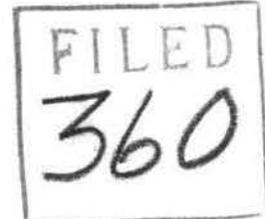


PUBLIC OFFICERS: Person elected to nonpartisan Circuit Judicial  
OFFICERS: Commission residing within such district at the  
NONPARTISAN COURT PLAN: time of election who later removes his residence  
JUDICIAL COMMISSIONS: to a place not within such district is not  
CONSTITUTIONAL LAW: qualified to continue as a member of such Circuit  
RESIDENCE: Judicial Commission.  
DOMICILE:

OPINION NO. 360

November 25, 1964



Honorable Edward M. Ruddy, Chairman  
22nd Circuit Judicial Commission  
Civil Courts Building  
St. Louis, Missouri

Dear Judge Ruddy:

This opinion is being rendered pursuant to your request for an official opinion of this office as follows:

"The 22nd Circuit Judicial Commission established and organized pursuant to the provisions of Article V, Section 29 (a)-(g) and Supreme Court Rule 10 desires your opinion as the Chief Legal Officer of this State on the following matter which is now confronting the Commission.

"Charles A. Mogab, a lawyer elected member of the Commission, was so elected by the members of the Bar of this State residing in the 22nd Judicial Circuit in November 1961 and took office January 1, 1962. At the time of his election he was a resident of the 22nd Judicial Circuit living with his wife and children at 6415 Devonshire Avenue. We understand that he registered as a voter from this address.

"Recently he purchased a home on Spuede Lane in St. Louis County which is outside the boundaries of the 22nd Judicial Circuit. We understand that he is living there with his wife and children and that he and his wife are not separated or living apart. We further understand that they intend to live there indefinitely and that he and his wife and children have abandoned and severed all connections with his former home at 6415 Devonshire Avenue.

"We are further informed by Mr. Mogab that he is now registered as a voter from 3716 Delor Street in the 22nd Judicial Circuit which we have been advised by him is the home of his brother.

"The question of his right to continue as a member of the 22nd Circuit Judicial Commission because of the above change in the matter of his home as outlined has been raised by some of the members of the Commission.

"Mr. Mogab contends that he is still a resident of the 22nd Judicial Circuit and makes the alternative contention that if it is found that he does not reside in the 22nd Judicial Circuit that, nevertheless, he is entitled to continue as a member of the Commission giving as his reason that having possessed all of the necessary qualifications at the time of his election to the Commission he is entitled to serve as a member of the Commission until his term expires on December 31, 1967.

"He has agreed to supply a written statement of facts concerning his contention and his position. Just as soon as this is received it will be forwarded to your office to be considered by you as a part of this letter and as if incorporated herein. We ask your opinions on the following questions:

- "(1) Whether or not Mr. Mogab, under his present circumstances is now residing in the 22nd Judicial Circuit?
- "(2) If it is found that he is not residing in the 22nd Judicial Circuit then whether or not he is entitled to continue as a member of the 22nd Circuit Judicial Commission."

The facts in this matter have been difficult to obtain, in that certain questions propounded by this office to Mr. Mogab in an endeavor to clarify his statement of facts have not been answered as of the writing of this opinion. Therefore, we will of necessity have to make certain basic additional factual

assumptions, and where we do so, we will underline same so as to distinguish them from relevant facts supplied by Mr. Mogab. All of these factual assumptions are consistent with the facts as stated by him.

#### THE FACTS

Charles A. Mogab is a practicing member of the Missouri Bar with offices in the City of St. Louis. Since November, 1960, he has served as a lawyer-member of the 22nd Judicial Circuit Commission. From 1953 until June 2, 1964, he lived with his wife and daughters at 6415 Devonshire, City of St. Louis.

On June 2, 1964, he purchased a home in St. Louis County (15 Spodee Lane) and moved with his family to that address. Having sold his home in the City, he transferred his voting registration from 6415 Devonshire to his brother's house at 3716 Delor, City of St. Louis.

Mr. Mogab stays at his Delor address a small part of the time. However, he still lives with his wife and children and spends the major portion of his non-working hours with his family at the residence in St. Louis County.

Mr. Mogab states that he "intends" to maintain his "actual and legal" residence in the City of St. Louis, but this residence is technical in nature and his actual residence for the purposes of day-to-day living is in St. Louis County.

#### THE LAW

Section 29 (d), Article V, Constitution of Missouri, 1945, which deals with the number, qualification, selection, and terms of members of nonpartisan judicial commissions provides in part:

"Non-partisan judicial commissions whose duty it shall be to nominate and submit to the governor names of persons for appointment as provided by sections 29 (a)-(g) are hereby established and shall be organized on the following basis: for vacancies in the office of judge of the supreme court or of any court of appeals, there shall be one such commission, to be known as 'The Appellate Judicial Commission'; for vacancies in the office of judge of any other court of record subject to the provisions of sections 29 (a)-(g), there shall be one such commission,

to be known as 'The . . . . . Circuit Judicial Commission,' for each judicial circuit which shall be subject to the provisions of sections 29 (a)-(g) \* \* \*. \* \* \* each circuit judicial commission shall consist of five members, one of whom shall be the presiding judge of the court of appeals of the district within which the judicial circuit of such commission or the major portion of the population of said circuit is situated, who shall act as chairman, and the remaining four members shall be chosen in the following manner. The members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number to serve as members of said commission, and the governor shall appoint two citizens, not members of the bar, from among the residents of said judicial circuit, to serve as members of said commission; the terms of office of the members of such commission shall be fixed by the supreme court and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office."  
[Emphasis ours.]

It is seen that the two elected members of each Circuit Judicial Commission must reside in the judicial circuit of such commission in order to qualify. We shall now consider what the residence requirement in the above constitutional provision means.

In construing statutes, a basic rule of construction (incorporated in Section 1.090, RSMo) is to give words and phrases (other than technical ones) their plain, ordinary and usual meaning with a view to promoting the apparent objective of the law-makers. And this rule is equally applicable to construction of constitutional provisions. Rathjen v. Reorganized School District R-II, 365 Mo. 518, 284 S.W. 2d 516. Technical words are those pertaining to useful or mechanical arts, or any science, business, profession, sport, or the like.

"Residence" may mean something more than domicile, Rummel v. Peters, 51 N.E. 2d 57, 314 Mass. 504, and in this constitutional provision, we feel that it does mean more than technical domicile. The language employed can mean only that those members of the bar who actually and in good faith live and maintain their homes in the judicial circuit shall constitute the electorate to select

two of their number -- that is, two of those who in truth and in fact reside therein -- to serve on the commission. Such is the plain, ordinary and usual understanding of the word. A man's residence is where he dwells and is ordinarily the place where his wife and children reside. D'Elia and Marks Co. v. Lyon, D.C. Mun. App., 31 A 2d 647, 648; Fink v. Katz, D.C. Mun. App., 68 A 2d 813, 815.

This constitutional provision provides that:

" . . . the members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number \* \* \*"

Why did the provision not merely require the members of the bar of this state practicing or having offices in the judicial circuit of such commission elect two of their number? Irrespective of the reason, a choice was made here and the constitutional provision makes the requirement that members residing in the district elect one of themselves to the circuit judicial commission.

Section 1.020, RSMo, provides:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

\* \* \* \* \*

"(9) 'Place of residence' means the place where the family of any person permanently resides in this state, and the place where any person having no family generally lodges; \* \* \*."

This provision, strictly speaking, would not apply to construction of the constitution; however, it is worthy to note that when Article V, Section 29 (d), was adopted, the above rule of statutory construction was in effect. It follows that the term "residing in" would have been given further attention if it were intended to have a meaning different from the usual construction.

We are, therefore, of the opinion that under the factual situation set out above, Mr. Mogab is no longer a resident of the 22nd Judicial Circuit.

However, even if we accept the concept of "residence" being the equivalent of "domicile," the above stated facts fail to demonstrate that Mr. Mogab is still "domiciled" in the 22nd Judicial Circuit.

The concept of domicile has been before the courts of Missouri in innumerable cases. We here set out excerpts and principles of law from a few of the cases which we believe to be pertinent to the present situation.

Two fundamental elements are essential to constitute domicile or residence: (1) Bodily presence in a place; (2) The intent of remaining in that place permanently or for an indefinite time. *Phelps v. Phelps*, 246 S.W. 2d 838; *Barth v. Barth*, 354 Mo. App. 402, 189 S.W. 2d 451; *In Re Lankford's Estate*, 272 Mo. 1, 197 S.W. 147; *In Re Ozias' Estate*, 29 S.W. 2d 240; *Schneider v. Friend*, Mo. App., 361 S.W. 2d 308, 311. While bodily presence is one of the elements of residence or domicile, the length of time of bodily presence, however short, is of no consequence (*Nolker v. Nolker*, 257 S.W. 798), provided the concurring intent is established by other evidence. In *Barth v. Barth*, supra, 189 S.W. 2d, l.c. 454, the St. Louis Court of Appeals held:

"To create a residence in a particular place two fundamental elements are essential. These are actual bodily presence in the place, combined with a freely exercised intention of remaining there permanently, or for an indefinite time. Whenever these two elements combine a residence is created. Neither bodily presence alone nor intention alone will suffice to create a residence. Both must concur, and at the very moment they do concur a residence is created. The length of the period of bodily presence, however short, is of no consequence, provided the concurring intention is established by other evidence. Otherwise it may become an important fact for consideration in determining the existence or not of the intention."

In most cases the requirement of bodily presence is not too difficult to determine. The usual difficulty is determining whether the necessary intent is present. The intent of the individual whose residence is in question is to be deduced from all the surrounding circumstances, acts, and utterances of such person.

"Residence is largely a matter of intention."  
[Citations omitted.]

"This intention is to be deduced from the acts and utterances of the person whose residence is in issue." In Re Lankford's Estate, supra, pages 148, 149.

As stated by the Kansas City Court of Appeals in the case of In Re Ozias' Estate, supra, page 243, when considering the problem of residence:

"The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in Re Estate of Lankford, 272 Mo. 1, 197 S.W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person. Residence and domicile are used interchangeably, and, in so far as they apply to the situation here presented are synonymous.

"'Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.'

"Bouv. Law Dict., Vol. 1, page 915. \* \* \*"

If a discrepancy exists between the declarations of intent of the individual whose residence is in question and the conduct of the individual, the conduct is deemed to show the true intent and the declarations yield to the inference derived from such conduct. Barrett v. Parks, Mo., 180 S.W. 2d 665, 666.

See also State ex inf. McKittrick ex rel. Chambers v. Jones, 185 S.W. 2d 17, 353 Mo. 900; In Re Toler's Estate, 325 S.W. 2d 755.

Section 1.020, RSMo 1959 (above quoted) illustrates the importance of the place of residence of the family of the person whose domicile or residence is in question. The removal of one's family is a very important indication of intent in determining whether there has been a change of residence, McDowell v. Friedman Brothers Shoe Company, 115 S.W. 1028, 135 Mo. App. 276. There are numerous Missouri decisions which have considered the place

where the family of a married man lives, when such married man is not estranged from his family, as being of vital importance in determining such a man's residence. See State ex rel. Ramey v. Dayton, 77 Mo. 678; State v. Snyder, 182 Mo. 462, 82 S.W. 12.

There are, of course, exceptional situations such as in Barrett v. Parks, 180 S.W. 2d 665. There, Mr. Parks was required by his employer, the City, to live at the airport in St. Louis County for the more efficient discharge of the municipality's public purposes and necessities, and for that reason alone, he and his family lived at the municipally owned residence provided by the city. Such residence by Parks was clearly temporary in nature and did not negative nor was it inconsistent with his continued intention to retain his municipal citizenship (which was a charter-prescribed condition of employment). No comparable necessitous situation exists as to Mr. Mogab.

Proof of maintenance of a home and family in St. Louis County in which Mr. Mogab spends the major portion of his non-working hours is very persuasive in showing that he resides in St. Louis County under the above quoted authorities, and, considered in the light of all the facts, leads this office to the opinion that Mr. Mogab is no longer a resident or domiciliary of the 22nd Judicial Circuit.

The fact that Mr. Mogab stays at the Delor address of his brother a small part of the time, apparently for reasons of convenience, does not negative the basic fact that his actual home is in St. Louis County. In our opinion, Mr. Mogab resides in St. Louis County where he actually lives and where he maintains a home for and with his family.

Your next question is whether as the result of his change of residence, Mr. Mogab is entitled to continue as a member of the 22nd Judicial Circuit Commission. In our opinion, he is not.

The determination of this question involves a construction of the constitutional provision and a determination of its intent and purpose. Under the provisions of Article V, Section 29 (d), a Circuit Judicial Commission consists of five members, two of whom are elected by the members of the bar residing in the Judicial Circuit, two of whom are appointed by the Governor "from among the residents" of the circuit and the fifth member is the presiding judge of the Court of Appeals of the district in which the Judicial Circuit is situated.

As to all members other than the presiding judge, residence

within the Judicial Circuit is a necessary qualification. As to the members elected by the bar, it is significant that only those who reside within the circuit may vote and that they are authorized to elect only those who constitute "two of their number".

The obvious purpose is to have two resident members of the bar to act as the representatives of the entire group of resident members of the bar; that is, in lieu of resident lawyers themselves participating in the selection of nominees to fill a vacancy, two of their number act in their stead. In this context, it would appear evident that unless the representatives of the bar possess the requisite qualifications, not merely at the time of election, but at the time they are to act in behalf of the bar as a whole, the very purpose of the constitutional provision would be defeated. Surely, if a lawyer member of the Commission were suspended from practice or disbarred, it could not reasonably be said that he should nevertheless be entitled thereafter to participate in the nominating process as a member of the bar residing in the Circuit. Residence within the Circuit is of equal importance under the constitutional provision with membership in the bar. The mere fact that the change of residence is to a nearby Circuit instead of one far distant, or even to another state or country, in no way affects the principle involved.

We note that the lay representatives on the commission must also be appointed from "among the residents" of the Circuit. This fortifies our opinion that residing within the Circuit is a necessary qualification, not merely to election or appointment, but to the right to hold the membership and to participate in its important functions. Section 29 (d) contains the further provision: "No member of any such commission shall hold any public office, and no member shall hold any official position in a political party". Surely, it could not reasonably be contended that if a member were to be elected to a party office, he would still be qualified as a member of the commission for the remainder of his term.

Note should also be taken of the fact that the fifth member of the commission is the presiding judge of the Court of Appeals. There is no specific language in the constitution which would vacate the membership of a presiding judge when he ceases to hold that position. Yet, no one would seriously urge such was not the law. Just as continuing in the office of presiding judge of the Court of Appeals is a necessary qualification for any such

person to continue to participate in the functions of the commission at any given time, so too must residence within the Circuit continue to exist in order that a lawyer member may participate in such functions during the time for which he was elected.

Although there is no case directly in point, it is worthwhile to compare the case of State ex rel. Johnson v. Donworth, 127 Mo. App. 377, 105 S.W. 1055, subsequently cited with approval and followed by the Supreme Court En Banc in the case of State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S.W. 2d 929. The Donworth case held that an alderman of a city of the 4th class who moved out of the ward he was elected to represent thereby lost his qualifications for such office, one of which was that he must be a resident of the ward. The court held that the requirement that he be a resident of the ward from which he was elected is no less imperative than the requirement that he be a citizen of the United States, or a resident of the city, and that a continuation of such qualifications is required in order to entitle one elected as an alderman to remain as such.

In view of the foregoing, it is our opinion that a member of the commission, other than the presiding judge, who ceases to be a resident of the Judicial Circuit, is no longer qualified to participate in the nomination process.

#### CONCLUSION

It is the opinion of this office that Mr. Charles A. Mogab is not a resident of the 22nd Judicial Circuit and, therefore, is not qualified to continue as a member of the 22nd Circuit Judicial Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Yours very truly,

THOMAS F. BAGLETON  
Attorney General