I've been waiting for Part 2 of *"I Want to Expatriate But They Won't Let Me"...*

<http://taxconnections.com/taxblog/help-i-want-to-expatriate-but-they-wont-let-me-part-ii/#.UwLaMM6mXqp>

**Help, I Want to Expatriate, But They Won’t Let Me…Part 2**

Written by Virginia La Torre Jeker, J.D.



This is a two-part blog post ...

Renouncing US Citizenship if the Individual is a Minor

“Jus soli” (the law of the soil) is a rule of common law followed by the United States, under which the place of a person’s birth determines his citizenship. In addition to common law, this principle is embodied in the 14th Amendment to the US Constitution which states, in part, that: “All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Citizenship is also determined under various US citizenship and nationality statutes, such as the Immigration and Nationality Act (INA).

The renunciation of one’s citizenship is regarded as a personal elective right that cannot be exercised by another person. Parents or guardians cannot renounce or relinquish the US citizenship of a child who acquired his US citizenship at birth. This means that only the individual child himself can renounce his US citizenship, but this is not so easy to do in the case of children. The US Consular offices and Embassies recognize that minors who seek to renounce citizenship often do so at the urging of or under pressure from a parent(s). This pressure can sometimes be so overwhelming that it will destroy the free will of the minor such that the act of expatriation cannot be committed “voluntarily”.

Under guidelines issued by the Department of State, the younger the minor is at the time of renunciation, the more influence the parent is assumed to have. Consular officers are given strict guidelines to follow when a minor seeks to renounce his US citizenship. For example, when conducting the initial interview with a minor and during the renunciation procedure, officers are instructed to have at least one other person present. They are instructed that the parents and guardians should not be present and that the interview should take place in the presence of the consular officer and a witness, preferably another consular officer, a non-consular officer or locally employed staff. The minor should be clearly advised that upon reaching the age of 18, he has a six-month opportunity to “reclaim” his US nationality.

Even when there is no evidence of parental inducements or pressure, the relevant Consular personnel must make a judgment whether the individual minor manifested the requisite maturity to appreciate the irrevocable nature of expatriation so that his action can be treated as one that was taken “voluntarily”. In addition, it must be determined if the minor had the necessary intent to renounce his US citizenship. This will be found lacking if he did fully understand what he was doing. Under the guidelines issued by the Department of State, children under the age of 16 are presumed not to have the requisite maturity and knowing intent to undertake a renunciation of US citizenship.

Even if the consular report indicates the minor had the necessary intent and renounced his citizenship voluntarily, the matter does not end there. A CLN must be issued by the Department of State approving the renunciation. A CLN for a minor will not be issued without the concurrence of various divisions of the Department of State and without the prior appropriate consultations.

Potentially Expatriating Acts and the Minor

Section 349 of the INA, currently provides that US citizens are subject to loss of citizenship if they perform certain specified acts voluntarily and with the intention to relinquish US citizenship. Several of these potentially expatriating acts are limited by specific provisions mandating that the individual must be over the age of eighteen years at the time the act is committed.

Briefly stated, these acts are:

1. obtaining naturalization in a foreign state upon one’s own application after the age of 18 (Sec. 349 (a) (1) INA);

2. taking an oath, affirmation or other formal declaration of allegiance to a foreign state or its political subdivisions after the age of 18 (Sec. 349 (a) (2) INA);

3. accepting employment with a foreign government after the age of 18 if (a) one has the nationality of that foreign state or (b) an oath or declaration of allegiance is required in accepting the position (Sec. 349 (a) (4) INA);

The relevant provisions can be found here.  In other words, there can be no finding of a loss of US nationality when these acts are committed by a person under the age of eighteen.

In addition, INA Section 351(b) provides that an individual under the age of 18, shall not be deemed to have lost US nationality by having served in the armed forces of a foreign nation under certain circumstances, or by having formally renounced US citizenship, if within six months after attaining the age of eighteen, the individual reasserts his claim to US nationality in accordance with a special procedure.

**Mental Incompetency Issues**

If mental competency is an issue, special care must also be taken. An individual cannot lose US citizenship unless he has the legal capacity to form the specific intent necessary to give up his US nationality. When the person has some type of mental incapacity, the question will arise whether the individual understands the seriousness of renunciation, including its irrevocable nature and the major consequences that flow from it. “Voluntariness” may also be an issue with persons who suffer from mental incapacity or impairment, as such individuals may be especially susceptible to the influence of others.

A court finding of mental incompetency, whether by a US court or one overseas, will preclude a finding that the individual has the requisite intent to renounce his citizenship. A parent, guardian or trustee cannot renounce the US citizenship on behalf of a mentally incompetent individual, since it is viewed as a personal right that cannot be exercised by any other person.

**Parent or Guardian – What Should You Do?**

US tax planning in the kinds of cases discussed is ever critical. If the individual cannot expatriate currently, it is very important to structure his affairs to minimize any US tax bite during the time he remains a US citizen and in planning for a future expatriation. **\*\*\*\*\*\*If the individual is under a permanent mental incapacity such that renunciation will never be possible, then proper planning of US tax matters becomes even more critical. A well-meaning parent or guardian may often look to trust structures to ensure the continued care of the child or mentally challenged individual. However, setting up a “foreign” (non-US) trust for such an individual may well be the worst action to take from a US tax planning perspective! The stakes are high. Get proper advice.\*\*\*\*\*\***

So, more money for proper advice since the country in which my son was born, Canada, will / can do nothing to protect him?  In fact the Government of Canada just waived my son’s rights in signing an IGA with the US.  (And the rights of others like my son; and the rights of other persons who may have a “mental incapacity” like someone with age-related dementia.)  The person with **Mental Incompetency Issues** is even lesser than the second-class Canadian citizenship that all other ‘US Persons in Canada’ now have with the US IGA, compared to “all other Canadians, no matter where their ‘national origin’ or the ‘national origin’ of their parent ( s ).

Or, do I just do nothing and \*\*\*HOPE\*\*\* that \*\*\*they\*\*\* (whoever **they** is: local CANADIAN “foreign financial institutions” or the Canada Revenue Agency or the US Treasury or IRS [ who has the information on my son in my FBARs (Foreign Bank Account Reports) ] will not take action?  I refuse to register him with the US and the abyss of cost of administration of compliance of a US citizenship never registered / never asked for (the only purpose for which would be the ability to renounce, which he can’t).  It’s a circular argument.

Regards,

Carol Tapanila