

# D17 LEGAL BULLETIN

*Advice for Guardians of the Last Frontier*



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## Residency Series

### Number 2: Domicile and Taxation

#### State of Legal Residency Can they Tax That?

We often see members in the legal assistance office who have received an income tax notice from a state in which the member is not a resident. Specifically, a member stationed in Alaska might call the legal assistance office because the state of his most recent duty station—let’s say New York as an example—claims he owes New York state income taxes for the period during which he was stationed there. New York had compared with its state income tax returns federal tax returns that had been filed from New York addresses. When the member’s return was not there, New York assessed a liability based on the income reported on the federal return. “How could that be?” the member asks. “I picked Texas as my residence when the Coast Guard sent me there out of boot camp, and I’ve been a resident of Texas ever since. Help me, Mr. Legal Assistance Attorney.”

The member’s assertion that he had “picked” Texas as his residence is based on the concept of “domicile of choice” established by the Servicemembers’ Civil Relief Act (SCRA).<sup>1</sup> The idea that a service member can “pick” a domicile is not far off base, but it is not exactly spot on, either. SCRA does protect members from taxation by the state of their permanent duty station if it is not their state of domicile. But while the member may “claim” Texas as his residence, the claim by itself does not necessarily make it so. In order to claim a state as one’s domicile, the person must be present in the state with the intent to remain indefinitely and with the intent to return to the state when absent from it.

This article will discuss general concepts of residency, also known as domicile; the importance of domicile as it relates to state taxation; special domiciliary rules for service members, including protections arising from SCRA; and factors that play into determining one’s domicile. Applying those factors will equip the reader with the necessary tools for establishing a new domicile. While that will not include a “checklist” of actions needed to establish a domicile, the article will include some of the common indicators of domicile to enable the reader to more objectively determine his or her state of domicile, so that he or she may take steps to maintain the desired domicile and remain compliant with state tax authorities.

#### Residency in General

First, let’s address the word “domicile.” Practically speaking, domicile is legalese for one’s state of residency. But of course if domicile and residence meant exactly the same thing, there would be no reason for having two different words. Nevertheless, “residence” and “domicile” are so closely related that many

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<sup>1</sup> 50 U.S.C. §§ 3901-4043

references use them interchangeably. This article will do likewise. A domicile is “the place at which a person is physically present and that the person regards as home; a person’s true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.”<sup>2</sup> South Carolina calls it the place where you have the center of your financial, social, and family life.<sup>3</sup>

Residence and domicile often are both practically and legally the same, but that does not apply universally. While an individual may have more than one residence at a time—for example, a main home and a winter home—“[a] person can have only one domicile at a time.”<sup>4</sup> A person’s residence may change depending on where the person lays his or her head at night. On the other hand, “once domicile is established or determined to be in a particular location, it remains there until the person establishes a new domicile.”<sup>5</sup> A domicile is permanent and does not change until the person decides to change it. The difference between residence and domicile is best illustrated by example: The service member permanently stationed in New York had a residence in New York, because it is where he went to bed every night. That is why the residence he provided on his federal tax return was at a New York address. However, because of the protections provided by SCRA, New York does not become the member’s domicile unless he demonstrates his intent to reside there permanently. Since his stay is only temporary, New York may be his residence, but it is not necessarily his domicile.

Particularly when discussing the residence of military personnel, the more accurate word is domicile—that fixed place the person considers home, and to which he or she intends to return.

### The Servicemembers’ Civil Relief Act

A person establishes a state as the person’s domicile by being physically present in the state with the intent to remain indefinitely. For most Americans, the person’s domicile is established when the person establishes a home in the state for non-temporary purposes, together with other indications of intent to establish residency in the state. However, even though a service members and his or her spouse are physically present in a state with the intent to remain indefinitely, that fact does not establish the state as the member’s domicile. Residency for service members and their spouses is not so clearly ascertained.

The legal foundation for service members’ domicile comes from Sections 4001 and 4025 of SCRA. In general, “a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.”<sup>6</sup> The same benefit applies through section 4025 for voting, so that service members essentially are able to decide whether to retain their original domicile or to become a resident of the state in which the member is

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<sup>2</sup> Black’s Law Dictionary (Seventh Edition, 1999, West Group).

<sup>3</sup> Captured at <https://dor.sc.gov/tax/individual-income/faq>, “Am I a resident or nonresident?”

<sup>4</sup> *Zimmerman v. Zimmerman*, 155 P.2d 293 (Or. 1945). Iowa’s revenue department administrative regulations recognize that principle while demonstrating the practice of using the terms interchangeably. “Each person has one and only one state of residence. A person may be a resident of a state even though he or she does not actually live in the state.” Iowa Administrative Code 38.17. The proper term in that usage is domicile.

<sup>5</sup> *Duncan v. Department of Revenue*, Oregon Tax Court No 4315 (Nov. 3, 1998); *Doyle v. Doyle*, 522 P.2d 906 (Or. App. 1974).

<sup>6</sup> 50 U.S.C. § 4001(a)(1).

stationed—a “domicile of choice.” In 2009, the Military Spouses Residency Relief Act added the same residency protections to military spouses.

Accordingly, for service members and their spouses, the simple fact of being present in a state is not sufficient to establish residence in that state. The service member and the service member’s spouse may retain or abandon a domicile, at the service member’s or spouse’s option, as long as the person demonstrates an objective intent to remain in the state indefinitely and make a home in the state.

#### The service member’s declaration of residence is not absolute

Nevertheless, it is important to return to the place of beginning: One’s domicile is the place in which he or she resides, with the intent to remain indefinitely. Domicile is established, not arbitrarily chosen. While the member may subjectively, and even firmly, believe that a particular state is his domicile, the test is an objective one. For example, that a member started his 20-year career as a resident of Wyoming may be sufficient to retain Wyoming as the member’s domicile if the member retains some connections to Wyoming even after those years of service. But if other factors objectively indicate that she did not intend to retain domicile in Wyoming, it is possible that the state in which the member is stationed will claim the member as its resident and assess income taxes accordingly. While the member’s presence in the state pursuant to military orders will not change the member’s domicile, other conduct of the member, in conjunction with that physical presence, may.

Generally, a person remains a domiciliary of a state until the person takes affirmative steps to establish residency in another state.<sup>7</sup> A statement that a service member intends to carry out these actions at a later date is not sufficient.<sup>8</sup> While there is no definitive “magic formula,” a number of actions beyond physical presence in a state can indicate an intent to sever one’s relationship with one state and establish legal residence in another, including:

- registering to vote
- voting in the state, in person or by absentee ballot
- changing one’s driver’s license
- registering vehicles in the new state
- applying for other privileges offered by the other state, such as hunting and fishing licenses
- purchasing a home or leasing an apartment in the state
- claiming homestead or other property tax credits related to residency
- bringing children into the state and enrolling them in school
- transporting household goods to the state
- opening a bank account or obtaining a safe deposit box in the new state
- changing your phone number to the new state
- receiving mail in the new state
- payment of taxes in the new state.
- actively participating in a church, club, or professional or civic group

In short, a declaration of residency requires signs of permanency.

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<sup>7</sup> Captured at <https://tax.iowa.gov/expanded-instructions/are-you-resident-iowa-tax-purposes>.

<sup>8</sup> Captured at <https://www.ncdor.gov/taxes/individual-income-tax/armed-forces-information/active-military>.

State taxation—why domicile matters:  
The Case of Senior Chief Martin Carr

Where the service member claims his or her domicile matters because the service member's compensation for military service "shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders."<sup>9</sup> The state in which the member is stationed may not tax the member's military compensation earned in that state unless the member is domiciled in that state. However, that exemption is for the service member's **military** income only; the law does not restrict the state from taxing any income earned by the member from non-military employment within that state. Ironically, in that regard, the law provides greater benefit for the service member's spouse: All income earned by the spouse is subject to taxation only by the spouse's state of domicile, regardless of where the income was earned.<sup>10</sup> Of course if we are to protect the spouse at all, that only makes sense, since the spouse's only income would be from a non-military source.

More significantly, the law does not restrict a state's ability to assert that a member in fact is domiciled in the taxing jurisdiction, notwithstanding the member's assertion of a different state of domicile, based on an objective analysis of the person's circumstances. "A serviceperson may not be relieved from responsibility for state tax on the basis of a bare assertion of an address of record with the military. There is no evidence that Congress intended to go so far. Rather than confer immunity from tax, the federal legislation was designed to protect servicepeople from multiple taxes."<sup>11</sup>

That quote was from the Oregon Tax Court's review of claim of Navy Senior Chief Martin Carr to a domicile in Nevada. The facts of Senior Chief Carr's case are illustrative, because they demonstrate both the severing of ties with one state and the new connection with another. Carr had enlisted in the Navy on January 23, 1980, listing an address in Nevada as his home of record, and he had maintained that address throughout his entire military career. The problem is that the address was his parents', and even they no longer resided at that address. Aside from having some extended family members still in Nevada, Carr had maintained no connections to the state. The Carrs owned no property in the state and had not spoken of returning.

Of course whether Martin Carr claimed residence in Nevada did not matter to Nevada, because Nevada is one of the states that does not tax income. Oregon, on the other hand, does tax income, and it claimed the Carrs owed tax on their income as residents of the state. Carr had been first ordered to duty in Portland, Oregon, in February 1993. Upon his completion of that tour in April 1996, the Carr family transferred to Los Angeles, before subsequently being reassigned to Oregon in 1999, where they had been through the tax years in question.

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<sup>9</sup> 50 U.S.C. § 4001(b).

<sup>10</sup> 50 U.S.C. § 4001(c). The law also only applies to wages and limited self-employment income earned by the spouse in the state. If the spouse has income from a business or rental property, the state in which the money was earned may tax the business or rental income, notwithstanding the spouse's state of domicile.

<sup>11</sup> Carr v. Department of Revenue, p. 4 (Or. Tax 2005).

Throughout that tour, Senior Chief Carr continued unequivocally to declare that he had no intention of remaining in Oregon beyond his military obligation. However, while the Carrs' connection with Oregon was tenuous, there were connections beyond his military orders. The Carrs had purchased a home in Oregon in 2001, but that was partially explained by the fact that there was no Navy housing available there. They also had registered their vehicles in Oregon. However, Carr had not obtained an Oregon driver's license or registered to vote in Oregon.

Significantly, while stationed in Los Angeles in 1999, the Carrs filed Chapter 7 bankruptcy, claiming California as their domicile in that petition. Therefore, by the time of their dispute in the Oregon Tax Court, the Carrs had severed their relationship with Nevada by overtly declaring another state, and not Nevada, their legal domicile.

Accordingly, the Oregon Tax Court determined the Carrs to be Oregon residents. It acknowledged they had not chosen to make Oregon their home. However, the court opined that "they, albeit perhaps unknowingly, have made Oregon their domicile. The test for domicile is an individual's overt acts, no one of which, including a statement of intent, is determinative."<sup>12</sup> And having examined all of the Carrs' overt acts regarding their domicile, the court concluded "they must be Oregon domiciliaries because, tenuous though their connection to Oregon is, it is nonetheless the strongest of all their associations."<sup>13</sup>

For the Carrs, application of SCRA alone proved to be insufficient. They could not just rely on their state of residence at the time of enlistment without further contacts with the state. While the service member's residence does not change simply by virtue of the military transfer, it may be changed in the eye of the objective observer by other overt conduct, particularly if there are no remaining ties to the original home state. The Carrs had severed their contact with the home state by declaring themselves residents of California in their 1999 bankruptcy filing. Since there was no other connection anywhere else, they were domiciliaries of Oregon.

In any event, it is a good idea to compare the tax structures and tax rates in the respective states as part of the decision-making process. For example, a member domiciled in a high tax state such as New York or Virginia who transfers to a state that does not tax income, such as Texas, Florida, Washington, or Alaska, would do well to consider the benefits of making a home in the new state. Some states tax only income earned within the state, without regard for the person's state of domicile, and some states exempt military income from taxation, regardless of where it is earned. The next section will review the various tax treatments from the several states.

### A Summary of State Tax Law<sup>14</sup>

One primary reason service members change their state of residence, besides simple love for their new home, is taxes. Many service members, upon stationing in one of the nine states that do not tax

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<sup>12</sup> Carr, at p. 3 (citing *Hudspeth v. Dept. of Revenue*, 4 OTR 296, 298 (1971)).

<sup>13</sup> *Id.*, at p. 3.

<sup>14</sup> Military.com provides a good resource for a quick review of state income taxation at this weblink: <https://www.military.com/money/personal-finance/taxes/state-tax-information.html>. The link includes contact information for the revenue department of each state and the District of Columbia, including internal links to the webpage of each of the respective agencies. However, the reader is urged to refer directly to the relevant state Department of Revenue, as some of the information on the military.com summary page was found to be outdated or incorrect.

income,<sup>15</sup> suddenly become residents of that state. In fact, the several states provide a plethora of different taxation schemes, particularly when military income is included. For example, Arizona, Arkansas, Illinois, Kentucky, Michigan, Minnesota, Montana, Oklahoma, Pennsylvania, and New Mexico do not tax active-duty military income, regardless of where it is earned.

On the other hand, some states do not tax military income of their residents if earned while stationed outside the state but do tax the military pay of domiciliaries of the state while stationed within the state.<sup>16</sup> Similarly, Maryland excludes up to \$15,000 if earned outside the U.S. or its possessions but otherwise taxes the full amount. California does not tax any income earned outside the state, but it does heavily tax the income, including military income, of any domiciliary of California earned within California.

Iowa excludes military income paid by the federal government, but it does tax drill pay and active-duty pay received from the state. Some states take the opposite approach, exempting only a portion of military pay, intending that guard and reserve pay would be exempt. For example, South Carolina taxes active-duty pay but exempts all guard and reserve pay. That also appears to be Indiana's intent in exempting \$5,000 in military pay from taxation. While Indiana's exemption applies to active-duty pay as well as to guard and reserve pay, the intent clearly is to exempt the pay for those valuable part-time service members. In North Dakota, the exemption applies only to mobilized guard and reservists.<sup>17</sup>

Finally, four states provide an atypical residency status for residents who live outside the state for most of the year. Domiciliaries stationed outside those states are deemed to be nonresidents for tax purposes, provided they meet three qualifications: (1) they did not maintain a permanent home in the state during the tax years; (2) they did maintain a permanent home outside the state during the tax year, including military housing but excluding residence in a barracks, bachelor officers' quarters, or quarters assigned on a vessel; and (3) they spent less than 30 days in the state during the tax year. New York, New Jersey, and Connecticut all deem residents who meet all those qualifications to be non-residents for those tax years, and an income tax return is not required unless it is necessary to claim a refund of excess withholding. Maine calls those residents "safe harbor" residents, who must file a return. All other states<sup>18</sup> and the District of Columbia treat military pay of their residents the same as the federal tax code does.

### Establishing domicile—Or putting your heart where your home is

This is where I often am asked for a checklist of actions required to establish a new domicile. The member has arrived at her new duty station and truly fallen in love—and not just with the lower taxes. She is drawn to the mountains and the ocean, the slower pace and the lack of traffic, or to the sand and the heat, or to the fast pace, the nightlife, though not necessarily with the resulting nightmare traffic. Whatever the

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<sup>15</sup> Alaska repealed its income tax in 1980; South Dakota, in 1943; and Florida, in 1855. Nevada, Washington, and Wyoming never have had an income tax, and in Texas, the income tax is banned by the State Constitution. Tennessee and New Hampshire tax interest and dividend income of residents only.

<sup>16</sup> Colorado, Idaho, and Ohio fit into this category. Missouri provides the same benefit, provided the member and his or her spouse spent less than 30 days inside Missouri during the tax year. Oregon exempts all active-duty pay of its residents earned outside Oregon, but only \$6,000 of pay earned inside Oregon, and Vermont exempts military income earned outside the state but only \$2,000 of reserve and guard pay.

<sup>17</sup> Virginia's truly is a hybrid system. Virginia exempts up to \$15,000 of military income, but the exemption is scaled until its complete elimination after \$30,000 in the tax year, and the deduction is available only from members O-3 and below.

<sup>18</sup> Alabama, Delaware, Georgia, Hawaii, Kansas, Louisiana, Massachusetts, Mississippi, Nebraska, North Carolina, Rhode Island, Utah, West Virginia, Wisconsin, for those counting.

reason, the member has decided the permanent duty station is home. For service members, the first step in asserting the new domicile always is to complete Form DD-2058, State of Legal Residence Certificate. But even that assertion of a domicile alone may not be sufficient to establish a legal domicile. “It is well settled that three elements are essential to change domicile: 1) residence in another place; 2) an intention to abandon the old domicile; and 3) an intention to acquire a new domicile.”<sup>19</sup> This section will discuss the demonstrations of those intentions.

Consider the E3 whose “home of record” is Pennsylvania, but who serving his non-rate tour in Michigan. When he was not able to obtain the vehicle inspection required by Pennsylvania, he registered the vehicle in Michigan. In addition, he recently had changed his name, and Pennsylvania would have required him to make that change to his driver's license in person. Therefore, besides registering his vehicle in Michigan, the member also obtained a Michigan driver's license, both typical indicia of domicile.

Had the member, by those actions alone, changed his domicile from Pennsylvania to Michigan? Was he now required to complete Form DD-2058 so that Michigan taxes could be withheld? The answer depends on the member's intent. SCRA is only one piece of the puzzle. That a service member does not gain or lose a domicile merely by being present in the state pursuant to military orders does not mean the presence in the state cannot be among the many factors in determining the member's domiciliary intent. But neither does SCRA prevent the member from using the presence as his primary factor for determining to change his domicile. That's why the notion that a service member can “pick” his domicile is not completely unfounded.

Determining a service member's domicile becomes a bit murkier when he has taken steps that might otherwise indicate an intent to establish a new residence. Compare the E3's actions in obtaining a new driver's license vehicle registration to Senior Chief Carr's conduct during a 20-year career in which he had served in multiple locations. Despite his vehemently declared intent, the Oregon Tax Court found Senior Chief Carr had demonstrated through his conduct the requisite intent to change his domicile to Oregon. On the other hand, because the E3 stationed in Michigan completed those actions in Michigan only because they could not be completed in his home state, he had not necessarily become a resident of Michigan. However, if he had intended to change his residence, those actions would have been sufficient to document the intent. He could make that intent official by submitting the DD-2058 through his yeoman or through Direct Access. That would make him a resident of Michigan, even after further PCS transfer, until he declared his intention to become a resident of another state and took steps to establish that state as his domicile.

## Conclusion

States clearly are within their authority to critically examine service members' claims of SCRA-protected domicile and to determine domicile based on overt acts within the state. Notwithstanding the service member's SCRA rights, subsequent moves and subsequent actions can function to change the domicile, even unwittingly. The acts of registering a vehicle and obtaining a driver's license in a state certainly are indications of residency, but they are not necessarily determinative. The primary factor is one's objective intent to abandon the old domicile and acquire a new domicile by becoming a resident of the state and remaining indefinitely. Because military PCS orders are temporary in nature, the intent to

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<sup>19</sup> *In re Noyes' Estate*, 182 Or 1, 4-5, 185 P2d 555 (Oregon 1947).

become a resident is not inferred by the physical presence or even by the additional actions related to DMV. The real answer would come after examining all circumstances together.

The Servicemembers Civil Relief Act provides valuable protection for service members who maintain their ties to their home of record and want to maintain that domicile. However, the assertion of domicile alone will not suffice if there are no contacts in the state to back it up. While the domicile of the member or the member's spouse does not change solely by virtue of the member's presence in a state pursuant to military orders, other factors may effect that change. Therefore, it is a good idea routinely to verify the contacts you have with your home state to ensure you have maintained signs of permanency in that domicile. Members are encouraged to call the legal assistance office to ensure they have maintained sufficient contacts to their claimed state of domicile.

**Legal Assistance is a free benefit available to active duty service members and their dependents and retirees and their dependents. If you have questions about domicile or about any other legal assistance matter, call the Legal Assistance office at (907) 487-5474. For more information regarding the PFD, go to [www.pfd.state.ak.us](http://www.pfd.state.ak.us).**

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