

# MOVING FROM GOLD TO SILVER: BECOMING A NEVADA RESIDENT

BY DAVID M. GRANT, ESQ.

A gold rush motivated multitudes to migrate through Nevada on their way to California in the mid-1800s, inspiring California's nickname: the Golden State. Today, a reverse relocation of sorts is happening, as people trade the Golden State for the Silver State. While its crowded roadways and bulging urban areas may partially explain this inverse exodus, California's increased tax rates<sup>1</sup> are surely another major factor in some residents' decisions to abandon temperate coastal climes for a new life in the desert. This article will answer some of the more commonly-asked California state income tax questions associated with changing residency from California to Nevada.

## How can a state tax me in the first place?

In general, several states possess the constitutional power to tax all income of their residents, regardless of the source of that income, when those residents avail themselves of the privileges and protections of that state's laws.<sup>2</sup> Of course California has taken full advantage of those constitutional rights, taxing the entire income of its residents.<sup>3</sup>

## What makes me a resident of California?

California's definition of a resident includes:

1. Every individual who is in California for any amount of time other than for a temporary or transitory purpose; and
2. Every individual domiciled in California, who is outside the state for a temporary or transitory purpose.<sup>4</sup>

Under California law, a person who stays in the state for any reason other than a temporary or transitory purpose is a legal resident, subject to California taxation. Brief vacations or transactions in California — such as signing a contract or giving a speech — constitute temporary or transitory purposes that do not confer residency. However, nearly every other kind of visit can confer such a status, including going to California for health reasons, extended stays, retirement or employment requiring a long or indefinite stay. The California Franchise Tax Board (FTB) even collects state income tax from non-resident athletes and performers who earn any money while in California.<sup>5</sup>

It seems clear that when former Californians completely relocate themselves — along with their families, spouses, children and all property — to Nevada, and plan never to move back, California would have no further claim on them as residents. But what happens when someone doesn't sell his residence in the former state, returning to it from time to time for vacations or other reasons? Perhaps an executive takes a new full-time job in Las Vegas, but his children continue to attend school and live with their other parent in San

Diego? What about when a business owner retires from the business' day-to-day operations and moves to Reno, but continues to earn income from interests in her Sacramento-based company?

These questions are made tricky by several factors: the absence of a bright-line test, the aggressiveness of the FTB, the long-term nature of the FTB appeals process and the reality that subjective intent doesn't count for much. Unfortunately, only a few judicial decisions exist relating to the general questions of California residency.<sup>6</sup>

### How does California determine whether or not a visit has a temporary or permanent purpose?

The 1985 case *Corbett v. Franchise Tax Board* listed 29 different factors that the FTB uses to determine residency.<sup>7</sup> Not to be outdone, in 2003, the California State Board of Equalization heard *Appeals of Stephen D. Bragg*, and set forth the Closest Connection Test, to determine the state with which a person has the closest connection during the taxable year.<sup>8</sup> The *Bragg Appeal* added

19 more factors to be considered when determining residency, with weight given to particular factors depending on the totality of the circumstances. The author's synthesis of the *Corbett-Bragg* factors, which might be used to evaluate whether or not the overall presence of an individual in California is temporary or permanent, is as follows:

#### 1. Physical presence:

- The number of days spent within the state of California, weighed against the number of days spent within other states
- Where the taxpayer receives bills and personal communications

#### 2. Familial presence:

- Where the taxpayer's spouse/children reside
- Where children are born, married and raise their own families
- Where children attend school
- Where the taxpayer's family receives medical and dental care

#### 3. Property presence:

- Location of owned and rented real property, and where real property is owned in multiple states — the respective size/value may be a factor

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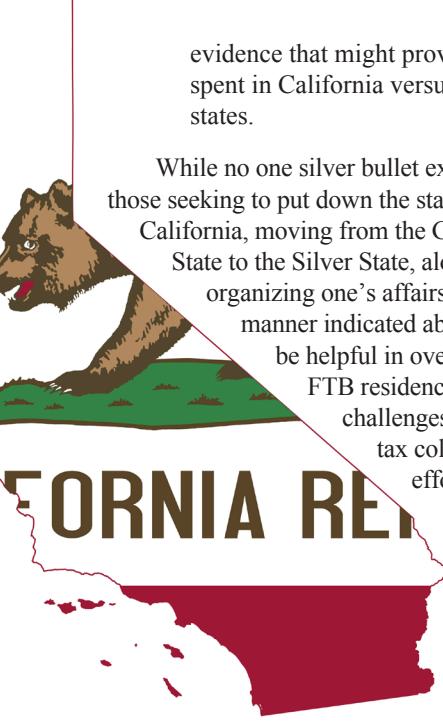


- b. Location of a home upon which the taxpayer claims homestead and tax exemptions
  - c. Location of vacation homes
  - d. Location of burial plots
  - e. Location of bank, checking, savings, credit accounts
  - f. Location of safe deposit boxes
- 4. Professional presence:**
- a. Where the taxpayer is employed and/or performs contracted services
  - b. Where the taxpayer is paid or receives substantial income
- c. Location of the taxpayer's family business or other business activities
  - d. Where the taxpayer serves as a director, officer or manager of a business
  - e. Where the taxpayer holds professional licenses and/or memberships
  - f. Where the taxpayer receives professional (*i.e.* legal, accounting or investment) services
- 5. Legal/Civic presence:**
- a. Where legal documents (*i.e.* trusts, wills, powers of attorney and contracts) are prepared and located
  - b. Where legal documents are to be given effect
  - c. Where tax returns are prepared and filed
  - d. Location of the taxpayer's automobile insurance/registration
  - e. Location of driver's licenses for both taxpayer and spouse
  - f. Where the taxpayer and spouse are registered to vote
  - g. Where the taxpayer and/or other witnesses may swear — through affidavit — that the taxpayer resides
  - h. Location of membership in social, civic or religious organizations and where donations are made thereto

## What other steps can be taken to protect from taxation in the State of California?

A recent legal victory,<sup>9</sup> coupled with innovative statutory law in Nevada, may provide hope that assets located in Nevada are safe from the taxing authority of California. Even so, you may want to take the following steps:

1. Update estate planning and testamentary documents in Nevada and consider replacing California trustees, attorneys-in-fact, executors and conservators with fiduciaries in other states;
2. Establish a Nevada self-settled spendthrift trust pursuant to NRS 166 and transfer your assets thereto;
3. Transfer your assets to a Nevada limited-liability company, limited partnership or closely held corporation, in order to receive Nevada's well-regarded charging order protection;
4. File partial year and final state income tax returns in California at the time of exit;
5. Record a Declaration of Domicile affidavit, pursuant to NRS 41.191; and
6. Be aware of credit/debit card transactions, travel records and other documented



evidence that might prove time spent in California versus other states.

While no one silver bullet exists for those seeking to put down the state of California, moving from the Golden State to the Silver State, along with organizing one's affairs in the manner indicated above, should be helpful in overcoming FTB residency challenges and unfair tax collection efforts. **NL**

1. Since 2012, the top marginal income tax rate payable by California residents has increased to 13.3 percent for incomes in excess of \$1,000,000.
2. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312 (1937).
3. Cal. Rev. & Tax Code § 17041. Credit may be given for taxes paid in other states. See Cal. Rev. & Tax. Code § 18001 et seq.
4. See Cal. Rev. & Tax. Code § 17014(a).
5. Commonly referred to as the Jock Tax, this practice began after the FTB sent tax bills to Michael Jordan and the rest of his Chicago Bulls teammates for all income received by the players during the Bulls' three-game visit to California during the 1991 NBA Finals.
6. See *Whittell v. Franchise Tax Board*, 231 Cal.App.2d at 284 (1964); and *Noble v. Franchise Tax Board* 118 Cal.App.4th 560 (2004).
7. *Corbett v. Franchise Tax Board*, 213 Cal. Rptr. at 893 (1985).
8. *Appeal of Stephen D. Bragg* 2003-SBE-002 (Cal.St.Bd.Eq.) (May 28, 2003).
9. See *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 and its progeny. In *Hyatt*, an individual who had recently moved to Nevada sued the FTB for its invasion of privacy, bad faith,

overreaching actions and other personal torts, as it went about building its tax case. The result was a Nevada civil verdict against the FTB in the amount of nearly \$400 million, which currently remains under appeal. It is the author's belief this case should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency.

**DAVID M. GRANT** is an

estate planning attorney at the law firm of Grant Morris Dodds, a firm specializing in trusts, probate and guardianship, with offices located in Las Vegas and Henderson. He can be reached at (702) 938-2244 or [david@gmdlegal.com](mailto:david@gmdlegal.com). The author gratefully acknowledges the editorial contributions of Mark A. Solomon, Esq., of Solomon Dwiggins & Freer, and Jason Aivaz, Esq. of Grant Morris Dodds.



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