NOTES

DOUBLE DEATH TAXATION: AVOIDANCE AND REMEDIES

I. INTRODUCTION

As public coffers shrink, economically strapped states can be expected to flex their revenue-raising muscles. The practitioner would do well to become more attuned to possible estate taxation problems involved in the passing of intangible personal property. Unless a deceased client had limited his business and investment activity to only one state, the problem of multiple state claims of the right to tax the transfer of the intangible estate may arise. Where a resident of Iowa owns stock or securities or an interest in a trust having sufficient contact with, for example, Florida or Texas, more than one state could constitutionally tax the transfer of such intangible personal property upon death.[1]

The limits of a state's power to tax the transfer of a decedent's property have been defined in a series of United States Supreme Court decisions interpreting the due process clause.[2] Jurisdiction to levy a death transfer tax depends on a state's connection with the decedent or his property.[3] Realty[4] and tangible personal property[5] are constitutionally subject to taxation only in the state in which the property is located.[6] On the other hand, intangible personalty such as stocks,[7] mortgage notes,[8] trust interests,[9] and partnership interests[10] may be taxed both by the decedent's state of domicile and by any other state having sufficient contacts with the property.[11] A state has suffi-

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1. *See* Lincoln v. Briggs, 199 N.W.2d 337, 339 (Iowa 1972). *See also* State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942).
2. *See* State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Graves v. Elliott, 307 U.S. 383 (1939); Curry v. McCanless, 307 U.S. 357 (1939).
3. *See* Cory v. White, 102 S. Ct. 2325, 2333 (1982) (Powell, J., dissenting).
4. *Id.*; Treichler v. Wisconsin, 338 U.S. 251 (1949).
5. *See* Cory v. White, 102 S. Ct. at 2333 (Powell, J., dissenting); Curry v. McCanless, 307 U.S. at 364; Frick v. Pennsylvania, 268 U.S. 473, 492 (1925).
6. Cory v. White, 102 S. Ct. at 2333 (Powell, J., dissenting).
7. *See* State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942).
8. *See* Curry v. McCanless, 307 U.S. 357 (1939).
9. *See id.*
10. *See id.*
11. *See* Cory v. White, 102 S. Ct. at 2333:

cient contacts with the intangibles of a decedent if it provides the benefit and protection of its laws to the property.[12] This Note will discuss avoidance and remedial techniques with respect to multiple state death taxation.

There are generally three ways in which an estate may be subjected to multiple death taxes.[13] First, intangible personal property may be taxed by both the state of domicile of the owner-decedent and any state in which the intangibles were protected by contact with the laws of that state.[14] Second, although this first possibility may be mitigated by reciprocity legislation enacted by the states involved,[15] a problem may arise where the states inconsistently classify the nature of the subject property.[16] Lastly, multiple taxation may also occur where more than one state claims to be the domicile of the decedent.[17]

II. Multiple Taxation—Domicile and Situs

A. *The Problem of Double Taxation*

A series of Supreme Court cases handed down in the first half of this century established the doctrine that intangibles are not constitutionally guarded from multiple state taxation.[18] Though at one time the Supreme Court adhered to the "single tax doctrine," which held double taxation to be

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> Th[e] test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

Id. (Powell, J., dissenting) (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

12. *See, e.g.*, State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942). In *Aldrich*, the court upheld taxation by Utah of shares of stock in a Utah corporation owned by a decedant domiciled in New York. *Id.* at 180. *See also* Curry v. McCanless, 307 U.S. 357 (1939). In *Curry*, the court stated that:

> [T]here are many legal interests other than conventional ownership which may be created with respect to land of such a character that they may be constitutionally subjected to taxation in states other than that where the land is situated. No one has doubted the constitutional power of a state to tax its domiciled residents on their shares of stock in a foreign corporation whose only property is real estate located elsewhere, [citations omitted] or to tax a valuable contract for the purchase of land or chattels located in another state, or to tax a mortgage of real estate located without the state, [citations omited] even though the land affords the only source of payment . . . .

Id. at 365 n.3.

13. "Death taxes" refers both to the estate tax and the inheritance tax. [1974] Inher., Est. & Gift Tax Rep. (CCH) ¶ 1000. Iowa imposes an inheritance tax and an estate tax. Iowa Code §§ 450.2, 451.2(1) (1981).

14. *See infra* text accompanying notes 18-20.

15. *See infra* text accompanying notes 33-38.

16. *See infra* text accompanying notes 57-69.

17. *See infra* text accompanying notes 101-03.

18. State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Graves v. Elliott, 307 U.S. 383 (1939); Curry v. McCanless, 307 U.S. 357 (1939).

unconstitutional,[19] the current rule is that intangibles are subject to multiple taxation.[20]

Based on the theory that the non-domiciliary state has afforded some benefit in the form of legal protection of rights, the Supreme Court has rejected a fourteenth amendment attack on double taxation.[21] In *Curry v. McCanless,*[22] the Court held that a trust was taxable both in Tennessee, the state of domicile of the decedent, and Alabama, the trustee's domicile.[23] In *Graves v. Elliot,*[24] the Court held that both New York and Colorado could tax the transfer of a power of revocation of a trust interest.[25] In *Elliot,* New York was the domicile of the decedent and Colorado that of the trustee.[26] In *Graves v. Schmidlapp,*[27] the state of domicile of a donee of a power of appointment was allowed to tax the exercise of the power, although the intangible property over which the power was exercised was located in the donor's state of domicile.[28] In *State Tax Commission v. Aldrich,*[29] it was held that multiple taxation of a transfer of stock was not constitutionally proscribed.[30] The Court upheld the right to tax in each of these cases on the theory that the states involved had provided protection and benefit of their laws.[31] The holding in this line of cases has been reaffirmed on numerous occasions.[32]

B. *Remedy and Avoidance*

It is obvious that possible taxation of intangibles based on a state's providing legal protection is not easily avoided. Many modern investment and business opportunities will involve intangibles coming in direct contact with

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19. *See* First Nat'l Bank v. Maine, 284 U.S. 312, 327 (1932) (expressly overruled in State Tax Comm'n v. Aldrich, 316 U.S. 174, 181 (1942)). The "single tax doctrine" was premised on the belief that the transfer of property was an event that could not take place in more than one state at the same time. *Id.* at 326. At one time Iowa adhered to the doctrine. *See* In re Estate of Smith, 209 Iowa 685, 228 N.W. 638 (1930) (decided prior to *Aldrich*).

20. Cory v. White, 102 S. Ct. at 2335 (Powell, J., dissenting).

21. *See* State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942). *See also* In re Briggs, 199 N.W.2d 337 (Iowa 1972).

22. 307 U.S. 357 (1939).

23. *Id.* at 373-74. The court was not oblivious to the inequities accompanying multiple taxation, but refused to find a constitutional remedy. *Id.*

24. 307 U.S. 383 (1939).

25. *Id.* at 387.

26. *Id.* at 384.

27. 315 U.S. 657 (1942).

28. *Id.* at 660-65.

29. 316 U.S. 174 (1942).

30. *Id.* at 182.

31. [1974] INHER., EST. & GIFT TAX REP. (CCH) ¶ 1675. The *Curry* opinion stated that "protection, benefit and power over the subject matter are not confined to either state." 307 U.S. at 368.

32. *See, e.g., Cory v. White,* 102 S. Ct. 2325 (1982).

the laws of states other than that in which the client resides. Fortunately, most jurisdictions have enacted provisions designed to mitigate the inequities of multiple taxation.[33] Iowa has enacted such a provision.[34] A majority of states have adopted statutes that confer the power to tax the estate of a nonresident decedent to the state of domicile of that decedent.[35] Iowa[36] and sixteen other states have adopted some form of the Uniform Reciprocal Transfer Tax Act.[37] Another eighteen states completely exempt intangibles owned by non-domiciliary decedents.[38] Thirteen states offer partial exemp-

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33. *See supra* text accompanying notes 26-33.

34. IOWA CODE § 450.91 (1981). The full provision reads:

> The tax imposed by this chapter in respect to personal property of nonresidents (other than tangible personal property having an actual situs in this state) shall not be payable (1) if the decedent at the time of this death was a resident of a state or territory of the United States which at the time of his death did not impose a transfer tax or death tax of any character in respect to personal property of residents of this state (other than tangible personal property having an actual situs in such state or territory), or (2) if the laws of the state or territory of residence of the decedent at the time of his death contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (other than tangible personal property having an actual situs therein) provided the state or territory of residence of such nonresidents allowed a similar exemption to residents of the state or territory of residence of such decedent.
>
> In no case shall the provisions of this section apply to the intangible personal property of nonresident decedents unless such intangible personal property shall have been subjected to a tax or submitted for purposes of taxation in the state of the decedent's residence.
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> This section shall apply only to estates of decedents dying subsequent to July 4, 1929.
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> For the purpose of this section the District of Columbia and possessions of the United States shall be considered territories of the United States.

Id.

35. *See* [1974] INHER., EST. & GIFT TAX REP. (CCH) ¶ 1680 for a succinct summary of the provisions of all states.

36. *See* IOWA CODE § 450.91 (1981).

37. ALA. CODE tit. 51, §§ 438(1)-(2) (1958); ARK. STAT. ANN. § 63-104 (1971); GA. CODE § 92-3405 (1975); IND. CODE ANN. § 6-4.1-3-5 (Burns Supp. 1979); KAN. STAT. ANN. § 79-1501e (Vernon 1969); KY. REV. STAT. § 140.275 (1970); N.M. STAT. ANN. § 72-33-4 (Supp. 1981); OHIO REV. CODE ANN. § 5731.34 (Page 1973); OR. REV. STAT. § 118.060 (1975); R.I. GEN. LAWS § 44-22-4 (1970); TEX. TAX.-GEN. ANN. art. 140.1(C)-(D) (Vernon Supp. 1979-1980); WIS. STAT. § 72-11(2) (1973).

38. ARIZ. REV. STAT. ANN. § 42-1503 (1956); CAL. REV. & TAX. CODE § 13851 (West 1970); COLO. REV. STAT. § 39-23-104 (Supp. 1975); CONN. GEN. STAT. § 12-340 (1977); DEL. CODE ANN. tit. 30, § 1307 (1974); DEL. CONST. art. IX, § 5; LA. REV. STAT. ANN. § 47.2404 (West Supp. 1977); ME. REV. STAT. ANN. tit. 35, § 3461 (1964 & Supp. 1976-1981); MASS GEN. LAWS ANN. ch. 65, § 1 (West Supp. 1976-1977); MINN. STAT. §§ 291.01(1),(4) (1974); MO. ANN. STAT. § 145.020.31(1) (Vernon 1976); N.J. STAT. ANN. § 54.34-1(b) (West 1960); N.Y. TAX LAW § 249-p (McKinney 1975); N.Y. CONST. art. XVI, § 3; N.D. CENT. CODE § 57-37.1-01(6) (Supp. 1980); PA. STAT. ANN. tit. 72, § 2485-306 (Purdon 1964); TENN. CODE ANN. § 30-1601 (1955 & Supp. 1980); VT. STAT. ANN. tit. 32, § 6541(a) (1970); VA. CODE § 58-189 (1950); WASH. REV. CODE § 83.04.040 (1981). A nineteenth state, Nevada, has no death taxes. NEV. CONST. art. 10, § 1.

tions,[39] most qualifying the provision by taxing intangibles that have attained a "business situs" within the state.[40] North Carolina offers no exemption whatsoever,[41] while Nevada, Illinois, Washington, and California have no estate tax.[42]

It would appear that the spectre of multiple taxation is all but eliminated by the state enactments. But problems arise from the differences in the scope of the various statutes.[43] A state may assert that another state involved in a conflict does not offer an exemption within the meaning of the statute, and both will end up taxing the estate. A typical situation is where a state claims that its reciprocity provision is dependent upon the presence of a like or similar provision in the code of another state that is involved in the matter.[44] Such a claim would deny reciprocity to decedents domiciled in states granting general exemptions or having divergent exemption statutes. This problem would probably arise where a state had enacted a statute similar to section two of the Iowa provision but failed to include a provision similar to section one.[45] Such a statute would have the effect of making an exemption contingent on the existence of a like exemption in another state's statute.[46]

In *Indiana Department of State Revenue v. American National Bank*,[47] the court held that the Indiana statute involved[48] provided immu-

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39. ALASKA STAT. § 43.31.410 (1962); FLA. STAT. § 198.44 (1975); HAWAII REV. STAT. § 236-11 (1968); IDAHO CODE § 14-410 (1948); ACT OF OCT. 25, 1967, 1967 ILL. LAWS 4248, ILL. REV. STAT. ch. 120, § 375(6) (1975); MD. ANN. CODE art. 81, § 174 (1957); MICH. COMP. LAWS ANN. § 205.201 (1967); MISS. CODE ANN. § 27-9-13 (1972); MONT. CODE ANN. § 91-4413 (1947); NEB. REV. STAT. § 77-2007.01 (1971); N.H. REV. STAT. ANN. § 89.29 (1970); OKLA. STAT. tit. 68, § 807(1) (Supp. 1976); S.C. CODE ANN. § 12-15-80 (Law. Co-op. 1976); S.D. COMPILED LAWS ANN. §§ 10-40-4, -5 (1967); UTAH CODE ANN. § 59-12-9 (1953); W. VA. CODE § 11-11-8 (1974); WYO STAT. § 39-344 (1957).

40. *See, e.g.*, MISS. CODE ANN. § 27-9-13 (1972).

41. N.C. GEN. STAT. § 105-2 (1972).

42. NEV. CONST. art. X.

43. A general discussion of discrepancies in statutory construction is provided in Marsh, *Multiple Death Taxation in the United States*, 8 U.C.L.A. L. REV. 69, 71-76 (1961).

44. *See, e.g.*, Indiana Dept. of State Rev. v. American Nat'l Bank, _ Ind. App. _, 419 N.E.2d 177 (Ind. Ct. App. 1981).

45. IOWA CODE § 450.91(1)(1981).

46. *Id.*

47. _ Ind. App. _, 419 N.E.2d 177 (Ind. Ct. App. 1981).

48. IND. CODE 6-4.1-3-5 (Burns Code Ed. Rept. 1978) (repealed). Subsection (b) of the statute provided:

> Reciprocal exemptions for transfers of out-of-state property.
>
> (b) The transfer of an interest in personal property is exempt from the inheritance tax if:
>
> (1) The property is not tangible personal property having an actual situs in this state;
>
> (2) At the time of his death, the transferor is a resident of another state, a United States' territory, or a foreign country; and
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> (3) At the time of his death, the death tax laws of the trans-

nity from taxation for a California resident.[49] The California statute in effect at that time offered an unqualified exemption to estates of "non-residents."[50] The court reasoned that even though the Indiana statute offered an exemption only if "the death tax laws of the transferor's state or country of residence provide a similar, reciprocal exemption for non-residents of the state . . .,"[51] identical dependent exemptions were not required.[52] A problem such as this would not arise where the state had enacted a provision similar to Iowa's statutory exemption of intangibles of decedents whose states of residence "[do] not impose a transfer or death tax of any character in respect to personal property of residents . . ." of Iowa.[53] Thus, it appears that Iowa would unquestionably exempt intangibles of decedents of at least thirty-five states.[54]

There would, however, apparently be no exempton for the intangibles of domiciliaries of North Carolina, which offers no such exemption to the property of non-domiciliary decedents.[55] Also, because the Iowa exemption statute, section 450.91, provides that "[i]n no case shall the provisions of this section apply to the intangible personal property of nonresident decedents unless such intangible personal property shall have been subjected to a tax . . . in the state of the decedent's residence," it appears that Iowa will not exempt property of residents of those states that do not levy death taxes.[56]

III. Inconsistent Property Characterizations

A. *The Tangible-Intangible Determination*

The problem of multiple taxation resulting from both the domiciliary and situs state asserting the constitutionally allowed power to tax is largely eliminated by the network of exemption statutes.[57] But the statutes men-

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feror's state, territory, or country of residence provide a similar, reciprocal exemption for non-residents of the state, territory, or country.

Id.

49. _ Ind. App. at _, 419 N.E.2d at 181.

50. Cal. Rev. & Tax. Code § 1385.1 (West 1968). The full provision reads:

13851. Intangibles of nonresident. Intangible personal property is exempt from the tax imposed by this part if the decedent at the time of his death was a resident of a territory or another state of the United States (repealed).

Id.

51. *Id.*

52. _ Ind. App. at _, 419 N.E.2d at 180.

53. Iowa Code § 450.91(1) (1981).

54. *See supra* notes 38-39.

55. *See* Iowa Code § 450.91 (1981). North Carolina offers no exemption, thus the Iowa reciprocity provision would not be triggered. N.C. Gen. Stat. § 105-2 (1972). Because Nevada does not levy death taxes, section 450.91 probably would not apply.

56. *See supra* note 42 and accompanying text.

57. *See supra* text accompanying notes 38-39.

tioned fail to protect against multiple taxation where the states involved make inconsistent classifications of the property at issue.[58] Multiple taxation is virtually non-existent where the domiciliary and situs states have compatible exemption provisions, and both classify the decedent's property as either tangible or intangible.[59] There is, however, a risk of multiple taxation where the domiciliary state classifes the property as intangible and the situs state clasifies an interest as real property.[60] This risk would be greatest where the property involved is an interest of the type which amounts to less than full ownership and right of possession in realty.[61]

As discussed earlier, intangible personal property may be subject to multiple taxation.[62] Tangible personal property presents a different story.[63] A state may levy a tax consistent with the due process clause only where "the taxing power exerted by the state bears a fiscal relationship to the protection, opportunities, and benefits given by the states."[64] Tangible personal property may only be taxed by the state in which it is located.[65] Due process also requires that realty be actually located within the taxing state.[66] Although commentators have criticized the Court's divergent opinions with regard to intangible and tangible property,[67] the differential treatment is firmly embedded.[68] Thus, where the situs state classifies an interest as tangible and the domiciliary as intangible, each would levy a tax based on firm constitutional precedent.[69]

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58. *See* Note, *Problematic Definitions of Property in Multistate Death Taxation*, 90 HARV. L. REV. 1656, 1665 (1977).

59. *Id.*

60. *Id. See also* 14 REAL PROPERTY PROB. & TRUST J. 277, 279 (1979).

61. Note, *supra* note 58, at 1657.

62. *See supra* text accompanying notes 2-4.

63. *See* Note, *Jurisdiction to Tax Tangible Personal Property*, 44 IOWA L. REV. 412 (1959).

64. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). Where a domicile declares intangibles to be tangible property, there is no constitutional remedy if a tax is imposed at all because the state would be merely asserting its right to tax under *Curry v. McCanless*, 307 U.S. 357 (1939). If only the situs, not the domiciliary, classifies an interest as intangible, the result will be either no tax or a constitutionally permissible tax.

65. Curry v. McCanless, 307 U.S. 357, 364 (1939).

66. Treichler v. Wisconsin, 338 U.S. 251 (1949); Frick v. Pennsylvania, 268 U.S. 473 (1925).

67. *See* Bittker, *The Taxation of Out-of-State Tangible Property*, 56 YALE L.J. 640 (1947); Traynor, *State Taxation and the Supreme Court, 1938 Term*, 28 CALIF. L. REV. 1, 4-6 (1939).

68. *See* Note, *supra* note 58, at 1662; *see also* Note, *supra* note 63, at 413. In *Cory v. White*, the Court once again stated in dicta that tangible property was amenable to taxation only at its situs. 102 S. Ct. at 2333. (Brennan, J., concurring).

69. See Note, *supra* note 58, at 1665-66.

B. *The Remedy*

When an estate is subject to possible multiple taxation there are several remedial measures that may be taken.[70] State court litigation is a possibility.[71] Indeed, where the domiciliary state incorrectly declares an interest to be tangible, it is the only available judicial remedy.[72] This follows from the fact that the state involved has the constitutional power to tax both tangible property located within its borders and intangible property of its domiciliaries.[73] By claiming a certain property interest to be intangible and thus taxing its devolution, the state would merely be asserting its constitutionally granted power.[74] Where the situs state declares that an interest is tangible and the domiciliary state declares it intangible, the matter may be litigated in state or federal court.[75] The Supreme Court would be the only federal court to hear the complaint,[76] and it would alternatively adopt one of the state determinations or make an independent characterization.[77]

C. *Classifications of Certain Interests*

There are various property intersts that may result in inconsistent characterizations.[78] It is universally accepted that traditional ownership of real property leads to taxation in the situs state only.[79] On the other hand, an interest in a partnership is generally considered intangible.[80] This is true whether it is a general or limited partnership interest.[81] However, Iowa will apparently not tax the interest of a decedent-domiciliary in a partnership owning real property in another state.[82] The Iowa Supreme Court, however, has ruled that the interest of a decedent-domiciliary in foreign real estate which she had contracted to sell prior to her death was intangible property subject to taxation by the domiciliary state.[83] In *Lincoln v. Briggs*,[84] the de-

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70. *See supra* text accompanying notes 62-69; *see also infra* text accompanying notes 71-86.

71. *See* Worcester County Trust v. Riley, 302 U.S. 292, 299 (1937). The state would be acting pursuant to its constitutional powers. *Id.*

72. *See id.*

73. *See* Cory v. White, 102 S. Ct. 2325, 2333 (1981)(Brennan, J., concurring).

74. *See* Note, *supra* note 58, at 1662.

75. *See, e.g.*, Blodgett v. Silberman, 277 U.S. 1 (1928). The *Blodgett* Court adjudged cash to be tangible and thus subject to taxation in the situs state. *Id.* at 7.

76. Note, *supra* note 58, at 1666. A detailed discussion of the procedural complexities attendant such a claim is provided at 1666 n.66. *Id.*

77. *Id.*

78. *See generally* 14 REAL PROPERTY PROB. & TRUST J. 279-85 (1979).

79. *Id.* at 280. *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949).

80. *See* IOWA CODE § 554.9106 (1981).

81. *Id.*

82. *See* 14 REAL PROPERTY PROB. & TRUST J. at 280.

83. Lincoln v. Briggs, 199 N.W.2d 337, 339 (Iowa 1972).

84. 199 N.W.2d 338 (Iowa 1972).

cedent, Ruth E. Lincoln, had died domiciled in Poweshiek County, Iowa.[85] Lincoln had sold on contract a parcel of land located in Illinois.[86] At Lincoln's death there remained an unpaid balance of forty thousand dollars plus accrued interest.[87] The state of Iowa collected inheritance taxes on the value of the contract and the executor of Lincoln's estate filed for an order requiring a refund.[88] Stating that "[i]t is not material that two states might both tax intangible personal property," the Iowa Supreme Court upheld the tax.[89] The opinion did not state whether there were inconsistent characterizations of the interest involved.[90] Nor was there any mention of a reciprocal exemption statute being used.[91] Illinois[92] and Iowa[93] both had similar statutes on the books at this time and it would appear that they would be applicable; thus, the situs state, Illinois, must have characterized the property interest as tangible.[94]

A wide spectrum of other property interests have been adjudged tangible or intangible at one time or another.[95] The United States Supreme Court has held that federal reserve notes,[96] shares of stock,[97] unpaid dividends and advances,[98] and mortgage notes[99] are all intangible and subject to taxation by a state of domicile.[100]

IV. Double Domicile

A. *The Problem in General*

Multiple taxation may also result when a decedent is adjudged to be a domiciliary of more than one state. The client obtaining a second residence,

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85. Appelant's Brief at 4, 199 N.W.2d 338 (Iowa 1972).
86. 199 N.W.2d at 338.
87. Appellant's Brief at 5, 199 N.W.2d 338 (Iowa 1972).
88. *Id.* at 4.
89. 199 N.W.2d at 339.
90. *Id.* The court did, however, state that the possibility of multiple taxation was not an element to be considered in the determination. *Id.* at 339 (citing State Tax Comm'r. v. Aldrich, 316 U.S. 174 (1942)).
91. *Id.*
92. Act of Oct. 25, 1967, Ill. Laws 4248, Ill. Rev. Stat. ch. 120 § 375(6) (1976).
93. Iowa Code § 450.91 (1981).
94. This type of inconsistent determination would surely have involved a federal question in that if Iowa was incorrectly taxing a tangible property interest beyond her borders the doctrine espoused in *Treichler v. Wisconsin*, 338 U.S. 251, and *Frick v. Pennsylvania*, 268 U.S. 473, would have been violated.
95. *See* [1974] Inher., Est. & Gift Tax Rep. (CCH) ¶ 1675. *See also* 14 Real Property Prob. & Trust J. 227 (1979); Marsh, *Multiple Death Taxation in the United States*, 8 U.C.L.A. L. Rev. 69, 76-79 (1961).
96. *See* Blodgett v. Silberman, 277 U.S. 1 (1928).
97. *See* First Nat'l Bank v. Maine, 284 U.S. 312 (1932).
98. *See* Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930).
99. *See* Savings and Loan Society v. Multnomah County, 169 U.S. 421 (1898).
100. *See* Marsh, *supra* note 43, at 78-79.

or dividing his time equally between states, may run the risk of being adjudged a domiciliary of more than one state.[101] Although the risk of obtaining multiple domiciles is slim for most clients, the possibly disastrous tax effects of such a finding warrants caution in this area.[102]

The elusive concept of domicile involves two vital elements: residence and intent.[103] The overwhelming presence of one will not excuse the absence of the other.[104] Once a domicile is acquired it is kept until supplanted by the acquisition of a new one.[105] In theory, one can have only one domicile at any given time.[106] Even so, it is not uncommon for a decedent to be adjudged a domiciliary of more than one state.[107] Although it has been termed a "monstrous absurdity" that a decedent may have two domiciles simultaneously,[108] it is generally accepted that two or more different states, acting in separate judicial proceedings, may each determine the decedent to have been a domiciliary of their respective jurisdictions.[109]

One oft-cited decision[110] involved the estate of Dr. Dorrance, the head of the Campbell Soup empire.[111] Dorrance left an estate of over one hundred fifteen million dollars, most of it in the form of Campbell Soup stock.[112] Both Pennsylvania and New Jersey claimed Dorrance as a domiciliary, and the Supreme Court refused to review the conflicting state court opinions that held Dorrance to be a domiciliary of both states.[113] The states levied and collected in excess of thirty-five million dollars in death taxes.[114] An interesting account of how the decedent got himself into this precarious situation is supplied by one commentator who is of the belief that most double domiciliary cases arise from tax evasive actions on the part of the decedent.[115] This account relates that Dr. Dorrance unwittingly subjected his es-

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101. *See generally* Zabel, *Clients Migrating to Florida*, 10 INST. ON EST. PLAN. ¶ 1400 (1976).

102. *See supra* text accompanying notes 96-101.

103. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11-20 (1971). Domicile is a place, the home of which every person has one and only one. *Id.* at § 11. Three types of domicile are recognized: domicile (1) by origin, (2) of choice, and (3) by operation of law. *Id.* at §§ 14-15.

104. *See, e.g.*, Texas v. Florida, 306 U.S. 398 (1939). *See also* Citizens Bank & Trust Co. v. Glazer, 70 N.J. 72, 357 A.2d 753 (1976).

105. Edmundson v. Miley Trailer Co., 211 N.W.2d 269, 270 (Iowa 1973).

106. *Id.* at 270-71.

107. *See, e.g.*, California v. Texas, 102 S. Ct. 2335 (1982); Texas v. Florida, 306 U.S. 398 (1939); *In re* Trowbridge's Estate, 266 N.Y. 283, 194 N.E. 756 (1935).

108. Somerville v. Somerville, 31 Eng. Rep., 839, 858 (ch. 1801).

109. *See* Marsh, *supra* note 95, at 81.

110. *In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932), *cert. denied*, 288 U.S. 617 (1932); 115 N.J. Eq. 168, 170 A. 601 (1934); 116 N.J. Eq. 204, 172 A. 503 (1934); 116 N.J. Eq. 362, 184 A. 743 (1936), *cert. denied*, 298 U.S. 678 (1936).

111. Estate of Dorrance, 115 N.J. Eq. 268, 170 A. 601, 602 (1934).

112. *Id.*

113. 288 U.S. 617; 298 U.S. 678.

114. 115 N.J. Eq. at __, 170 A. at 602.

115. *See* Marsh, *supra* note 95, at 81.

tate to double death taxation because he wished to give his daughters the benefit of the social life in Philadelphia while keeping for himself the benefit of the lack of state income taxes in New Jersey.[116]

B. *The Constitutionality of Double Domicile Taxation*

The Supreme Court has stated that only in very rare instances will it grant relief from multiple taxation of this type.[117] Only where the threatened state death tax liability and the federal tax liability exceed the gross estate will the Supreme Court exercise its original jurisdiction and provide a remedy.[118]

C. *Available Remedies*

The best policy is to avoid this thistle patch completely by proper planning,[119] but where an attorney fails to discover the problem of possible double domicile until after the fact, there are some remedial avenues available.[120] One preliminary consideration is selecting the jurisdiction in which to administer the estate.[121] If the will is probated in one jurisdiction as the state of domicile, and later the evidence points to a different state of domicile, the error could be disastrous.[122] In *In re Hartman's Estate*[123] the decedent's representatives, erroneously assuming her domicile to be New York, probated her will in that state.[124] Death taxes were subsequently levied and paid in New York.[125] The decedent, a wealthy heiress who had married the rector of the Episcopal Church in Dover, New Jersey,[126] had at all times previous to her marriage lived on New York City's Madison Avenue.[127] During their marriage, the couple lived in the decedent's New York home during the week and traveled to the rectory in Dover on the weekends.[128] Upon her death, the decedent's representatives probated her will in New York.[129] Unfortunately they overlooked the prevailing law which dictated that a wife's domicile was deemed to be that of her husband.[130] As a result, New Jersey

116. *Id.*
117. *See* California v. Texas, 102 S. Ct. at 2337.
118. *Id. See infra* text accompanying notes 150-60.
119. *See infra* text accompanying notes 175-210.
120. *Id.*
121. *See* Marsh, *supra* note 95, at 84.
122. *See infra* text accompanying note 135.
123. 70 N.J. Eq. 664, 62 A. 560 (1906).
124. 70 N.J. Eq. at _, 62 A. at 561.
125. *Id.* at _, 62 A. at 561.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at _, 62 A. at 562.

collected an inheritance tax over and above that collected by New York.[131] The problem might have been avoided had the estate been probated in New Jersey.

A similar problem was encountered in the *Dorrance* litigation in New Jersey.[132] The respondent tax commissioner argued that the appellant was estopped from claiming that Dr. Dorrance was not domiciled in New Jersey since his will was probated there.[133] Although the court addressed the issue of domicile, the opinion commented that the claim of estoppel or preclusion was probably sound.[134] Thus the executor should, if possible, delay the probate of the will until after all parties have asserted their domiciliary claims and an attempt to compromise is made.[135]

1. *Statutory Remedies*

Unfortunately, statutory remedies are unavailable to the Iowa practitioner.[136] Numerous states have enacted variations of the Uniform Act on Interstate Compromise of Death Taxes.[137] This act allows state tax officials to reach a compromise whereby the states involved divide an amount equal to the higher of the two possible state taxes.[138]

Alternatively, a number of states have enacted the Uniform Interstate

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131. *Id.*
132. 115 N.J. Eq. at _, 170 A. at 602.
133. *Id.* _, 170 A. at 602.
134. *Id.*
135. Marsh, *supra* note 95, at 84.
136. *See infra* text accompanying notes 137-38.
137. *See* [1974] INHER., EST. & GIFT TAX REP. (CCH) ¶ 1680.
138. UNIF. INTERSTATE COMPROMISE OF DEATH TAXES ACT § 1, 8 U.L.A. 271 (1971). The entire act reads:

> § 1. [Compromise Agreement; Filing; Interest or Penalty for Non-Payment of Taxes].
>
> When the [tax commission] claims that a decedent was domiciled in this state at the time of his death and the taxing authorities of another state or states make a like claim on behalf of their state or states, the [tax commission] may [with the approval of the attorney general] make a written agreement of compromise with the executor or administrator that a certain sum shall be accepted in full satisfaction of any and all death taxes imposed by this state, including any interest or penalties to the date of filing the agreement. The agreement shall also fix the amount to be accepted by the other states in full satisfaction of death taxes. The executor or administrator is hereby authorized to make such agreement. Either the [tax commission] or the executor or administrator shall file the agreement, or a duplicate, with the authority that would be empowered to assess [determine] death taxes for this state if there had been no agreement; and thereupon the tax shall be deemed conclusively fixed as therein provided. Unless the tax is paid within [_] days after filing the agreement, interest [or penalties] shall thereafter accrue upon the amount fixed in the agreement but the time between the decedent's death and the filing shall not be included in computing the interest [or penalties].

Id.

Arbitration of Death Taxes Act.[139] This statute establishes a procedure by which the states involved and the administrator of the estate submit the disputed domicile claims to arbitration.[140] The determination is to be made by a board of arbitrators selected by the parties.[141] Because the act specifies that it applies only where all of the states involved have enacted similar provisions,[142] this practical remedy is not available to Iowans.

2. *State Court Litigation*

There are few decisions leading to multiple taxation because courts have generally reached the conclusion that domicile is indicated by the evidence without regard to the state in which the case is decided.[143] There are numerous cases in which a court in the state claiming the decedent as a domiciliary has held the decedent to have been domiciled in another state.[144] In a few instances, the officials of one state have even been persuaded to intervene in the litigation in another state, thus enabling the court to render a binding decision.[145]

3. *Federal Court Litigation*

a. *Review of State Court Determinations.* It is axiomatic that the constitution does not forbid double death taxation based on conflicting claims of domicile.[146]

> That two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within it in proceedings binding upon the representatives of the state, but to which the other states are non-parties, is an established principal of our federal jurisprudence.[147]

The Court grants relief only in the rare instances where the potential tax liability exceeds the value of the estate.[148] In refusing relief in other instances, the Court has propounded that:

> Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions in the courts of different states as to

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139. *See* [1974] INHER., EST. & GIFT TAX REP. (CCH) ¶ 1680.

140. UNIF. INTERSTATE ARBITRATION OF DEATH TAXES §§ 1-14, 8 U.L.A. 255 (1971).

141. *Id.* at §§ 1, 2.

142. *Id.* at § 10.

143. *See* Texas v. Florida, 306 U.S. 431 (1939) (dissenting opinion).

144. Marsh, *supra* note 95, at 86; *see also* Guterman, *Avoidance of Double Taxation of Estates and Trusts*, 95 U. PA. L. REV. 701 (1947).

145. *See, e.g.*, Estate of Trowbridge, 266 N.Y. 283, _, 194 N.E. 756, 758 (1935); *see also* Marsh, *supra* note 95, at 85.

146. *See supra* text accompanying notes 10-23.

147. *See* Marsh, *supra* note 95, at 85. Professor Marsh suggests that the presiding judge must be highly thought of if this is to be a realistic remedy. *Id.*

148. *See* California v. Texas, 102 S. Ct. 2335, 2336 (1982).

> the place of domicile, where the exertion of state power is dependent upon domicile within the boundaries.[149]

It has been estimated that an estate must be valued at over thirty million dollars in order that the potential tax liability will exceed its gross value.[150] Thus the Supreme Court has all but washed its hand of the issue. A further drawback of this remedy is that only the state may bring such an action, and therefore the estate is powerless to do so if the state decides not to pursue such a remedy.[151]

Another federal court remedy was suggested by four justices in concurring opinions in *California v. Texas*.[152] This case involved California's motion to bring an original action before the Supreme Court to determine the domicile of deceased millionaire Howard Hughes.[153] The Court denied California's motion and Justices Stewart, Powell, Stevens, and Brennan appended concurrences.[154] The concurring opinions expressed the belief that the Federal Interpleader Statute[155] might provide the proper relief in the case.[156] Subsequently, the administrator for the Hughes estate filed an action in federal court in the Western District of Texas pursuant to this suggestion.[157] The district court dismissed the action for lack of jurisdiction[158] and the United States Court of Appeals for the Fifth Circuit reversed.[159] The Supreme Court, in *Cory v. White*, held that the action was barred by the eleventh amendment.[160]

The majority opinion in *Cory* reaffirmed the 1937 decision of *Worcester County Trust Co. v. Riley*,[161] which held that an interpleader action nominally brought against two state tax officials was barred by the eleventh amendment.[162] In *Worcester County*, the administrator of the decedent's estate brought a federal interpleader action against the tax officials of the states of California and Massachusetts which both claimed the decedent as a domiciliary.[163] The *Worcester* Court stated that: (1) an action seeking to restrain a state agent acting in his official capacity is actually an action

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149. Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937).

150. Tweed & Sargent, *Death and Taxes are Certain—But What of Domicile*, 53 HARV. L. REV. 68, 76 (1939).

151. *See* [1974] INHER., EST. & GIFT TAX REP. (CCH) ¶ 1425 E.

152. 437 U.S. 601, 602, 615 (1978) (concurring opinion).

153. *Id.* at 602.

154. *Id.* at 601, 602, 615.

155. 28 U.S.C. § 1335 (1976 & Supp. V).

156. 437 U.S. 601, 611, 615 (1978).

157. California v. Texas, 102 S. Ct. at 2335.

158. *Id.* at 2336.

159. *Id.*

160. Cory v. White, 102 S. Ct. 2325, 2329 (1982).

161. 102 S. Ct. at 2328. The Court reaffirmed the decision of *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

162. 102 S. Ct. at 2328.

163. Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937).

against the state, and (2) the suit can escape the constitutional proscription only if the official's action is without the state's authority or in violation of federal statutes or the Constitution.[164]

The appellate court in *Cory* determined that *Worcester* had been overruled by *Edelman v. Jordan*,[165] and thus held that non-monetary relief, such as that requested in *Cory*, could be granted.[166] This opinion was rejected by the Supreme Court.[167] The *Edelman* case involved a class action by plaintiffs to recover withheld benefit payments.[168] The plaintiffs alleged that officials of the Illinois Department of Public Aid were dispersing welfare benefit payments in a manner inconsistent with federal regulations.[169] The plaintiffs sought injunctive relief and payment of the wrongfully withheld benefits.[170] The Supreme Court, in refusing to award damages for the withheld payments, held that the federal courts could grant only prospective relief.[171] The court of appeals in *Cory* interpreted the *Edelman* holding as taking nonmonetary relief out of the eleventh amendment proscription.[172] The Supreme Court in *Cory* found it untenable that the *Edelman* decision supported a finding that the interpleader statute could be used to obtain nonmonetary relief.[173]

Thus, after the *Cory v. White* decision, the federal interpleader statute is not a method by which relief from a double domicile determination can be obtained. The eleventh amendment bars such an action unless the state taxing officials are violating federal law or acting without state authority.[174]

B. *Avoidance, The Best Remedy*

The best way to deal with a questionable domicile problem is by recognizing it in advance and planning accordingly. Where a client is planning to retire or purchase a vacation residence or merely relocate, certain steps whould be taken to avert any possibility of a determination of domicile in an undesired jurisdiction.[175]

It must first be recognized that even if an individual goes through all of

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164. 302 U.S. at 296-97.
165. 415 U.S. 651, 663 (1974).
166. 102 S. Ct. at 2329.
167. *Id.* at 2328.
168. 415 U.S. 651, 653-54.
169. *Id.* at 653.
170. *Id.*
171. *Id.* at 665.
172. 102 S. Ct. at 2328.
173. *Id.*
174. *Id.*
175. *See generally*, F. Acker, *Domicile Selection For the Retiring Client*, 8 ILL. BAR. J. 760 (1977); *see also* M. Jacobowitz, *Retiring to a New Domicile—An Estate Planning Tax Shelter?*, 10 INST. ON EST. PLAN. § 700 (1976).

the motions of establishing or destroying a domicile,[176] the requisite elements of residence and intent are indispensable.[177] A determination of domicile is mainly a factual one.[178] Decisions such as *Citizens Bank and Trust Co. v. Glazer*[179] should act as a caveat to the practitioner. In *Glazer*,[180] the Supreme Court of New Jersey held that the decedent, Inez Duff Bishop, was a domiciliary of the state of Virginia at the time of her death.[181] The decedent had attempted to retain New Jersey as a legal domicile to avoid Virginia taxes.[182] New Jersey, like Iowa,[183] adheres to the common law doctrine of domicile which is codified in the Restatement (Second) of Conflict of Laws.[184]

Despite the fact that the decedent filed her federal income tax returns with a New Jersey address, never filed a Virinia income tax return, and registered to vote in New Jersey and in fact did vote there by absentee ballot, the court found her to be a domiciliary of Virginia.[185] The court rested its decision on the fact that the "central fulcrum" of the decedent's life was in Virginia.[186] Factors leading to this conclusion included findings that the decedent's family, doctor and lawyer, burial place, and place of worship and community interest were located in Virginia.[187] Thus, the court looked beyond the "window dressing" attempts of decedent to bootstrap herself into a New Jersey domicile.[188]

With this in mind, it should be noted that in most instances a client should merely be trying to avoid conflicting determinations of domicile rather than attempting to manufacture a false domicile for tax avoidance purposes. Certain simple steps should be taken to establish a factual basis by which a finding of one and only one domicile may result.[189] It shoud be remembered that the initial factual determination of domicile will be made by the state taxing authorities. Many state tax authorities have developed questionnaires to aid in the determination of domicile.[190] Counsel should obtain a copy of such questionnaires if available and use them as a checklist.[191]

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176. *See* Citizens Bank and Trust Co. v. Glazer, 70 N.J. 72, 357 A.2d 753 (1976).
177. *Id.* at _, 357 A.2d at 758.
178. *See* Julson v. Julson, 255 Iowa 301, 122 N.W.2d 329 (1963).
179. 70 N.J. 72, 357 A.2d 753 (1976).
180. *Id.*
181. *Id.* at _, 357 A.2d at 759.
182. *Id.* _, 357 A.2d at 758-59.
183. *See In re* Guardianship of Lehr, 249 Iowa 625, 87 N.W.2d 909 (1958).
184. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11-23 (1971).
185. 70 N.J. at _, 357 A.2d at 759.
186. *Id.*
187. *Id.*
188. *Id.* at _, 357 A.2d at 757.
189. *See infra* text accompanying notes 170-77.
190. *See* Zabel, *supra* note 101, at ¶ 1401.
191. *Id.* Though the Iowa Department of Revenue has no written checklist, the revenue officials will look to all of the relevant factors to make a domicile determination. *See infra* text

Although the Iowa Department of Revenue has no structured checklist, there are certain criteria that are used to make the initial determination of a decedent's domicile.[192] The Department looks to the estate's probate inventory for indicia of domicile,[193] and in doing so the Department strives to determine the decedent's intended domicile.[194] Among others, the following factors are considered: (1) the claim of domicile in the probate file itself is, of course, given weight;[195] (2) whether Iowa income tax returns were filed as a resident or non-resident is looked to;[196] (3) whether the decedent voted in Iowa is a factor;[197] (4) if a bank account was maintained in Iowa, whether there was any business reason for doing so;[198] (5) whether the decedent licensed his car in Iowa is a factor;[199] (6) the probate inventory is examined to determine if household furniture and furnishings were present in Iowa.[200]

Other checklists which show an indicia of domicile have been developed and may be referred to.[201] The following list of considerations is by no means exhaustive:[202] (1) all documents should list the client as a domiciliary of the desired state;[203] (2) the client should pay local taxes in the intended domicile and file his federal income tax return in that state;[204] (3) the client should not reside in any other state for more than six months out of any given year;[205] (4) the client should maintain a permanent mailing address in the intended domicile;[206] (5) the client should maintain membership in fraternal, social, and religious organizations only in the intended domicile;[207] (6) the client should register and vote in the intended domiciliary state;[208] (7) the client's automobile should be registered in the state, and the client should hold a driver's license of the intended domiciliary state;[209] (8) check-

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accompanying notes 192-200.

192. *See infra* text accompanying notes 193-200.

193. Interview with Ben W. Brown, Administrator, Estates and Trusts Division, Iowa Department of Revenue in Des Moines (Feb. 4 1983).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* Most individual clean out their accounts when leaving Iowa permanently unless a farm or business is maintained in the state. *Id.*

199. *Id.*

200. *Id.*

201. *See* Zabel, *supra* note 101, at 1402.

202. *See* Guterman, *supra* note 144; *see also* Lentz, *Problems in Determining Domicile*, N.Y.U. 15th Inst. on Fed. Tax. 945 (1957).

203. *See* Zabel, *supra* note 101, at 1402.

204. *Id.*

205. *See* Acker, *supra* note 175, at 763.

206. *Id. But see* Citizens Bank and Trust Co. v. Glazer, 70 N.J. at _, 357 A.2d at 757.

207. *See* Texas v. Florida, 306 U.S. 398, 414 (1939).

208. *See In re* Guardianship of Lehr, 249 Iowa 625, 87 N.W.2d 909 (1958).

209. *See* Acker, *supra* note 175, at 763.

ing and savings accounts should be maintained in the intended domicile.[210]

V. Conclusion

The threat of multiple estate taxation is negligible for a majority of clients. The threat does, however, remain for some clients, generally those with the most to lose. The threat of multiple taxation by the situs and domicile states appears to be greatly diminished by the network of reciprocal exemption statutes. There remains, however, a risk that some state statutes may not be reciprocal, or that inconsistent characterizations of an interest in property may result in redundant taxation. And for a few clients, probably the "heavy hitters" that are the most sought after by attorneys, there remains the possible double domicile situation. Although most attorneys can ill-afford to advise a big client to stay in Iowa, instead of enjoying the beach in Florida during half the year, taking steps to avoid inconsistent domcile claims is in the client's best interests.

Frank B. Harty

210. *See* Citizens Bank and Trust Co. v. Glazer, 70 N.J. at _, 357 A.2d at 761.