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Specialty Law Columns
Estate and Trust Forum
Traversing Multi-Jurisdictional Estate Planning

by Jennifer M. Spitz

As increasing numbers of people are moving across state lines,[1] Colorado estate planners are apt to encounter more clients moving to Colorado with out-of-state estate planning documents and out-of-state property. In addition, existing clients may leave Colorado, but wish to retain the services of their Colorado attorneys. Other clients may have more than one home, and it may be unclear where they are domiciled. This article discusses how, in each of these instances, Colorado estate planning attorneys should determine what law applies to their clients' estate planning documents and property and should determine the extent to which the attorneys can represent and advise their clients when other states' laws apply.

Domicile

The practitioner initially should ascertain where the client is domiciled. Domicile is important because it may affect several legal issues, including which state's laws apply to determine the validity and construction of wills and trusts and to questions of property ownership, and where a trust is subject to income taxation.

Every person should have only one domicile. However, domicile has no universally accepted meaning. As a result, if more than one jurisdiction applies its laws to determine whether a person is domiciled in the jurisdiction, each may claim that the person is domiciled in its own jurisdiction. Therefore, if a client has multiple homes, an important task for the estate planner is to clarify which jurisdiction is the client's domicile.

Determining domicile is a factual inquiry. It is not necessarily the same as residence. Domicile depends upon the client's intent to make a location his or her permanent home, or his or her home for the indefinite future, as well as the qualitative presence of the client in the jurisdiction.[2] The factors to be considered include:

1. The client's views on where he or she is domiciled, including where the client tells friends and relatives he or she is domiciled (the client's views are not conclusive, but are an indication of intent);
2. A recitation of domicile in the will (this is an indication of domicile at the time of execution, but not necessarily at the time of death);
3. If the client has multiple homes, the number of days spent at each home during the year;
4. Which residences are owned by the client and which are leased (ownership suggests permanency);
5. Whether the client leases any of the client's residences to others;
6. Which of the client's homes was acquired first;
7. The jurisdiction where the client is registered to vote, has a driver's license, and vehicle registration;
8. The location of the client's bank accounts, safe deposit boxes, investment advisors, and attorneys;
9. The jurisdiction where the client keeps important documents, such as estate planning documents;
10. The place where the client keeps valuable tangible personal property;
11. The address used by the client as the mailing address for bills, investments, credit cards, Social Security, veteran's benefits, pension benefits, legal documents, magazines, and personal mail;

12. The jurisdiction where the client works or, if self-employed, where the client operates a business and owns business properties;
13. The jurisdiction where the client pays state taxes;
14. The location of the client's primary social, religious, and charitable affiliations;
15. The jurisdiction where the client has established credit;
16. The jurisdiction claimed as the client's domicile in any lawsuits; and
17. A declaration of domicile filed with a state (some states, such as Florida, authorize filing such a declaration).[3]

Colorado estate planners who want to clarify that their clients are domiciled in Colorado should focus on the factors that can be changed and weight those factors in favor of Colorado. For example, they might advise the clients to keep bank accounts, store important documents, register to vote, register vehicles, and obtain a driver's license in Colorado.

Validity and Construction Of Wills and Trusts

Different rules apply to the determination of which state's laws apply to the construction of a will or trust, as opposed to the determination of which state's laws apply to questions of validity, although the distinction between validity and construction is not always clear. Furthermore, different rules apply to determine which state's laws apply to questions of the validity of wills, as opposed to trusts. As a result, the laws of several states may apply to one client's estate plan.

Some of these rules hinge upon whether property is characterized as real or personal property. That question itself can have different answers depending upon which state's laws apply. More than one state may apply its laws to that question, resulting in a conflict of laws. Also, some states draw a distinction between movable and immovable property, rather than real property and personal property, which may result in different characterizations of property.[4]

Validity of Wills

In order to dispose of real property, a will must be considered valid by the state where the property is located. In contrast, in order for a will to dispose of personal property, the will must be considered valid by the state where the client is domiciled at death. Even if personal property is located in another state, that state generally will look to the law of domicile. An attempt to specify which state law controls questions of validity will not be effective in states that do not recognize such a provision.[5]

In Colorado, CRS § 15-11-506 provides that a written will is valid if one of the following criteria is met: (1) it is executed in compliance with CRS § 15-11-502 (witnessed or holographic wills); (2) it complies with CRS § 15-11-503 (writings intended as wills); (3) at the time of execution, its execution complies with the law of the place where the will is executed; or (4) at the time of execution or the testator's death, its execution complies with the law of the place where the testator is domiciled, has a place of abode, or is a national.

Other state statutes are similar, but not all are identical, to CRS § 15-11-506. Most states recognize a will as valid if executed in compliance with the law of the place of execution. Therefore, a will validly executed in Colorado will be recognized in most states. In general, laws applicable to determinations of validity of a will also apply to questions of the revocation of a will.[6]

To ensure that the will is recognized as valid by the state where the client is domiciled and all states in which a client has real property, practitioners should first ascertain the domicile of the client and the location of all of the client's real property. Second, they should discern the relevant states' requirements for recognizing the validity of the will. Finally, if the client changes domicile or acquires property in other states after the execution of the will, counsel should look at the laws of those states to determine whether they recognize the validity of the will.[7]

Validity of Trusts

Generally, the law of the situs of real property controls the determination of a trust's validity for purposes of disposition of such property, even if the client specifies a different law in the trust. This is known as the situs rule.[8]

" . . . [E]state planners should know how to determine which laws apply when they represent clients with ties to multiple states."

For personal property, a designation in the governing instrument of the law governing questions of validity of a trust generally is given effect, unless the application of the law violates the public policy of the state. However, such a designation will not be respected if the trust does not have sufficiently substantial contacts with the state. Factors considered in determining whether sufficiently substantial contacts exist include: the place of administration of the trust; the domicile of the trustee; the domicile of the settlor at execution of the governing instrument and at death; the place of execution of the governing instrument (this is a weak factor); the location of the trust assets; and the domicile of the beneficiaries.[9] If the laws of several states apply to the determination of validity, a trust can be deemed valid in some states and not in others.[10]

A will creating a testamentary trust must be valid in order for the testamentary trust to be valid. However, a testamentary trust may be invalid, even if the will is valid. For example, this can occur if the trust violates a state's laws regarding the operation or purposes of trusts.[11]

Construction of Wills and Trusts

In Colorado, CRS § 15-11-703 provides that the meaning and legal effect of a will or trust is determined by the local laws of the state selected by the transferor in the governing instrument, unless application of that law is contrary to the provisions relating to the elective-share, exempt property and family allowance, or any other public policy of Colorado otherwise applicable to the disposition. No nexus is required between the law chosen by the testator, the testator's domicile, and the location of the testator's property. Other state statutes are similar, but not all are identical to CRS § 15-11-703. Most states give effect to a designation in the will of the law governing the construction, interpretation, and legal effect of the will or trust, unless the application of the law violates the public policy of the state.[12]

Examples of provisions that have been deemed to violate public policy include releasing fiduciaries from liability for breach of fiduciary duty, restrictions on creditors' rights, violating the state's rule against perpetuities and violating the state's rule against accumulations. However, some of these public policy considerations may apply to questions of validity rather than construction.[13]

It is possible for more than one state's laws to apply to the construction of a will or trust. If so, the testator's property located in various states may be disposed of in different manners. Consequently, if a client has connections with more than one state, it is important to determine which states' laws apply and the effect of those laws on the client's estate plan. [14]

Administration of Trusts

Practitioners may designate in wills and trusts the state law that will govern the administration of the trusts created under the instrument. The designated law does not need to be the same one that applies to questions of validity and construction. Most states give effect to a designation in the governing instrument of the law governing questions of administration of the trust. However, a state may not give effect to the designation if the application of the designated law violates the public policy of the state. A provision in the governing instrument authorizing a

change of the place of administration will also generally be respected. This may be inferred from a provision empowering someone to name a new trustee, unless it requires the replacement trustee to be local, or if the instrument names a successor trustee who is in another state.[15]

Designating the Governing Law

If the governing law is not specified in the governing instrument, the complexities of determining the applicable law are increased. Therefore, it is important for estate planners to designate the governing law in wills and trusts. This includes specifying the law to apply to questions of validity, construction, and administration in cases when such a designation will be recognized.[16]

Income Taxation of Trusts

Because of the compressed income tax rates for trusts, it may be advisable to distribute all of the income of a trust to the beneficiaries rather than keeping it in the trust. If all or most of the income is distributed, and the trust has little or no capital gain, the trust will have minimal taxable income. Nevertheless, when there is income to be taxed, practitioners should determine which states will tax the trust.[17]

When a trust has contacts with more than one state, the trust may be subject to state income taxation in multiple states. Generally, when a trust meets the requirements of a state in order to be taxed by it, the trust is referred to as a "resident trust." There are five different approaches, based on different types of contacts with the state, to tax a trust as a resident trust:[18] (1) many states tax a testamentary trust of a resident or domicilary of the state;[19] (2) these same states also tax an *inter vivos* trust created by a settlor who is a resident or domicilary of the state (however, the point in time in which the residence of the settlor in the state is relevant varies among these states; the relevant date may be the date of creation of the trust, the date property is transferred to the trust, the current taxable year, or the date a revocable trust becomes irrevocable);[20] (3) some states, including Colorado, tax a trust if it is adminstered in the state;[21] (4) some states tax a trust if the trustee resides in the state;[22] and (5) a few states tax a trust if beneficiaries of the trust reside in the state.[23]

Even if a trust is not a resident trust in a particular state, most states that tax trusts impose income tax on that portion of a trust's income which is produced within the state.[24] For example, Colorado taxes trusts which are not administered in Colorado on their Colorado-source federal taxable income.[25] Some states may use more than one approach to tax a trust. However, those states that tax a trust based upon residency of the settlor generally do not impose tax on the basis of any other contacts. Also, there are a few states, such as Alaska, Florida, Nevada, Texas, and Wyoming, that do not impose any income tax on individuals or trusts.[26]

The imposition of state income tax may not be constitutional if the trust does not have sufficient contacts with the state. However, there are cases which have granted states wide latitude to tax trusts. For example, taxing a testamentary trust on the basis of the residency of the testator has been upheld, even when the trustee, trust assets, and beneficiaries are located in another state.[27]

If a trust is subject to income taxation in multiple states, practitioners should find out about possible tax credits. Such a tax credit may be available in one or more states when a trust is subject to income taxation in several states. However, each state involved may rely upon the other states to provide a credit to the trust, with the result that no credits are available.[28]

It is important to consider which states will tax a trust when a trust is created, and again if the trust's contacts change. There may be an opportunity for forum shopping. For example, a trust will not be taxed in Colorado if its administration and sources of income are in another state, even if the settlor and beneficiaries reside in Colorado. If that trust is administered and has its sources of income in a state such as Wyoming, where there is no income taxation of trusts, the trust apparently escapes state income taxation. However, if any of the beneficiaries reside in a state such as California, which taxes trusts with beneficiaries in the state, a portion of the trust will be subject to tax in California. Thus, there may be unexpected income tax consequences if estate planners fail to consider which states will tax a trust.[29]

Community Property

As important as ascertaining the law that applies to wills and trusts is determining the law that applies to how property is owned. This is particularly relevant when property may be community property. Although Colorado is not a community property state, clients who move to Colorado from community property states may preserve their community property.

Eight states follow a community property system: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. Wisconsin follows a marital property system, which is a form of community property and is treated as such for federal tax purposes. Alaska provides a procedure by which a married couple can elect to treat certain assets subject to Alaska jurisdiction as marital property. The laws of the various community property states differ from each other on issues involving community property, including the determination of what property is community property.[30]

Usually, the law of the situs of real property governs the characterization of such property as separate or community property. However, the law of the situs may apply the law of the domicile of the spouses.[31]The law of the domicile of the spouses at the time of acquisition or, in the case of Alaska, at the time the election is made, typically controls the characterization of personal property as separate or community property. However, other events or actions may alter the community property character of the property. Also, the law of the place of domicile at acquisition may not apply for questions involving creditors' rights.[32]

In general, a married couple must be domiciled in a community property state at the time property is acquired in order for the property to be community property. However, it may be possible for couples living in non-community property states to purchase real property in community property states and characterize the property as community property. This depends, in part, upon the law of the community property state.[33]

Community property generally retains its character even if it is moved to a non-community property state or the spouses change domicile. However, this is not as clear in states that have not adopted the Uniform Disposition of Community Property Rights at Death Act (the "Act"),[34] as discussed below.

Community Property In Colorado

Colorado has adopted the Act.[35]Community property cannot be created in Colorado. However, under the Act, if clients with community property move to Colorado, the character of property as community property may be preserved for purposes of disposition of the property at death. The general presumption is that all personal property, wherever situated, which was acquired as or became, and remained community property *under the laws of another jurisdiction*, retains its character as community property in Colorado for purposes of disposition at death. This rule also applies to personal property acquired with the rents, issues or income of, the proceeds from, or in exchange for community property. A similar rule applies to real property that is traceable to community property.[36]

The result is that community property may be preserved in Colorado when clients move here from other states. However, multi-jurisdictional issues cannot be avoided. The estate planner should first look to the laws of the community property jurisdiction where the clients were domiciled, and possibly where real property was owned, to determine whether the clients' property is community property under the laws of another jurisdiction. Then the estate planner should determine whether the community property was preserved when the clients moved to Colorado. This may involve some difficult tracing if community property is commingled with separate property. However, planning opportunities may be missed and clients' property may not be distributed as intended if community property issues are overlooked.

Ethical Considerations

The two primary ethical concerns regarding multi-jurisdictional estate planning are (1) competent representation and (2) the unauthorized practice of law. Each is discussed below.

Competent Representation

The Colorado Rules of Professional Conduct ("Colo.RPC") Rule 1.1 requires Colorado attorneys to provide competent representation to clients. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Colo.RPC 1.1 is a model rule which has been adopted by many states.

If attorneys advise clients about the laws of other states, they must provide competent representation. Although the unauthorized practice of law rules generally prevent attorneys from practicing in other states, when attorneys render advice about other states' laws, they can be held to as high a standard as applies to local counsel.[37] Colorado lawyers who attempt to represent clients without the requisite skill and knowledge risk violating Colo. RPC 1.1.

The Unauthorized Practice of Law

Colo.RPC 5.5, also a model rule adopted by many states, prohibits Colorado lawyers from practicing law in a jurisdiction where doing so violates the regulations of the legal profession of the jurisdiction. CRS § 12-5-112 is an example of a regulation of the legal profession. It prohibits practicing law in Colorado without a license. However, for attorneys licensed to practice in Colorado, they do not need to be concerned with this statute. Instead, they need to be concerned with similar laws of all other states, in which they are not licensed, which relate to the planning for their clients. These states may include the state where the client is domiciled, where the client has real property, and the state chosen as the governing law in the client's estate planning documents. Colorado estate planning attorneys should make sure that those states do not consider the attorneys' representation to constitute the unauthorized practice of law in those states.

To determine whether an activity constitutes the unauthorized practice of law in a particular state, the first question is whether the activity constitutes the practice of law in that state. This is a state-by-state inquiry, but most of what estate planning attorneys do is the practice of law.[38] For example, Colorado has found that the following activities constitute the practice of law: drafting wills and causing them to be executed;[39] drafting trust documents;[40] and preparing deeds, promissory notes and deeds of trusts, coupled with the giving of explanation or advice as to their legal effect.[41]

States have different interpretations about what constitutes the *unauthorized* practice of law, especially with respect to attorneys licensed in other states, as opposed to laypersons. For example, Florida has taken a strict stance on what constitutes the unauthorized practice of law by an out-of-state attorney. It has taken the position that the preparation of wills and antenuptial agreements for Florida residents without the review and approval of Florida counsel constitutes the unauthorized practice of law.[42] On the other hand, California, Hawaii, and Massachusetts have been more lenient.[43] They have recognized the increasing mobility of society and that attorneys in other states should not have to retain local counsel to advise them in every case.

Some states have statutes, and some have court rules, preventing anyone not licensed in the state from practicing law in the state, but there is little uniformity among the states. The unauthorized practice of law is not limited to actions taken while physically present in the state, and there is no exception for providing advice solely regarding federal law.[44] Essentially, there are few justifications for practicing law in a state in which the attorney is not licensed.

The Restatement of the Law Governing Lawyers ("*Restatement*"), which has not been adopted in Colorado, also acknowledges that an attorney's representation often stretches beyond state lines. The *Restatement* allows a lawyer currently admitted to practice in one state to provide legal services on a matter within another state to the extent that the lawyer's activities in the matter arise out of or are otherwise related to the lawyer's practice in the state where the lawyer is licensed.[45]

Until all states adopt more lenient rules, comparable to the *Restatement* rule, Colorado estate planners should proceed cautiously when representing clients domiciled in other states, or who have ties to other states. They may need to enlist the help of out-of-state counsel in order to avoid the unauthorized practice of law.[46]

Conclusion

Multi-jurisdictional estate planning is complex because, by its very nature, more than one set of laws applies to any given estate plan. However, estate planners should know how to determine which laws apply when they represent clients with ties to multiple states. Adding to the complexity is the fact that practitioners may find that they cannot undertake representation of such clients without enlisting the help of out-of-state counsel. This may be difficult, impractical, and frustrating, but it is the result of having fifty states with fifty different sets of laws.[47]

NOTES

1. U.S. Census Bureau, *Geographic Mobility Population Characteristics* (Jan. 2000).

2. Schoenblum, *Multistate and Multinational Estate Planning* § 8.01 (Boston, MA: Little Brown and Co., 1982 and 1997 Supp.).

3. *Id.* at §§ 8.01 to 8.04; Fla. Stat. § 222.17.

4. *Id.* at § 17.01.

5. *Id.* at §§ 14.02 to 14.05.

6. *Id.* at § 14.06.

7. *Id.* at § 14.02.

8. *Id.*at § 17.01; *see* Rosepink, "Representing Clients with Ties to Multiple States or Counties," 22 *ACTEC Notes* 78, 80-81 (Summer 1996).

9. *Id.*

10. Schoenblum*, supra*, note 2 at § 17.01.

11. *Id.*

12. *Id.* at §§ 14.08 and 17.02.

13. *Id.*

14. *Id*

15. *Id.* at § 17.03.

16. The will and trust forms in *Colorado Estate Planning Forms* (Denver, CO: CLE in Colorado, Inc., 1996) ("Orange Book") contain an applicable law clause that designates that the validity and construction of the instrument shall be determined by the laws of Colorado and questions of administration of any trust established under the instrument shall be determined by the laws of the situs of administration of such trust.

17. Coleman, *State Fiduciary Income Tax Issues* 1 (2000 Fall ACTEC Meeting, Nov. 2000).

18. *Id.* at 1-3 and 18-25.

19. *Id.* at 2 and 18-25.

20. *Id*.

21. *Id*.; CRS § 39-22-103(10).

22. Coleman, *supra*, note 17 at 2 and 18-25.

23. *Id*.

24. Gutierrez, Jr., "Oops! The State Income Taxation of Multi-Jurisdictional Trusts," 25 *U. of Miami Sch. of Law Philip E. Heckerling Inst. on Estate Planning* ¶ 1203.5 (1991).

25. CRS § 39-22-403.

26. Coleman, *supra*, note 17 at 2 and 18-25.

27.*District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. Cir. 1997); Coleman, *supra*, note 17 at 5-16.

28. Coleman, *supra*, note 17 at 4-5.

29. *Id*. at 16-17.

30. Reinecke and Bradley, "Community Property Issues for Noncommunity Property Practitioners," 4 *ALI-ABA Estate Planning Course Materials J.* 5, 6-17 (Dec. 1998).

31. *Id*. at 17.

32. *Id*. at 16-17.

33. *Black v. Commissioner*, 114 F.2d 355, 40-2 USTC ¶ 9617, n.1 (9th Cir. 1940); Mertens, Jr., "Community Property," *Law of Federal Income Taxation* § 19:29 (2000); Moore, "Migration and Property in the 1990's: The Increasing Importance of Community Property—Separate Property Recognition and Resolution," 25 *U. of Miami Sch. of Law Philip E. Heckerling Inst. on Estate Planning* ¶ 1108.2 (1991).

34. Reinecke and Bradley, *supra*, note 30 at 17.

35. CRS §§ 15-20-101 *et seq*. The Act also has been adopted by Alaska, Arizona, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. *See* Reinecke and Bradley, *supra*, note 30 at 17.

36. CRS § 15-20-102.

37. Schoenblum, *supra*, note 2 at § 4.09.

38. Fox, "Is Crossing State Lines Ethically Challenging to Estate Planners?" 33 *U. of Miami Sch. of Law Philip E. Heckerling Inst. on Estate Planning* ¶ 1503.1 (1999).

39. *People ex. rel. Atty. Gen. of Colo. v. Woodall*, 265 P.2d 232 (Colo. 1954).

40. *People v. Macy*, 789 P.2d 188 (Colo. 1990).

41. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998 (Colo. 1957).

42. *Florida Bar v. Larkin,* 298 So.2d 371 (Fla. 1974).

43. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), *cert. denied*, 525 U.S. 920 (1998); *Fought & Co., Inc. v. Steel Eng'g and Erection, Inc.*, 951 P.2d 487 (Haw. 1998); *Lindsey v. Ogden*, 406 N.E.2d 701 (Mass.App.Ct. 1980).

44. Fox, *supra*, note 38 at ¶ 1503.2.

45. *Restatement of the Law Governing Lawyers*, Ch. 1 § 3 (adopted by the ALI on May 12, 1998).

46. Fox, *supra*, note 38 at ¶ 1507.1(B). For example, it is advisable to retain out-of-state attorneys to prepare deeds to fund revocable trusts with out-of-state real property.

47. This article addresses only some of the basic issues relating to multi-jurisdictional estate planning. There are many others, including the complexities associated with multi-international estate planning and estate administration involving multiple states.

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