

The Meaning of “Reside” and “Residence” in Family Law Cases

by Greg Enos

Consider these scenarios and the meaning of “reside” or “residence” found in so many parts of the standard divorce decree:

1. A divorced father keeps his house in Katy but buys a lake house outside of Austin and begins to spend most of his time there, but he returns on weekends to Katy to exercise his visitation with his children, who live with their mother in west Houston. On April 1, the father designates 42 days of visitation in the summer because he says he resides more than 100 miles from the children. The mother/ex-wife disagrees and points out the father still owns his house in Katy (which is designated as his homestead) and he is registered to vote in Katy. Where does the father reside?
2. A divorced mother lives with her three year old child in an apartment in Clear Lake in Harris County where the divorce was granted. Mom meets a new guy and begins to spend most nights at the boyfriend’s house in Friendswood, which is in Galveston County. The ex-husband who lives in Harris County contends that the mother must now come to his house to get the child at the end of his possession periods because the mother no longer resides in Harris County where they both resided at the time of the divorce.
3. Father is granted the exclusive right to determine the child’s residence in Harris or contiguous counties. The mother volunteers for the Donald Trump campaign and when Trump is elected (and I move to Canada), the mother accepts a job in the White House in Washington, D.C. Mom rents an apartment in Virginia but keeps her house in Houston and lets her nephew live there. Can the father now move to Japan with the child because the mother no longer resides in Harris or contiguous counties?
4. A woman owns a house in the Woodlands but for two years she has worked for Exxon in Indonesia while her husband has been living with a woman in Dallas. Can the female engineer file for divorce in Montgomery County? She may be a domiciliary of Texas but can she say she has resided in the Woodlands while she was working overseas?

All of these questions hinge on the meaning of “reside” or “residence.” The meanings of those words can determine what a specific portion of a court order means and what restrictions or obligations the court order imposes, whether a court has jurisdiction in a divorce and where a divorce or custody case can be filed or how a court order is enforced (and even whether it is enforceable by contempt). Where a child or parent or spouse resides

can have huge legal significance, and that depends on what “residence” or "reside" means.

“Residence” vs “Domicile”

The terms “residence” and “domicile” are often used interchangeably, but usually they have different meanings. *Black’s Law Dictionary On Line* says:

[Domicile] “is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him.... “Domicile” and “residence” are not synonymous. The domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. The domicile is the habitation fixed in any place with an intention of always staying there.

Put simply, “domicile” is where a person intends to live permanently, and residence is where she physically is. For most people, their “residence” and “domicile” are the same thing. But, as the above examples show, some folks in our mobile society may temporarily be staying in one place even if their real home is another place.

The vast majority of Texas cases on the meaning of “residence” have arisen in election cases. Those election cases probably are probably not good precedent for family law cases because the Texas legislature have totally confused things by enacting a definition of “residence” in the Election Code that says, “residence means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence.” Tex. Election Code, Sec. 1.015(a). Thus, in cases decided under the Election Code, a person’s intent largely determines residence. As stated by the Texas Supreme Court in the leading elections case in Texas, *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex.1964), regarding residence:

The meaning that must be given to it [residence] depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Volition, intention and action are all elements to be considered in determining where a person resides and such elements are equally pertinent in denoting the permanent residence or domicile.

...
Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue.

So, Texas election law may allow a man registered to vote in Virginia to run for the Texas Senate in Dallas by saying that is where he intends to live. But, to enforce or interpret a

divorce decree, something more concrete and provable is needed.

Family Law Cases on “Residence”

Fortunately, most (but not all) cases decided under the Family Code and the Family Code statute itself distinguish between the concrete meaning of “residence” and the much more vague (and harder to prove) concept of “domicile.” Texas Family Code Section 6.301, on standing to file for divorce, requires the individual to have been (1) a domiciliary of the state for six months, and (2) a resident of the county in which the suit is filed for 90 days. While the Family Code does not explicitly define “residence,” numerous cases have.

The San Antonio Court of Appeals in *Skubal v. Skubal*, 584 S.W.2d 45 (Tex. Civ. App. - San Antonio 1979, writ dismiss'd) looked at the meaning of the residence requirement needed to file a divorce, and stated:

Residence requires that a person be living and physically present in a particular locality, Wilson v. Wilson, 494 S.W.2d 609 (Tex. Civ. App. Houston (14th Dist.) 1973, writ dismiss'd), but domicile requires that a person live in that locality with the intention of making it a fixed and permanent home. Schreiner v. Schreiner, 502 S.W.2d 840 (Tex. Civ. App. San Antonio 1973, writ dismiss'd).Id. at 46.

The Court of Appeals in *Carroll v. Jones*, 654 S.W.2d 54, 56 (Tex. App. - Fort Worth 1983, no writ) was also decided under the Texas Family Code and it stated:

However, § 11.052 uses the term "principal residence", not "domicile". We hold that although Carroll by virtue of her husband's occupation may retain her "domicile" in Texas, although actually residing in Colorado or elsewhere pursuant to military orders, her principal residence for purposes of the jurisdiction of the district court to entertain a motion to modify child support is that place where she and her children maintain their home. Id. at 56.

In the above quote, “that place where she and her children maintain their home” meant on the facts of the *Carroll v. Jones* case that place where the mother and children were physically living and present.

Flores v. Melo-Palacios, 921 S.W.2d 399 (Tex. App.—Corpus Christi 1996, writ denied) was also a family law case, and there the court held:

In order to establish residency, a person must be living and physically present in a particular locality. San Patricio County v. Nueces County Hosp., 721 S.W.2d 375, 377

(Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.). Residence simply requires bodily presence as an inhabitant in a given place. Holt v. Drake, 505 S.W.2d 650, 652 (Tex. Civ. App. - Eastland 1973, no writ).

In re Lawson, 357 S.W.3d 134 (Tex. App. - San Antonio 2011)(orig. proc.) was a mandamus action involving a motion to transfer under the Family Code in a modification case. There, the mother was given the exclusive right to determine the child's primary residence but she was ordered to move to within 100 miles of the father's residence in Bexar County by a date certain. In the meantime, the mother and child moved more than 100 miles from the father in McLennan County. The mother filed a modification case in Bexar County and moved for transfer to McLennan County, where the child had been living for over six months. The father objected, and argued that McLennan County was not the child's place of residence because it was temporary. The trial court bought the father's argument but the Court of Appeals issued a writ of mandamus and held that even a temporary residence is still a residence under the Texas Family Code. The court in *Lawson* equates a person's physical location to her "residence."

Other cases on the meaning of "reside" or "residence" decided under statutes other than the Family Code also distinguish between "residence" and "domicile." For example, in the case of *San Patricio County v. Nueces County Hosp.*, 721 S.W.2d 375, 377 (Tex. App. - Corpus Christi 1986, writ ref'd n.r.e.), the court said:

The statute under which Memorial sued requires only that the recipient of the medical services be a resident of the county to be charged, not a domiciliary. "Residence" requires that a person be living and physically present in a particular locality, but "domicile" requires that a person live in that locality with the intention of making it a fixed permanent home." Id. at 401 (citations omitted).

Some older family law cases in Texas unfortunately confuse "residence" and "domicile." In *Vickerstaff v. Vickerstaff*, 392 S.W.2d 559 (Tex. App. – El Paso, 1965, no writ), the couple moved from Midland to New York where they lived for three years. Three years after the move, the wife filed for divorce in Texas. Both the trial court and appeals court held that the couple's residence was still in Midland, Texas because they intended to return there. In *Beavers v. Beavers*, 543 S.W.2d 720 (Tex. App. – Waco, 1976, no writ), the wife set up "residence" in Waco, but the court said she had not actually moved out until she "publically moved out of the marital residence and publically moved her belongings into the Waco residence." The court of appeals said:

A mere constructive residence will not satisfy statutory requirement that a petitioner or respondent in a divorce suit have been a resident of the county in which suit is filed

for 90-day period preceding suit; statute requires an actual, physical, continuous living in the county of suit by one of the parties for the period specified, coupled with a good-faith intent to make that county home; however, continuity of residence is not broken by a simple, temporary absence from the county.

Those older cases ignore the common legal meanings of “residence” and “domicile” and the more recent cases cited above apply the proper definition of “residence” in the family law context.

A “Bright Line” Meaning is Required

Most importantly, “reside” and “Residence” as used in the family law context must mean where a person is living and physically present instead of where he or she intends as a permanent home. Parents, attorneys and courts must have a simple, “bright line” definition of “reside” and “residence” in order to understand and enforce child custody orders. If a divorce decree says a child’s primary residence must be in Harris County, it would totally nullify the order for a parent to move the child to Colorado for three years, maintain a home in Houston and say that his intention is to permanently reside in Harris County and “we are just visiting Colorado temporarily.” If “reside” really depends on where one plans to live in your heart, then a parent who moves away “temporarily” with a child could never be found to have violated the geographic restriction. The public policy purpose for geographic restrictions on the primary residences of children is to foster quality time with both parents because both parents live near the children. This purpose is defeated if one parent is allowed to “temporarily” move away with the child.

I just recently won a dispute over transfer of modification and enforcement cases from Harris to Kerr County where the father had gone to work in Hawaii for 9 months and while he was away, the mother with primary custody moved with the child to Kerrville. The legal battle was over whether the father's temporary job in Hawaii lifted the geographic residence restriction. My position that the father no longer resided in Harris County prevailed.