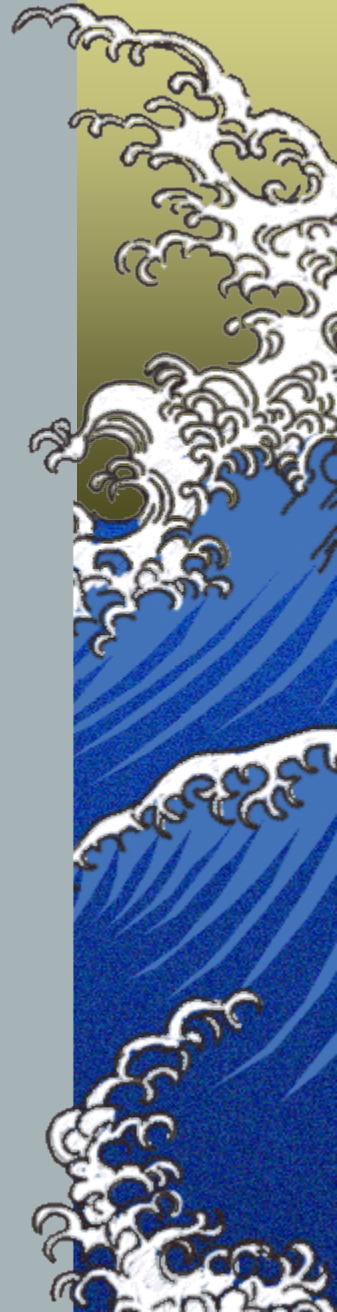
# Post-Mortem QDOT

## ▲ *Small QDOTs*

▲ *Bank trustee requirement OR*

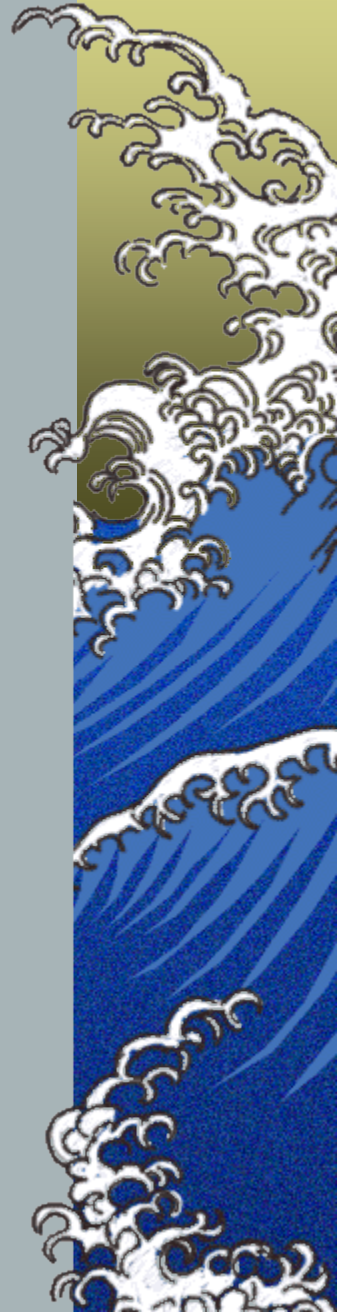
▲ *Bond requirement and*

▲ *Less than 35% of trust assets are real estate*



# Post-Mortem QDOT

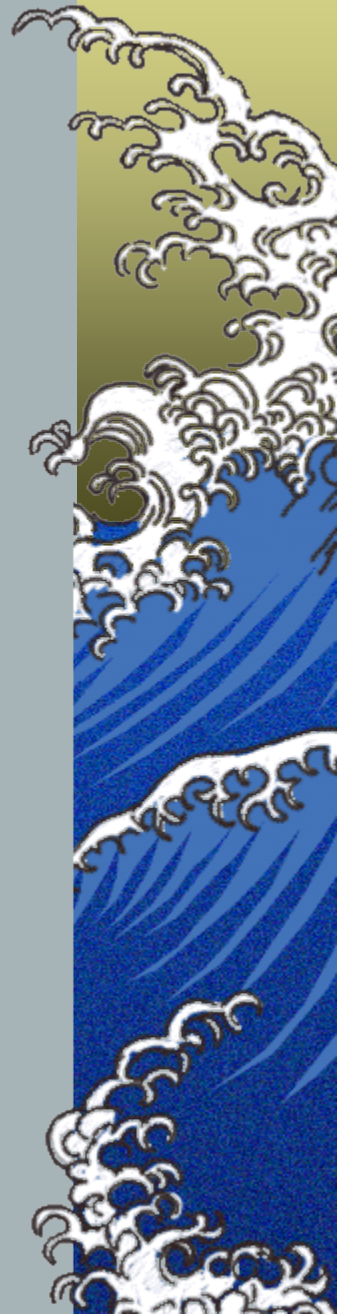
- ▶ *Transfer or assignment to QDOT must be in writing*
- ▶ *Assignment may be a calculation or pecuniary amount*
- ▶ *Protective allocation may be made if bona fide controversy exists at the time the FET is filed*



# Distributions/Taxes

## ▲ *Tax triggers:*

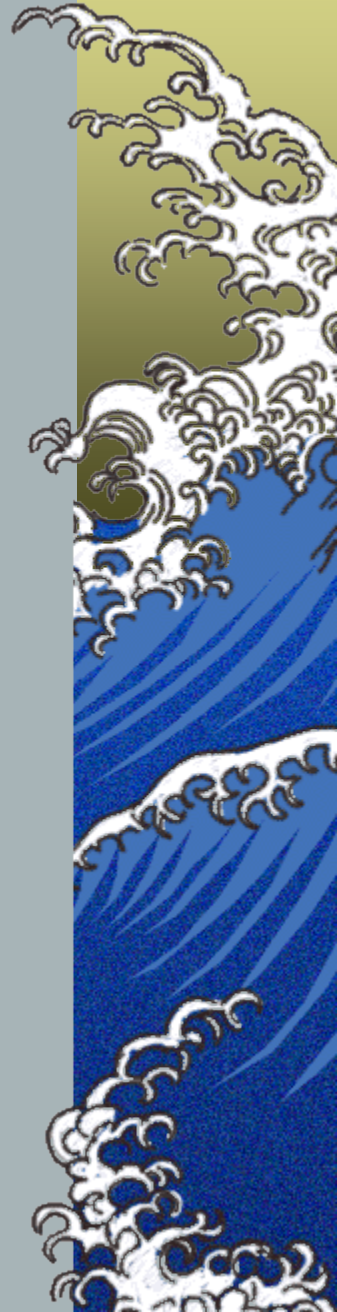
- ▲ *Distributions from QDOT during lifetime of surviving spouse*
- ▲ *Death of the surviving spouse*



# Hardship Distributions

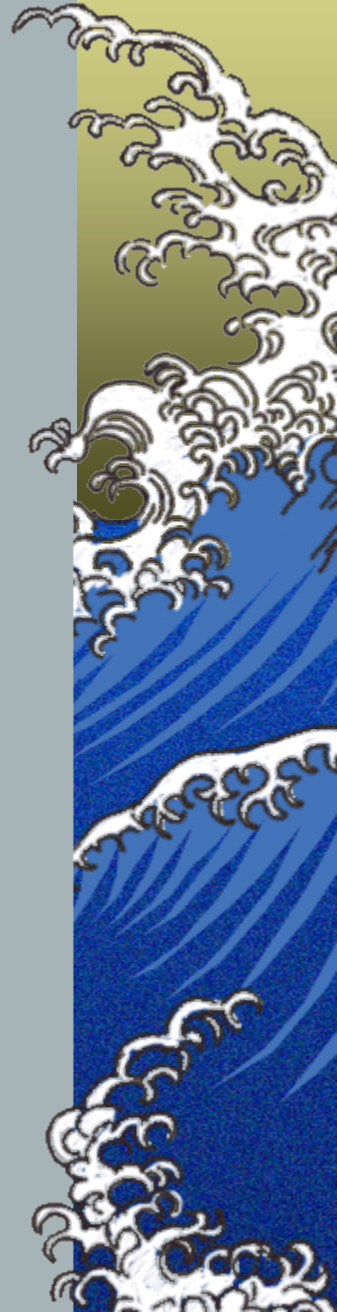
*What is hardship?*

- ▶ *Distributions in response to an immediate and substantial need relating to the spouse's health, maintenance, education and support*



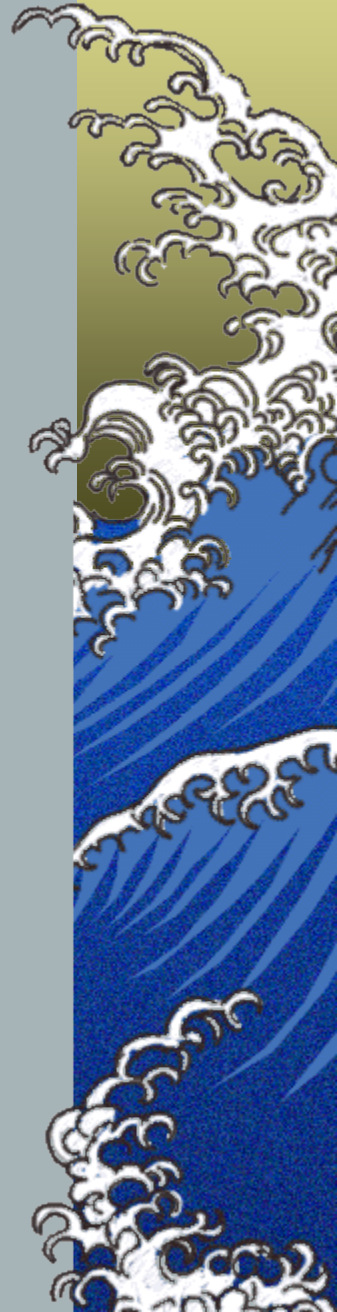
# Leaving? Who Should Plan?

- ▶ *Annual net income tax is over \$165,000 (in 2018) for five years preceding loss of citizenship/residency*
- ▶ *OR estate is over \$2 million*
- ▶ *OR fails to certify tax compliance for the preceding 5 years OR fails to submit such evidence of compliance as the Secretary may require*



# Section 7701(b)(6) – Lawful Permanent Resident

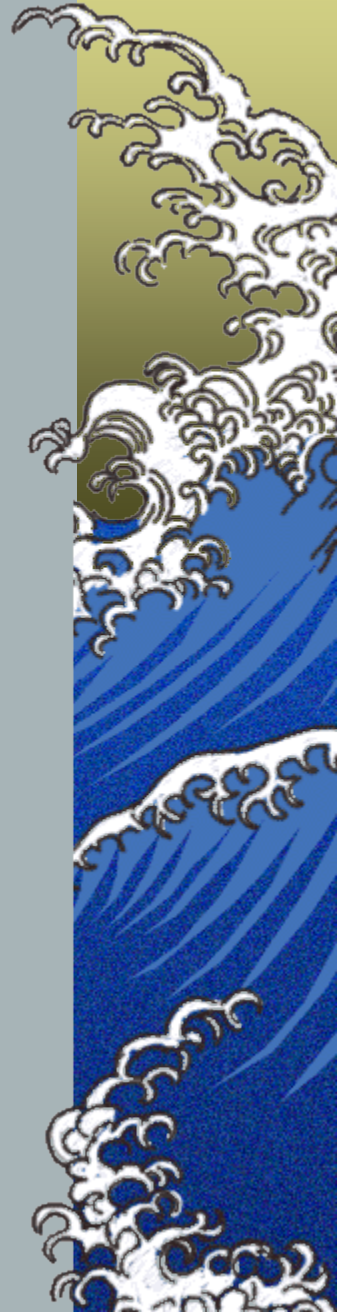
- ▶ *Definition of “lawful permanent resident”*
  - ▶ *Lawfully accorded privilege of residing permanently in the U.S. under immigration law AND*
  - ▶ *Such status has not been revoked, administratively or judicially determined to have been abandoned*
  - ▶ *Lawful Permanent Residence ceases if individual is treated as a resident of a foreign country under the tax treaty and does not waive benefits of such a treaty and notifies the IRS of such treatment*





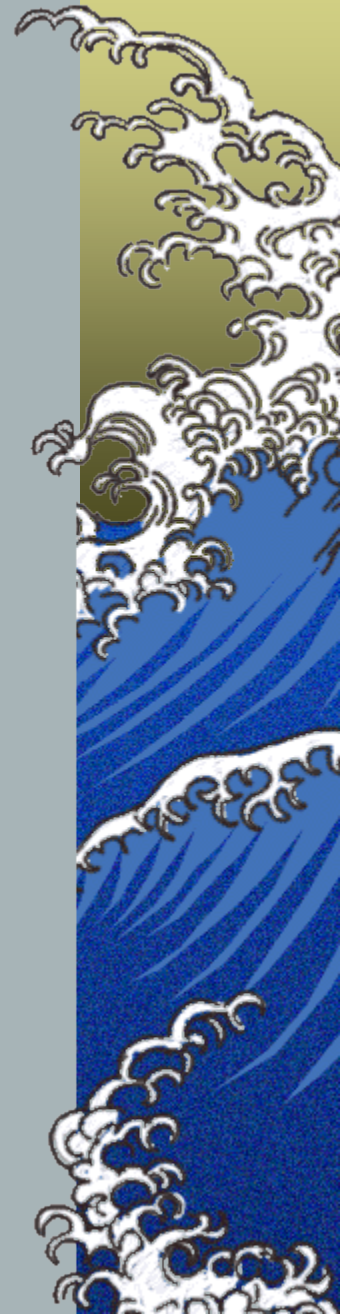
# Definition of Citizen

- ▶ *U.S. citizenship can be relinquished on the earliest of four possible dates:*
  - ▶ *renounces nationality before a diplomatic or consular officer of the U.S.*
  - ▶ *furnishes a signed statement of voluntary relinquishment to U.S. Department of State confirming performance of an expatriating act*
  - ▶ *U.S. Department of State issues a certificate of loss of nationality*
  - ▶ *U.S. court cancels certificate of naturalization*



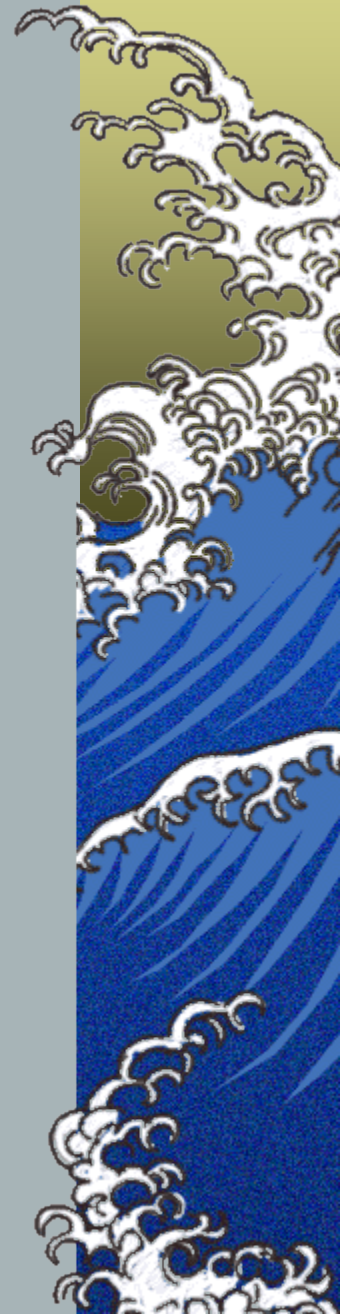
# Section 877 – The Ten Year Rule

- ▶ *Applies to individuals expatriating prior to June 17, 2008*
- ▶ *Who are expatriates?*
  - ▶ *Citizens giving up citizenship*
  - ▶ *Lawful permanent residents (section 7701(b)(6)) for 8 out of previous 15 years giving up residency*
    - ▶ *Except - not considered lawful permanent resident for any year if treated as resident of a foreign country under provisions of a tax treaty and does not waive the benefits of that treaty.*
  - ▶ *Meets the Net Worth Test*
- ▶ *An individual continues to be a citizen or LTR until the individual gives notice of an expatriating act or termination of residency*



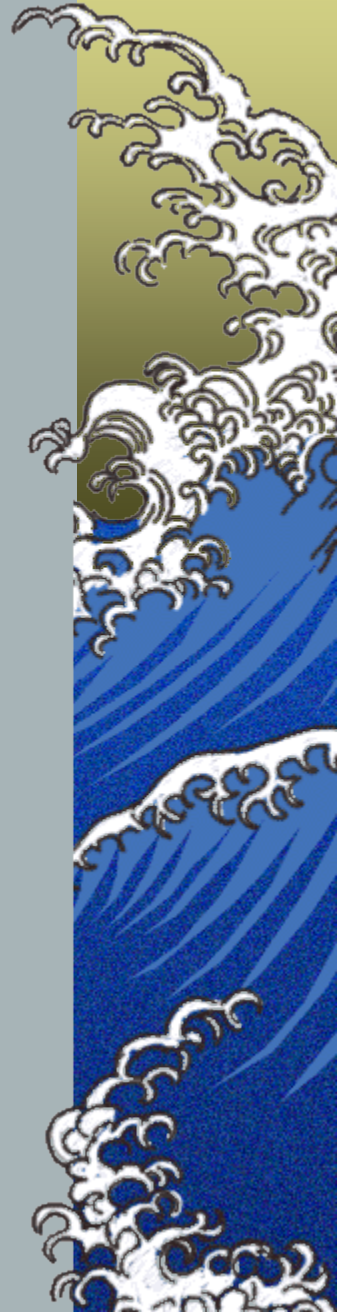
# Section 877 – The Ten Year Rule

- ▶ *Death within 10 years of expatriation deems U.S. ability to tax for estate tax purposes*
- ▶ *If present for more than 30 days in the U.S. after expatriation, taxed as estate tax citizen/resident for that year*
- ▶ *Expatriates must file an annual statement with the IRS for first 10 years after loss of citizenship/residency on Form 8854 even when no tax is due*
- ▶ *Failure to file is a \$10,000 penalty or exception for reasonable cause*



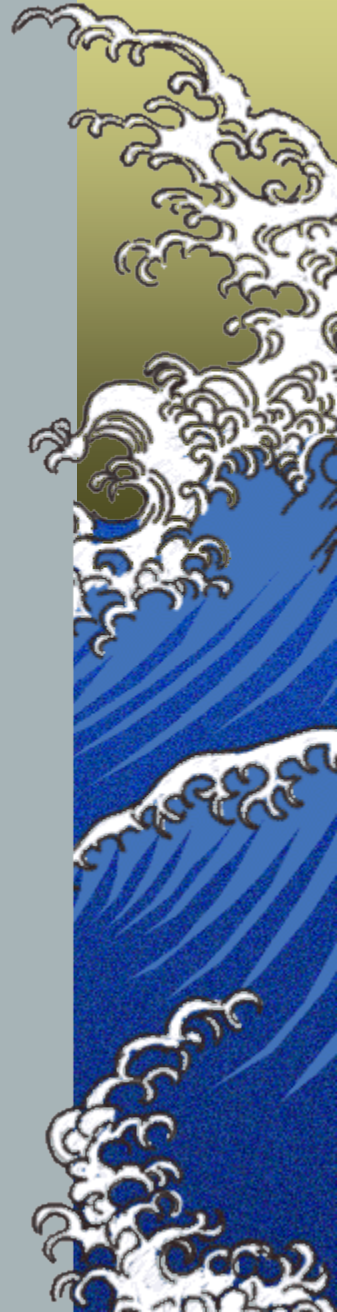
# Section 877A

- ▶ *Applies to “covered expatriates” who expatriate on or after June 17, 2008*
- ▶ *Who are “covered expatriates”?*
  - ▶ *Meets Net Worth Test*
  - ▶ *Citizen giving up citizenship*
  - ▶ *Lawful permanent residents (section 7701(b)(6)) for 8 out of previous 15 years giving up residency*



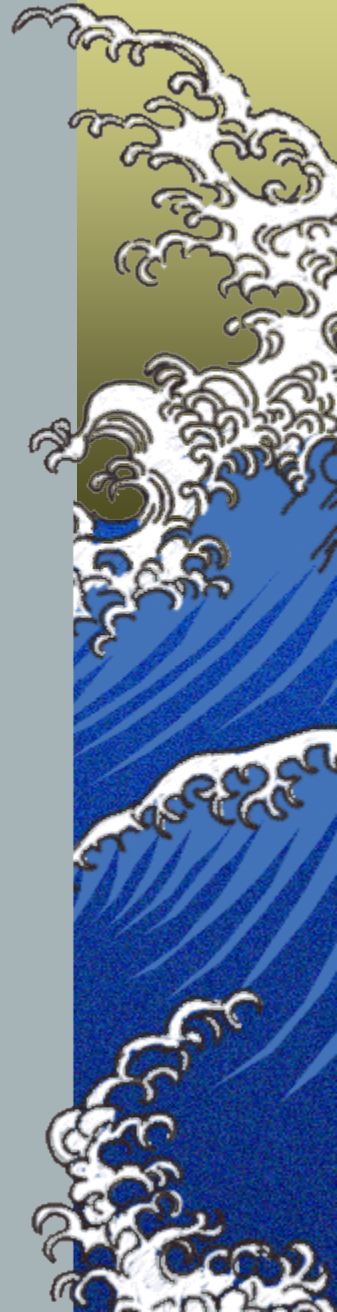
# Section 877A Exceptions

- ▶ *Born with citizenship in the U.S. and in another country, continues to be a citizen of and is taxed by other foreign country and the individual has been resident in the U.S. for no more than 10 years during last 15*



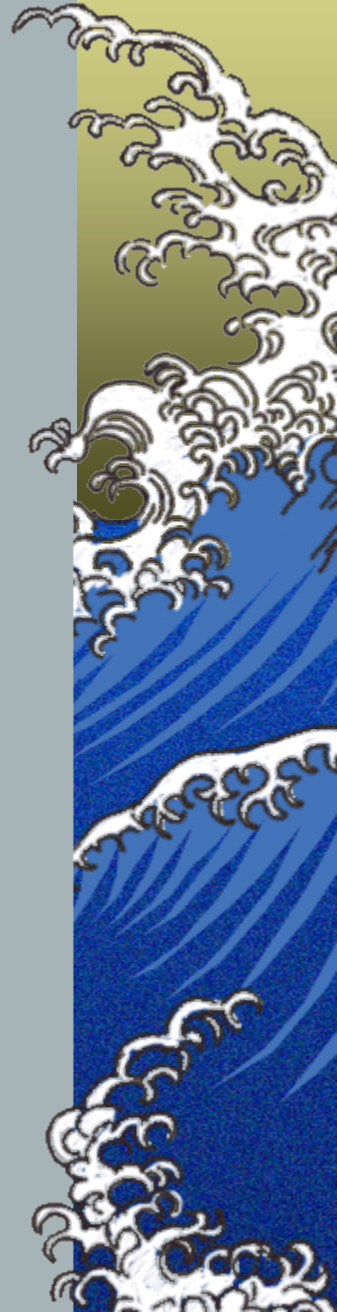
# Section 877A Exceptions

- ▶ *U.S. citizen relinquishes citizenship prior to reaching age 18 ½, provided a resident of the U.S. for no more than 10 years prior to expatriation*



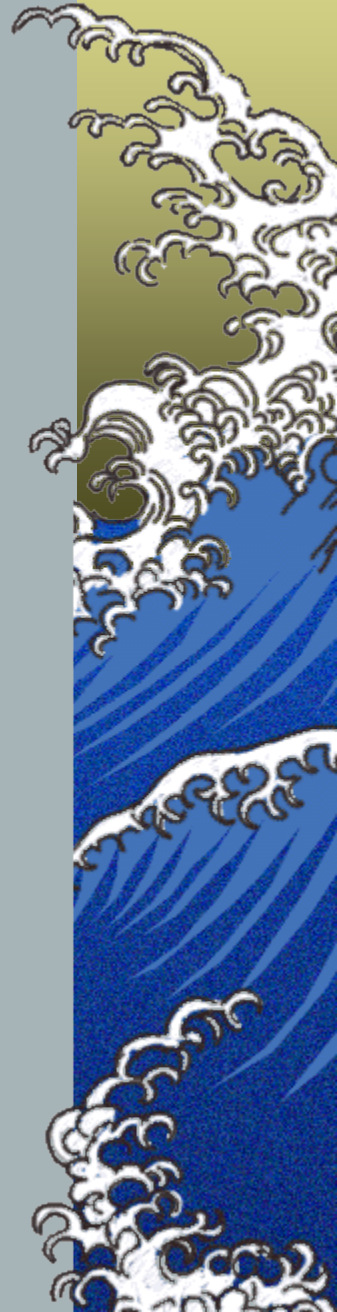
# Section 877A

- ▶ *Exit tax if triggered by covered expatriate*
  - ▶ *mark to market exit tax*
  - ▶ *triggers capital gain*
  - ▶ *exclusion amount of \$713,000 (in 2018)*
  - ▶ *deferred comp withholding or deemed distributed*
  - ▶ *non-grantor trusts*



# Section 877A

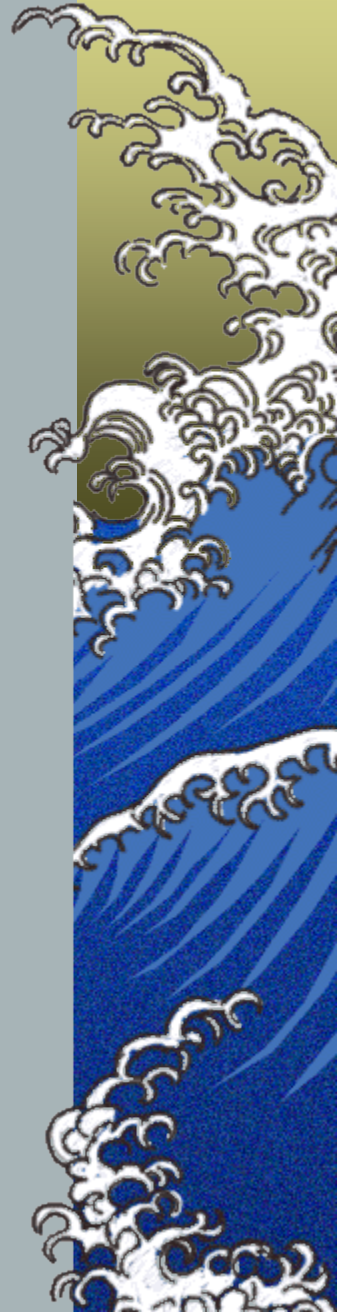
- ▶ *Assets on which exit tax is triggered include any property that would be part of the gross estate for federal estate tax purposes*





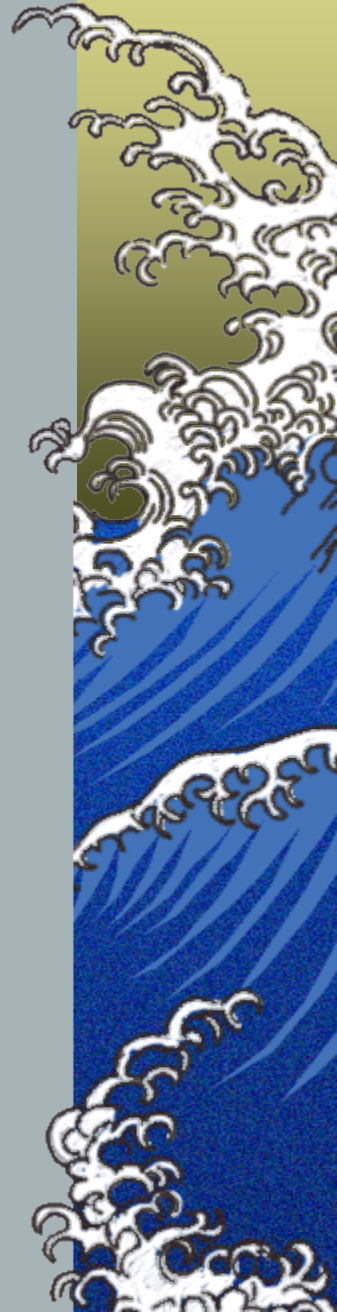
# Section 877A

- ▶ *In addition, the covered expatriates beneficial interest in each trust that is not part of gross estate*
  - ▶ *All interests in trust allocated to beneficiaries or in default,*
  - ▶ *All interest in trust allocated pursuant to laws of intestacy (following the Uniform Probate Code)*



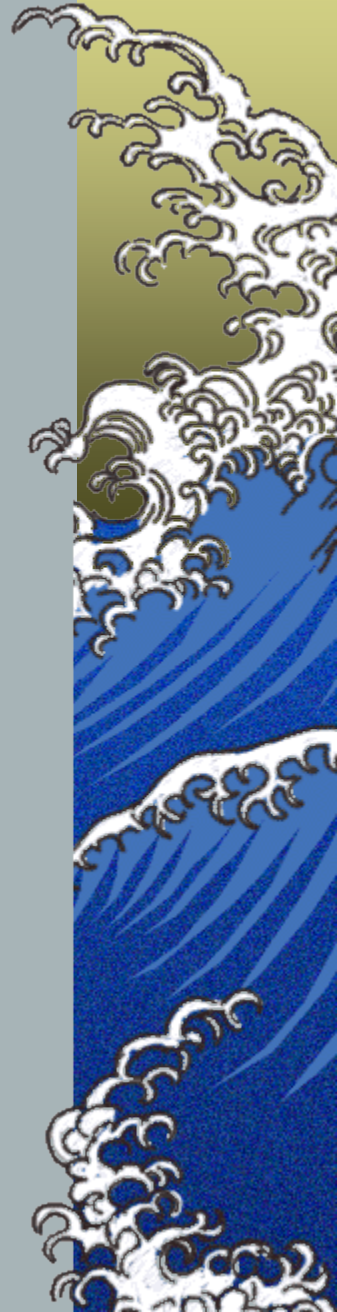
# Section 877A

- ▶ *Basis is the value on the first day the individual first became resident of the U.S.*
- ▶ *Value is the fair market value the day prior to expatriation*
  - ▶ *No alternate valuation date*
  - ▶ *Don't consider tax liability under 877A or other Code section*
  - ▶ *Don't consider marital, charitable, etc. deductions*



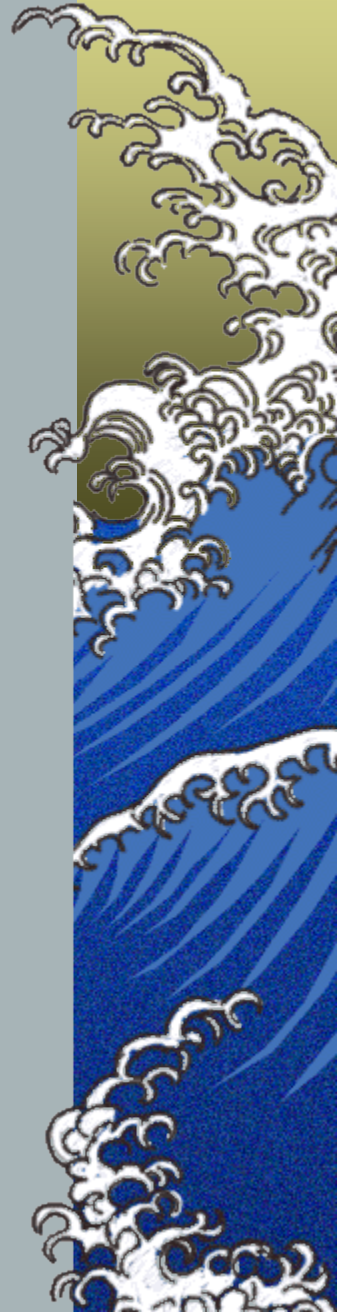
# Section 2801

- ▶ *“Covered gift” and “covered bequest”*
- ▶ *Gift is transfer during life, bequest is transfer at death*
- ▶ *Does NOT include, 1) taxable gift on a timely filed gift tax return or 2) included in gross estate and shown on timely filed estate tax return*



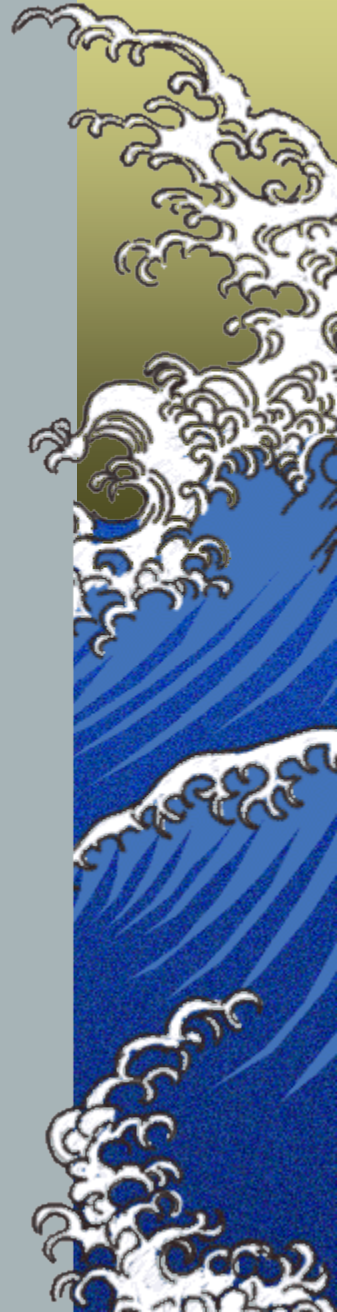
# Section 2801

- ★ *U.S. recipients of transfers from a covered expatriate are subject to the highest transfer (estate or gift) tax rate (not to exceed the value of the gift or bequest)*



# Section 2801

- ▶ *Recipient is responsible to pay Section 2801 tax only to extent that total covered gifts and bequests received by recipient exceeds \$15,000 annual exclusion for the year*
- ▶ *Same marital deduction would apply if recipient is a U.S. citizen*



# Section 2801

- ▶ *Situs of property gifted outright is irrelevant*
- ▶ *Covered gift or bequest to domestic trust*
  - ▶ *Tax applies as if trust is a U.S. citizen and the trust is required to pay the tax*
- ▶ *Covered gift or bequest to foreign trust*
  - ▶ *Tax applies to any distribution from trust attributable to covered gift or bequest to a recipient that is a U.S. citizen or resident*

