

Opinion No. 27

**Residence—Employment Outside State—Fish and Game Residence—
Section 26-202.3, Ch. 267, L. 1955**

Held: A resident of Montana does not lose his residence by being employed outside the State of Montana.

A resident of Montana who has resided six months or more and who is absent from the state prior to his making application for a resident fish and game license, need not reside six continuous months after his return before he is eligible for a resident's license.

September 9, 1957

Mr. Gordon T. White
County Attorney
Glasgow, Montana

Dear Mr. White:

You have requested my opinion concerning a resident of Valley County, Montana, who left the state to engage in construction work

in Wyoming and California from November of 1956 until April 30, 1957. The person returned to Montana May 1, 1957, and applied for and received a resident fish and game license on May 21, 1957. You wish to know whether the person lost his Montana residence by accepting employment outside the state, and, whether he must reside in Montana continuously for six months from May 1, 1957, to be eligible for a resident fish and game license.

The determination of when a residence is gained or lost requires a distinction to be made between residence and domicile. In *Rawstone v. Maguire*, 192 N. E. 294, 265 N. Y. 204, the court stated: ". . . Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile . . ." The distinguishing factor between residence and domicile is intention: "For residence there is an intention to live in the place for the time being. For the establishment of domicile the intention must be not merely to live in the place but to make a home there." See, Beale, *Conflict of Laws*, Vol. 1, Sec. 10.3, p. 109.

Section 83-303, RCM, 1947, enunciates several rules to determine a person's residence and provide in part:

"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

2. There can only be one residence.

3. A residence cannot be lost until another is gained.

* * *

7. The residence can be changed only by the union of act and intent."

In *State ex rel. Dickworth v. District Court*, 107 Mont. 97, 101, 80 Pac. (2d) 367, the court referred to the above section and stated:

"Our Legislature in declaring these rules for determining residence has adopted the rules which courts generally prescribe with reference to the rules of determining domicile; hence the decisions with reference to the rules for determining domicile are clearly in point." See, also, Beale, *Conflict of Laws*, Vol. 1, Sec. 10.3 p. 110.

Residence is where one returns when special or temporary purposes are completed. A new residence cannot be changed unless the act and intent are present. In *Herrin v. Herrin*, 103 Mont. 469, 473, 63 Pac. (2d) 137, the court stated: ". . . 'A Change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained.'" See, also, in *re Coppock's Estate*, 72 Mont. 411, 436, 234 Pac. 258. Thus, your question whether

a Montana resident has lost his residence by being employed outside of this state has reference to his domicile.

In *Pioneer Southwestern Stages v. Wicher*, 50 F. (2d) 582, a person having resided in California three years accepted employment in Oklahoma. A suit in federal court was initiated shortly thereafter and the question of diversity of citizenship was raised. The defendant contended the plaintiff had lost his citizenship in California by accepting employment in Oklahoma. The court denied this argument and stated:

“. . . He had a right to such employment in a new place without changing domicile and without losing citizenship in California, and his domicile would remain there until a new one was acquired. Citizenship means membership in the political civil community of a state, and entitled one to its privileges.”

In *United States v. Knight*, 291 F. 129, 133, an Englishman became a citizen and received his final papers in Helena, Montana. Eleven months later he accepted employment in South Africa for twelve years. An attempt to revoke his citizenship resulted in the court holding:

“A change of abode with present intent to return to the former abode upon the contemplated happening of an event in the indefinite future, as business dispatched, health recovered, employment ended, employer’s recall, is not a change of residence or domicile. If, however, a person removes to another place with present intent to abode there indefinitely, and not merely until the contemplated happening of a contingency as aforesaid, he abandons, his old residence or domicile in the place from which he removed, and acquires a new residence or domicile in the place to which he removed, notwithstanding he may entertain a vague, floating intent or hope to some time return to the former place.” See, also, *Shenton v. Abbott*, 15 A. (2d) 906, 908, 178 Md. 526.

Therefore, a resident of Montana, one whose domicile is this state, does not ipso facto forfeit his residence by being employed outside the state. Physical presence is one element necessary to create a new domicile but not to maintain it once the domicile has been established. See, *Pignatelli v. Pignatelli*, 8 N. Y. S. (2d) 10, 13, 169 Misc. 534. As stated in *re Takahashi’s Estate*, 113 Mont. 490, 497, 129 Pac. (2d) 217: “. . . The fact of residence, of course, must be determined in each case from the evidence adduced, and by the application thereto of ordinary rules of evidence.”

Your second inquiry is whether a resident of Montana who has worked outside the state must reside, upon his return, for a continuous period of six months before he is eligible to obtain a resident hunting and fishing license. Section 26-202.3, Chapter 267, Laws of 1955, defines a resident for fish and game purposes and provides in part:

“(2) Any citizen of the United States of America who has continuously resided within the State of Montana for a period of

six (6) months immediately prior to making application for said license, and who is a legal resident of the state, shall be eligible to receive a resident hunting or fishing license."

In *re* Takahashi's Estate, 113 Mont. 490, 497, 129 Pac. (2d) 217, the court referred to the meaning of residence and noted:

"While the word 'residence' has been involved in many controversies as will be seen from the reported cases, it will be found that it is not the word itself that has been difficult of understanding. It has been in the construction of language expressive of the effect of residence and of the rights arising therefrom and based on the fact of residence. In each such case the word becomes a part of a concept larger than itself, such as residence necessary to the right to vote, residence in establishing a domicile, residence necessary to citizenship, etc. In each such case the context in connection with which the word is used must be considered, and the word, together with the context, then gives the meaning sought to be conveyed. There is thereby no change made in the simple, clear meaning of the word itself." See, also, *Smith v. Smith*, 288 Pac. (2d) 497, 499, 45 C. 2d. 235; *Rawstone v. Maguire*, 192 N. E. 294, 265 N. Y. 204.

Section 26-202.3, *supra*, requires the applicant to be a legal resident of Montana. In *United States v. Twelve Ermine Skins*, 78 F. Supp. 734, 738, a former Alaskan resident who had remained in California twelve years obtained a resident hunting license within one year of his return to Alaska. The Alaska law granted a resident hunting license to one who had resided three years in Alaska. The Court interpreted resident and stated:

". . . I think the purpose of the law was to give some measure of protection or advantage to those who had their homes in Alaska against those who might temporarily dwell here or who might visit in Alaska even for the length of time which is the statute of limitations under the Alaska Game Law. Therefore, my present construction is that the word 'residence' as used in the Alaska Game Law means 'domicile' . . ."

This position is supported in *Minick v. Minick*, 149 So. 438, 488, 111 Fla. 469, wherein the court cited 19 C. J. pp. 395, 396, 397, *et seq.* and stated:

"Generally, where a statute prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent."

The "legal resident" requirement means the applicant must be present in this state and have the intent to become a Montana resident. He must be a domiciliary of this state. In addition, the applicant must have continuously resided in this state for a period of six months.

The two conditions of Section 26-202.3, *supra*, are to protect Montana's fish and game reserves from being depleted by transients, vacationers and those who reside in Montana but are not domiciled in this state. The statute is applicable to those who are establishing a new domicile in Montana or to former domiciliaries who lost their domicile by creating one elsewhere.

As previously stated, a resident of Montana does not lose his residence by being employed outside the state. The six months continuous residence assures the state that the applicant intends to reside in Montana. The conditions of the statute are not applicable to a resident of Montana who has resided in the state six months or more and is absent from the state prior to his application for a resident fish and game license. The resident, upon his return, need not wait six months before he may obtain a resident fish and game license. He may obtain a license without delay. The six months prohibition applies to new domiciliaries who have not resided in the state six months or more.

It is therefore my opinion that a resident of Montana does not lose his residence by being employed outside the State of Montana. Further, a resident of this state who has resided for a period of six months or more and who is absent from the state prior to his application for a resident fish and game license, need not reside six months after his return before he is eligible to obtain a resident fish and game license.

Very truly yours,
FORREST H. ANDERSON
Attorney General