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ADVISORY

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DOMICILE AND RESIDENCE: KEY FACTORS TO CONSIDER FOR ESTATE PLANNING

Though the words are often used interchangeably in casual conversation, domicile and residence are two distinct legal concepts. Your domicile is the place you intend to make your home. You may be a resident of more than one state, but you are domiciled in only one state. Domicile is determined by a number of factors, which can include the location of your principal residence, bank accounts and motor vehicles, your driver's license and voter registration, and membership in local organizations. Residence is usually determined primarily by the amount of time you spend at a given place. In most cases, you are a resident of the state in which you are domiciled. But you might also be a resident of another state if you spend enough time there during the year. For example, California and Arizona presume that your intention is to become a resident, and be taxed as such, if you are there for more than nine months during a one-year period.

WHY DO DOMICILE AND RESIDENCE MATTER?

Where you are domiciled has important estate planning consequences because your state of domicile will assert primary authority to tax your estate. As a result, because the states have different gift, estate and succession taxes, your choice of domicile may affect the amount the beneficiaries of your estate ultimately receive. The states also have different laws regulating other estate issues that may be important to you, such as who is eligible to be appointed as your executor. For example, Florida limits executor appointments to Florida residents, nonresident relatives and resident banks.

For many people, residence is most important for income tax purposes, although residence may also affect other rights and privileges, such as professional or recreational licenses and access to state land. The states have different income tax rates and certain states (e.g., Florida and Texas) have no state income tax.

CHANGING DOMICILE OR RESIDENCE

If you will be living in more than one state for any length of time during the year, you should consider whether this will affect the determination of your residence or domicile. If the move is temporary, or if property is maintained in your original home state, it may not be appropriate to change your domicile or to establish resident status in the new state. However, if a change in domicile or resident status may be advantageous, you might want to take steps to establish domicile or residence in the new state.

With no income tax, no estate tax and the abolishment of the tax on intangibles, Florida has become an especially appealing state in which to be domiciled. As a resident of Florida, you may also be able to obtain some relief from the state's increasing property taxes (which have increased, in part, because of the lack of income and estate tax revenue).

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Checklist for Changing Domicile

Domicile is a subjective concept because it depends on your intent. However, when disputes arise over a person's domicile, courts look at a number of objective factors to aid them in determining a person's domicile. The following list contains some factors that taxing authorities and courts have considered as evidence of domicile.

- **Obtain a Driver's License in the New State and Register Cars and Boats in the New State.** Obtain license plates in the new state. If you keep any licenses from your prior home state, make sure they reflect that you are a nonresident.
- **Buy or Lease Property.** Particularly if you are you going to keep property in your old domicile state, you should purchase a residential home in the new domicile state. Your new home should be furnished as a permanent home, not as a vacation place. If you rent a residence, the term of your lease should be for at least one year.
- **Spend More than 183 Days Per Year in the New State.** Limit return trips to your prior home and keep a record of where you spend your time when you are not in the new state.
- **Register to Vote in the New State.** In some states, it is possible to register to vote when you apply for a driver's license. Some states even allow you to register to vote online. In addition to registering to vote in the new state, write to your registrar of voters at your prior home, mentioning your change of domicile, and ask that you be removed from voting lists.
- **File Declaration of Domicile.** In some states, like Florida, it is possible to file a declaration of domicile with the county clerk.
- **Move Bank Accounts and Safe Deposit Boxes to the New State.**
- **Declare a Change of Address.** Send notification of your change of address to family, friends, business associates, professional organizations, credit card companies, brokers, insurance companies and magazine subscription offices.
- **Use the New State as a Home Base.** When you travel, try to return to the new state. When you make large purchases, make them in the new state. Keep your family heirlooms, furniture and keepsakes in the new state.
- **Change Legal Documents to Reflect Residency in the New State.** Update your will and trusts. Make sure that these documents do not identify you as a resident of another state.
- **File Tax Returns in the New State.** Provide your new address on Federal returns and make sure to comply with any state or local filing requirements of the new domicile.
- **Develop Local Affiliations.** Join local organizations in the new state, such as clubs and religious groups, and participate in local charitable activities.
- **If it Exists, Apply for the Homestead Exemption in the New State.** In some states, like Florida, the homestead exemption will be counted against your real estate taxes.

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It is important that your domicile and resident status are clear. If a decedent's domicile is not clear, more than one state may try to claim the decedent as a domiciliary and assess death taxes. Confusion about resident status can also result in complicated income tax problems, particularly if care is not taken to preserve the right to claim a deduction for income taxes paid to another state. In either case, clear and consistent action now can avoid expensive difficulties later.

COMMUNITY PROPERTY VERSUS COMMON LAW PROPERTY

One often overlooked implication of changing your domicile involves the classification of property. There are two different systems for classifying marital property in the United States: the common law property system and the community property system. Most states, including Connecticut and New York, utilize the common law property system. Under this system, property acquired by a married person during marriage is the property of that person separately, unless the person agrees with his or her spouse to hold the property jointly. By contrast, nine states are community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Additionally, in Alaska, South Dakota and Tennessee, spouses can opt into the community property system. Generally speaking, under the community property system, property acquired by either spouse while married becomes community property. Property acquired before marriage, as well as property inherited or received as a gift during the marriage, is generally considered separate property.

Whether property is classified as community property or as common law property affects rights of ownership, rights to income from property, rights and duties of management and control, rights to make lifetime gifts, property rights in the event of divorce and rights of disposition at death.

Moving from a Common Law State to a Community Property State. Community property states have different systems for treating the property of spouses who have migrated from common law states. Usually, assets acquired in community property states are community property and assets acquired in common law states are separate property. However, some community property states, such as California, have a system of quasi-community property, which converts any property that would have been community property had it been acquired in that state into community property.

Whether or not a community property state reclassifies property acquired elsewhere may be of great significance, especially with respect to a spouse who does not work. Because property acquired by a spouse is considered separate property in common law states, most common law states, including Connecticut, have statutes providing for an elective or forced share in the deceased spouse's estate to protect the other spouse from being involuntarily divested of all property acquired during a marriage.

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This means that in the event of the death of a spouse, the surviving spouse may claim an interest in the estate regardless of what the deceased spouse stated in his or her will. When a couple from a common law state moves to a state like California, property acquired by either spouse during the marriage becomes quasi-community property, and a surviving spouse is entitled to half of the quasi-community property in a deceased spouse's estate.

Community property states differ in other ways as well. For example, in some states, income from separate property remains separate property, while in other states, income from separate property becomes community property. States with quasi-community property systems also disagree as to whether a spouse is entitled to one-half of the value of the total quasi-community property or to one-half of each asset.

Moving to a Common Law State from a Community Property State. Generally, common law states, like Connecticut and New York, treat property acquired during marriage in a community property state as jointly held property in which each spouse has an undivided one-half interest.

However, to the extent the common law state also has an elective or forced share statutory right in a surviving spouse, that right usually will not extend to the undivided one-half interest deemed to be owned by the deceased spouse.

Given the significant differences between community property states and common law states, it is important to understand how a state's particular system will affect you before you move. It is also important to find out to what extent the state law system can be overridden by the provisions of a properly executed will or other testamentary disposition.

RESIDENCE AND DOMICILE ISSUES FOR NON-CITIZENS

Estate and gift taxation of non-U.S. citizens is based on residence. For estate and gift tax purposes, an individual is a resident of the U.S. if he or she is domiciled in the United States. A facts and circumstances test is used to determine domicile and takes into consideration the following factors:

- Statements of intent (in visa applications, tax returns, wills, etc.)
- Length of U.S. residence
- Whether the person has a green card
- Style of living in U.S. and abroad
- Ties to former country
- Country of citizenship
- Location of business interests
- Place where club and church affiliations, voting registration and driver licenses are maintained.

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A person is considered a non-U.S. resident (i.e., a non-resident alien) for estate and gift tax purposes if he or she is not considered a domiciliary under the facts and circumstances test described above.

Notably, residency for estate and gift tax purposes is determined differently than residency for income tax purposes. Thus, you may be a resident alien for income tax purposes, but a non-resident alien for estate and gift tax purposes.

Because countries apply different standards to determine domicile, it is possible that two or more countries will consider a person to be domiciliary. In that case, the person could be subject to estate tax in more than one country. Proper planning and consideration of governmental tax, treaties, and foreign tax credits may eliminate or minimize double taxation.

Estate Tax Issues. Non-citizen U.S. residents are taxed on the value of their worldwide assets owned at death in the same manner as U.S. citizens. Non-citizen, non-U.S. residents are taxed only on the value of their U.S. "situs" assets. Generally, U.S. situs assets include real and tangible personal property located in the U.S. and stock of U.S. corporations. Significantly, bank accounts held by U.S. banks are not considered to be U.S. situs assets for this purpose.

Applicable exemption amounts are available against gift and estate tax for U.S. residents; the estate and gift tax exemptions are $13,610,000 in 2024. Non-U.S. residents are generally allowed a reduced estate tax exemption amount, which permits only $60,000 of U.S. situs assets to be transferred free of U.S. estate tax in 2024.

If your surviving spouse is a U.S. citizen, there is an unlimited marital deduction allowing for deferment of any estate tax owed until the death of the surviving spouse. In other words, an unlimited amount of assets can pass to a U.S. citizen spouse without being subject to U.S. estate tax. However, if your surviving spouse is not a U.S. citizen, a marital deduction is generally not allowed unless U.S. property is held in a Qualified Domestic Trust (QDOT) for the benefit of the non-U.S. citizen spouse. A QDOT must be designed to comply with specific requirements which allow the trust to qualify as a QDOT and an election to claim the deduction must be made by the executor of the decedent's estate on the U.S. estate tax return.

In addition, some governmental estate and gift tax treaties allow for some form of a marital deduction in cases where such a deduction would not normally be available. The U.S. currently has a combination of estate and gift tax treaties with the following fifteen countries: Australia, Austria, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, South Africa, Switzerland and the United Kingdom.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

A non-citizen U.S. resident donor is entitled to the tax exclusions, deductions and credits relating to the gift tax that are available to U.S. citizens for transfers to U.S. citizen spouses. An unlimited amount can be given to a spouse who is a U.S. citizen pursuant to the unlimited marital deduction. However, for gifts to a non-citizen spouse, there is an annual marital deduction which is limited to $185,000 in 2024. (A QDOT may not be used in order to obtain an unlimited marital deduction for transfers made to a non-U.S. citizen spouse during life.) You should be particularly wary of this rule when creating a joint tenancy with a non-citizen spouse.

If the U.S. citizen spouse contributes the bulk of the consideration for the property that is titled jointly in survivorship with a non-citizen spouse, unanticipated gift tax consequences may be triggered.

There is a gift tax annual exclusion available which currently exempts up to $18,000 per donee per year of "present interest" gifts from U.S. gift tax. United States citizens can "gift split" which, in effect, allows a married donor to double the annual exclusion amount by characterizing the gift as having been made one-half by the spouse. However, if either spouse is a non-U.S. resident, gift splitting is not permitted.

FINAL THOUGHTS

An individual's domicile and residence status can have a substantial impact on his or her estate planning. Because these are complex, case-by-case analyses, consider consulting with your Wiggin and Dana attorney if you spend significant time in another state, or if you are contemplating a move.