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INHERITANCE TAXATION:

As affected by questions of Situs, Domicile
and Residence

H. W. IRRIG*

IT IS a commonplace to wish to conserve one's estate by avoiding inheritance taxation but to do so is not so commonplace. That the motive is a proper one as far as the testator is concerned, inasmuch as the tax is a levy on the right to transfer or receive and not on the property itself, is easily discernible. That the motive is proper in the eyes of the law is apparent from a decision of the Wisconsin Supreme Court.

In what we have said we do not wish to be understood as denying the right of the deceased to freely change his residence at will, and for no other reason than to escape taxation. * * *

One may change his domicile for any reason or for no reason.¹

And further:

The question was suggested by respondent that the deceased should not be aided by the court in escaping just taxation. The court can neither give nor refuse such aid. All it can do is to declare the law upon the facts presented.²

The difficulty lies, as the Wisconsin Court stated in the first case above in whether or not one comes within the law, and,

Whether he changes his domicile or not will depend upon intent and actual change of residence.

A consideration of the Involvements of a legal change including the evidentiary requisites and the bearing of the burden of proof to take a case out of the law otherwise applicable represents the essence of the present article. The question of "situs" of property will also receive general treatment.

A reference to the respective state statutes attempting to impose an inheritance tax will disclose the three factors of a tax (1) upon the transfer, or the right to receive, and not a tax upon the property itself, (2) by a person of his property or estate, except real estate outside of that state while a resident of the state, or (3) by a non-resident, of taxable property within the state or its jurisdiction, either by a will or

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¹ *State ex rel. Hsley v. Leuch*, 156 Wis. 631, 634, 146 N. W. 790.

² *In re Heymann's Will*, (Wis.) 208 N. W. 913.

under the intestate laws or in contemplation of death, or of a taxable transfer under a power of appointment.

Also see the Wisconsin case of *Estate of Shepard*.³

The law relative to different items of property varies in the different states. In minimizing the diminution of one's transferable estate by the levy of estate or inheritance taxes a person has two large factors to consider.

1. The nature and situs of the various items of a person's property; the laws of the state where such property is located, and of the various other states relative to the taxation of such property either by estate or inheritance tax methods.

2. The legal residence and domicile of the decedent at the time of his death as far as the taxation of the various kinds of property is concerned, and the establishment of such domicile and residence as legal before the courts of the states attempting to impose either an estate or inheritance tax.

Of course, whether the trouble and expense of so attempting to legally conserve an estate is justified will depend upon the size and nature of the estate and the amount of the tax levied, due to the usual minimum value exemptions and the low rates of taxation in the lower bars.

As an example of the saving in a large estate that is sometimes possible by a study as above described, trust departments frequently illustrate in their literature how in large estates by simple methods very large amounts may be saved for one's heirs. This literature is to the point insofar as the practical savings are concerned, except that the items considered are not comprehensive, representing in many instances only the more frequently occurring situations, and, often omitting from consideration the medium sized estate. An appreciation of the subject's importance and of how to provide for the various properties is absolutely essential to the proper counseling of a client in the management of his property and in the proper preparation of wills and trusts.

As for the first point, situs, the more general rules are set forth in 29 Ruling Case Law, Taxation, pages 209 to 217:

Sec. 177—*Property subject to inheritance taxation.*

The inheritance tax ordinarily applies to *all property* within the power of the state to reach passing by will or the laws regulating intestate succession or by gift inter vivos in the manner designated by statute, whether such property be real or personal, tangible or intangible, corporeal or incorporeal.

³ Chapter 72, Wisconsin Statutes of 1925.

Inheritance Taxation (4th Ed.) Gleason & Otis, Part IV.

Estate of Shepard, 184 Wis. 88, 197 N. W. 344.

In deciding whether there shall be any change in the property of the prospective estate a general inventory should be made of it and important items thereof investigated as to the prospective tax liability both as to the situs and place of descent and transfer. If a change is justified it should be made in the interest of the estate.

There is one fundamental limitation upon the power of a state to impose an inheritance tax. No transmission of property can be taxed by a state unless the property itself or the transmission thereof is subject to the jurisdiction of the state. It therefore becomes necessary to determine the situs of the property before it can be decided whether or not it falls within the inheritance tax laws of a particular jurisdiction.

Sec. 178—*Situs of Property for Purposes of Inheritance Tax.*

In the administration of inheritance tax statutes no more difficult question is likely to arise than the determination of the situs of property. Of course, when property is actually located in the state of the owner's domicile at the time of his death, the taxation of such property and of its transmission is governed exclusively by the law of that state; but when the property is in fact located in one state and the owner dies domiciled in another, problems are presented that do not lend themselves to easy solution. The tendency in many states has been to tax all personal property within its territorial boundaries notwithstanding it may be owned by nonresidents, and also to tax all property of its residents notwithstanding it may be located without the state. Clearly this is not entirely consistent, and possibly it is not free from injustice, but it is not opposed to constitutional principles. Decisions with respect to the situs of property for the purposes of direct taxation are of little service in determining the situs of property for the purposes of the inheritance tax. The state has undoubted power to impose a succession tax in respect to all property upon which it has power to impose an ordinary tax, but in addition thereto it has power to impose a succession tax in respect of certain sorts of intangible property upon which it cannot impose such ordinary tax.

Sections 179 to 185 inclusive, present the general principles applicable to the question of the taxation of real and personal property of residents and nonresidents, within and without the state of legal residence, as affected by the inheritance tax laws.

As a general principle, although not without exception, it is laid down that personal property of a decedent whatever its character and wherever situated, is subject to an inheritance tax in the state of which its owner was an inhabitant at the time of his death. (Sec. 179)

With respect to real estate the situation is somewhat different. The succession to the real estate of a deceased intestate depends upon the law of the state in which it is situated, and not upon that of the domicile of the owner and there is no jurisdiction upon which to base an inheritance tax in the state of the owner's domicile with respect to real estate situ-

ated in another state. Where there is a will, while the devolution is governed by the testamentary instrument and thus in a sense by the law of the testator's domicile, the will can have no effect with respect to real estate in another state unless it is admitted to ancillary probate in such state, and the inheritance tax laws of the testator's domicile have been held not to apply in such a case. With regard to a conversion of real estate in other states than that of the owner's domicile into personalty under the direction of its will, a different doctrine sometimes holds. (Sec. 180)

It is also well settled that a state may tax the succession to all personal property ordinarily and permanently kept within its territorial limits, even if the owner was a resident of another state. Inheritance tax on the property of a deceased nonresident kept within the state will not, however, be held to have been imposed unless the statute clearly so provides. (Sec. 182)

There are numerous questions which arise relative to securities kept within a particular state by a resident of another state. (Sections 183-185)

Jurisdiction for inheritance tax purposes of the property of a non-resident is at times asserted where an estate resorts to the courts thereof to enforce its rights on debts and the like against persons therein. (Sec. 184)

One of the latest cases on the question of situs is the Wisconsin case of *Estate of Shepard*.⁴

Sec. 186.—*Double and Multiple Taxation.*

It will be seen from the foregoing paragraphs that the succession to the same property may be and frequently is taxed by two or more different states, on different and more or less inconsistent principles, and if each is acting within the established sphere of its powers, it infringes no rule of constitutional law. Double taxation, is, however, not favored by the law, and when the statute is open to either construction the one which prevents the exaction of an inheritance tax upon the passing of the same property by two jurisdictions should be adopted.⁵

The distinction between a resident and a non-resident is the second concern. On it hinges the determination of whether the tax will be on all of a transfer by a resident, except his real estate in other states, or on only that part in the particular state's jurisdiction, of a transfer by a non-resident.

⁴ *Estate of Shepard*, 184 Wis. 88, 197 N. W. 344.

⁵ Also see: 37 Cyc. (Taxation) p. 1559-77; *Inheritance Taxation*, (4th Ed.) Gleason & Otis; *Inheritance Taxes*, Blakemore & Bancroft; *Nelson's Wisconsin Tax Service*, Vol. 3 (1926).

The question of domicile arises in the determination of whether a person is a resident in a certain state at the time of his death. Thus it is, as far as inheritance taxes are concerned, a question of being domiciled in a state wide taxing district, and not at any one particular location in that state. When the taxing district is a unit of the state the consideration of residence will be between the different units as in *State ex rel Illsley v. Leuch*.⁶

In determining whether one is a resident of a certain state—whether he is domiciled there he must first determine what the law of that particular state constitutes such residence to be. Some states like New York have undertaken by statute to define residence for inheritance tax purposes. The New York act provides for the purpose of inheritance taxation that:

every person shall be deemed to have died a resident and not a nonresident, of the State of New York, if and when such person shall have dwelt or shall have lodged in this State during and for the greater part of any period of 12 consecutive months in the 24 months preceding his or her death. * * *⁷

However, the courts have held the statute above to create a mere presumption which may be overcome by proof, thus leaving, the question dependent, as before, upon the facts and not upon the statute.⁸

Other states have left such determination of what constitutes residence entirely to the courts. As for the large number of cases defining residence it has been said by the Iowa Supreme Court:

Residence and domicile have no uniform meaning in law; and when it becomes necessary to interpret them much depends upon the nature of the action.⁹

Domicile is defined at 19 Corpus Juris, 392, as follows:

Domicile is the relation which the law creates between an individual and a particular locality or country * * *. It is the legal conception of home * * *. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. The definition of domicile as a habitation fixed in some place, with the intention to remain there always, has frequently been quoted but it has generally been criticized as inapplicable to conditions in this country, and restated thus: That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom. This definition has been still further

⁶ *State ex rel. Illsley v. Leuch*, 156 Wis. 631, 146 N. W. 790.

⁷ Sec. 243 of Chapter on Inherit. Tax. N. Y. Stat. (Chapt. 551, N. Y. Laws, 1916.)

⁸ Cases cited, *Inheritance Taxation*, (4th Ed.) Gleason & Otis, p. 782.

⁹ *Barhydt v. Cross* (Iowa), 136 N. W. 525, 40 L. R. A. (N. S.) 986, 993.

improved, as follows: That place is properly the domicile of a person in which he has voluntarily fixed his abode, nor for a mere special or temporary purpose, but with a present intention of making it his permanent home. The best definitions agree in making the elements of domicile residence and the intent to remain. Thus domicile is defined as a residence at a particular place, accompanied by an intention, either positive or presumptive, to remain there permanently or for an indefinite length of time. The term "domicile" may have a variety of significations dependent upon its various applications, and it is difficult to form any exact definition of domicile, universally applicable, because it does not depend upon any single fact, or precise combination of circumstances.

In Wisconsin the chapter of the Statutes dealing with inheritance taxes does not definite a resident or nonresident. However, Section 6.01 of the Statutes for 1925 relating to the qualification of electors requires that a person shall have "resided" in the state for one year next preceding any election and in the election district where he offers to vote ten days before he shall be deemed a qualified elector, as far as residence is concerned. Section 6.51, relating to the determination of the question of "residence" as a qualification to vote lays down for the most part the well established common law rules for determining residence, to govern as far as applicable. While these do not apply by direct reference to the question of residence for inheritance tax purposes, they necessarily do apply as a matter of fact, because if a person is a resident for the purposes of voting, he would be a "resident" for the purpose of inheritance taxation, inasmuch as voting is an indicia of residence, where the other qualifications are present.

The law is not settled by the above statute whether the same rules will be used in determining whether a legal residence has been acquired by one coming to Wisconsin, where he has not complied with the requirements of the time element, although it would seem that the court would take the common sense view and consider whether the person was qualified to vote. In this connection it would test the facts of the particular case by the statutory rules. If it found all the elements present except the requisite time to vote it undoubtedly would hold that there was a residence for the purpose of taxation and that with the passing of time the right to vote would have followed, the view being that the requirements to vote being more comprehensive than the question of residence since it involves the additional time element, there would be residence if the rules laid down by the statute were fulfilled to the extent that they require.

Whether one has succeeded in changing his residence to another state is a mixed question of law and fact. The principles of law are well

settled. The more general being set forth in the above mentioned statutes being Section 6.51 of the Wisconsin Statute for 1925, as follows:

Second: That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning.

Third: A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or county, town or ward of this state for temporary purposes merely, with an intention of returning.

Fourth: A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely.

Fifth: If a person remove to another state with an intention to make it his permanent residence, he shall be considered and held to have lost his residence in this state.

Sixth: If a person remove to another state with the intentions of remaining there for an indefinite time and as a place of present residence, he shall be considered and held to have lost his residence in this state, notwithstanding he may entertain an intention to return at some future period.

Seventh: The place where a married man's family resides shall generally be considered and held to be his residence; but if it is a place of temporary establishment for his family, or for transient objects, it shall be otherwise.

Eighth: If a married man has his family fixed in one place and does his business in another, the former shall be considered and held to be his residence.

Ninth: The mere intention to acquire a new residence, without removal, shall avail nothing; neither shall removal without intention.

Tenth: If a person shall go into another state and while there exercise the right of a citizen by voting, he shall be considered and held to have lost his residence in this state.

Sections two to nine inclusive above are practically a codification of the Wisconsin law as laid down in the decisions of the Wisconsin Supreme Court on the question of domicile.

In view of the certainty of the law governing the question of domicile and residence the main question in a trial is evidentiary in nature.

Certain principles have been declared which are helpful in solving the question. Fundamentally it is universally assumed as a fact or fiction of the law that a man has a habitation or domicile somewhere and that he can have but one at the same time for one and the same purpose, and that in order to lose one he must acquire another.¹⁰

¹⁰ *In re Heymann's Will* (Wis), 208 N. W. 913; *Seibold v. Wahl*, 164 Wis. 82, 85, 159 N. W. 546; *Will of Eaton*, 186 Wis. 124, 202 N. W. 309.

These must be shown, to establish a change of residence from an established domicile:

1. An intention to abandon the old domicile (State), and
2. An abandonment in fact, and to effectuate this there must also be
3. An intention to establish a new domicile, and
4. The actual establishment of a new domicile.¹¹

Where the evidence and proof are uncontradicted the question of residence resolves itself into one of law. (*Guardianship of Fiji* supra), but merely to have testimony that a person "took up a residence permanently at a particular place with intent of going there to live and do business there, with no further intention of removing from that place to any other and that he intended to make that his home," is vague and unsatisfactory to establish a change as a matter of law, and such testimony along with testimony of a temporary return to the city of his previous domicile, made it very doubtful that a new residence was acquired and justified the submission of that question to a jury.

The court stated in *Johnston v. Oshkosh* at page 475:

It will be observed that the plaintiff fails to state or prove what he did to obtain a residence in Topeka. He does not state that he removed his family or any of his effects to that city, or that he engaged in any business there. Neither does it appear that he disposed of his property in Oshkosh, or made any changes in his business affairs with reference to his removal therefrom. Indeed, it only appears by inference that he was ever in Topeka in his life. If we knew what are the grounds for his statements that he took up his residence there,—that he made it his home there,—we might find that his definition of residence and home does not necessarily include personal presence at the designated place, but requires only the intention to reside there. He fails to tell us what he means by the term "residence," or what facts and circumstances he regards essential to constitute a residence or home in a specified place. He says he took up his residence in Topeka with the intention "of going there to live." This seems to imply a claim of residence there before he personally went there. Perhaps, however, he does not mean to be so understood. Were the plaintiff prosecuted for perjury, in that he falsely testified on the trial of this action that he was in Topeka in 1883, we apprehend the prosecution would have some difficulty in making proof by this record that he directly gave any such testimony.¹²

To the same effect is *Carter v. Sommermeyer*.¹³

In *Will of Eaton*, the Wisconsin Supreme Court, lays down some of the facts which are essential to show a change of domicile, at page 133:

Many other facts may be shown to indicate the establishment of a new domicile,—the exercise of a franchise; the payment of income

¹¹ *Will of Eaton*, supra; *Guardianship of Fiji*, 181 Wis. 136, 138, 194 N. W. 41.

¹² *Johnston v. City of Oshkosh*, 65 Wis. 473, 27 N. W. 320.

¹³ *Carter v. Sommermeyer*, 27 Wis. 665.

taxes; the place of a man's dwelling house; the place of his business, trade, or occupation, etc. In the instant case the testimony shows that the deceased had been in the habit of paying an annual visit to his relatives and friends living in and around Monroe. The time spent in Monroe in 1923 did not extend over a period of about three months. His wife, with whom he had lived for about twelve years, did not accompany him to Wisconsin, but continued her residence in Venice. He did not purchase or lease a home in Monroe, nor did he establish permanent quarters for residence purposes, but lived during a large portion of the time there, in a hotel. He expressed great dissatisfaction with the climate of Wisconsin, particularly objecting to the cold winters. These facts, when taken into consideration in connection with his declarations contained in the will and in the deed, squarely raised an issue of fact for the court to determine, and from such facts the court decided that the residence of the deceased at the time of his death was in the state of California. The decision of the trial court, therefore, on the subject of domicile cannot be disturbed.¹⁴

The same court in *State ex rel Small v. Bosacki*, at page 478 says:

Every person can fix his own residence provided he makes it reasonably permanent by intending to return thereto when a temporary job is finished.¹⁵

In the case of *State ex rel Ilsley v. Leuch* the court considers evidence of the establishment of a new residence. While the question is merely between two taxing units of Wisconsin the facts were held sufficient to constitute a change of domicile and on this point are very pertinent. In the language of the court, at page 634:

The renting of and living in such flats, as stated, in no wise contradicted the undisputed facts that the deceased intended to change his place of residence from the city of Milwaukee to the town of Milwaukee, and that such intention was effectuated by an actual removal of residence to the town in May, 1909, which continued uninterrupted till his death in December, 1912. His name was taken from the tax rolls in the city and placed upon the tax rolls of the town for personal property taxation. He voted in the town and ceased to vote in the city. In fact, he did everything that could, under his mode of life and business necessities, be done to effectuate his intent to change domicile.

The fact of a man having a residence in one taxing district and a business office in another is now so common as not to cast any doubt upon the question of residence. The same is almost true of the custom of residents of the country, who have a business office in the city, to move into the city temporarily for the winter months. Certainly in the case of the deceased, who was about seventy years old, such temporary winter residence in the city should not be held inconsistent

¹⁴ *Will of Eaton*, 186 Wis. 124, 202 N. W. 309.

¹⁵ *State ex rel. Small v. Bosacki*, 154 Wis. 475, 143 N. W. 162.

with an unmistakable effectuated intent to establish his residence in the town of Milwaukee.¹⁶

Other principles established in Wisconsin, on this question are, that:

To establish domicile does not require any particular length of time. Residence at a place for any length of time, however short, with the concurring intention of *permanently* residing at such place, renders such place in a legal sense, the person's domicile.¹⁷

A person who already has a fixed residence or place of abode, cannot change it by mere intention or mental resolution; nor will a party's affirmation that he has changed his residence have the effect to change it, if there be no actual removal, or if he continues the use and occupation of the same house and home, with all the indicia and circumstances of continued residence therein.¹⁸

To effect a change, it is only essential that there be an *actual removal*, accompanied by an intention to thereafter make the *new location* a permanent residence or home; and even an intention to return at some future *indefinite* time will not prevent the change from being effectual.¹⁹

In *Wells v. Chase*, testatrix, after an absence of twenty years, returned to Neenah which had been her home for eighteen years with a declared intention of making it her home until death. She remained two months looking for a suitable place and then after living with her brother a short time in a neighboring city, went on a trip to California always asserting Neenah to be her home to which she expected to return. In her will and other documents she referred to Neenah as her place of residence. The evidence was held to sustain a finding that her domicile was at Neenah, Wisconsin.²⁰

In *State ex rel. Ilsley v. Leuch*, a person changed his residence from the city of Milwaukee to the town of Milwaukee, the mere fact that he continued to have a business office in the city and that he moved into the city temporarily in the winter, he being about seventy years old, were held not to be inconsistent with an unmistakable effectuated intent to establish his residence in the town.²¹

The general rule is that the domicile of one who is in itinere from an old to a new home continues to be the old domicile till the new one is reached.²²

¹⁶ *State ex rel. Ilsley v. Leuch*, 156 Wis. 631, 146 N. W. 790.

¹⁷ *Kempster v. City of Milwaukee*, 97 Wis. 343, 72 N. W. 743.

¹⁸ *Carter v. Sommermeyer*, 27 Wis. 665.

¹⁹ *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39, aff'd in 176 U. S. 350.

²⁰ *Wells v. Chase*, 126 Wis. 202, 105 N. W. 799.

²¹ *State ex rel. Ilsley v. Leuch*, 156 Wis. 631, 146 N. W. 790.

²² *Reynolds v. Lloyd Cotton Mills* (N. C.), 99 S. E. 240, 5 A. L. R. 284 and note at 296.

The latest statement by the Wisconsin Supreme Court on the question of whether a person previously domiciled here succeeded in establishing a legal residence elsewhere is found in the case of *In re Heymann's Will*. The facts were held to support a finding of no change. With regard to evidence of a change, the court states, at page 914:

As to these questions of fact the usual rules of evidence apply. The declarations of the party before, at, and after the time of change of domicile are admissible, as well as all the facts and circumstances gained with such change of domicile.

and at page 915:

While the deceased had a legal right to change his domicile for the purpose of escaping taxation, the courts will scrutinize the evidence of change closely to see whether the change was actual and bona fide or fictitious.

The right to choose another residence implies the right to declare his choice even for the sole purpose of making evidence to prove what his choice was.

While such declarations are admissible, yet,

If they are false and made for a sinister purpose, they will meet the fate that falsehood always meets in courts of justice when discovered by the triers of fact.²³

With regard to the conservation of an estate consideration should also be given to the various laws and holdings on the question of transfers made in contemplation of death including the question of gifts.

CONCLUSION

The foregoing article applies to the general situations and does not take into consideration especially those particular persons considered as dependents. Of these it is stated generally in *Corpus Juris*:

But the domicile of every dependent person is determined by and changes with that of the person on whom he is dependent.²⁴

Reference in this regard must be had to the statutes of the various states, and the decisions of the courts of those states.

Neither the Federal nor State estate taxes are specially considered herein, except by analogy where the same questions arise.*

²³ *In re Heymann's Will* (Wis.), 208 N. W. 913.

²⁴ 19 *Corpus Juris*, Domicile, 410.

*For special features of Estate taxes see: *Inheritance Taxation*, (4th Ed.) Gleason & Otis; also *Federal Income and Estate Tax Laws* (3rd Ed.) Barton & Browning.

Reference is also made to a very interesting article on collateral matter of the same question in Vol. IX *Marq. Law Rev.* 262.

From the foregoing it is clearly seen that to conserve one's estate transferred at death or in contemplation thereof, from inheritance taxation, requires the securing of the best situs for a person's property which itself also should be adapted to the transfer laws, the satisfactory legal transfer if made in contemplation of death, and the proper establishment of a satisfactory legal domicile, which all are of increasing importance inasmuch as some of the states do not impose such a tax with the express purpose of inducing wealthy persons to take up their residence there, while others levy inheritance or transfer taxes of from minor to major importance with varying applications.