



FEATURE: ESTATE PLANNING & TAXATION

By **Robert T. Napier**

Exodus: The Art of Domicile

Disconnect from the old state and establish ties in the new one

Much has been made recently of professional athletes, like Phil Mickelson, considering fleeing less favorable state tax jurisdictions. Many clients will wander the country, and even the globe, in search of jurisdictions willing to tax less of their incomes or estates. Many states have imposed ever-higher taxes, resulting in a new migration of clients prepared to wander from their old place of domicile to a new, less-taxing place. However, the pharaohs (governors) of those states don't want them—or their money—to leave.¹

Clients often want to know what they have to do to leave their current place of domicile and establish a new one. Of course, the answer is easy if the client simply pulls up stakes and moves everything from one state to another, never intending to return to the prior state. The reality, however, is that most clients prefer to maintain at least some connection to their former state of domicile; after all, they may have lived there for their entire lives. How much of a connection to the prior state of domicile is too much, and what should be done in the new state to establish domicile there?

Typical Fact Pattern

Imagine that a former Illinois politician (George) wants to change his domicile to Florida. Why choose a person migrating from Illinois to Florida for this hypothetical? Because it's a typical fact pattern. In fact, it's been suggested that a person leaves Illinois every 10 minutes and that 1,000 new people select Florida as their state of domicile every day.²

However, just because George declares that he's

domiciled in Florida doesn't mean his supposed former place of domicile, Illinois, is going to respect that declaration. Illinois requires George to abandon his Illinois domicile with no intent to return, to have physical presence in the new state of domicile and to have intent to make the new state his place of domicile. Because one's intent isn't easily known, Illinois will look to George's behavior and other evidence to determine his intent.³

What can George do and what shouldn't he do to establish domicile in Florida? What if George wants to keep a home in Illinois? While this fact alone isn't fatal to establishing domicile in Florida, clients are surprised to learn that Illinois may impose an estate tax on the home in Illinois.

If Timothy Leary had been an estate planner, he might have classified the different ways to establish a new place of domicile as follows: Turn On, Tune In and Drop Out. These ideas help to create favorable evidence to establish a new place of domicile.

Turn On: Government Connection

Registering to vote in the new state and actually voting are always helpful. (One client really took this advice to heart and was elected mayor of his newly adopted town in Florida.) George should at least register his automobiles in the new state, secure a new driver's license there and send his federal tax filings to the appropriate Internal Revenue Service office responsible for the new state of domicile—not the office for the prior state of domicile.

George should also elect the homestead exemption in Florida and waive any homestead exemption claimed on his home in Illinois. This is usually financially beneficial for former Illinoisans, as the homestead exemption in Illinois is modest, and the homestead exemption in Florida is more meaningful. In Florida, it's also prudent to sign an "Affidavit of Domicile" and



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record it in the county where George resides.⁴ Finally, it would be wise to have any federal benefits, like social security, paid to George at his new Florida address.

Tune In: Social Connection

As proof of George's intent to establish domicile in Florida, it makes sense to establish new utilities and join new social clubs, charitable groups and places of worship. (If George is introverted or a homebody, he should, nevertheless, join and participate in some club for introverts or homebodies.) Of course, spending significant time, ideally more than six months per calendar year, in Florida is important to show George's intent to remain there.⁵ George should engage local medical, legal and accounting professionals as further evidence of his intent to make Florida his chosen state of domicile. Having an estate plan prepared under the laws of the new state of domicile is also beneficial. That plan should include that state's statutory powers of attorney.

George can obtain a cell phone with a Florida area code and subscribe to Florida newspapers or periodicals and have them delivered to his Florida address. All these facts were referenced as relevant in the recent *Hamer* case.⁶ Note that these particular facts become less relevant in a digital world, where subscriptions are delivered electronically, almost any area code can be selected from a new cell service provider and family photos are stored in the cloud.

Drop Out: Disconnect

Severing the ties that bind George to Illinois strengthens the argument that Florida is really his new state of domicile. Physically removing oneself from his prior state of domicile is straightforward; however, it may be easier to part the Red Sea than it is to cut all contact with the prior state of domicile.

Therefore, George should start with the easy things and progress from there. Filing the appropriate final or partial year tax returns with Illinois and suspending any state-issued business or professional licenses are certainly good ideas. Renouncing homestead exemptions, no longer voting in Illinois and removing his name from the

voter rolls (even if one was once a Chicagoan) are simple, constructive things to do. If possible, club memberships should be changed to non-resident status. George should change the mailing addresses for his bank statements, investment accounts and other important papers. It's also probably a good idea to remove wedding albums, collections, car titles or other important papers that are of significant legal or emotional value from Illinois. One

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Illinois appellate court also made reference to the location of the family Bible.

But the social ties of friends, family and business contacts are the siren's song that may keep George coming back to Illinois. That's where the danger begins. This behavior opens the door to allow Illinois to scrutinize and assess tax. And remember, Illinois has attorneys on staff, while George will need to secure his own counsel and scramble to recreate family and business records for years gone by. George should also be advised that Illinois is hiring 200 new revenue agents. Therefore, George is wise to create facts that bolster his case so strongly that Illinois looks for some other less-cautious individual to assess tax.

In reality, George may well retain his home in Illinois, club memberships, social memberships and charitable activities. In addition, George will spend time in Illinois. Certainly, spending more than six months in a state George doesn't claim as his domicile is asking for trouble.⁷ Therefore, it's prudent to spend less time in Illinois and more in Florida. It's equally wise to spend less money in Illinois than Florida and to complete fewer business transactions in Illinois than Florida.⁸

Interestingly and sadly, the location of one's



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charitable beneficiaries was noted in the recent *Hamer* case. The court noted that more of the taxpayers' charitable causes were directed outside of the prior state of domicile. This is a troubling observation, as it encourages as clean of a financial break as possible from the prior state of domicile to the detriment of the charities, businesses and residents of the state left behind.

Spending money in Illinois, visiting Illinois, owning real estate in Illinois and supporting charitable causes in Illinois are all evidence that Illinois will use against George when it attempts to tax him as being domiciled in Illinois. The unintended consequence of this is obvi-

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ous: George should visit Illinois as little as possible, support charities outside Illinois, make more purchases outside Illinois and spend more money elsewhere. When George returns from his travels, he should return to Florida, rather than his prior place of domicile. Put succinctly, George should “drop out” of Illinois.

George should even seek any extensive or long-term medical care outside of Illinois. It's interesting to note that the Illinois Administrative Code states that one can reestablish domicile in Illinois if that individual returns to Illinois for a long or indefinite period of recuperation for medical treatment.⁹

Some practitioners have commented that Illinois, for example, has often been unsuccessful in pursuing tax challenges on domicile. While that may be true, George doesn't wish to endure the financial and emotional expense of waging battle, even if he ultimately enjoys a Pyrrhic victory. Keeping thorough diaries, travel logs, expense records and evidence that convincingly establishes Florida as George's new place of domicile

best avoids confrontations. To paraphrase Sun Tzu, it's preferable to succeed without fighting.

While clients can seldom sever all ties with the prior jurisdiction, they should do as much as possible to create favorable evidence by establishing facts that show intent to create a new state of domicile—before the audit papers are served. The stakes are high, both emotionally and financially. Clients are wise to beware the pursuing Pharaoh—and all his charioteers—from their prior state of domicile. 

Endnotes

1. Minnesota's governor has even proposed legislation that would tax individuals present in the state for more than 60 days but less than 183 days. The tax would be assessed pro rata based on out-of-state income. See Gov. Mark Dayton, “Budget for a Better Minnesota: Governor Mark Dayton's FY 2014-15 Budget Recommendations,” www.mmb.state.mn.us/doc/budget/bud-op/op14/gov-presentation.pdf. Regardless of whether this proposal becomes law, it's further evidence of states attempting to find tax revenue wherever possible.
2. J. Scott Moody, *Still Leaving Illinois: An Exodus of People and Money*, The Illinois Policy Institute, (Dec. 20, 2011), http://illinoispolicy.org/uploads/files/IllinoisMigration12-20_3.pdf.
3. See *Viking Dodge Inc. v. Hoffman*, 497 N.E.2d 1346 (Ill. App. Ct. 1986).
4. Affidavit of Domicile available at: <http://bcpa.net/Forms/domicile.pdf>.
5. Note that this fact alone isn't dispositive on the issue. See 86 ILL. Admin. Code 86 Section 3020 (2000).
6. *Cain v. Hamer*, 363 Ill. Dec. 519 (1st. Dist. 2012).
7. A proposed Illinois regulation would eliminate any presumptions based on days in or away from Illinois. See 86 Ill. Admin. Code 86 Section 100.3020 (2000) and 36 Ill. Reg. 18149 (Dec. 28, 2012).
8. See *Hamer*, *supra* note 6.
9. 86 Ill. Admin. Code 86 Section 100.3020 (2000).