

Client Alert

Current Issues Relevant to Our Clients

September 25, 2013

Understanding Residency

In today's mobile society, individuals change their place of residence for a number of reasons: a new job opportunity, a new place for treatment or care, retirement or simply a desire for a change in life. Whether you are just spending more time at a second home, taking up a temporary residence in a new state or planning a permanent move, you should understand what actions cause a change in residency and how such a change affects you. Although you may be aware that changing residency can change your state taxes, there are other property rights and interests that can change. For example, the property rights associated with marriage, divorce, adoption, inheritance, bankruptcy/creditor rights and even your qualification for government benefits can be vastly different depending on your state residency.

This alert will discuss the general guidelines as to what creates a change in residency. We will also highlight a few of the tax and property law differences between the states, using Illinois, Florida and Arizona as examples, to illustrate how a change of residency may impact you.

Understanding Residency vs. Domicile

Before discussing what it takes to change your residency, it is important to understand what is meant by "residency." For many purposes, "residency" refers to domicile. Although these terms are often used synonymously, "domicile" has a very particular meaning, while "residency" can have a broader application or meaning.

Your domicile is your true, fixed and permanent home. Domicile depends on your intention — it's the place you consider to be your permanent home. You can have only *one* domicile. Because of that, you only have a new domicile after you have given up your prior domicile. Even though domicile is a matter of your intent, you establish domicile by the facts and circumstances that prove your intent. Where you're physically located, that is, where you spend your time, may be only one of many facts that establish your domicile.

Residency can mean domicile or it can simply refer to any place where you live or spend time. Because residency can have a variety of meanings, whether or not any particular law, rule or benefit applies to you as a "resident" may depend on where you are domiciled or only on where you live, that is, the location where you principally spend your time.

What Is Needed to Change Domicile?

To change domicile, you must have both an intent to abandon the former domicile and, at the same time, an intent to create a new one. Your domicile cannot be changed merely by stating an intent, if it is contrary to the facts. Your actions must match your stated intent. There are a number of facts that various courts, government agents, etc. will consider, or that various laws will identify, as determinative of whether you have changed your domicile, including, among others:

1. Filing a declaration of domicile with the proper government entity in the new state.
2. Having an extended physical presence within the new state.
3. Declaring the new state on all affidavits, documents and forms that require a recitation of residence, such as credit cards, deeds, leases, social security applications and contracts.
4. Registering to vote and voting in the new state.
5. Updating your will, trust, and powers of attorney to recite the new state as the place of domicile.
6. Filing local tax returns.

7. Obtaining a driver's license and automobile license plates in the new state.
8. Filing for a homestead exemption for a home in the new state, if available.
9. Having bank and other accounts in the new state.
10. Maintaining personal property of monetary and sentimental value in the new state.
11. Joining social and professional organizations or clubs and transferring religious affiliations to locations in the new state and leaving or resigning membership in such organizations in the former state.
12. Changing mailing addresses.
13. Purchasing a burial site in the new state.

As this list illustrates, there are many actions that you may take to establish your domicile. Even though you can have only *one* domicile, it may not always be clear which state is your domicile. For example, when you spend a lot of time in one state but have a lot of property and connections in another state, or when you have a number of the above links to more than one state, each state may try to claim (or to deny) that you are a domiciliary. As such, you should be consistent in maintaining and referring to one place as your domicile.

Differences in State Taxation

As indicated above, when a particular law applies to a "resident," the law may be referring only to those who are domiciled in the state or it may be referring to anyone who lives (*i.e.*, is physically present) in the state. This is especially true when looking at how state income tax rules apply. States that have an income tax will often apply their tax both on their domiciliaries (those who meet a "Domicile Test") and on those who are physically present within the state (those who meet a "Presence Test"). Because of these different tests, it is possible to be treated as a "resident" of more than one state for income tax purposes. As such, it will be important to understand the residency rules of the states where you spend most of your time as well as the state where you may be considered domiciled.

Illinois

You will be considered an Illinois "resident" for income tax purposes if you meet either a Presence Test (present in the state for other than a temporary or transitory purpose) or a Domicile Test (domiciled in Illinois even if absent from the state for a temporary or transitory purpose). Because of the two different tests, you can be subject to Illinois income tax based on the amount of time spent in the state, or you can be subject to Illinois income tax even if you spend no time in the state, but it is still considered your

domicile. Recently, the Illinois Department of Revenue issued new regulations that create a presumption of Illinois residency if you claim a homestead exemption for your Illinois real estate (since the exemption is only available if the real estate is your permanent and primary residence). There is also a presumption of residency if, in the years after changing your domicile to another state, you are present in Illinois more days than you are present in any other state. In addition to factors similar to those listed above, the Illinois Department of Revenue considers other factors, such as the location of your spouse and dependents, the permanent nature of work assignments in a state, the location of any professional license(s), the location of your preferred medical professionals, other healthcare providers, accountants and attorneys, and your telephone and/or other utility usage over a duration of time.

If you are domiciled in Illinois, you are also subject to Illinois estate tax. The tax applies to all property of the deceased resident in excess of \$4,000,000, except tangible personal property and real property physically located in another state.

Arizona

You will be considered an Arizona resident for income tax purposes if you meet either a Presence Test or a Domicile Test, which are very similar to those tests in Illinois. Arizona's regulations also presume you are a resident if you are physically located in Arizona for more than 9 months. In addition to the factors listed above, the Arizona Department of Revenue considers the purchase of a principal residence in Arizona combined with a sale of a principal residence in the former state and the payment of personal or real property taxes as an Arizona resident as factors in establishing an Arizona domicile.

Arizona repealed its estate tax in 2006 and neither residents nor nonresidents are subject to state estate tax for property located in Arizona.

Florida

Since Florida has no individual income tax, there is no definition of "resident" for tax purposes. However, Florida's statute regarding the homestead exemption for real estate tax purposes states that you can show an intent to maintain a Florida residence as a permanent home by filing a sworn Declaration of Domicile with the clerk of the circuit court, although intent also is indicated by many of the factors stated above.

Florida currently has no estate tax. Its estate tax is tied to the former federal death tax credit, which was eliminated from the Internal Revenue Code. If that credit is ever reinstated, Florida would again have an estate tax, in the absence of an affirmative repeal by the Florida legislature.

Differences in Property Rights

Inheritance

Regardless of what you may provide in a will, trust or beneficiary designation as to the distribution of property at your death, state law may change or affect these documents. For example, both Illinois and Florida permit a surviving spouse a right of election, which permits the surviving spouse to disavow the will and receive a certain percentage of the deceased spouse's assets. This right of election under Florida law is much more expansive than it is under Illinois law and, if exercised, can have a greater impact on the distribution of assets. Arizona, on the other hand, is a community property state. While there is no right of election under Arizona law, absent a written agreement, the surviving spouse has the right to receive one-half of all community property, regardless of who holds title to the property or what the deceased spouse's will, trust or beneficiary designation states. Often, married couples moving to a community property state like Arizona will enter into a written agreement to deal with the community property nature of their assets at the time of a change in residency.

Creditor Rights

In addition to differences in inheritance rights, states also vary in which of your assets they will exempt from creditors. For example, Florida exempts the following: (1) the wages earned by a "head-of-household," (2) the cash surrender value of an insurance policy, but not the death benefits, and (3) your principal residence, regardless of value, subject to few exceptions. In contrast, Illinois does not exempt wages and it limits the exemption for your principal residence to \$15,000 in value. However, Illinois exempts both the cash value and the death benefits of life insurance if the policy is paid to or for the benefit of a spouse or child. Arizona's exemption rules are similar to Illinois' rules but the exemption for your principal residence is for \$150,000 of value.

As illustrated above, there can be a number of issues that arise when changing residency. Depending on the law in question and the state, you can change your residency merely by the amount of time you spend in a state or you may need to take many steps to establish that you have a new domicile.

Please consult your Chapman and Cutler Trusts and Estates attorney. We would be pleased to help you plan in advance for a change of residency or help you understand the implications associated with a temporary or permanent move.

For More Information

To discuss any issue covered in this Client Alert, please contact an attorney in our Trusts and Estates Group or visit us online at Chapman.com.

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