

# CHANGING RESIDENCY FOR ILLINOIS TAX PURPOSES

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## I. INTRODUCTION

There are many proverbs and famous quotes about the home. Perhaps the one best fitting this article is, “home is where the heart is.”<sup>1</sup> In a tax sense, and for reasons explained later, this is actually not far off. In general, the State of Illinois assesses a tax on every individual who has the “privilege of earning or receiving income in or as a resident of this State.”<sup>2</sup> By definition, this taxing statute reaches three categories of individuals. First, those individuals who are residents of another state but receive income from specified sources within the state of Illinois.<sup>3</sup> Second, the statute covers part-year residents who became a resident during the taxable year or ceased to be a resident during the taxable year.<sup>4</sup> Finally, the statute reaches all individuals considered residents of Illinois.<sup>5</sup>

It is a taxable privilege for an individual falling within one of the three categories above to earn income while that individual is “enjoying the benefit of its government.”<sup>6</sup> Not surprisingly, there are those who wish to decline this “privilege” by becoming residents of another state, the most obvious being the retiree who seeks to become a resident of a state with a warmer climate.

In Illinois the term resident includes, “an individual (i) who is in this State for other than a temporary or transitory purpose during the taxable year; or (ii) who is domiciled in this State but is absent from the State for a temporary or transitory purpose during the taxable year.”<sup>7</sup> Since the temporary or transitory test and the domicile test are separate, there are four

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1. This quote is often attributed to the writings of Pliny the Elder. See *Pliny the Elder quotes*, goodreads.com, [http://www.goodreads.com/author/quotes/302386.Pliny\\_the\\_Elder.html](http://www.goodreads.com/author/quotes/302386.Pliny_the_Elder.html) (last visited Oct. 24, 2014); see also *Pliny the Elder Quotes*, andiquote.co.za, [http://www.andiquote.co.za/authors/Pliny\\_the\\_Elder.html](http://www.andiquote.co.za/authors/Pliny_the_Elder.html) (last visited Oct. 24, 2014).
2. 35 ILL. COMP. STAT. ANN. 5/201(a) (West Supp. 2014).
3. See 35 ILL. COMP. STAT. ANN. 5/301(c)(1) (West 2012).
4. See 35 ILL. COMP. STAT. ANN. 5/301(b) (West 2012).
5. See 35 ILL. COMP. STAT. ANN. 5/301(a) (West 2012).
6. ILL. ADMIN. CODE tit. 86 §100.3020(b) (2013).
7. 35 ILL. COMP. STAT. ANN. 5/1501(a)(20) (West 2012).

possible taxpayer classifications regarding residency status. First, those domiciled in Illinois and, if absent for a period of time, whose absence was only for a temporary or transitory purpose will be considered Illinois residents; this category includes the taxpayer who lives in Illinois and takes a vacation. Second, those domiciled in another state, but who are in Illinois for a purpose that is other than temporary or transitory will also be considered an Illinois resident. An example would be an employee transferred to Illinois for an extended period. Third, taxpayers domiciled in another state who visit Illinois for a purpose that is temporary or transitory will be considered a non-resident. Finally, those domiciled in Illinois but whose absence during the taxable year is not temporary or transitory in nature will also be considered a non-resident. The most obvious example of this final category is an employee transferred to another state or country for an extended period of time.

For Illinois, the problem with residents seeking warmer climates is they may take their otherwise taxable income with them. Income tax is a central part of the revenues generated by the state of Illinois. In 2013, Illinois individual income tax accounted for approximately 45% of the total revenues collected for the State of Illinois.<sup>8</sup>

Currently, Illinois is in a financial crisis.<sup>9</sup> In reaction to this crisis, former Governor Quinn pushed legislation that raised the Illinois individual income tax from 3% to 5% while concurrently raising the corporate income tax and claimed these were “temporary” measures to counter the large budget deficit anticipated in the coming years.<sup>10</sup> These tax increases were scheduled to automatically revert to their previously lower amounts in 2015,<sup>11</sup> and in fact did revert.

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8. This approximate percentage was calculated by comparing the 2013 individual income tax to the 2013 collections grand total. See Illinois Department of Revenue, Annual Report of Collections and Distributions, available at <http://tax.illinois.gov/Publications/AnnualReport/2013-Table-1.pdf> (last modified Dec. 31, 2013).
  9. See generally Anthony Kniermin, *How Much Money Does Illinois Have? We Don't Know!*, HUFFINGTON POST, [http://www.huffingtonpost.com/anthony-knierim/we-dont-know\\_b\\_3504903.html](http://www.huffingtonpost.com/anthony-knierim/we-dont-know_b_3504903.html) (Jun. 26, 2013, 5:00 PM) (Illinois balanced budget issues); David Von Drehle, *Why Illinois is Going Bankrupt*, TIME, <http://swampland.time.com/2013/01/18/why-illinois-is-going-bankrupt/> (Jan. 18, 2013) (Illinois pension issues); *Illinois Unpaid Bills: State Lawmakers Consider \$2.5 Billion Bond Deal To Catch Up On Bills*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/04/11/illinois-unpaid-bills\\_n\\_3056849.html](http://www.huffingtonpost.com/2013/04/11/illinois-unpaid-bills_n_3056849.html) (Apr. 10, 2013, 7:52 PM) (Illinois creditor issues).
  10. See, e.g., Andrew Malcolm, *Illinois Gov. Pat Quinn delighted with a whopping 66% income tax hike; you'll never guess his party*, L.A. TIMES, <http://latimesblogs.latimes.com/washington/2011/01/pat-quinn-illinois-tax-hikes.html> (Jan. 13, 2011, 3:04 AM).
  11. Numerous Illinois state statutes indicate that there was a sunset provision on the five percent Illinois income tax. Compare 35 ILL. COMP. STAT. ANN. 5/201(5) with 35 ILL. COMP. STAT. ANN. 5/201(5.2) (West Supp. 2014).

Amidst this crisis, the First District Appellate Court of Illinois, in 2012, decided *Cain v Hamer*.<sup>12</sup> In *Cain*, the issue was whether a pair of snowbirds (retirees spending the winter months in a warmer climate and returning to Illinois each year) were residents of Illinois for income tax purposes when they spent roughly an equal amount of time in Illinois as in Florida.<sup>13</sup> The court narrowed the issue of residency down to two important issues; namely, whether the taxpayers (the “Cains”) changed domicile, and if so, whether their visits to Illinois were temporary or transitory in purpose.<sup>14</sup> Based on the facts of the case, the court held that the taxpayers were not residents of Illinois and their visits back to Illinois were for a temporary purpose.<sup>15</sup>

How the court came to this conclusion of Florida residency raises doubt, and may have a drastic impact on the future of Illinois income taxes given that the retiring baby boomer generation may be looking for lower taxes along with a warmer climate.<sup>16</sup> This article reviews both the analysis done in *Cain* and the legislative and judicial responses. Part II focuses on the case itself and is divided in a similar fashion to the sequencing used by the court in *Cain*. First, this article looks at how the court determined if the Cains effected a change in domicile. Then this article examines how the court determined if their frequent returns to Illinois were for a temporary purpose. Part III turns to the concept of domicile and how it may be changed. The common law test for a change of domicile is compared with the test offered in the Illinois Administrative Code (the “Code”). The flaws in both tests are then examined. Finally, this section stresses importance for a court not to discard the ‘intent not to return’ element which exists in both tests. Part IV looks at the temporary or transitory purpose exception that allows Illinois to tax those domiciled in another state if their visits to Illinois are not temporary. Part IV analyzes and agrees with the approach taken by the court in *Cain* in looking at this residency exception to domicile in another state. Parts V and VI review the judicial and legislative responses to *Cain*. They begin by looking at the approaches used by other courts and then turn to the changes made by the Illinois Department of Revenue (the “Department”) regarding its definition of both domicile and residency. Part VII provides some guidance for those who wish to change residency by listing some important factors the Department will consider when determining whether a change in domicile has occurred. Finally, the

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12. See generally 2012 IL App. (1st) 112833, 975 N.E.2d 321.

13. *Id.* ¶ 1, 975 N.E.2d at 322.

14. *Id.* ¶ 12, 975 N.E.2d at 324.

15. *Id.* ¶ 23, 975 N.E.2d at 329.

16. See generally *New Poll 2012: What Baby Boomers Want*, CONSUMER FEDERATION OF THE SOUTHEAST, <http://consumerfederationse.com/2012/02/01/new-poll-shows-what-baby-boomers-want/> (Feb. 1, 2012) (demonstrating that having low local taxes was “very” or “somewhat” important to 81.1 percent of baby boomers polled).

conclusion disagrees with the “change of domicile” rule as used in *Cain* and suggests a change to the Code to guide courts with future domicile analysis.

## II. THE *CAIN* CASE

### A. Background of the Case

Prior to 1995 the Cains were considered residents of Illinois for income tax purposes.<sup>17</sup> The court was called upon to answer whether, under the totality of the circumstances, the Cains were in fact Florida residents after 1995.<sup>18</sup> The concept of residency is very fact oriented. If the Cains could demonstrate that they were Florida residents, they would be able to avoid almost 1.9 million dollars in unpaid Illinois state income taxes and penalties for the tax years between 1996 through 2004.<sup>19</sup>

Mr. Cain was a retired self-employed trader who worked on the Chicago Board Options Exchange.<sup>20</sup> The Cains worked and lived in Illinois since 1964.<sup>21</sup> In 1990, Mr. Cain retired and the Cains constructed a new home in Florida.<sup>22</sup> In early 1995, the Cains purchased a lot in Illinois with the intention to build a smaller home.<sup>23</sup> However, in August, 1995, the Cains abandoned this idea and began work on an addition to their longtime Illinois home.<sup>24</sup> In November 1995, the Cains filed in Florida a “declaration of domicile” and renounced Illinois residency in favor of becoming Florida residents.<sup>25</sup> The court split the remaining facts into three categories.

First, there were facts that weighed in favor of Florida residency. In addition to buying a home in Florida and making a declaration of Florida residency, both Mr. and Mrs. Cain held Florida driver’s licenses and also obtained permanent resident identification cards.<sup>26</sup> They were registered to vote in Florida and received jury duty summonses in Florida.<sup>27</sup> Mr. Cain obtained a Florida firearm license.<sup>28</sup> They both used Florida cell phone numbers.<sup>29</sup> They had a newspaper subscription delivered to their Florida

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17. *Cain*, 2012 IL App. (1st) 112833, ¶¶ 18–19, 975 N.E.2d at 325.

18. *Id.* at ¶ 1, 975 N.E.2d at 322.

19. *Id.* at ¶ 1, 975 N.E.2d at 322.

20. *Id.* at ¶ 3, 975 N.E.2d at 322.

21. *Id.*

22. *Id.*, 975 N.E.2d at 323.

23. *Id.*, 975 N.E.2d at 322–23.

24. *Id.*, 975 N.E.2d at 323.

25. *Id.* at 4, 975 N.E.2d at 323.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

house.<sup>30</sup> Additionally, the Cains were able to show that, during the years in question, 73% of all credit card expenditures were made outside of Illinois as were 61% of the total transactions (swipes).<sup>31</sup> Finally, although they donated to charities in both states, the Cains demonstrated as the years progressed they favored Florida charities over those in Illinois.<sup>32</sup>

Second, there were some facts, apart from buying a lot in 1995 and the addition to their current Illinois home, that weighed in favor of Illinois residency. The Cains exclusively used Illinois income tax preparers for their taxes.<sup>33</sup> The Cains made political contributions to Illinois candidates but made no contributions to Florida candidates.<sup>34</sup> Mrs. Cain maintained an interior designer license in Illinois and never indicated on the renewal forms, which she completed after making the declaration of residency, that she had moved.<sup>35</sup> However, she did not use the license in either state.<sup>36</sup>

Finally, the court held the remaining facts were of little use since they favored neither state. The Cains had doctors and legal advisors in both states.<sup>37</sup> They spent roughly an even number of days in each state between 1996–2004 (1,700 in Florida: 1,666 in Illinois: 284 elsewhere).<sup>38</sup> They maintained private club memberships in both states but spent \$236,000 on memberships in Illinois as compared to \$422,000 on memberships in Florida.<sup>39</sup> Lastly, the Cains were board members or committee members in organizations in both Florida and Illinois.<sup>40</sup>

The court began by looking at the Illinois Income Tax Act and to the Code for the definition of residency. The court noted that an individual can be an Illinois resident for income tax purposes in one of two ways. An individual may be domiciled elsewhere but present in Illinois for a purpose which is other than temporary or transitory.<sup>41</sup> Alternatively, an individual can be domiciled in Illinois and absent for a period which is merely temporary or transitory.<sup>42</sup> From this, the court framed the issue into two questions. First, whether the Cains' "move to Florida constituted a change in domicile or a departure from Illinois for 'other than a temporary or transitory purpose' so that they lost their Illinois residency, and, conversely,

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30. *Id.*

31. *Id.* at ¶ 7, 975 N.E.2d at 323.

32. *Id.* at ¶ 9, 975 N.E.2d at 323.

33. *Id.* at ¶ 5, 975 N.E.2d at 323.

34. *Id.*

35. *Id.* at ¶ 8, 975 N.E.2d at 323.

36. *Id.*

37. *Id.* at ¶ 5, 975 N.E.2d at 323.

38. *Id.* at ¶ 6, 975 N.E.2d at 323.

39. *Id.* at ¶ 7, 975 N.E.2d at 323.

40. *Id.*

41. *Id.* at ¶¶ 14–15, 975 N.E.2d at 324–25.

42. *Id.*

whether their periodic returns to Illinois were not for ‘a temporary or transitory purpose’ so that they should be classified as Illinois residents.”<sup>43</sup>

#### B. Did the Cains Change Domicile?

For domicile, the court looked to the Code, which provides guidance on both the definition of domicile and how an individual loses domicile.<sup>44</sup> The court noted that the Illinois definition of domicile, found in the Code, has the following five components: (1) a fixed permanent home or establishment, (2) a place where a person returns after being absent, (3) a voluntary fixed habitation of self and family, (4) a place where the person has the present intention of making a permanent home, and (5) a place where the person has no present intention of permanently moving away from.<sup>45</sup> However, since it was already established that the Cains were domiciled in Illinois prior to 1995, the real question was whether their actions caused a change in domicile from Illinois to Florida.<sup>46</sup>

The Code provides a two-part test for a change in domicile. An individual domiciled in Illinois loses their domicile (i) by locating elsewhere with the intention of establishing the new location as his or her domicile, and (ii) by abandoning any intention of returning to Illinois.<sup>47</sup> However, the court chose a somewhat different and more detailed four-part test found in *Viking Dodge Inc. v. Hoffman*.<sup>48</sup> In *Viking Dodge*, the four factors required for a change of domicile were: (1) a physical abandonment of the last domicile, (2) the intent not to return to the last domicile, (3) a physical presence in the new domicile, and (4) the intent to make it one’s domicile.<sup>49</sup> The court in *Cain* quickly dispensed with the third factor, finding that the Cains clearly occupied the home in Florida.<sup>50</sup> The analysis centered on the other three factors.

The court struggled with the issues of physical abandonment and intent not to return. Since the Cains “split their time roughly equally between the two states,” the court found that both the “physical abandonment” and “intent not to return” factors were moot.<sup>51</sup> The issue of domicile was therefore decided solely on “physical presence in the new

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43. *Id.* at ¶ 16, 975 N.E.2d at 325 (citing 35 ILL. COMP. STAT. ANN. 5/1501(a)).

44. *Id.* at ¶ 15, 975 N.E.2d at 325 (citing 100.3020 Resident (IITA Section 301), ILL. ADMIN CODE tit. 86 § 100.3020 amended 24 Ill. Reg. 10593, effective July 7, 2000) (previous version).

45. *Id.* at ¶ 17, 975 N.E.2d at 325.

46. *Id.*

47. ILL. ADMIN. CODE tit. 86 § 100.3020(d) (2013).

48. *Cain*, 2012 IL App. (1st) 112833 at ¶ 18, 975 N.E.2d at 326 (citing *Viking Dodge Inc. v. Hoffman*, 497 N.E.2d 1346 (Ill. App. Ct. 1986)).

49. *Viking Dodge*, 497 N.E.2d at 1347 (citations omitted).

50. *Cain*, 2012 IL App. (1st) 112833 at ¶ 19, 975 N.E.2d at 326.

51. *Id.* at ¶ 18, 975 N.E.2d at 326.

domicile” and “intent to make that one’s domicile.”<sup>52</sup> Having already concluded physical presence in Florida was established, the court reasoned that the Cains had a clear intention of making Florida their new domicile.<sup>53</sup> They were persuaded by the facts that the Cains “changed their voter registrations to Florida, paid Florida taxes, obtained residency cards and drivers’ licenses in Florida, and even filed a declaration of their Florida residency.”<sup>54</sup>

This discarding of two factors, conveniently referred to as “totality of the circumstances” approach, was a departure from *Viking Dodge*. The court in *Viking Dodge* stated that the burden was on the taxpayer to establish that all factors were met.<sup>55</sup>

### C. Were the Cains’ Returns to Illinois Temporary or Transitory in Purpose?

Finally, having concluded that the Cains were now domiciled in Florida, the court set out to answer their second question, namely, whether the Cains’ frequent returns to Illinois were temporary or transitory in purpose?<sup>56</sup> If a visit to a state is temporary or transitory, then residency defaults back to the state of domicile. The Code provided examples for guidance as to what is considered temporary or transitory.<sup>57</sup> These examples weighed factors including time spent in a given state, declarations of residency, social clubs, business connections, and home ownership.<sup>58</sup>

The court interpreted these examples to mean that an individual who splits their time evenly between Illinois and another state will not automatically fall under the ‘temporary or transitory’ element of residency.<sup>59</sup> In fact, the court held that a nexus analysis was helpful when a timing analysis was indeterminate. The court concluded that the Cains had a stronger nexus with Florida than Illinois. The Cains spent more money on Florida social clubs, held drivers’ licenses and residency cards in Florida, voted in Florida, used a Florida telephone number, distanced themselves from Illinois companies, shifted charitable focus to Florida, spent more money in Florida, and purchased burial plots in Florida.<sup>60</sup> Once buried in

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52. *Id.*

53. *Id.* at ¶ 19, 975 N.E.2d at 326.

54. *Id.*

55. *Viking Dodge*, 497 N.E.2d at 1347.

56. *Cain*, 2012 IL App. (1st) 112833 at ¶ 22, 975 N.E.2d at 326.

57. *Id.*, at ¶ 21, 975 N.E.2d at 326 (citing 100.3020 Resident (ITA Section 301), ILL. ADMIN. CODE tit. 86 § 100.3020 amended 24 Ill. Reg. 10593, effective July 7, 2000).

58. *Id.*

59. *Id.*

60. *Id.*

Florida, Illinois would be hard pressed to argue the Cains were still Illinois residents.

Having concluded that the Cains' domicile was in Florida and that their frequent returns to Illinois were temporary or transitory in purpose, the Court held the Cains were residents of Florida for income tax purposes.<sup>61</sup>

The issue is not whether the court in *Cain* got the result correct. The issue is in the methodology the court used in determining first whether a change in domicile had occurred, and then whether the Cains' frequent returns to Illinois were temporary or transitory. Since domicile and temporary or transitory purpose are two individual components of residency, *Cain's* approach to each will be analyzed separately.<sup>62</sup>

### III. DOMICILE

Use of the concept of domicile has a long history in this country.<sup>63</sup> In *Lawrence v. State Tax Commission of Mississippi*, the U.S. Supreme Court stated "the obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state . . . to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits."<sup>64</sup> In *Curry v. McCannless*, the U.S. Supreme Court expanded the definition of domicile by adding that "it is undeniable that the state of domicile is not deprived by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax."<sup>65</sup> Taken together, *Curry* and *Lawrence* stand for the proposition that mere activities by the individual taxpayer outside of their state of domicile are not enough to defeat an individual's obligation to pay state taxes. Furthermore, the burden of proof is clearly on the party claiming a change of domicile.<sup>66</sup>

There are two important concepts that accompany the idea of domicile. The first is that the words domicile and home are not interchangeable. A home can be any fixed structure or abode that an individual either owns or occupies, including summer homes.<sup>67</sup> A person can own and occupy more than one home. Conversely, a person can have but one domicile.<sup>68</sup> A domicile is often described as the state where the

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61. *Id.*

62. *See supra* text accompanying note 8.

63. *E.g.*, *Murray v. Schooner Charming Betsy, The*, 6 U.S. 64 (1804) (explaining that the United States may only have jurisdiction to enforce its laws on an individual if they are domiciled in the United States).

64. *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932).

65. *Curry v. McCannless*, 307 U.S. 357, 368 (1939).

66. *E.g.*, *O'Boyle v. Pers. Bd. of City of Chicago*, 456 N.E.2d 998, 1003 (1983) (citing *Matter of Jackson's Estate*, 363 N.E.2d 919, 921 (1977)).

67. ILL. ADMIN. CODE tit. 86 § 100.3020(c)(2) (2013).

68. *E.g.*, *O'Boyle*, 456 N.E.2d at 1003 (1983).



individual has their principal permanent home.<sup>69</sup> Domicile has also been described as the place where an individual intends to return whenever they are absent.<sup>70</sup>

Proving a change in domicile is difficult because it is a subjective intent analysis that is often guided by objective indicators.<sup>71</sup> The Code has a two-part test for changing domicile. In order to lose an Illinois domicile, taxpayers must demonstrate that they relocated elsewhere with the intention of establishing the new location as their domicile, and the abandonment of any intention to return to their Illinois domicile.<sup>72</sup>

Illinois courts have created a separate common law test for changing domicile. As mentioned above, the four-part test relied on by the court in *Cain* is that a person cannot change their domicile unless they can establish (1) a physical abandonment of the old domicile, (2) an intent not to return, (3) a physical presence in a new domicile, and (4) an intent to make it a new domicile.<sup>73</sup> This four-part test gained traction in Illinois as a means of deciding domicile.<sup>74</sup>

#### A. Changing Domicile: The Two Tests and Abandonment Issue

The Code and the common law rules for changing domicile are similar but not identical. The Code states that a person must locate elsewhere.<sup>75</sup> That is essentially the same as the common law rule, which requires a physical presence in the new domicile.<sup>76</sup> Both state that an individual must intend to make the new residence their new domicile.<sup>77</sup> Also, both state that the individual must have an intention not to return to the old domicile.<sup>78</sup> However, the common law rule adds an additional factor,

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69. ILL. ADMIN. CODE tit. 86 § 100.3020(d) (2013).

70. ILL. ADMIN. CODE tit. 86 § 100.3020(d) (2013).

71. See *Viacom Inc. v. Flynn*, No. 96 C 3131, 1997 WL 97697, at \*7 (N.D. Ill. Feb. 27, 1997) (“In order to determine a person’s domicile, there must be an objective inquiry into the physical location of the person’s ‘true, fixed home and principal establishment,’ plus a subjective inquiry regarding the place ‘to which, whenever he is absent, he has the intention of returning.’”) (citations omitted).

72. ILL. ADMIN. CODE tit. 86 § 100.3020(d)(1)-(2) (2013).

73. See, e.g., *Stein v. Cnty. Bd. of Sch. Trustees of DuPage Cnty.*, 229 N.E.2d 165, 168 (Ill. App. Ct. 1967).

74. See *O’Boyle*, 456 N.E.2d at 1003; see also *Viking Dodge*, 497 N.E.2d at 1347.

75. ILL. ADMIN. CODE tit. 86 § 100.3020(d)(1) (2013).

76. See, e.g., *Viking Dodge*, 497 N.E.2d at 1347.

77. Compare, e.g., *Viking Dodge*, 497 N.E.2d at 1347 (stating that individual must have the intent to make a new domicile) with ILL. ADMIN. CODE tit. 86 § 100.3020(d)(1) (2013) (stating that and individual must intend to make the new location their domicile).

78. Compare, e.g., *Viking Dodge*, 497 N.E.2d at 1347 (stating that an individual must have the intent not to return to their first domicile) with ILL. ADMIN. CODE tit. 86 § 100.3020(d)(1) (2013) (stating that an individual must abandon the intention of returning to Illinois).

namely, that persons must actually show physical abandonment of their old domicile before they can establish a new one.<sup>79</sup>

The court in *Cain* struggled with this element before eventually abandoning it.<sup>80</sup> It struggled because the element is antiquated and no longer belongs in today's law. Black's law dictionary defines 'abandonment,' in relation to property, as the "relinquishment of or departing from a homestead, etc., with the present, definite, and permanent intention of never returning or regaining possession."<sup>81</sup> It could be argued that physical abandonment simply means the taxpayer must relocate to a new domicile. However, the common law test already includes a physical presence requirement in the new domicile.<sup>82</sup> So, what is meant by "physical abandonment of the first domicile"? Black's Law Dictionary requires that we must find an intention to never return to the former property.<sup>83</sup> This is confusing because people can legally own and have a physical presence in more than one house.

In fact, the Illinois common law requirement of an actual physical abandonment, when determining the validity of a change in domicile in Illinois, may trace back to *Hayes v Hayes*, an 1874 case, where the issue was whether Illinois or Iowa intestacy laws should be applied to distribute the decedent's assets.<sup>84</sup> That case was decided five years after the first transcontinental railroad was built in North America, thirty-four years before the Ford Model T, and almost forty years before the first commercial flight.<sup>85</sup> It is safe to say that today a retired person has considerably more mobility than retirees had in 1874. Today, a retired person can, and often does, use and maintain multiple properties in different states.

Just because the common law rule requiring an actual abandonment of a domicile is not perfect, does not mean that the Code's rule is. The second part of the rule states that the individual must abandon "any intention of returning to Illinois."<sup>86</sup> It is obvious that drafters were not taking the position that an individual can never again manifest the intention to step

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79. Requiring actual physical abandonment is only found in the common law test. See, e.g., *Viking Dodge*, 497 N.E.2d at 1347.

80. See *supra* text accompanying note 52.

81. *Abandonment*, BLACK'S LAW DICTIONARY (9th ed. 2009).

82. See *supra* text accompanying notes 76-80.

83. *Abandonment*, BLACK'S LAW DICTIONARY (9th ed. 2009).

84. See *Hayes v. Hayes*, 74 Ill. 312, 316 (1874) (explaining that to effect a change of domicile requires an actual abandonment of the old domicile).

85. See, e.g., *Transcontinental Railroad*, HISTORY CHANNEL, <http://www.history.com/topics/inventions/transcontinental-railroad> (last visited Oct. 28, 2014) (completed on May 10, 1869); *Model T*, HISTORY CHANNEL, <http://www.history.com/topics/model-t> (last visited Oct. 28, 2014) (car first manufactured in 1908); Susan Carey, *First Airline Offered No Frills, Many Thrills*, WALL STREET JOURNAL, <http://online.wsj.com/news/articles/SB10001424052702304361604579290493407153708> (last visited Jan. 1 2014 11:37 AM) (first recorded commercial flight offered on Jan. 1, 2014).

86. ILL. ADMIN. CODE tit. 86 § 100.3020(d)(2) (2013).

foot in Illinois. The drafters likely meant that even if an individual leaves Illinois, they will still be domiciled in Illinois if they believe there is a chance they will return to the state for the purpose of establishing a true fixed permanent home.<sup>87</sup> However, read plainly, this sentence does not totally clear up the issue of whether actual physical abandonment of an Illinois property is required. For this reason, it is understandable that courts still use the four-part test for changing domicile, which may have originated in *Hayes*.<sup>88</sup>

#### B. Changing Domicile-Intent Not to Return is an Indispensable Element

The second part of changing domicile is the intent not to return to the original domicile.<sup>89</sup> As mentioned above, both of the tests have this element.<sup>90</sup> In *Cain*, the court held that this element should not govern their analysis since the facts demonstrated that the Cains “maintained an intent to return to both Illinois and Florida for approximately half of their time throughout the relevant period.”<sup>91</sup> Their reasoning was based solely on the number of days spent in each state.<sup>92</sup> While time is clearly one objective factor in this subjective intent analysis, it is not the only one. In fact, the court used other factors in its temporary or transitory discussion which could have been parlayed to this one, namely, buying burial plots in Florida, obtaining Florida drivers licenses and I.D. cards, Florida cell phone numbers, putting an addition on their Illinois home, buying a plot to build a new home in Illinois, and others.<sup>93</sup> The court could have used these factors in determining whether the Cains really intended not to return to their Illinois domicile.

The biggest issue with the court discarding this element is that both the Code’s rule and the rule at common law require that this element must be met before taxpayers can change their domicile. The court in *Viking Dodge* states that all four elements are “required for a change in domicile.”<sup>94</sup> The Code uses the conjunction “and” which also indicates that this element is indispensable.<sup>95</sup> If the court did in fact find that this element was not met, or was inconclusive, then under either test, the Cains did not change domicile.

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87. The Code explains this in a hypothetical involving an individual that moves to California. ILL. ADMIN. CODE tit. 86 § 100.3020(d) (2013).

88. See *supra* text accompanying note 85.

89. ILL. ADMIN. CODE tit. 86 § 100.3020(d)(2) (2013).

90. See *supra* text accompanying note 79.

91. *Cain*, 2012 IL App. (1st) 112 833 at ¶ 19, 975 N.E.2d at 326.

92. *Id.*

93. *Id.*, at ¶ 4, 975 N.E.2d at 323.

94. *Viking Dodge*, 497 N.E.2d at 1347.

95. ILL. ADMIN. CODE tit. 86 § 100.3020(d)(1) (2013).

## IV. TEMPORARY OR TRANSITORY PURPOSE

No matter where individuals are domiciled, they may be subject to Illinois income tax if their visits to Illinois are not temporary or transitory in purpose.<sup>96</sup> The Code states that whether an individual's visits to Illinois "will be considered temporary or transitory in character will depend upon the facts and circumstances of the case."<sup>97</sup> The Department provides some examples of what is a temporary purpose.<sup>98</sup> For example, completing a particular transaction, going on vacation, and fulfilling a short term engagement are all considered to be for a temporary purpose.<sup>99</sup> The Department also lists some examples that are not temporary or transitory.<sup>100</sup> Examples here include improving one's health for an indefinite period, establishing a long or indefinite business arrangement, or being in a long or indefinite employment in Illinois.<sup>101</sup>

The court in *Cain* found the Code's "prefatory portion" unhelpful when determining whether an individual's visits to Illinois are for a purpose other than temporary or transitory.<sup>102</sup> However, the court found the examples listed within the Code to be instructive and employed a spectrum analysis to determine whether the Cains' visits were temporary or transitory.<sup>103</sup>

In addition to the spectrum analysis, the court attempted to balance the facts of this case and establish in which state the Cains had a stronger nexus.<sup>104</sup> They began by eliminating the time-splitting fact, noting that the examples provided in the code "make clear that this level of time-splitting does not render an individual's presence in Illinois other than 'temporary or transitory.'"<sup>105</sup> With this difficult fact removed, the court balanced the remaining facts and concluded that the Cains' visits to Illinois were for a temporary or transitory purpose.<sup>106</sup>

Both the spectrum analysis and the nexus analysis used by the court are directly in line with the Code's explanation of "temporary or transitory." The first three sentences of the "temporary or transitory" section provide a range of what is and what is not temporary.<sup>107</sup> This, with

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96. ILL. ADMIN. CODE tit. 86 § 100.3020(a)(1) (2013).

97. ILL. ADMIN. CODE tit. 86 § 100.3020(c) (2013).

98. ILL. ADMIN. CODE tit. 86 § 100.3020(c)(1)-(3) (2013).

99. ILL. ADMIN. CODE tit. 86 § 100.3020(c) (2013).

100. ILL. ADMIN. CODE tit. 86 § 100.3020(c)(1)-(3) (2013).

101. ILL. ADMIN. CODE tit. 86 § 100.3020(c) (2013).

102. *Cain*, 2012 IL App. (1st) 112833 at ¶ 21, 975 N.E.2d at 327.

103. *Id.* at ¶ 21, 975 N.E.2d at 327–28 (comparing all three examples in the Code to the facts of the case).

104. *Id.* at ¶ 21, 975 N.E.2d at 328–29.

105. *Id.* at ¶ 22, 975 N.E.2d at 328.

106. *Id.*

107. ILL. ADMIN. CODE tit. 86 § 100.3020(c) (2013).

the addition of the remaining examples, could be viewed as a spectrum that is being offered to the reader. Additionally, the nexus analysis is in line with the first sentence of the “temporary or transitory” section of the Code because it requires the reader to look at “the facts and circumstances of each particular case.”<sup>108</sup>

## V. JUDICIAL RESPONSES TO *CAIN*

Two recent residency cases following *Cain* are relevant. First, in *Grede v. Ill. Dep’t of Revenue*, the Second District Appellate Court was asked to determine whether an individual who moved to Hong Kong to help establish a new business, but kept his family in Illinois, had changed his domicile.<sup>109</sup> The court cited *Cain* noting that the First District did not apply the ‘intent not to return’ factor in its analysis.<sup>110</sup> However, *Grede* quickly dismissed *Cain’s* relevance to the case because there was no time-splitting issue that prevented the use of the “intent not to return” factor.<sup>111</sup> Thus, aside from noting a distinction, the Second District provided no insight into whether it agreed with how First District discarded the “intent not to return” element in *Cain*.

The court in *Grede* used many facts, including number of days spent in Illinois, when they decided whether the taxpayer had effectively changed his domicile. Mr. Grede clearly spent more time in Hong Kong during the time period in question.<sup>112</sup> However, the court did not determine that this conclusively established intent not to return to his Illinois domicile. Instead, the court considered additional facts before deciding the issue.<sup>113</sup> One of the major factors was that Mr. Grede did not move his family permanently to Hong Kong.<sup>114</sup> The Department argued this should be viewed as a fact evincing that the Grede’s had no intention of abandoning Illinois residency.<sup>115</sup> Coupled with other facts, the court agreed.<sup>116</sup> Nevertheless, the Department lost this case because the court determined that even though the Grede’s were domiciled in Illinois, Mr. Grede’s absences during the relevant period were more than temporary or transitory in purpose.<sup>117</sup>

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108. ILL. ADMIN. CODE tit. 86 § 100.3020(c) (2013).

109. *Grede v. Illinois Dep’t of Revenue*, 2013 IL App (2d) 120731-U.

110. *Id.* at ¶ 41.

111. *Id.* at ¶ 42.

112. *Id.* at ¶ 44.

113. *Id.* at ¶ 44–46.

114. *Id.* ¶ 52.

115. *Id.*

116. *Id.* at ¶ 55.

117. *Id.* at ¶ 56; see also 35 ILL. COMP. STAT. ANN. 5/1501(a)(20) (West 2012) (stating that the residency test concerning domicile is independent of the residency test concerning temporary or transitory purpose).

Second, in *Sweeney v Hamer*, the Cook County Circuit Court decided whether a person who moved from Illinois to Florida, but later bought an Indiana home for frequent business trips to Chicago where he spent considerable time running a company branch, was an Illinois resident.<sup>118</sup> This was predictable since Cook County Circuit Court falls within the First District, that the court adopted a test nearly identical to the common law test used in *Cain*.<sup>119</sup> However, unlike *Cain*, the court did weigh the factor of ‘intent not to return’ and concluded that since Sweeney purchased an Indiana home during the years in question, he clearly intended not to return to his Illinois domicile.<sup>120</sup> Still, the court cited *Cain* and stated that the court relied solely on “the concept of domicile as an intended permanent home,” which, it could be argued, demonstrates an approval of the methodology in *Cain* that disregarding certain factors is allowed.<sup>121</sup>

## VI. LEGISLATIVE AND ADMINISTRATIVE RESPONSES

Following *Cain*, the Department made three amendments to the Administrative Code Section 100.3020 to assist taxpayers in determining their residence under the Illinois Income Tax Act.<sup>122</sup> First, the Department eliminated the presumption that a person spending “in the aggregate more than nine months of any taxable year in Illinois,” will be presumed an Illinois resident.<sup>123</sup> This is no doubt a reaction to *Cain* since the Cains spent roughly half of the year in each state and the Department could have undoubtedly used this presumption to its benefit.<sup>124</sup>

The second amendment creates two rebuttable presumptions regarding Illinois residency. The first presumption is that an individual “receiving a homestead exemption” on any Illinois property is presumed to be a resident of Illinois.<sup>125</sup> This can be a trap for the unwary. Many counties in Illinois have a general homestead exemption that renews automatically.<sup>126</sup> No doubt, taxpayers attempting to change residency may find themselves

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118. Edmund Sweeney v. Ill. Dep’t. of Revenue, No. 2010 L 050524 (Cook Cty. Cir. Ct., June 26, 2013), available at [http://www.saltlawyers.com/media/74755/sweeney\\_-\\_residency\\_case.pdf](http://www.saltlawyers.com/media/74755/sweeney_-_residency_case.pdf).

119. *Id.* (analyzing numerous cases and concluding they would use all four elements of the common law test along with a fifth element requiring a physical presence in the new location).

120. *Id.*

121. *Id.*

122. ILL. ADMIN. CODE tit. 86 § 100.3020. Amended at 37 Ill. Reg. 5823, effective April 19, 2013.

123. For a review of the previous version of the Code, see 100.3020 Resident (ITA Section 301), ILL. ADMIN. CODE tit. 86 § 100.3020 amended 24 Ill. Reg. 10593, effective July 7, 2000.

124. See *supra* text accompanying note 52.

125. ILL. ADMIN. CODE tit. 86 § 100.3020(f)(1) (2013).

126. Many counties in Illinois automatically renew a homeowner’s exemption and state that it is the duty of the homeowner to notify the county of any changes. *General (Residential) Homestead Exemption*, The County of DuPage, <http://www.dupageco.org/SOA/1508/> (last visited Oct. 28, 2014); *Exemptions*, Cook County Treasurer’s Office, <http://www.cookcountytreasurer.com/exemptions.aspx>.

facing this presumption if they fail to proactively cancel their homestead exemption.

The second new presumption is that an individual who was a resident in the prior year, and who spent more days in the current tax year in Illinois than any other state, will be presumed to be an Illinois resident.<sup>127</sup> The Department expanded this in a general information letter stating that the presumption applies if a person is “present in Illinois more days than he was present in any other state during the year.”<sup>128</sup> As an example, a person that spends 160 days in Illinois, 150 days in Florida and 55 days in Wisconsin must overcome the rebuttable presumption of residency even though they spent more days outside of Illinois than in it.

Finally, the Department added four factors that it will strongly consider when determining residency in addition to the list of seven that already existed.<sup>129</sup> The seven existing factors were: affidavits, voter registration, automobile registration or driver’s license, filing a return in another state, home ownership or rental agreement, club or organizational membership, and telephone or other utility usage over time.<sup>130</sup>

The first addition to the list was the location of the taxpayer’s spouse and dependents.<sup>131</sup> This was likely in reaction to the Department’s partial victory in *Grede* when the court was persuaded by the fact that the taxpayer’s family stayed in Illinois even though the family discussed moving to China.<sup>132</sup> The second addition the Department will consider is the permanent or temporary nature of work assignments in a state.<sup>133</sup> This is a likely response to the Department’s loss in *Sweeney* where the taxpayer moved to Florida but spent considerably more time in Illinois making sure that his company’s Illinois branch was successful.<sup>134</sup> The third addition was the state where a person holds professional licenses.<sup>135</sup> This is potentially a response to *Cain*, where Mrs. Cain maintained an interior design license and indicated on her license renewal application that she was still an Illinois resident.<sup>136</sup> The final addition is the location of the taxpayer’s “medical professionals, other healthcare providers, accountants

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127. ILL. ADMIN. CODE tit. 86 § 100.3020(f)(2) (2013).

128. Ill. Dep’t of Revenue, Gen. Info. Ltr. IT 13-0008-GIL (Jun. 27, 2013).

129. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(1) (2013).

130. For a review of the previous version of the Code, see 100.3020 Resident (IITA Section 301), 86 IL ADC 100.3020 amended 24 Ill. Reg. 10593, effective July 7, 2000.

131. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(1) (2013).

132. See *supra* text accompanying note 115.

133. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(1) (2013).

134. See *supra* text accompanying note 119.

135. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(1) (2013).

136. See *supra* text accompanying note 37.

and attorneys.”<sup>137</sup> This has been a common factor in all three of the cases just mentioned.<sup>138</sup>

## VII. A GUIDE ON CHANGING RESIDENCY

What does all this mean for those who wish to change residency to another state and avoid Illinois income taxes? It is important to remember that even if individuals change domicile to another state, they still may be considered Illinois residents for income tax purposes if their visits to Illinois are for purposes other than temporary or transitory. Below is a list of suggestions that will aid an individual in persuading the Department that the person did establish domicile in another state, and that any returns to Illinois are temporary or transitory in purpose. The first two are the most critical and the remaining are important indicators. Please note, no individual item on this list is sufficient to prove a change in domicile and the absence of any single item is not itself conclusive. Even if an individual violates the first two, it only creates a presumption that can be rebutted by other evidence. However, those interested in establishing residency outside of Illinois should try to at least meet the first two.

### Most Critical:

1. Cancel your homeowners exemption on your Illinois Property.<sup>139</sup>
2. Retain proof that you spent more time in another state than in Illinois. This can be done by tracking purchases, utility usage, keeping journals, keeping plane tickets, etc.

If an individual either keeps their homeowners exemption, or spends more time in Illinois than another state, they should have their accountant follow the instructions described in the Code to avoid penalties.<sup>140</sup>

### Other Indicators:

3. Driver's license and ID cards
4. Home ownership, leasing, building additions, property and land purchases
5. Filing an income tax return as a resident of another state
6. Permanent or temporary nature of work and business ownership
7. Location of spouse and dependents
8. Declaring domicile
9. Location of medical professionals, other health providers, accountants, and attorneys.
10. Bank and brokerage accounts

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137. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(1) (2013).

138. Cain, 2012 IL App. (1st) 113833, 975 N.E.2d 321; Grede v. Ill. Dep't of Revenue, 2013 IL App (2d) 120731-U; Edmund Sweeney v. Illinois Dept. of Revenue, No. 2010 L 050524 (Cook Cty. Cir. Ct., June 26, 2013).

139. See *supra* text accompanying notes 126–27.

140. ILL. ADMIN. CODE tit. 86 § 100.3020(g)(3) (2013).



11. Voter registration
12. Automobile registration
13. Recreational licenses including fishing, boating and firearm licenses.
14. Club or organizational membership and participation
15. Telephone number
16. Location of professional licenses
17. Mail, newspaper and magazine subscriptions
18. Political contributions
19. Burial plots

### VIII. CONCLUSION

The court in *Cain* answered two residency questions. First, whether the facts indicated that the Cains had changed their domicile from Illinois to Florida.<sup>141</sup> Second, regardless of whether they changed their domicile to Florida, whether their returns to Illinois were temporary or transitory in purpose.<sup>142</sup> Additionally, there is no fault in the court's method of answering the second question. A spectrum analysis of the Code's examples, coupled with a nexus analysis of which state has the strongest bond, is a logical approach to determining whether an individual's visits to Illinois are temporary or transitory.

However, on the question of change of domicile, both the court's choice of the common law rule and the application of that rule could lead future Illinois courts astray. Choosing the common law rule brings about confusion. The element requiring a court to find a physical abandonment of the old domicile is an antiquated idea that has no place in today's highly mobile society.

Perhaps more damaging than choosing a confusing common law rule is eliminating an element essential to gauge a change of domicile. Since the Cains split their time equally between the two states, the court discarded the element of "intent not to return," focusing instead on the element of intent to establish a new domicile (principal home).<sup>143</sup> An individual can have but one domicile at a time.<sup>144</sup> Therefore, to change domicile, individuals must intend to establish their principal home in a new domicile and abandon the intention of returning to Illinois with the intention to establish a permanent home there. Both intentions must be present before persons can be said to change their domicile for income tax purposes. The absence of either

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141. *Cain*, 2012 IL App. (1st) 112833 at ¶¶ 14–20, 975 N.E.2d at 325–27.

142. *Id.* at ¶¶ 22–24, 975 N.E.2d at 327–29.

143. *Id.* at ¶ 18, 975 N.E.2d at 326.

144. ILL. ADMIN. CODE tit. 86 100.3020(d) (2013).

intention must lead to the conclusion that the taxpayer did not effectively change their domicile.

It is always possible for a person to simply declare residency in another state, but their actions may demonstrate that they always intended to return to their principal home in Illinois. Determining whether the individual fostered the requisite intent to abandon their home in Illinois is not rendered impossible simply because that individual splits their time evenly between two or more states. That is simply one factor, among many, that the courts may use.

Both the Code and the common law agree that a factor in changing domicile is that the taxpayer must have no intention to return to their last domicile.<sup>145</sup> Both are equally ambiguous as to how a court should work with this factor. A simple amendment could aid courts in approaching this element correctly.

At present, the second element for a change of domicile reads, “by abandoning any intention of returning to Illinois.”<sup>146</sup> If the words “for the purpose of establishing a principal and permanent home,” or something similar, were added, it would provide future courts with guidance on how to employ this element when called on to determine changes in domicile. This would help courts look past those situations in which an individual returns to Illinois for other purposes and avoid unnecessary crossover with the temporary and transitory test.

Home really is where the heart is. In the world of tax law, we simply think of this as intent. You cannot claim to change your residency, and avoid taxes, unless you truly believe in your heart that someplace other than Illinois is home. Both the Department and courts will face increased challenges in determining changes in domicile as more people retire. Regardless of how courts decide in the future, it is clear that both *Cain*, and the subsequent changes to the Code, will have a lasting effect on retirees seeking to avoid Illinois income tax.

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145. See *supra* text accompanying note 79.

146. ILL. ADMIN. CODE tit. 86 100.3020(d)(2) (2013).