Aston Asset Management

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Re-Nesting Your Estate

Selecting a strategic jurisdiction makes sense.

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I'm the type of guy that likes to roam around
I'm never in one place, I roam from town to town
And when I find myself a-fallin' for some girl
I hop right into that car of mine
and ride around the world
Yeah, I'm the wanderer; yeah, the wanderer
I roam around, around, around...

—Dion, "The Wanderer"

Where is the most advantageous jurisdiction for your estate? What results would justify uprooting one's nest? How would one go about selecting or accomplishing a change of domicile?

Within the United States, there are many locations with attractive features. Alaska has no income tax. Florida has a homestead protection policy. Nevada has gone to great lengths to provide the best in asset protection laws. Ohio has abolished its estate tax. New Hampshire is the most livable state (according to one survey). Choosing a new location is not a simple matter. There are multidimensional factors, both financial and personal.

Not everyone has any intention of moving, of course, but given the current conditions, a change of domicile might be the most beneficial strategy for certain estates and should be considered seriously.

The Way Things Were

Mem'ries,
Light the corners of my mind.
Misty water-colored memories
Of the way we were.

In 2010, Barbra Streisand and Robert Redford reunited on *The Oprah Winfrey Show* and recreated their kiss from *The Way We Were* after 37 years.

If that lyric and kiss reference transports you to a weepy reverie, you're welcome; if you instead experience a momentary pang of nausea ("ugh, why?"), then pardonnez-moi.

In 1973, when *The Way We Were* was released, the top estate tax rate was 77% for estates exceeding $10 million with an exemption of $60,000. Taxpayers would be justified in experiencing weepy reveries and pangs of nausea when facing a tax with such a harsh reality.

Yet, that was simply the way things were. The 77% bracket was not a brief and draconian measure that caused shock or outrage—and it wasn't quickly repealed. It was in place for 35 years (1941 through 1976). In fact, top estate tax rates of 60% or more were in place for half a century, from 1934 to 1984.

Ahh, mem'ries...of confiscatory Federal estate taxation.

However, the point to be drawn is not merely about social enlightenment finally reforming the tax code, or even the relative merits of different transfer tax systems, but to identify how the primary focal point of planning has shifted.

A 77% tax that applied in all 50 states was a monster that commanded a lot of attention, even though it did not apply to the vast majority of estates. If you changed states, your estate would still be subject to the same system. And moving was not an available option for most people. Jobs, family, and property limited the feasibility of relocating for most people.

The state death tax credit arrived in 1976 and ultimately unified state death taxes. By the time the credit was phased out by the repeal of the estate tax in 2001, it had prompted every state in the union to adopt a "pick up" tax or "sponge" tax to absorb a portion of any tax that would otherwise go to the Federal Treasury. As a result, the difference between state death taxes was largely neutralized.

Flash forward to the present and a lot has changed. Robert Redford is turning 75 (but is still very cool). The Federal estate tax is capped at 35% and doesn't affect marital estates of less than $10 million, plus some states have significant death taxes, while others do not.

Who is impacted by the Federal estate tax? In 2004, the median household net worth in the U.S. was $93,100. There are currently about 1 million households in the United States with a net worth of $5 million or more. Perhaps a quarter of those households have a net worth of more than $10 million. That means that the number of American estates facing Federal estate tax liability is well below half of one percent of all households. And that's without any sophisticated planning or even rudimentary lifetime gifting of assets.

The net result is that the Federal estate tax is not the monster that once dominated planning. State taxes may be one of the key burdens that certain estates will face, and it's the reason that some testators may consider moving.

Going Mobile

I'm goin' home, and when I want to go
home I'm goin' mobile
Well, I'm gonna find a home on wheels,
see how it feels goin' mobile
Keep me movin'

—The Who, "Goin' Mobile"

There is now an unprecedented level of mobility for people for numerous reasons. The Internet has made it possible for many careers and businesses to be conducted from home or anywhere.

Communication is greatly improved, so a retired couple moving to a tax- friendly state can make free phone calls via cell phone, Skype via Internet, and send texts, "tweets," and so on, if they are so inclined.

Transportation has also improved. So moving to another state no longer feels as far away or as permanent.

The rise of the LLC as a common and flexible entity has facilitated the ability to transfer real estate, distribute shares to family members, and relocate one's domicile to someplace with lower tax rates and nicer weather.

Let's have a tour around the United States to compare.

State Death Tax Tour

There were 21 states (and Washington, D.C.), which had estate and/or inheritance taxes in place for 2011. Curiously, that number is subject to fluctuation in both directions. There is some speculation that with so many revenue-strapped states, many jurisdictions could adopt new estate tax measures. On the other hand, states are trying to retain businesses and residents or attract businesses from other states.

There are 13 states and the District of Columbia with estate taxes. New Jersey and Maryland have both estate and inheritance taxes. Six states have only inheritance taxes.

Recent Changes: Hawaii adopted its estate tax in 2010, while Ohio put an end to its estate tax. The significance of changes of this nature go far beyond state boundaries.

First of all, Ohio residents contemplating the relocation of their estates for tax purposes suddenly have a reason to leave their estates in place.

Secondly, residents of nearby states may find it convenient to consider moving to Ohio to retire.

But most significantly, Ohio is a charter member of the "tax belt," i.e., the Northeastern states that share heavy industrialized pasts and higher tax levels than the rest of the United States. For Ohio to make an effort to distinguish itself from the other tax belt states for estate tax purposes is significant.

State Estate Tax Thresholds for 2011

Connecticut	$2,000,000
Delaware	$3.5 million or $5 million (to be determined)
District of Columbia	$1,000,000
Hawaii	$3,500,000
Illinois	$2,000,000
Kansas	$ 850,000
Maine	$1,000,000
Maryland	$1,000,000
Massachusetts	$1,000,000
Minnesota	$1,000,000

Nebraska	$1,000,000
New Jersey	$ 675,000
New York	$1,000,000
North Carolina	$5,000,000
Ohio	$338,333*
Oregon	$1,000,000
Rhode Island	$ 859,350
Vermont	$2,750,000
Washington	$2,000,000

* Ohio recently enacted legislation phasing out its separate estate tax by January 1, 2013.

Inheritance Taxes: Eight states currently have a separate inheritance tax: Indiana, Iowa, Kentucky, Maryland, Nebraska, New Jersey, Pennsylvania, and Tennessee. **Note:** Indiana is phasing its inheritance tax out between 2013 and 2018. Nebraska inheritance taxes are imposed at the County level.

State Income Tax

Variations on tax rules from one state to another have created a brand-new type of tax map. Within the United States, Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming are the nine states that do not impose income tax. This list has remained the same for several years. **Note:** New Hampshire and Tennessee plan to impose a tax on income from interest and dividends.

In 2005, when *The Estate Analyst* last reviewed state income tax rates, the highest state income tax rate was 11% in Montana. Now, for 2011, Montana has fallen back into the pack with a top rate of 6.9%, and there are 17 states with higher rates, including 8.5% for Maine, 8.95% for Vermont, 8.97% for both New Jersey and New York, 8.98% for Iowa, 9.3% for California, and 11% for both Hawaii and Oregon.

There are certain jurisdictions with additional taxes, however. For instance, all the counties in Maryland and cities in Ohio have their own income taxes. New York City has a separate income tax of up to 3.648%, making the total of state and city income taxes more than 12.6%. This is actually lower than the combined rate of 13.52% that applied in 2005.

The variations continue. There are 27 states and the District of Columbia that exclude income from Social Security from state income tax. Some jurisdictions treat retirement income differently. Iowa school districts add an income tax surtax. And then there are additional dimensions from state business taxes and local property taxes.

To truly compare jurisdictions accurately, one would have to account for income, cost of living, business taxes, and fees, and then fully calculate returns for both jurisdictions to see if there is a clear benefit.

Asset Protection

Selection of a jurisdiction for either personal or business reasons may also be directed by the need to secure assets from foreseeable future adversaries, litigants, and creditors.

Nevada is the most likely destination for those seeking asset protection. If you are trying to deter creditors and litigants, you want the jurisdiction with the least loopholes and the most protection.

In Nevada, the statute of limitations for a creditor is only two years after assets have been transferred for purposes of a non-preexisting creditor or six months after they knew or should have known of the transfer, if longer, for purposes of a preexisting creditor. This is the shortest statute of limitations period in the United States. South Dakota and Utah have three-year statutes of limitations. Alaska, Colorado, Delaware, and other DAPT jurisdictions have four-year statutes of limitations.

Note: A chart prepared by nationally known Nevada estate planning and asset protection attorney Steve Oshins comparing the rules of DAPT jurisdiction can be found at www.oshins.com.

It would be a cruel and unwanted result if someone from a non-DAPT state chose to set up a DAPT in Alaska or Delaware and had a creditor reach the DAPT assets more than two years after the transfer. So an attorney advising a client on where to set up a DAPT may be risking a malpractice claim by not making a client aware of the Nevada advantage.

The Nevada DAPT or "NAPT" has its own requirements. The trust must have some minimal connection with Nevada. This can be easily satisfied but must not be overlooked. For example, the trust should have at least one Nevada-based trustee, whether an individual, trust company, or bank. Having Nevada assets as the primary

asset of the trust or having the primary administrative functions of the trust handled by a Nevada-based trustee would also meet the Nevada connection requirement.

There are three types of trustees with the NAPT, at least one of which must be based in Nevada. In addition to the Settlor and the Nevada-based trustee, there is a "distribution trustee" who authorizes distributions to the Settlor. The Nevada-based trustee can also be the distribution trustee.

Nevada continues to adopt legislation that is helpful in protecting assets, and other states are attempting to keep pace and remain competitive as well. Hawaii just adopted asset protection measures. Alaska and Delaware are keenly aware of the need to appeal to entities that are shopping for friendly havens.

Around the World

Roam if you want to,
Roam around the world,
Roam if you want to,
Without wings, without wheels.
Roam if you want to,
Roam around the world,
Roam if you want to,
Without anything but the love we feel.

—The B-52s, "Roam"

It is overly simplistic and misleading to simply compare top estate tax rates from various countries. An effective tax rate or tax burden on typical estates of $1 million, $5 million, $10 million, and $25 million might be a more accurate and useful tool for comparative purposes. A nation with a very high top rate could have large exemptions, for example.

If one were seriously considering expatriation based on estate and inheritance tax burdens, the larger context of income taxes, capital gains, cost of living, and expatriation taxes would all have to be factored in.

For example, Canada continues to lack a specific estate tax per se on a national level, yet there is a probate fee in Ontario, and capital gains are taxed at death from the estate without a stepped-up basis.

Yet the need to flee from the Federal estate tax is increasingly less relevant. For starters, our nation only recently ended a decade-long flirtation with the concept of a complete repeal of the estate tax and has now reinstated the tax with a $5 million exclusion.

The portability of unused exemptions for married people has increased the effective estate tax exclusion amount to $10 million for every marital household. The increasing number of jurisdictions recognizing same-sex marriage is further broadening the application of the new portability provision.

Ten years ago, the United States had the second highest top estate tax bracket in the world. Only Japan was higher, with a top inheritance tax rate of 70%. Today, with a top rate of 35%, the United States is more attractive than France or Britain, which have remained at 40% for their top rates.

What's the use of worrying?
It never was worthwhile, so
Pack up your troubles in your old kit-bag,
And smile, smile, smile.

— George Asaf (Powell), ***"Pack Up Your Troubles in Your Old Kit-Bag, and Smile, Smile, Smile"*** *(1915)*

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