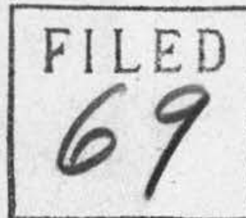
DIVISION OF WELFARE:
RESIDENCE OF DEPENDENT CHILDREN:

To establish residence requires actual bodily presence in this state for one year combined with intention of remaining permanently or indefinitely, but continuous bodily presence is not (required if residence had been previously established in this state.

December 30, 1949



1/3/50

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

I.

We hereby acknowledge a request for an opinion from this office upon the following question:

> Does the residence requirement pertaining to aid for dependent children require actual physical residence within the State of Missouri for one whole year preceding the filing of an application?

II.

The 65th General Assembly of this state enacted Senate Bill No. 68, which repealed Section 9408, R. S. Mo. 1939, relating to and prescribing eligibility requirements for aid to dependent children benefits and enacted in lieu thereof two new sections relating to the same subject matter to be known as Sections 9408 and 9408a.

This section, 9408, as now in effect, provides:

> "Aid to dependent children shall be granted to a parent or other relative as herein specified for the benefit of any child who:
>
> (We have here omitted subsections 1 and 2 of Senate Bill No. 68)
>
> "(3) has resided in the state for one year immediately preceding the application for benefits, or who was born within the state within one year immediately preceding the application and whose mother has resided in the state for one year immediately preceding the birth."

When the young lady mentioned in your letter applied for aid for her dependent children one of the questions that the Division of Welfare had to decide was whether or not the child had been a resident of the State of Missouri for one year, that is, 365 days, immediately preceding the application for benefits; or if the child had been born within one year immediately preceding the application; or whether the mother of the child had resided in the state for one year immediately preceding the birth of the child. The question of residence is one of fact, which is often difficult to determine, and each case must be determined upon its own individual set of facts. This office can only give the general rule of law to be followed in determining the question of residence.

Section 655, R. S. Mo. 1939, provides:

> "The construction of all statutes of this state shall be by the following additional rules unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute: * * *seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons, respectively."

This statute does not clearly state the rules or facts necessary to establish residence in the State of Missouri.

The Supreme Court of Missouri in the case of State v. Wiley, 160 S.W.(2d) 677, l.c. 686, 349 Mo. 239, considers the question of whether or not Wiley had established residence in DeKalb county for one year so as to be qualified to serve as prosecuting attorney of that county in this state. The court said that the evidence in this case showed no more than a future intention to locate in DeKalb County and that such intention was unaccompanied by any present acts or conduct evidencing a present intention to establish residence. The court said:

> "* * *In none of the cases relied upon does the court indicate that intention, separate and apart from actual presence, to-wit, staying or abiding, controls. On the other hand the authorities indicate that, when one claims to have established a new residence, there must be a concurrence of physical acts evidencing such intent, such as physical presence or actual habitation in the place claimed as the place of residence, and the present intention evidenced by conduct or

> utterances there to remain indefinitely, or for a fixed time and then and there to establish residence.
>
> "(8) We hold that respondent Wiley was not a bona fide resident of DeKalb County for twelve months immediately preceding the general election held on November 5, 1940. * * *"

This case is cited with approval by the Supreme Court in the case of State v. McKittrick, 185 S.W.(2d) 17, l.c. 21, 353 Mo. 900.

Section 1517, R. S. Mo. 1939, provides that:

> "No person shall be entitled to a divorce from the bonds of matrimony who has not resided within the state one whole year next before filing of the petition, unless the offense or injury complained of was committed within this state or whilst one or both of the parties resided within this state."

A leading case construing this residence requirement is Barth v. Barth, 189 S.W.(2d) 451, in which the St. Louis Court of Appeals said:

> "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. The residence of a soldier in the military service of his country generally remains unchanged though he may be temporarily stationed in the line of duty at a particular place, even for a

> period of years. This is so because he acts under military orders, and not of his own volition. He may, however, acquire a new residence if both the fact and the intention concur. Trigg v. Trigg, 226 Mo. App. 284, 41 S.W.(2d) 583; Matthews v. Matthews, 224 Mo. App. 1075, 34 S.W.(2d) 518; Bradshaw v. Bradshaw, Mo. App., 166 S.W.(2d) 805; Nolker v. Nolker, Mo. Sup.,257 S.W. 798; State ex rel. Taubman v. Davis, 199 Mo. App. 439, 203 S.W. 654; Finley v. Finley, Mo. App., 6 S.W.(2d) 1006; Dorrance v. Dorrance, 242 Mo. 625, 148 S.W. 94."

We believe that this case clearly states the rule in Missouri as to the requirements to create a residence in this state, and that this case and the Wiley case would be followed by the courts in construing the provision for residence stated above in Section 9408, as enacted by the recent 65th General Assembly.

Your subsequent letter of December 16th carries additional facts in regard to your question and from this letter I assume that the mother of the child was a resident of McDonald county and the State of Missouri prior to her marriage and for a short time after her marriage as defined by the above cases and the statute cited; that during the past three years said mother would come back to your county and stay with her parents for two or three weeks at a time; that she and her husband did not establish a permanent residence in any other state and that she had no intention of remaining away from your county and this state permanently or for an indefinite time, and that she has actually been present in this state since June, 1949.

The leading case on the question of maintaining an established residence in this state is Trigg v. Trigg, 41 S.W.(2d) 583. In this case an army officer filed suit for a divorce in Kansas City, Missouri, where he had established residence in 1917, and thereafter was sent by the United States Army to various army posts in the United States where he lived with his wife until their separation in 1929. His wife contested the divorce on the ground that he had not been a resident of the state of Missouri one whole year next before the petition for divorce was filed. The divorce petition was filed in October, 1929. He had not been in Kansas City for three years prior to the filing of the divorce petition. The court held:

> "The injury complained of was not committed within this state, and the plaintiff was required to allege and prove that he had resided within the state the required time. * * *

* * * * * *

"There is no evidence of an intent or act on the part of plaintiff to change his residence after it was re-established in Kansas City, and before the institution of this action."

The defendant contended that because of the absence of the plaintiff from the state, plaintiff was not a resident of the state as commonly understood but that the statute requires the actual bodily and physical presence of the plaintiff within the state for one whole year before the suit is instituted.

The court further said:

"* * *We cannot agree that such is the law, but interpret the section of the statute in question to mean that if a person has become a resident of the state and remains so without change for the required period he does not lose his right of action for divorce merely because he was not physically present continuously within the state one whole year before filing a petition. * * *Residence is neither gained nor lost by merely crossing the state line. * * *

"We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in conformity with such intention, and that a residence once established within this state and not thereafter changed is sufficient for the maintenance of a divorce action, notwithstanding the physical absence of the resident for a short or long period. In the case of an army officer it would be peculiarly arbitrary and unjust to deny him the right accorded any other citizen merely because of his physical absence from the state in the performance of his duty as a soldier. His absence is not of his own volition, but is occasioned by necessary obedience

> to martial orders. The continuity of residence is not broken by a mere bodily absence from the state. Appellant says that no case has been found where the facts are exactly like the ones involved here. Residence involves a question of fact controlled mainly by intention. The trial court determined this question upon substantial proof and we see no reason to interfere with the finding made. The following authorities support the conclusions which we have reached and stated above: State ex rel. v. Shepherd, 218 Mo. 656, 666, 117 S.W. 1169, 131 Am. St. Rep. 568; Humphrey v. Humphrey, 115 Mo. App. 361, 363, 91 S.W. 405, and cases cited; In re Kalpachnikoff (D.C.) 28 F.(2d) 288; Ex parte White (D.C.) 228 Fed. 88; Ruling Case Law, Vol. 9, page 551; Harris v. Harris, 205 Iowa, 108, 215 N.W. 661; Stevens v. Allen, 139 La. 658, 71 So. 936, L.R.A. 1916E, 1115; Johnston v. Benton, 73 Cal. App. 565, 239 P. 60; Pendleton v. Pendleton, 109 Kan. 600, 201 P. 62; Walton v. Walton (Mo. App.) 6 S.W.(2d) 1025; Nolker v. Nolker (Mo. Sup.) 257 S.W. 798. The plea to the jurisdiction was properly denied."

The case of Bradshaw v. Bradshaw, 166 S.W.(2d) 805, follows the Trigg v. Trigg case, supra, and supports the holding therein as to the elements necessary to maintain a residence once established in this state.

In the case of Lewis v. Lewis, 176 S.W.(2d) 556, the question of whether the plaintiff in a divorce action had been a resident of Harrison county, Missouri, for one whole year next before filing the divorce petition was considered. The plaintiff in this case had established his residence in that county before his marriage and then lived in other states while he was a member of the United States Air Force and while in the Diplomatic Service of the United States. The plaintiff from 1919 until 1942 had not actually lived in Harrison county, Missouri. The court held that if his domicile or residence was actually in Missouri prior to his marriage then a declaration on his marriage application that he was a resident of California would not be sufficient to establish California as his domicile and that physical absence from this state for a period of more than twenty years, under circumstances here shown, is not alone sufficient to deprive one of a residence once established. The court cited Trigg v. Trigg, supra, and followed this case on the question of losing an established residence in this state.

III.

CONCLUSION

It is, therefore, the opinion of this office that to establish residence as required in Section 9408, as enacted by Senate Bill No. 68 of the 65th General Assembly, requires actual bodily presence in this state for a period of one year immediately preceding the application for benefits, combined with a freely exercised intention of remaining here permanently or for an indefinite time, and a dependent child or parent of such a child could not live outside the State of Missouri during the period of one year immediately preceding the application for benefits unless residence in this state had been previously established.

If the applicant for benefits had an established residence in this state and did not establish a residence in another state then it would not be necessary for the applicant to be physically present within this state continually during the previous year before making the application for benefits.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

SJM:mw