



Proskauer» Private Client Services
Should I Stay or Should I Go (to Florida)

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Introduction

Every person has a domicile. This rarely-considered fact has far-reaching consequences, including where and how an individual is taxed.

The general rule is that a state may tax the worldwide income of a person domiciled in that state.¹ While it is impossible to avoid federal tax (unless an individual expatriates and pays the applicable exit tax), many individuals want to minimize their “state” tax burdens, and to do so, they may consider changing their domicile. Some states impose higher income and estate tax than others. Some states, like Florida, impose no income or estate tax on individuals. This difference leads innumerable New Yorkers and other individuals from other “high tax” states to change their domicile to Florida.

The laws of one’s domicile can also significantly affect one’s estate plan. Accordingly, changing domicile may be the best way to achieve one’s estate planning, asset protection and family planning goals.

Another consideration in changing domicile is the timing of the change, which can have significant tax implications. One’s ability to take advantage of particular laws, such as Florida’s “Homestead Exemption,” may be dependent upon the timing of the domicile change.

Notwithstanding the state and local tax laws, individuals should also consider their own convenience. Work and family may be located in a state with high taxes, and moving away from those connections and severing ties to change one’s domicile may not be ideal. Taking advantage of tax benefits may be appealing, but an individual’s particular circumstances may make changing one’s domicile impractical. As we frequently tell clients, “don’t let the tax tail wag the dog.”

As indicated above, many people change their domicile from New York to Florida. Becoming a Florida domiciliary is often an ideal way to minimize one’s income and estate tax burden and otherwise receive the benefits of a more favorable legal regime.

This primer discusses the considerations and challenges that may arise when changing domicile from any state to Florida, with a particular focus on issues arising in New York. First, we provide an overview of the law of domicile in various states. Next, we highlight the factors to consider when changing domicile and the steps to take to actually change a domicile to Florida. Particular tax differences between New York and Florida will be discussed as well. As an audit is a potential risk in this area, we also discuss the audit process and identify ways to avoid problems. Finally, we discuss the estate planning consequences of changing a domicile.

The Law of Domicile

“Domicile” and “residence” are often used synonymously in modern speech. But, legally, and especially for tax purposes, these terms have very different meanings.

What is a Domicile?

Domicile is a common law concept that is sometimes clarified by statute. The common law defines one’s domicile as “living in [a particular] locality with *intent* to make it a fixed and permanent home...[D]omicile’ requires bodily presence in that place and also an *intention* to make it one’s domicile.”² A common law interpretation of domicile is subjective and, therefore, somewhat unpredictable. New York regulations provide additional guidance, albeit subjective, defining domicile as: “the place which an individual intends to be such individual’s permanent home – the place to which such individual intends to return whenever such individual may be absent.”³

Once established, one’s domicile continues until moved to a new location “with a bona fide intention of making such individual’s fixed and permanent home there.”

New Jersey defines domicile by reference to the individual’s subjective intent as well. *In re Seyse*, a New Jersey appellate decision, defines domicile as “a place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning.”⁴ Other states also use subjective tests to determine one’s domicile.⁵

Once established, one’s domicile continues until moved to a new location “with a bona fide intention of making such individual’s fixed and permanent home there.”⁶ This echoes the common law, which was stated in *Matter of Newcomb*: “[t]he existing domicile, whether of origin or selection, continues until a new one is acquired.”⁷ This is in contrast to residency, as one may have multiple residences in which he or she resides. Inherently, one cannot intend to return to each of these residences as his or her permanent home.

In *Keveloh v. Carter*, Florida’s domicile law was similarly summarized:

*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.*⁸

The subjective nature of determining one’s domicile makes any determination of domicile a fact-intensive inquiry.⁹ Therefore, one should be sure that the facts support a conclusion that he or she has abandoned the old domicile and intend to return to his or her permanent home in the new domicile state.

What is a Statutory Resident?

In order to combat the subjectivity inherent to the definition of domicile, many states have developed objective criteria used to determine residency and correspondingly impose that state’s income tax.

New York deems an individual a statutory resident if he or she (1) maintains a permanent place of abode in New York, and (2) spends more than 183 days in the state.¹⁰ In order to qualify as one’s permanent place of abode “there must be some basis to conclude that the dwelling was utilized as the taxpayer’s residence.”¹¹ Also, a “day” in this context means any part of a calendar day,¹² except for when the presence in New York is solely to board a plane, ship, train or bus for a destination outside of New York¹³ or to receive emergency medical care.¹⁴

Other states also use objective tests to determine if an individual is a resident for income tax purposes. For example, in Maine, an individual is a statutory resident if he or she spends more than 183 days in Maine in a given tax year and maintains a permanent place of abode in Maine for the entire tax year.¹⁵ Many states, including Connecticut,¹⁶ Delaware,¹⁷ Massachusetts,¹⁸ New Jersey¹⁹ and Pennsylvania,²⁰ are in line with New York and Maine and consider an individual a statutory resident if he or she is in that state for more than 183 days and maintain a permanent place of abode in that state. Other states have slightly different requirements, such as Oregon, which considers an individual a statutory resident if the individual spends more than 200 days in Oregon and maintain a permanent place of abode in Oregon.²¹

When changing domicile, it is critical to take steps to ensure that only one state can successfully assert that the individual is domiciled in that state.

For purposes of the “statutory residency” test, the “permanent place of abode” prong is determined on a factual basis, and can be any property leased, owned or otherwise utilized by an individual. For example, a Connecticut decision found that an individual no longer had a permanent place of abode in Connecticut upon moving into a New York city apartment (even though there was no written lease on the new apartment) based on the return of his security deposit and the receipt for a “final bill” for utilities with respect to his Connecticut apartment.²² In Oregon, a

residence is simply an “abode,” and an “abode” is “any physical building, structure, or vehicle in which the taxpayer lives and sleeps.”²³ Whether an individual’s abode is “permanent” enough to satisfy the particular statutory residence test, however, is a largely subjective inquiry based on the overt acts of the individual.²⁴

Dual Domicile

Despite the fact that an individual can have only one domicile, two or more states may conclude that an individual is domiciled within their state. Because determining one’s domicile is a question of fact, and each state’s law and precedent may be different, two or more states may conclude that an individual is a domiciliary of that particular state.²⁵ The United States Supreme Court has found that the Constitution does not prohibit two or more states from each concluding that an individual is a domiciliary for state tax purposes.²⁶

Therefore, especially when changing domicile, it is critical to take steps to ensure that only one state can successfully assert that the individual is domiciled in that state. Failing to do so may subject the individual to taxation in two or more states, along with the significant legal costs that may be incurred in disputing such assertions. As individuals get older it is also particularly important to quickly establish a new domicile to prevent multiple states from asserting jurisdiction over the individual’s estate.²⁷

Deciding to Change Domicile – What to Consider in Establishing Domicile?

Why does Domicile Matter?

Most individuals rarely consider their domicile, often equating it with residence or simply where one is living. But, an individual's domicile has important tax and non-tax consequences.

States subject those domiciled within their borders to different taxes than those domiciled elsewhere. This often includes income taxes, and may include gift taxes²⁸ and/or estate taxes.²⁹ New York in particular imposes an income tax³⁰ and estate tax³¹ on New York domiciliaries.

An individual's domicile also affects the law governing the individual's estate. Trust and estate laws vary from state to state, and certain provisions that may be more favorable to an individual may only be available in a particular state. Important variations include treatment of a surviving spouse, permitted perpetuities periods applicable to the duration of trusts, creditor rules and the availability of decanting.³²

Taxes

Minimizing one's tax burden is an important goal for many individuals. Changing domicile can be an effective way to achieve this goal and benefit from a more favorable tax regime.

The tax advantage of being a nonresident of New York is an important consideration for those considering a change of domicile from New York to Florida.

As discussed throughout this primer, the tax advantage of being a nonresident of New York is an important consideration for those considering a change of domicile from New York to Florida. The differences between New York's taxation of residents and non-residents are discussed below.

For New York tax purposes, a "resident" means an individual who is either (1) domiciled in New York (i.e., New York is intended to be "such individual's permanent home – the place to which such individual intends to return whenever such individual may be absent"³³), or (2) a statutory resident (i.e., "not domiciled in this state (New York), but who maintains a permanent place of abode in this state and spends more than one hundred-eighty three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."³⁴). All other individuals are non-residents.

Income Tax (including accumulated distribution tax)

New York residents are responsible for paying and reporting New York income tax on income from all sources, regardless of where the income is generated or the nature of the income.³⁵

Conversely, non-residents of New York only report and pay taxes on income from New York sources.³⁶ Some income produced by intangible assets is only New York source income if it is attributable to a business, trade or profession carried on in New York.³⁷ Therefore, being a non-resident of New York provides significant income tax benefits.

Florida, on the other hand, does not impose an individual income tax on Florida domiciliaries or residents.³⁸ Accordingly, significant income tax savings can be achieved by becoming domiciled in Florida because only the individual's New York source income would be subject to New York taxation.³⁹ Additionally, as discussed below, there are also steps that can be taken to further minimize this burden as well.

Gift/Generation-Skipping Transfer Tax

Federal law imposes a tax on gifts made during an individual's life.⁴⁰ A separate transfer tax is imposed on generation-skipping transfers (e.g., transfers made to those two or more generations below the transferor, such as from grandparent to grandchild).⁴¹ Though most states do not currently impose gift taxes or generation-skipping transfer taxes, Connecticut imposes a gift tax on all transfers of property except transfers of real and tangible personal property located outside of Connecticut by a non-resident.⁴² Other states may enact similar statutes in the future or add their own generation-skipping transfer tax regimes,⁴³ particularly in light of the 2017 passage of the Tax Cuts and Jobs Act, which will likely cause many individuals to consider moving from high tax states to low tax states.

Estate Tax

An individual's domicile at death can also have significant estate tax consequences. Many states impose an estate tax on the estates of decedents domiciled within the state at the time of their death.⁴⁴

New York imposes an estate tax on "every deceased individual who at his or her death was a resident of New York state."⁴⁵ An estate tax is also imposed on the property of non-residents if the property's "actual situs" is in New York state⁴⁶ and the property is either (i) includable in the non-resident's federal gross estate or (ii) would be includable in the non-resident's New York gross estate if the non-resident were a resident.⁴⁷

Conversely, Florida does not impose an estate tax on decedents domiciled in Florida. As previously mentioned, the estate of a Florida domiciliary would only be taxed in New York on the tangible and real property located in New York. Therefore, similar to the income tax regime, significant estate tax savings can be achieved by changing one's domicile from New York to Florida prior to death. Additionally, New York estate tax can be further reduced by engaging in minor estate planning as discussed below.

To further reduce one's New York estate tax exposure, Florida domiciliaries who own New York tangible and/or real property have a few options. First, the individual could gift or sell the property to persons who would inherit the property upon the individual's subsequent death. The individual needs to consider whether a gift of the property will cause federal gift tax to be owed or whether such individual has sufficient gift tax exemption to shelter the gift. If the individual sells the property, the sale terms should be similar to an arm's length transaction between unrelated parties, which would include obtaining a fair market value appraisal of such property. Whether the individual sells or gifts the property, he or she must either relinquish the right to use the property or pay fair market rent for the use of the property to ensure that the value of the property is not included in his or her estate for estate tax purposes. It is important that there is no implied agreement between the donor and the donee whereby the donee agrees to allow the donor to retain the use and enjoyment of the property rent-free or by paying less than fair market value rent.⁴⁸ But, individuals should consult with their advisor to determine whether any gift or sale will nonetheless be brought back into one's New York estate under New York's new estate tax law.⁴⁹

A second option is for the individual to contribute the property to an entity, such as an S corporation, limited liability company ("LLC"), a limited partnership ("LP") or a limited liability limited partnership ("LLLLP"). By contributing property to an entity, this would convert the tangible property (the real estate and personal property) to an interest in intangible personal property (an entity). Moreover, contributing the property to an entity allows the individual to retain control over and the right to use said property. As intangible personal property is subject to state estate tax in the individual's domicile state and Florida does not impose an estate tax on intangible personal property, this is a strong option to reduce the New York estate tax exposure on New York real and personal property. However, it is critical that the S corporation, LLC, LP or LLLL have a substantial business purpose in order to reduce the New York estate tax exposure. There are other structures that can be implemented which are beyond the scope of this primer.

Asset Protection

Another advantage to becoming a Florida domiciliary is that Florida residents are afforded a significant level of creditor protection. That being said, affirmative steps may be necessary to benefit from these protections.

Florida residents are afforded a significant level of creditor protection.

In particular, Florida provides Florida domiciliaries the advantage of its homestead rules. Pursuant to Article X of the Florida Constitution, homeowners, as well as the surviving spouse or heirs of the owner, are exempt from a forced sale of their homestead except in certain cases. A permanent residence may be established as a homestead if the property does not exceed 160 acres of contiguous land outside of a municipality, or, one-half of an acre, if within a municipality. If the residence is deemed a homestead, it will generally be exempt from creditors' claims. This debtor protection is automatic upon becoming domiciled in Florida and is one of the strongest protections in the country. There are restrictions, however, regarding the devise of homestead property.⁵⁰ While a complete analysis of the restrictions is beyond the scope of this primer, generally, one cannot devise homestead property when he or she is survived by a spouse or minor child.⁵¹ If a homestead application is filed with the property appraiser in the county where the real property is located, the Florida domiciliary may also receive certain property tax benefits that reduce the property tax due annually and limit the amount that the value can be increased each year.⁵²

Florida also provides that life insurance proceeds inure to the exclusive benefit of the beneficiary and are exempt from creditors of the insured unless the insurance policy or a valid assignment provides otherwise and unless the insurance proceeds are payable to the insured's estate.⁵³ The cash surrender value of insurance policies insuring the life of Florida residents are exempt from the reach of creditors, as are the proceeds of an annuity contract issued to a Florida resident.⁵⁴ Amounts payable from a qualified retirement or profit-sharing plan, along with assets set aside in a medical savings account, college trust fund or plans established under IRC section 529, are also exempt from creditor claims as well.⁵⁵

Property owned by a husband and wife as tenants by the entirety is also protected from creditors' claims unless the creditor is a joint creditor of both the husband and wife.⁵⁶ Note, however, this protection may be limited if the creditor is the IRS.

Other Considerations

Additional rights and obligations flow from an individual's domicile. Certain state laws are mostly (or only) applicable for those domiciled in the state.

Trust and estate laws also vary amongst the states. Where one is domiciled will often affect the applicable law for that person's estate, including, but not limited to, guardianship laws and probate laws. Understanding the intricacies of the new domicile's trust and estate law can often provide significant planning opportunities.

Despite Florida's advantages for Florida domiciliaries, those considering changing domicile should recognize the practical effects of such a change. The tax benefits that flow from a change of domicile may be outweighed by the inconvenience of moving far from one's family and friends.

Changing Domicile

How is Domicile Determined?

The actions one takes to change one's domicile must be "genuine."

Generally, there are various reasons why a particular individual may choose to change his or her domicile. At common law, when it comes to changing domicile "[m]otives are immaterial, except as they indicate intention."⁵⁷ New York courts have held that "a change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention."⁵⁸ Any motive must have "no presence or deception" and must be "honest."⁵⁹ Correspondingly, the actions one takes to change one's domicile must be "genuine."⁶⁰

Theoretically, a change of domicile can even be motivated by a desire to gain tax advantages so long as the intent to change is honest and the actions are genuine. Changes motivated solely to avoid taxation can be subject to increased scrutiny, however.⁶¹ Changing domicile for reasons other than "merely to escape taxation," may ultimately be beneficial to a finding that the individual's domicile has in fact changed.

Once established, an individual's domicile continues until such individual abandons the old domicile and moves to a new location with the bona fide intention of making the new location his fixed and permanent home. Accordingly, there are two elements that must be established to prove a change of domicile:

1. abandonment of the old domicile and acquisition of a new domicile and

2. actual change of residence.⁶² It is not enough to intend to change domicile. The individual must also actually reside in the new location. Similarly, residing in a new location without the intent to make it one's domicile is not sufficient.⁶³

There is no definitive period of time that an individual must be in a location to establish a domicile, but an individual must have both an intent to create a new domicile and reside in such domicile to effectively change domicile.⁶⁴

Although it may not seem logical, an individual's domicile continues until a new domicile is established even if a residence is no longer maintained in the old location. In *Matter of Richard and Hazel Rubin*, the taxpayers intended to move from Scarsdale, New York to Connecticut.⁶⁵ The taxpayers sold their Scarsdale home in July 1994 but were unable to find a suitable home in Connecticut until June 1995.⁶⁶ New York's Tax Appeals Tribunal ruled that the taxpayers remained domiciled in Scarsdale until June 1995 when they closed on their Connecticut home even though they did not maintain a residence in Scarsdale in the interim.⁶⁷

Conversely, in *Matter of Patrick*, the taxpayer reconnected with a high school sweetheart and abruptly retired from his job to move to Paris to be with her, all while maintaining an apartment in New York city.⁶⁸ Despite spending many nights in New York during the relevant period (some of which were related to medical treatment), the Tax Appeals Tribunal determined that the taxpayer changed his domicile upon moving to Paris based on his application to become a French resident and the absence of family or "near and dear" items in New York.⁶⁹

The determination of an individual's domicile is thus based on a review of the facts and circumstances in each case.

Burden of Proving Domicile

As noted in *Matter of Bodfish v. Gallman*, the party asserting the change of domicile must prove the change of domicile by clear and convincing evidence.⁷⁰ Similarly, the New York Department of Taxation and Finance bears the burden of proof to show that an individual who was previously a non-domiciliary of New York changed his domicile to New York.⁷¹

The party asserting the change of domicile must prove the change by clear and convincing evidence.

Proving domicile is a fact intensive inquiry. New York's Appellate Division has stated that "no single factor is controlling and the unique facts and circumstances of each case must be closely considered."⁷²

In *Matter of Rudolph (Deceased) & Loretta Zapka*, the taxpayers were New York domiciliaries arguing a change of domicile to Florida but they had strong ties to both New York and Florida. New York's Tax Appeals Tribunal stated that "[t]he mere fact that persuasive arguments can be made from the facts in support of both Florida and New York as petitioners' domicile indicates that they have not clearly and convincingly evidenced an intent to change their New York domicile."⁷³ Accordingly, establishing strong ties in a new location may not be sufficient as clear and convincing evidence of intent if strong ties are continued with the old domicile.

Steps to Change Domicile

If an individual has in fact decided to change his or her domicile, certain actions should be taken to bolster the evidence of the individual's intent to change domicile. This will be required both to establish Florida as the new domicile, and to terminate the old domicile, as is necessary for any change of domicile. It should be noted, however, that decisions from the Department of Taxation have stated that "certain declarations may evidence a change of domicile," but that those declarations "are less persuasive than informal acts which demonstrate an individual's general habit of life."⁷⁴

File a Declaration of Domicile

The taxpayer should file a Declaration of Domicile and Citizenship form in the office of the Clerk of the Circuit Court of the County of his or her Florida residence and in the old county of domicile indicating the change of domicile to Florida.⁷⁵

Change Voter Registration

A new Florida domiciliary should register to vote in Florida and actually vote (whether in person or by absentee ballot, but preferably in person) in the next available election and consistently vote in Florida. If the taxpayer lives in a municipality, he or she should register at the local city hall. If the taxpayer lives in an unincorporated area, he or she should register at any county governmental center. Additionally, any such voter's registration in the former state of domicile should be cancelled.

Rent a Principal Residence or Own Residential Property in Florida

The taxpayer should own or lease and occupy a dwelling in Florida. If possible, the taxpayer should sell, gift or rent the home located in the former domicile. It should be clear that the taxpayer no longer considers the dwelling in the state of former domicile as his or her principal residence.

If the taxpayer does not own real property but instead is leasing a residence in Florida (or intends to enter into a lease) and the taxpayer wishes to declare the leased premises as his or her principal residence, he or she should sign a lease of at least 12 months. A lease for less than 12 months may create the inference that the taxpayer is merely a seasonal resident and not a permanent resident of Florida.

If the taxpayer retains ownership of real estate (including a condo) in the former domicile, the taxpayer should consider placing such property in a revocable trust and/or an LLC or other entity to avoid ancillary administration in such state upon his or her death.

Re-Register Cars, Trucks and Boats in Florida and Obtain Florida Licenses

Cars, trucks, boats and other property that must be registered should be re-registered in Florida. Similarly, any corresponding license, such as a driver's license or boater's license, should also be obtained in Florida. Re-registration of automobiles and obtaining a driver's license can be done at any Florida Division of Motor Vehicles office. Additionally, the taxpayer should be aware that when applying for a new driver's license, he or she may be required to surrender an existing driver's license issued by the former domicile.

Obtain Insurance in Florida on the Florida Residence and Other Property

After acquiring a Florida residence and re-registering cars, trucks and boats with the appropriate Florida authorities, one should obtain insurance on these properties. Also, insurance for other personal property, such as art and furniture, should be considered, especially if such items were insured in the previous state of domicile. Along with the practical benefits of insuring one's property, purchasing insurance shows intent to utilize the property in Florida and correspondingly protect said property.

Apply for Florida Homestead Exemption from Real Property Taxes

If, before January 1 of any given year, the taxpayer is domiciled in Florida, and owns Florida residential property, he or she is entitled to a \$50,000 reduction in the assessed value of such property for property tax purposes. In addition, the assessed value for property tax purposes of homestead property cannot be increased by more than 3% annually. Depending on the County in which the taxpayer resides, to obtain the exemption, the taxpayer may have to apply in person at the County Governmental Center, e-file a completed homestead exemption application or mail in a completed homestead exemption application.

When applying for a homestead exemption, the taxpayer should have the following documents available to prove ownership and domicile status (all are not needed, but having as many as possible is helpful): voter's registration; deed to residence; vehicle registration; declaration of domicile (recorded); and valid Florida driver's license.

If property is owned *jointly between spouses*, one spouse can apply for both if the applying spouse provides as many of the above documents on behalf of the other spouse as possible. If the property is owned *jointly between non-spouses*, both individuals must apply for the exemption in order to receive the full exemption amount.

The homestead exemption must be filed between January 1 and March 1, although at the option of the local Property Appraiser, initial applications for homestead exemption for the succeeding year may be accepted after March 1.

File Federal Income and Other Tax Returns using Florida Address

When filing Federal income taxes, the taxpayer should use his or her Florida address as his or her tax address. If one is required to make quarterly estimated tax payments, use the Florida address for those payments as well.

Additionally, if one has to file non-resident income tax returns in any states, including the former state of domicile, the individual should use the Florida address for those returns.

Declare Residence in Will

As discussed below, a new Florida domiciliary should sign a new will and other estate planning documents to ensure such documents comport with and are governed by Florida law. In doing so, the taxpayer should update his or her Last Will and Testament to recite that he or she is a resident of Florida. It is advisable, though not absolutely necessary, that such updated estate planning documents be executed in Florida.

Transfer Bank and Other Financial Accounts to Florida

It is helpful, but not critical, that assets are transferred out of the prior state of domicile. Preferably the assets would be transferred to Florida banks, and many bank and trust companies have Florida branches. Any account maintained in the prior domicile should be changed to reflect the individual's Florida address. This change should be reflected in account statements, as well as on checks and credit cards.

Move Safe Deposit Box to Florida

Place personal and valuable items in Florida safety deposit boxes. Remember to surrender any safe deposit boxes in the former domicile as well.

Use Florida Address to Transact Business, Correspond with Friends

If possible, those who have recently changed domicile should avoid prolonged, active business involvement in the former domicile state. Ideally, all business would now be transacted in Florida instead. New Florida domiciliaries should remember to use their Florida address in their emails and letterhead. Also, when signing deeds, contracts, letters and other business (or personal) documents, the individual's Florida address should be used.

If a new Florida domiciliary continues to carry on his or her business from the former domicile after changing domicile, the principal place of business for the entity should be changed to Florida. Moreover, the new domiciliary should strive to spend as much time working in Florida as possible.

Religious Organizations and Other Membership

Those individuals who were involved in temples, churches, clubs or other organizations in their former domicile state should seek to become similarly involved in Florida equivalents. Where available, the individual should also change his or her status in organizations to out-of-state membership or non-resident.

Of course, be careful that domicile is not a requirement for continued involvement in any club in a former domicile. If domicile is required, then retention of the membership could prove problematic upon a domicile dispute.

Physical Presence

Obviously, physical presence in Florida is critical to changing domicile. Taxpayers should spend as much time as they can in Florida. Ideally, this is at least six months and a day. Keeping a diary of days spent in Florida and using a credit card while in Florida may be helpful, but not necessarily determinative, in showing physical presence.

Florida Charitable Giving

If an individual gave to charity in New York, he or she should consider shifting giving to Florida charitable organizations. Doing so will help show that the individual intends to become a permanent part of the Florida community, while further giving up the former domicile.⁷⁶

Personal Matters

Every small decision can affect an individual's domicile.⁷⁷ Accordingly, one should even take care to move subscriptions to magazines to his or her Florida address and discontinue local newspaper subscriptions in the state of former domicile. One should also relocate his or her personal effects, like family pictures and heirlooms, to Florida. Other considerations include getting a new phone with a Florida phone numbers, hiring a Florida attorney, consulting with Florida accountants and visiting Florida health care providers.

Special Cases

Military

Military personnel face many special taxation issues. Domicile is usually not affected by an individual's service in the Armed Forces because transfers and service in the military do not constitute intentional and freely made decisions necessary to change one's domicile.⁷⁸ Accordingly, military personnel may be domiciled in a state they have not actually been in for years.⁷⁹ New York applies the same rule, by statute, to the military personnel's family members.⁸⁰

Domicile can of course be changed as long as the individual serving in the armed forces establishes an intent to abandon the original domicile and adopt a new one.⁸¹ Because New York's general rule is that military service "in no way affects a person's domicile...in the absence of acts showing an intent to change it," military personnel seeking to change domicile should be especially cognizant of their actions that can help prove their intent to change domicile.⁸²

Students

Students also do not generally gain or lose their domicile simply by being away from home.⁸³ College students actually retain the domicile of their parents unless they affirmatively show a change of domicile.⁸⁴ In order for a student to establish that he or she has changed domicile to the location of the student's studies, "the facts to establish such a change must be wholly independent and outside of [the student's] presence...as a student."⁸⁵

Tax Differences – New York Residents vs. Non-Residents

As discussed throughout this primer, the tax advantage of being a nonresident of New York is an important consideration for those deciding to change domicile from New York to Florida. Similarly, the tax advantage of being a resident of Florida compared to being a resident of many other states is also an important consideration. The particular advantages of being a Florida resident are discussed below, with a particular focus on the differences between New York's taxation of residents and non-residents.

As previously mentioned, for New York tax purposes, a "resident" means an individual who is either (1) domiciled in New York (i.e., New York is intended to be "such individual's permanent home – the place to which such individual intends to return whenever such individual may be absent"⁸⁶), or (2) a statutory resident (i.e., "not domiciled in [New York] but who maintains a permanent place of abode in [New York] and spends more than one hundred-eighty three days of the taxable year in [New York], unless such individual is in active service in the armed forces of the United States."⁸⁷) All other individuals are non-residents.

Similar rules apply in Connecticut, Delaware, New Jersey, Maine, Massachusetts and Pennsylvania, among others.

Income Tax (including accumulated distribution tax)

New York residents are responsible for paying and reporting New York state income tax on income from all sources, regardless of where the income is generated or the nature of the income.⁸⁸

Conversely, non-residents of New York only report and pay taxes on income from New York sources.⁸⁹ Some income produced by intangible assets is only New York source income if it is attributable to a business, trade or profession carried on in New York. Similar rules apply in many other states, including Connecticut, Delaware, New Jersey, Maine, Massachusetts and Pennsylvania.

New York's highest marginal tax rate is 8.82%, which does not include the additional income tax charged on residents of New York city, which is 3.876%. New Jersey's top marginal tax rate is 8.97%, which is also one of the highest in the country. Most other states, including Connecticut, Delaware, Maine, Massachusetts and Pennsylvania also impose significant income taxes on statutory residents. The following chart compares the highest marginal income tax rates imposed by these states:

State	Highest Marginal State Income Tax Rate
Connecticut	6.99%
Delaware	6.60%
Maine	7.15%
Massachusetts	5.10%
New Jersey	8.97%
New York	8.82%
Pennsylvania	3.07%

Importantly, Florida does not have a state income tax.

Therefore, being a non-resident of New York, New Jersey or other states that impose an income tax provides significant income tax benefits to an individual.

Estate Tax

One's domicile also affects whether and how such individual's estate will be subject to estate tax at death. New York's estate tax is imposed differently depending on whether the decedent was a resident of New York at death.⁹⁰ Other states that impose an estate tax, such as Connecticut and Massachusetts, implement the estate tax differently depending on whether the decedent was a resident at death.

One's domicile also affects whether and how such individual's estate will be subject to estate tax at death.

In New York, resident estates are taxed based on their federal gross estate, subject to some modifications. All real and tangible personal property having a situs outside of New York is excluded from the calculation of a resident's "New York gross estate."⁹¹ A resident's New York gross estate is increased by the amount of taxable gifts made during the three-year period ending on the decedent's date of death, except such gifts (1) made while the decedent was not a resident of New York, (2) made before April 1, 2014 and (3) of real and tangible personal property having an actual situs outside of New York.⁹²

Conversely, New York imposes an estate tax on non-resident estates only if they contain "real and tangible personal property having an actual situs in New York."⁹³ Non-residents are only taxed based on the value of their New York situs property. Thus, no New York estate tax will be imposed on a non-resident if the value of such individual's New York situs property does not exceed the applicable New York estate tax exemption amount (\$5,250,000 as of January 1, 2017, but scheduled to rise to at least \$5,600,000 as of January 1, 2019 in accordance with inflation adjustments as would have been determined under federal law in effect before the 2017 passage of the Tax Cuts and Jobs Act) in the year of such individual's death.

For estates that exceed the New York estate tax exemption amount, the state imposes a tax as high as 16% on the entirety of the estate's New York assets. Connecticut, Maryland, Massachusetts and Pennsylvania, among others, also impose estate taxes on estates of their domiciliaries at various rates between 7% and 16%. Florida, on the other hand, does not impose an estate tax on estates of decedents who die as Florida domiciliaries. Note that the amount of any state estate taxes paid can be taken as a deduction on the federal estate tax return.⁹⁴

The following chart compares the estate tax rates (imposed and effective) for the aforementioned states:

State	Highest Marginal Imposed State Estate Tax Rate	Effective State Estate Tax Rate
Connecticut	12%	7.2%
Maryland	16%	9.6%
New York	16%	9.6%
Massachusetts	16%	9.6%
Pennsylvania	15%	9.0%

As previously discussed, tangible personal property and real property may be able to be converted to intangible property by contributing such property to an LLC or other entity. Intangible personal property owned by a non-resident estate is not taxed by New York because such intangible property is not deemed to have a situs in New York.⁹⁵ Additionally, gifts are not brought back into a non-resident estate unless such gifts were of real or tangible personal property actually located in New York or intangible personal property used in a trade or business carried on in New York.⁹⁶ Excluding these categories of assets from New York taxation at death can provide significant benefits, especially if the decedent died in a state without estate tax, such as Florida.

Audit Considerations

Audit Process

During an audit, three issues are examined. The first issue that is examined is the domicile of the individual. If it is determined that the individual is not domiciled in New York, the next issue that is examined is whether the individual is a Statutory Resident.⁹⁷ If the individual is determined to be a Statutory Resident, the third issue that is examined is the allocation of income. The scope of the audit will be based on the facts involved. For example, the Nonresident Audit Guidelines issued by the State of New York – Department of Taxation and Finance explain that “a non-domiciliary with no permanent place of abode in New York but working within the state might only be asked to verify the allocation of income to New York, while individuals who reside at several locations during the year and have a long established pattern of maintaining a ‘home’ in New York would be questioned concerning their resident status.”⁹⁸

Audit Time Frame

In many cases, the taxpayer continues to earn some source income in New York after changing his or her domicile to Florida, and, therefore, the taxpayer continues to file New York state income tax returns as a non-resident. In these cases, the statute of limitations on assessment⁹⁹ as a New York domiciliary will begin to run because the New York income tax return was filed. However, if New York income tax returns are not filed by the taxpayer after changing his or her domicile to Florida, the statute of limitations will not begin to run and, theoretically, New York could initiate an audit and assess tax at any time after the taxpayer changed his or her domicile.

When a taxpayer files a New York income tax return as a non-resident, audit notices generally appear within 12–18 months after filing the return. This time line has accelerated recently, however, especially in the case where the taxpayer was audited in earlier years. In these cases, audit notices may be sent to the taxpayer within 3–4 months of the return being filed.

The length of time for the New York audit (from date of receipt of the audit notice through resolution) varies greatly and depends on various factors. Some of these factors include:

the complexity of the facts concerning the domicile change

the complexity of the substantiation concerning the day count with respect to the statutory residency issue

the complexity of determining the correct income allocation to NY

how many years are included in the audit period (generally the audit can comprise as little as one year, or two or three years (generally, the more years in the audit period, the longer the audit will last)

how long the taxpayer takes in responding to the auditor’s residency questionnaire and information document requests

the auditor’s work schedule

Indeed, it is not unusual for a moderately complex audit to last 12–18 months before resolution at the audit level. If the audit cannot be satisfactorily resolved at the audit level, the taxpayer may, at his or her option, proceed to a conciliation conference, which process could take an additional year or more. Further administrative review of the audit determination can occur in an Administrative Law Judge (ALJ) proceeding which generally takes significantly longer than a year from the close of the audit (or conciliation conference) to conclusion. For example, the ALJ has six months from the submission of all evidence and the closing of the record in which to render

a decision. The taxpayer or the audit division may appeal an adverse ALJ decision to the Tax Appeals Tribunal, which can last as long as the ALJ process. The Tax Appeals Tribunal decision is final from the perspective of New York.

If the taxpayer disagrees with the Tax Appeals Tribunal's decision, he or she may further appeal the decision by initiating an Article 78 proceeding to the Appellate Division, Third Department, which is a New York intermediate appellate court in Albany. In determining whether to appeal a Tax Appeals Tribunal's decision, the taxpayer should consider that the Appellate Division's standard of review is high, meaning that a Tax Appeals Tribunal decision will be affirmed if there is "substantial evidence" to support the decision. Finally, if the taxpayer disagrees with the Appellate Division's ruling, he or she can request leave of the Court of Appeals, New York's highest court, to further appeal the decision. It should be noted that appeals to the Court of Appeals are discretionary, rather than as of right. Accordingly, the Appellate Division's ruling will generally be final as to the taxpayer unless there are extraordinary circumstances that would necessitate the Court of Appeals hearing the appeal.

Interest and Penalties

In residency cases, administrative penalties, interest and other penalties may be imposed by the auditors at the New York Department of Taxation. Penalties can be imposed for various reasons and can be very expensive.

If an auditor finds that an individual failed to file a required return or to pay the correct amount of tax due, penalties can be imposed and calculated on a monthly basis up to 25% of the tax liability.¹⁰⁰ Such errors that are deemed to be the result of negligence or intentional disregard (without intent to defraud) are subject to an additional 5% penalty along with a 50% penalty on any interest owed on the underpayment.¹⁰¹ An additional 10% penalty on the understatement can be imposed if the error led to a "substantial understatement of liability."¹⁰² In cases where the Department of Taxation believes that the taxpayer committed fraud, a penalty equal to twice the amount of the tax liability owed may be imposed, though the Department has the burden of proof in such a situation.¹⁰³ Criminal penalties may also be imposed for deliberate acts of noncompliance or evasion, otherwise known as "tax fraud acts" such as willfully failing to file a return or willfully filing a return that the taxpayer knows contains false information.¹⁰⁴

The Domicile Test

New York auditors analyze two general categories to determine an individual's domicile – primary factors and other factors. If a determination can be made solely on the basis of the primary factors, the other factors will not even be considered.

The Five Primary Factors Are:

- 1. The home**
 - The auditor looks at the individual's use and maintenance of a New York residence compared to the nature and use patterns of a non-New York residence. The auditor will compare whether the residences are occupied or rented, and the approximate values and sizes of the residences.

- 2. Active business involvement**
 - The auditor reviews the individual's pattern of employment as it relates to the compensation derived by the taxpayer in the particular year. Business involvement also includes active participation in a New York trade, business, occupation, or profession and/or substantial investment in, and management of, any New York closely held businesses, such as sole proprietorships, partnerships, LLCs and corporations.

- 3. Time**
 - The auditor analyzes where the individual spends time during the year. Specifically, the auditor will review the individual's calendar and travel to determine if such individual was in New York more than 183 days.

- 4. Items "near and dear"**
 - The auditor considers where the individual keeps items that are "near and dear" (i.e., those items with significant sentimental value). Such items include works of art, family heirlooms, jewelry, collectibles involved with the individual's hobbies and personal items that enhance the individual's quality of lifestyle.

- 5. Family connections**
 - The auditor will consider the individual's family connections and where such family resides. For this purpose, "family" will be the individual's spouse and children. The location of siblings is generally not considered.

None of these factors are determinative alone. When an analysis of the primary factors indicates by "clear and convincing evidence" that an individual is or is not a New York domiciliary, the audit and analysis is over. But, if not, the "other" factors must be considered.

Other Factors Affecting Domicile and Nonfactors

When the auditors have to consider “other” factors, they turn to the traditional “self-serving” steps taken by an individual when changing domicile. This includes (1) the address at which bank statements, bills and other correspondence are primarily received; (2) the physical location of the individual’s safety deposit boxes where valuables and family records are kept; (3) where the individual’s cars, boats and similar items are registered, as well as where the individual’s driving and operating licenses are issued from; (4) where the individual is registered to vote and whether the individual actually votes in that location for both national and local elections; (5) whether the individual possesses a New York City Parking Tax exemption; (6) an analysis of the individual’s telephone services at all residences; and (7) the citation in wills and other legal documents regarding which location is to be considered the individual’s place of domicile.

Certain actions are not factors in a New York auditor’s analysis of an individual’s domicile.

The location of an individual’s volunteer work for non-profits is a non-factor in this analysis.¹⁰⁵

Similarly, where an individual makes charitable contributions is not considered.¹⁰⁶ An individual’s membership in religious organizations, such as churches and temples, is also a non-factor in a domicile audit.¹⁰⁷

Statutory Resident Test

As discussed above, New York also taxes a statutory resident as if such individual was domiciled in New York. The statutory test is a means of providing objective criteria for the determination of one’s domicile. A statutory resident is one who (1) maintains a permanent place of abode in New York and (2) spends more than 183 days in the state.¹⁰⁸ Any part of a calendar day counts as a “day” under the statutory resident test,¹⁰⁹ except for days spent in New York only to travel to destinations outside of New York¹¹⁰ or days spent in New York to receive emergency medical care.¹¹¹

Despite the more involved audit process, one may still be deemed a New York resident simply by virtue of failing the statutory resident test. Accordingly, those changing domicile from New York should keep track of their time spent in New York, being sure to avoid coming near the 183 day limit. Those individuals who have recently changed their domicile to Florida may consider documenting where they are each day in order to have proof that they are not nearing the limit on New York’s statutory resident test. This can be done through keeping a diary or maintaining a calendar. Maintaining proof of change of domicile is critical, as the taxpayer has the burden of proof in showing that he or she has changed domicile.

Effect of Changing Domicile on Estate Planning

Upon changing domicile an individual should consult with a local attorney to ensure that the individual's estate plan conforms to and is taking full advantage of the new domicile's laws. Certain provisions in the individual's estate plan may no longer be effective or may need to be updated to take advantage of the new domicile's particular trust and estate laws. The following will highlight some of the particular differences new Florida domiciliaries should consider.

Florida trusts can continue for significantly longer than New York trusts, potentially allowing an individual to use trusts to provide for their great-grandchildren and later generations of descendants.

Wills/Trusts

Florida and New York have important substantive differences in their testamentary legal regimes. For example, the perpetuities period applicable to the duration of trusts is significantly longer in Florida, and Florida trusts should include references to this perpetuity period in order for any testamentary trusts to extend for longer periods of time. Indeed, there is a 360-year perpetuities period for trusts in Florida;¹¹² in contrast, New York retains the common law's perpetuities period of lives in being plus 21 years.¹¹³ Accordingly, Florida trusts can continue for significantly longer than New York trusts, potentially allowing an individual to use trusts to provide for their great-grandchildren and later generations of descendants.

Additionally, the executor named in one's New York will may not be entitled to act as personal representative under Florida law. Further, in Florida, homestead property cannot be devised if the individual is survived by a spouse and/or minor children¹¹⁴ and no-contest clauses, which are permitted in New York wills and trusts, are invalid in Florida.¹¹⁵

Taxes

As mentioned above, Florida does not impose an income, estate or inheritance tax. Florida also does not impose an income tax on trusts. That said, changing an individual's domicile to Florida will not automatically change the taxation of trusts already in existence. New York, for example, imposes an income tax on trusts based on the testator's or settlor's residence at the time the trust becomes irrevocable, except New York does not impose an income tax on trusts if (1) all trustees are outside of New York, (2) all trust assets are outside of New York and (3) there is no New York source income.¹¹⁶

Therefore, in order to avoid New York taxation on trusts created while a New York resident, steps should be taken to change trustees to non-New Yorkers (easily accomplished with corporate trustees by changing the trustees to a non-New York branch),¹¹⁷ moving property out of New York and avoiding New York source income.

Other Documents

Newly domiciled individuals should also consider updating their other estate planning documents, such as powers of attorney, health care proxies and living wills to ensure compliance with the new domicile's laws. In particular, Florida does not permit springing powers of attorney (those powers of attorney that only become effective upon the occurrence of an event), so those with springing powers of attorney from their old domicile should be updated.

Estate Administration

Changing domicile also has significant effects on the administration of one's estate.

Summary administration is allowed in both Florida and New York. To be eligible for summary administration, the value of the decedent's entire estate subject to Florida administration cannot exceed \$75,000 or the decedent must have been dead for more than two years, regardless of the size of the estate.¹¹⁸ In New York, summary administration of small estates is only available if the value of the decedent's estate is less than \$30,000.¹¹⁹

Often the real differences for those changing domiciles are in the formal administration process. Florida estates that exceed \$75,000 or where the decedent has been dead for less than two years require formal administration.¹²⁰ The benefit of formal administration is that it cuts off creditor claims and, unlike in New York, the formal administration process in Florida is not unduly burdensome.¹²¹

Similarly, where the small estate procedures are not available in New York, formal probate proceedings will also be required. That being said, formal administration in New York varies in time and complexity to complete administration depending on the applicable court involved. In both Florida and New York, the formal administration process will require the executor to notify known creditors, and pay the decedent's legitimate claims and distribute the decedent's assets appropriately. Of course, New York executors must also pay any New York estate tax in addition to any Federal estate tax that may be due.

Another significant difference between New York and Florida is that New York courts will remain involved in testamentary trusts long after a New York decedent's death. For example, permission from a New York court is necessary for many basic tasks relating to the administration of a New York testamentary trust, such as changing trustees and approving the prepayment of fees. Conversely, Florida courts do not remain involved in testamentary trusts to nearly the same degree. It should also be noted that New York imposes an income tax on New York resident trusts (including testamentary trusts created under a New York decedent's will), whereas Florida does not impose an income tax on Florida trusts.

The fees owed for administration of an estate in Florida and in New York also differ. Both states have statutory fees for the estate's administrator. Executors in New York are paid 5% on the first \$100,000 in the estate, 4% on the next \$200,000, 3% on the next \$700,000, 2.5% on the next \$4,000,000 and 2% on any amount greater than \$5,000,000.¹²² In Florida, personal representatives of an estate are also entitled to statutory fees equal to 3% of the first \$1,000,000, 2.5% of the next \$4,000,000, 2% of the next \$5,000,000 and 1.5% for all amounts greater than \$10,000,000.¹²³ Governing instruments for Florida estates can provide for different compensation, and in both New York and Florida, the executor or personal representative, as applicable, is not required to take compensation but, rather, can waive the right to receive such compensation.¹²⁴

Estate Fees: New York vs. Florida

New York	Florida
5% of the first \$100,000	5% of the first \$1,000,000
4% of the next \$200,000	2.5% of the next \$4,000,000
3% of the next \$700,000	2% of the next \$5,000,000
2.5% of the next \$4,000,000	1.5% of any amt. <\$10,000,000
2% of any amt. <\$5,000,000	

Florida and New York also both provide that the attorneys for the personal representative or executor (as the case may be) are entitled to attorney's fees. New York law allows for attorneys of an estate to be compensated for the "fair value of his services" upon a court order.¹²⁵ Conversely, Florida allows the attorney of a personal representative to receive reasonable compensation without a court order, and provides a statutory schedule of reasonable fees which is used if the parties do not agree on other compensation.¹²⁶

Trustee fees for trustees of Florida trusts and New York trusts are different as well. New York has a statutory system for trustee fees that is based on two separate factors: annual commissions and commissions on principal paid out of the trust.¹²⁷ The annual commissions in New York pay trustees 1.05% on the first \$400,000 in the trust, 0.45% on the next \$600,000 in the trust and 0.3% on any amount greater than \$1,000,000. The paying out commissions are calculated at 1% of all amounts of principal paid out of the trust. It should be noted that unless specifically allowed, no more than two trustee commissions will be paid from a New York trust, even if there are three or more trustees acting. Florida's statute, however, does not provide for specific fees. Rather, it simply provides that unless the terms of the trust specify the trustee's compensation, "a trustee is entitled to compensation that is reasonable under the circumstances."¹²⁸

Conclusion

An individual's domicile has important effects on the individual's tax treatment, as well as on the tax treatment of the individual's estate. Those who choose to change domicile to more favorable jurisdictions, such as New Yorkers moving to Florida, can take advantage of many benefits. Florida domiciliaries are afforded more favorable tax treatment and can receive greater asset protection. In deciding to change domicile one should weigh the potential benefits of the new domicile against those of the old domicile, keeping in mind the practical realities of such a change.

Upon deciding to change domicile, there are many steps that should be taken to ensure that decision is respected by both the old and new domicile jurisdictions. Taking affirmative steps to move one's property and contacts out of the old domicile, especially if that domicile is New York, is critical to avoiding undesired consequences such as dual domicile treatment or taxation by the old domicile. Individuals should consult and work with their advisors to ensure they do not run afoul of their own state's rules in doing so, such as New York's statutory resident rule. By taking these steps, individuals can help themselves avoid a potentially painful and expensive audit process, and if an audit does occur, can be well-positioned to succeed in a finding that they have changed domicile away from New York.

After changing domicile an individual should consult with an attorney qualified to practice in the new domicile to ensure that the individual's estate planning documents comply with the local law. Additionally, meeting with a local attorney can help the new domiciliary take advantage of other benefits of being domiciled in the new jurisdiction.

Endnotes

1. *Cohn v. Graves*, 300 U.S. 308 (1937).
2. *Matter of Newcomb*, 192 N.Y. 238, 250 (N.Y. 1908).
3. N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(1).
4. *In re Seyse*, 803 A.2d 694, 698 (N.J. App. Div. 2002).
5. See, e.g., *Sullivan v. Rotondi*, No. 9700690, 2000 WL 1474117, at *1 (Mass. Super. July 21, 2000) (“Domicile means the place of one’s home. It is the place where one dwells and the center of his domestic, social and civil life”); *In re Loudenslager’s Estate*, 240 A.2d 477, 479 (Pa. 1968) (“The domicile of a person is the place where he has voluntarily fixed his habitation with a present intention to make it either his permanent home or his home for the indefinite future”).
6. *Id.* at (d)(2).
7. *Newcomb*, 192 N.Y. at 250.
8. *Keveloh v. Carter*, 699 So.2d 285, 288 (Fla. 5th DCA 1997).
9. *Newcomb*, 192 N.Y. at 250.
10. N.Y. Tax Law §605(b)(1)(B). Note that this definition does not apply to individuals in active service in the armed forces.
11. *Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592, 594 (N.Y. 2014).
12. N.Y. Comp. Codes R. & Regs. tit. 20, § 102.2(c).
13. N.Y. Comp. Codes R. & Regs. tit. 20, § 105.2(c).
14. *Stranahan v State Tax Commission*, 68 A. D. 2d 250 (3d Dept. 1979); see also *Matter of Patrick*, New York Department of Taxation Appeals, DTA No. 826838, June 15, 2017. But, this exclusion does not extend to outpatient care. See *Matter of Kern*, 240 A.D. 2d 969 (3d Dept. 1997).
15. Code Me. R. tit. 18-125 Ch. 807 § .05.
16. Conn. Agencies Regs. 12-701(a)(1)-1.
17. Del. Code Ann. tit. 30 § 1103.
18. Mass. Gen. Laws Ann. ch. 62, § 1(f).
19. N.J. Stat. Ann. § 54A:1-2.
20. 61 Pa. Code § 121.3.
21. Or. Rev. Stat. §316.027.
22. *Sobel v. Comm’r of Revenue Servs.*, 2017 WL 1240119, at *12 (Conn. Super. Ct. Mar. 7, 2017).
23. *Smith v. Dep’t of Revenue*, 2016 WL 4922483 at *2 (Or. T.C. Sept. 13, 2016).
24. *Id.*
25. See *Dorrance’s Estate*, 163 A. 303 (Pa. 1932) cert. denied, 287 U.S. 660 (1932, 288 U.S. 617 (1033)).
26. See *Cory v. White*, 457 U.S. 85 (1982) (so holding in the state estate tax context).
27. See *id.*; see also *Texas v. Florida*, 306 U.S. 398 (1938) (Wherein four states claimed that the decedent was a domiciliary of their state for estate tax purposes).
28. See Conn. Gen. Stat. Ann. §§ 12-640 to 649.
29. See, e.g., Conn. Gen. Stat. Ann. §§ 12-391; N.J. Stat. Ann. § 54:38-1.
30. See N.Y. Tax Law §§ 601; 605(b)(1).
31. See N.Y. Tax Law §955.
32. For example, New York’s decanting statute, N.Y. E.P.T.L. §10-6.6, has very different requirements for decanting from Florida’s decanting statute, Fla. Stat. § 736.04117.
33. N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(1).
34. N.Y. Tax Law §605(b) (this is the same definition as “Statutory Resident,” discussed in II.b above).
35. N.Y. Tax Law §605(b).
36. See N.Y. Tax Law §§ 601(e).
37. N.Y. Tax Law §605(b)(D)(ii).
38. See Hale E. Shappard, *The New Federal-State Tax Enforcement Alliance: Carrots, Sticks, and Implications for Taxpayers*, 13-FEB Journal Multistate Taxation 14, 23.
39. N.Y. Tax Law §605(b).
40. Internal Revenue Code of 1986, as amended (hereinafter referred to as “IRC”) §2501.
41. IRC §2601.
42. Conn. Gen. Stat. Ann. §12-643(c).
43. For example, as of early 2018, there is a California ballot initiative, the “College for All Act of 2018,” that would amend California’s constitution to establish a California estate tax on decedents estates over \$3.5 million.
44. See, e.g., N.Y. Tax Law §952(a).
45. N.Y. Tax Law §952(a).
46. For these purposes, “actual situs” only applies to tangible property and real property, not intangible property (i.e., stocks, bonds and entity interests).
47. N.Y. Tax Law §952.
48. But, one should consult with their advisor to determine whether a gift or sale will nonetheless be brought back in to one’s New York estate under New York’s estate tax law. Under New York’s estate tax, any gifts made by a decedent during the three year period immediately before death are included as part of the decedent’s New York gross estate for New York estate tax purposes.
49. See N.Y. Tax Law §954.
50. Florida Constitution Art. X §4(c).
51. *Id.*
52. Florida Constitution Art. VI §6.
53. Fla. Stat. §222.13.
54. Fla. Stat. §222.14.
55. See Fla. Stat. §§222.21, 222.22.
56. *In re David*, 403 B.R. 914 (Bankr. M.D. Fla. 2009).
57. *Newcomb*, 192 N.Y. at 251.
58. *Id.*
59. *Id.*
60. *Id.*

61. See N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20 (d)(2) (“The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation”).
62. *Aetna National Bank v. Kramer*, 126 N.Y.S.2d 970 (3rd Dept. 1911).
63. *Bodfish v. Gallman*, 378 N.Y.S.2d 138, 140 (3rd Dept. 1976).
64. See Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, page 10.
65. *Matter of Richard and Hazel Rubin*, New York Department of Taxation, DTA No. 817675 (October 30, 2003).
66. *Id.*
67. *Id.*
68. New York Department of Taxation Appeals, DTA No. 826838, June 15, 2017.
69. *Id.*
70. *Bodfish v. Gallman*, 378 N.Y.S.2d 138, 140 (3rd Dept. 1976); see also Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, page 12 (June 2014).
71. See Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, page 12 (June 2014).
72. *Ingle v. Tax Appeals Tribunal of Dep’t of Taxation & Fin. of State*, 973 N.Y.S.2d 877, 879 (3rd Dept. 2013) citing Newcomb, 192 N.Y. at 250-251.
73. *Matter of Rudolph (Deceased) & Loretta Zapka*, New York Department of Taxation Appeals, DTA No. 804111 (June 22, 1989).
74. *Matter of Campaniello*, New York Department of Taxation Appeals, DTA No. 825354, July 21, 2016.
75. Fla. Stat. §222.17.
76. See *Newcomb*, 192 N.Y. at 251.
77. See *Ingle v. Tax Appeals Tribunal of Dep’t of Taxation & Fin. of State*, 973 N.Y.S.2d 877, 879 (3rd Dept. 2013) (“[N]o single factor is controlling and the unique facts and circumstances of each case must be closely considered.”).
78. See *Consford v. Consford*, 271 A.D.2d 106, 111 (3rd Dept. 2000).
79. *People v. Guariglia*, 65 N.Y.S.2d 96, 100 (Co. Ct. 1946) aff’d, 272 A.D. 784 (2d Dept. 1947).
80. N.Y. Soc. Serv. Law § 117.
81. See *Matter of Seld*, 51 N.Y.S.2d 1, 2 (4th Dept. 1944).
82. See *Zimmerman v. Mingo*, 171 A.D.2d 662 (2d Dept. 1991).
83. See *Ledwith v. Sears Roebuck and Co., Inc.*, 231 A.D.2d 17 (1st Dept. 1997).
84. *Hamilton v. Accu-Tek*, 13 F. Supp. 2d 33 (E.D.N.Y. 1998).
85. *In re Goodman*, 146 N.Y. 284, 287 (N.Y. 1895); see also *Seitelman v. Lavine*, 36 N.Y.2d 165, 171 (N.Y. 1975).
86. N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(1).
87. N.Y. Tax Law §605(b) (this is the same definition as “Statutory Resident,” discussed in II.b above).
88. See N.Y. Tax Law §612 (referring to the resident’s federal gross income); see also IRC §61 (“gross income means all income from whatever source derived”).
89. N.Y. Tax Law §631.
90. See N.Y. Tax Law §952; 960.
91. N.Y. Tax Law §954 (a)(2).
92. N.Y. Tax Law §954(a)(3).
93. N.Y. Tax Law §960.
94. Thus, the effective federal estate tax rate is 40% less the imposed rate in a given state. In New York, this translates into a 9.6% effective rate (i.e., 16% x 40% = 6.4%, and 16%–6.4% = 9.6%).
95. *Id.*
96. *Id.*
97. See discussion at II.b, for the definition of Statutory Resident.
98. See Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, page 7 (June 2014).
99. Generally, three years from the date of filing the return or its due date, if the due date is later.
100. N.Y. Tax Law §685(a)(1)-(3).
101. N.Y. Tax Law §685(b)(1) and (2). A substantial understatement exists when the difference between the amount shown on the taxpayer’s return for the taxable year as compared to the amount required to be shown is greater than (1) ten percent of the tax required to be shown or (2) \$2,000.
102. N.Y. Tax Law §685(p).
103. N.Y. Tax Law §685(e) and (e)(1).
104. See N.Y. Tax Law §§1800-1848.
105. See Nonresident Audit Guidelines, State of New York – Department of Taxation and Finance, page 40 (June 2014).
106. *Id.*
107. Paul Comeau, Mark S. Klein and Timothy P. Noonan, *New York Residency and Allocation Audit Handbook* ¶1.08 (2011).
108. N.Y. Tax Law §605(b)(1)(B).
109. N.Y. Comp. Codes R. & Regs. tit. 20, § 102.2(c).
110. *Id.*
111. *Stranahan v State Tax Commission*, 68 A.D. 2d 250 (3d Dept. 1979). But, this exclusion does not extend to outpatient care. See *Matter of Kern*, 240 A.D. 2d 969 (3d Dept. 1997).
112. Fla. Stat. §689.225.
113. N.Y. Est. Powers & Trusts Law §9-1.1.
114. Florida Constitution Art. X §6.
115. Fla. Stat. 732.1108.
116. N.Y. Tax Law 618; 633.
117. See *In re Application for Judicial Approval of Resignation of Chase Manhattan Bank as Tr. & Appointment of Chase Manhattan Bank USA, N.A.*, 773 N.Y.S.2d 529, 531 (N.Y. Surr. Ct. New York Co. 2003) (denying petition to change situs when desired tax savings were achieved by merely changing corporate trustee to affiliate branch in another state).
118. Fla. Stat. §735.201.
119. N.Y. Surr. Ct. Proc. Act §1301.
120. See Fla. Stat. §735.201.
121. See Fla. Stat. §733.701.
122. N.Y. Surr. Ct. Proc. Act §2307.
123. Fla. Stat. §733.617.
124. *Id.*
125. N.Y. Surr. Ct. Proc. Act §2110.
126. Fla. Stat. §733.6171.
127. N.Y. Surr. Ct. Proc. Act. §2309.
128. Fla. Stat. §736.0708.



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