Every day, attorneys, accountants, and other professionals across Florida interact with clients or potential clients who could benefit from domicile planning. Because clients rarely engage attorneys or other professionals with domicile planning in mind, many opportunities to properly plan for domicile are missed. If the right questions are asked at the right time, however, steps may be taken to avert possible disaster and maximize outcomes for clients and their families.

What Is Domicile?
While there is no universally adopted definition of domicile, the states (and the IRS) share a general understanding of what domicile means. In Florida, [a] legal residence or “domicile” is the place where a person has fixed an abode with the present intention of making it his or her permanent home. Once established, a domicile continues until it is superseded by a new one. A domicile is presumed to continue, and the burden of proof ordinarily rests on the party asserting the abandonment of one domicile to demonstrate the acquisition of another.

A Massachusetts court recently determined that domicile is where a person has “his home—that is, his dwelling place and the center of his domestic, social, and civil life.” While these definitions are inexact and difficult to apply, they sufficiently allow the attorney or other professional to identify clients with domicile planning issues.

Who Needs Domicile Planning?
Clients in need of domicile planning may be broken down into three distinct groups: those with a changing domicile; those with a changeable domicile; and those with an ambiguous domicile. Clients with a changing domicile, such as older clients retiring to Florida, professionals moving because of job relocation, and non-U.S. citizens moving to Florida for a variety of personal, financial, or political reasons should stand out as candidates for domicile planning. Clients with a changeable domicile, such as part-year residents who could adopt a Florida domicile with relatively little effort, are more difficult to identify because they may not have given any thought to the advantages of changing domicile. Clients with an ambiguous domicile, a group which includes clients who have taken insufficient steps in an intended domicile change or have inadvertently accumulated significant indicia of domicile without an intent to change, are perhaps the most difficult to identify, but also have the most to gain from domicile planning. Each group presents special opportunities and challenges.

Choosing a Domicile
Domicile planning consists of determining the appropriate domicile in as many steps to document the choice of domicile. While it may be tempting to assume that every domicile planning candidate simply needs to clarify or adopt a Florida domicile, a Florida domicile may not be the best choice, depending on the client’s circumstances. As a result, once a client with a changing, changeable, or ambiguous domicile is identified, the first step is to determine which domicile is the most beneficial. Once all of the implications of domicile change are known, a client may wish to postpone or even reverse domicile change.

Most clients with sufficient Florida contacts should be advised to change to Florida domicile. Florida is widely recognized as a tax-friendly state, and many clients may wish to avoid the state income, gift, or estate taxation levied by their previous states of domicile. Other clients may benefit from favorable Florida creditor protection laws, including creditor protection for homestead, annuities, and cash value of life insurance policies. Clients who own valuable residential real property in Florida should consider the effect of the homestead “Save Our Homes” cap on property tax increases. Some non-U.S. citizens should be advised to establish Florida (or at least U.S.) domicile since they would otherwise be facing federal estate tax on U.S. situs assets with only a very limited credit to offset the tax.

Other clients may wish to actively avoid Florida domicile, at least temporarily. For example, many clients desire to retain partial avoidance of federal capital gains tax on the sale of an out-of-state residence (if the residence was the primary residence two out of the five years prior to sale). Other clients who are unwilling to sufficiently cut ties to non-Florida domicile, or wish to retain the protection of the laws of the current state of domicile, need to make sure that he or she will not be treated as a domiciliary by both
Florida and the other jurisdiction. A client with significant intangible assets may desire to avoid the impact of the Florida intangible personal property tax. In some situations, a client should be advised to avoid or relinquish Florida domicile in order to avoid homestead forced heirship provisions on death. Non-U.S. citizens may wish to delay obtaining Florida domicile in order to undertake pre-immigration planning prior to establishment of U.S. domicile or may wish to avoid U.S. domicile altogether to avoid estate taxation of worldwide assets.

Only careful questioning and coordination with the client's advisors in both Florida and the competing domicile jurisdiction can bring out all of the information required to make an informed domicile decision. For example, the current domicile may have more favorable laws with respect to taxes, divorce, elective share, or other issues that only an attorney in that jurisdiction can fully appreciate. Perhaps the client foresees estate litigation and wishes to retain the protection of a no-contest provision in his or her will, but has not been informed that such provisions are not enforceable in Florida. The client may insist on estate plan provisions (such as naming an ineligible person or trust company as personal representative) that are inconsistent with Florida law. The client may wish to remain politically active in the non-Florida domicile, or may wish to remain closely involved with non-Florida work, church, social, or family activities. Many legal or tax advantages to a non-Florida domicile may be replicated in Florida by careful planning, but without careful review, the client may never become aware of the consequences of a domicile change.

While coordination with non-Florida advisors is essential, it should be noted that an individual's legal, tax, and investment advisors may have different perspectives on the wisdom of a domicile change. Any potential disagreement is exacerbated by the realization that a non-Florida advisor who suggests a domicile change may find himself or herself replaced by a Florida advisor as part of the domicile change process.

Steps to Establish Florida Domicile

Once it is determined that Florida domicile is desirable, a client must take steps to terminate non-Florida domicile and adopt Florida domicile. The first step is to review the law of the former state of domicile. Many states have statutes defining domicile in a way that is inherently subjective and difficult to define, domicile in a way that is inherently subjective and difficult to define. Florida law should be reviewed to determine how domicile challenges are handled. While the states share a general understanding of domicile, general principles are no substitute for a review of the law of the involved jurisdiction.

Many states, including Florida, define domicile in a way that is inherently subjective and difficult to prove. Faced with a generally broad definition of domicile, courts and taxing authorities rely on the intent of the individual, as proved by contemporaneous expressions of intent and by positive overt acts proving intent. Intent, sentiment, and feeling may be shown by testimony of the client and others. However, courts and taxing authorities tend to focus on nonsubjective evidence in order to infer intent. Generally, this analysis focuses on which jurisdiction has the more significant contacts. This gives the planner the opportunity to recommend steps that will lead to the desired result. For example, while a client may...
change domicile for any reason or no apparent reason, it is helpful to have a record of a clearly enunciated purpose that is consistent with the timing and circumstances of the domicile change. 15

While many clients will retain a few contacts in the state of former domicile, as many of the indicia as possible should point to Florida. A list of some of the indicia considered by courts in determining domicile is attached as appendix, and some of the more important indicia are set forth below.

As one court stated, "[a] person's declarations about his home, residence, or domicile are evidence of his intent, including a statement contained in a formal legal document like a will."16 A client wishing to establish domicile should accordingly take aggressive steps to document his or her new domicile contemporaneously with the domicile change. For example, in accordance with F.S. §222.17, a person wishing to establish Florida domicile may file a sworn statement with the clerk of the circuit court. A person may also file a sworn statement regarding intent not to establish Florida domicile. A Florida homestead declaration is also powerful proof of intent to choose Florida domicile. While such statements without more are unlikely to prove domicile, absence of such statements may be taken as evidence that domicile has not changed. Note that when faced with conflicting evidence of domicile, a court or taxing authority may give less weight to self-serving formal expressions of intent than to more concrete indicia of domicile.

The concept of domicile is closely connected with a person's home. Selling or failing to sell the former residence is powerful, but not conclusive, evidence of domicile change. If the residence in the state of prior domicile is put on the market but fails to sell, evidence of the attempt should be retained. If the former residence is not sold, it should be shut down for the period it is not being used. Year-round pool service and cable TV have been used as indicia of lack of intent to change domicile. 17 The sale of a residence in Florida should be treated as the sale of a principal residence for federal capital gains treatment.

As much time as possible should be spent in Florida and as little time as practical should be spent in the former domicile state. A trip log should be maintained to show relative time spent in each location. If records are not kept, credit card receipts can be used to show the amount of time spent in a location.18

Keeping business contacts in the state of prior domicile is powerful evidence that domicile has not been abandoned. 19 Transitional years where prior business is being wound up are particularly vulnerable to challenge. Domicile may not be considered changed until business involvement has substantially ceased.20 Establishing business contacts in a new location may not be sufficient to show that previous domicile has been abandoned, if other facts show that previous domicile has been retained.

A court has held that a husband and wife can each have a different domicile if they live separately in a "nontraditional" marriage without fraudulent intent. 21 As a result, if only one spouse of a married couple is unable to amass sufficient evidence of Florida domicile to safely change his or her domicile, the other spouse may still be able to obtain a Florida domicile. Advantages available to the couple from this arrangement would include access to the creditor protection and property tax benefits of Florida homestead.

Issues to Consider Upon Domicile Change

While each domicile change or clarification will involve a unique set of issues, every domicile planner needs to keep an eye out for a few recurring risks. For example, obtaining Florida domicile may not avoid state income tax in the state of former domicile.22 A client may remain a "statutory resident" of the state of former domicile based on the income tax law of that state, or that state may apply its own criteria to consider the client a continuing domiciliary of that state. The client could legitimately be subject to more than one state's taxing authority.23 Local counsel should be consulted to determine whether income tax liability has ceased. In addition, a Florida domiciliary may still be liable for income tax on "source" income from the state of former domicile or may pay tax as a part-year resident. A new Florida domiciliary should consult a local accountant or attorney to determine the liability for and possible legal avoidance of the Florida intangible personal property tax. If Florida tax is paid, it may not be possible to obtain a refund in the event of a successful tax challenge by the state of former domicile resulting in taxation by both Florida and the other jurisdiction.

A new Florida domiciliary should consult a local attorney and have his or her estate planning documents reviewed to make sure they conform
to local law. For example, a non-Florida document may name an ineligible personal representative, contain an unenforceable no-contest clause, or contain an ineffective disposition of the homestead. The new documents and estate plan should carefully plan for existing community property, either by a conscious decision to convert assets into separate property or by careful documentation of the preservation of community property status.

A new Florida domiciliary should replace as many non-Florida advisors with Florida advisors as possible, not only to prove change of domicile but to avoid errors by advisors unfamiliar with Florida law. While many clients are reluctant to change or long-term professional relationship, the planning process should include a frank discussion of the capabilities of the advisors and the requirements of Florida law.

Real property located in other states may be subject to a state estate or inheritance tax. It may be possible to avoid the state estate tax by placing the real property into a corporation or other similar entity (thereby changing the character of the property into personal property). Note that the entity used would be subject to the Florida intangible personal property tax unless planning is undertaken to avoid the tax.

A client expecting to obtain the property tax and creditor protection benefits (and probate limitations) of homestead should be careful to review the applicable rules, including federal bankruptcy rules. Some considerations include acreage limitations on the homestead, the possibility that holding title in trust takes away creditor protection, inapplicability to vacant land or a house being built, and the annual deadline for application for property tax purposes. Zingale v. Powell, 885 So. 2d 277 (Fla. 2004), holds that the constitutional limitation on increases in homestead valuation assessments does not apply to any increase prior to actual granting of homestead status, even if the property qualified as homestead prior to this time.

Conclusion

Many clients may not realize the magnitude of the advantages of proper domicile planning and the corresponding disadvantages of poor planning. While the issues raised in the domicile planning process are varied and complex, both the risks of poor planning and the rewards of proper planning make domicile a subject that attorneys cannot afford to ignore.

1 Kovoloh v. Carter, 699 So. 2d 285 (Fla. 5th D.C.A. 1997) (citations omitted). This paternity case contains an extensive discussion of domicile in connection with a determination of whether Florida had subject matter jurisdiction and whether personal jurisdiction was acquired.

2 Horvitz v. Commissioner of Revenue, 798 N.E.2d 1046 (Table) (Mass. App. Ct. 2003) (unpublished). Taxpayer determined to have changed domicile from Florida to Massachusetts when he purchased a Massachusetts residence in order to remain involved in his children's lives.

3 In 2005, a New York domiciled decedent who pays estate tax on $10 million will pay approximately $565,828 more in state and federal estate taxes than an otherwise identical Florida decedent. For more on this topic, see Dean L. Surkin, The Impact of the Decoupling of State Estate Taxes on a Taxpayer's Choice of Domicile, 101 J. TAXATION 49 (2004).

4 Fla. Const. art. X, §4; Fla. Stat. §222.14. It should be noted that while recent changes to federal bankruptcy law have reduced the creditor protection available to the homestead, significant creditor protection remains.

5 Fla. Stat. §193.155(1). This often overlooked provision may be worth tens of thousands of dollars to a client who sees the taxes assessed on his or her pricey second home double and triple while domiciliary neighbors pay only incremental increases.

6 I.R.C. §2102(b)(1) allows a decedent who is a nonresident and not a citizen of the U.S. to shelter only $60,000 from the federal estate tax. Some clients, such as those with substantial U.S. assets but total worldwide assets of less than the applicable exclusion amount for U.S. residents (currently $1.5 million), may reduce their tax burden by establishing a U.S. domicile. Note that domicile planning for non-U.S. citizens should carefully consider the effect of any applicable treaty.

7 I.R.C. §121. A domicile change may
be postponed until the out-of-state residence is ready to be sold.

Due to the low rate and the ease of avoidance of this tax, this factor should not weigh heavily for most.

For example, a single client may not want to leave a valuable homestead to minor children in the custody of a former spouse.

Note that the test of domicile for U.S. income taxes is lawful permanent residence or substantial presence based on the number of days present, but the test for U.S. estate and gift taxes is domicile.

I.R.C. Reg. §20.0-1(b)(1).


Since Florida does not currently charge a separate state estate tax, Florida has no incentive to intervene in a state estate tax claim made by another state.

"The test of intent with respect to a purported new domicile has been stated as whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling, and permanent association with it." In re Bodfish v. Gallagher, 50 A.D.2d 457, 458 (N.Y. App. Div. 1976), quoting In re Estate of Boarne, 181 Misc. 238, 246 (N.Y. Sur. 1943).

A change of residence is accomplished and becomes effective when there is a good-faith intention to establish it, coupled with an actual physical move to the new residence, as evidenced by positive overt acts." Keidoh, 699 So. 2d at 288. Note that "the intention to acquire a new domicile must be to make a home at the moment, not to make a home in the future." Id. (citation omitted). Buying property, building a home, and other similar steps toward acquisition of domicile are insufficient without further proof that a change has already been made.

Note that unlike many other tax purposes, domicile change is valid even if the sole purpose is tax avoidance.

Estate of Burshiem v. Burshiem, 483 N.W.2d 175 (N.D. 1992) (citation omitted). (Decedent determined to be a Florida domiciliary notwithstanding that he had a North Dakota driver's license and hunting license and spent 80 percent of his time in North Dakota, largely based on the declaration in his will that he was a Florida resident); see also Getz v. Bogatki, 611 A.2d 778 (Pa. Commw. Ct. 1992). (Decedent determined to be a Pennsylvania domiciliary notwithstanding a Florida homestead exemption, vehicle registration, driver's license, bank accounts, address on federal income tax return, and Florida residence eight months of each year, largely based on the declaration in his will that he was a Pennsylvania resident).

N.Y. Tax Appeals Tribunal TSB-D-94-4(1).

See, e.g., N.Y. Tax Appeals Tribunal TSB-D-95-5(1).

In re Kartiganer, 194 A.D.2d 879 (N.Y. App. Div. 1979) (Active involvement in business showed continued New York residence in spite of Florida voter registrations, licenses, and will declarations. Note also that Florida wills were provided for a New York probate); see also Gray v. Tax Appeals Tribunal of the State of New York, 651 N.Y.S.2d 740 (N.Y. App. Div. 1997).

If domicile has been satisfactorily established, however, a temporary return to the state of previous domicile will not disrupt the domicile because "mere absence with the specific clear-cut bona fide intention of returning will not destroy the residence actually theretofore established." Bloomfield v. City of St. Petersburg Beach, 82 So. 2d 364 (Fla. 1955).

In Judd v. Schooley, 158 So. 2d 514 (Fla. 1963), the Florida Supreme Court approved of a homestead tax exemption for a wife though the husband was a non-domiciliary and they "lived[d] together harmoniously" without divorce or separation. See also Bleusedeil v. Department of Revenue, 2004 WL 1293855 (Or. T.C. 2004). Note that the income tax implications of split domicile should be considered if the remaining spouse lives in a community property jurisdiction.


While at least one regional group, the North Eastern States Tax Officials Association, has attempted to bring uniformity to the determination of domicile for tax purposes (adopting a cooperative agreement on determination of domicile in 1996), the current wide variation in methodology leaves many traps for the unwary.


For a general discussion, see Barry A. Nelson and Kevin E. Packman, Florida's Unlimited Homestead Exemption Does Have Some Limits, 77 Fla. B. J. 60 (Jan. 2003).

As noted by Barry A. Nelson and Kevin E. Packman in Florida's Unlimited Homestead Exemption Does Have Some Limits, 77 Fla. B. J. 60 (Jan. 2003), an alien can only satisfy the permanent residency requirement necessary to have homestead creditor protection if the debtor is granted a permanent visa or "green card." The protection may be lost if the visa status is not kept up.

Appendix

Factors Suggesting Florida Domicile:

Filing federal income tax returns from a Florida address.

Filing Florida intangible personal property tax returns which include intangible personal property owned by the individual.

Filing only those tax returns which are required for nonresidents in the former state of domicile.

Executing a new will revoking Florida as the state of domicile.

Executing Florida advance directives such as a living will, designation of healthcare surrogate, and declaration nominating preneed guardian.

Filing a declaration of domicile with the clerk of the circuit court in the county where the individual resides and mailing a copy of the declaration to the tax authority in the former state of domicile.

Declaring Florida to be the place of the individual's domicile in all documents containing a recital of residence, including wills and trust agreements.

Notifying social and religious organizations of the change in domicile and changing membership records to reflect the change.

Obtaining a Florida driver's license and registration of motor vehicles in Florida.

Obtaining Florida library card.

Listing Florida address on passport.

Registering to vote in Florida and ceasing to be registered to vote in the former state of domicile.

Owning a Florida residence and filing a Florida homestead exemption claim for such property.

Listing the Florida residence as the primary residence on all homeowners insurance.

Moving valuable tangible personal property to Florida residence.

Disposing of the residence in the former state of domicile.

If residence in the former state of domicile is not disposed of, offering the residence for rental or closing it up (turning off nonessential services) during periods of nonuse.

Spending little time in the former state of domicile.

Notifying creditors (such as credit cards) and debtors of the new domicile.

Ceasing employment activity in former state of domicile.

Giving up resident fishing and hunting licenses in former state of domicile.

Recognizing professional relationships (medical, dental, legal, financial, accounting, etc.) to Florida practitioners.

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