Venue in Illinois Divorce Cases:

What is Residency?

By Gunnar J. Gitlin
Gitlin Law Firm
Woodstock, Illinois
www.gitlinlawfirm.com

It seems that more and more often Cook County lawyers are handling divorce matters in the collar counties. Often, there is a race to the court house to establish venue. Before the passage of the Illinois Marriage and Dissolution of Marriage Act in 1977 if a divorce or legal separation action was filed in the wrong venue, the court acquired no jurisdiction and thus the decree that was entered was void. The IMDMA, however, specifically states that venue is no longer jurisdictional. 750 ILCS 5/104.

Section 104 of the IMDMA states that proceedings are to be had in the county where the plaintiff or defendant resides and that objection to venue is waived if not made within such time as the defendant's response to the divorce or legal separation petition is due. When passage of the IMDMA was being considered there was concern that with venue not being jurisdictional, and being waived if no objection is made, that there would be a great deal of forum shopping, but twenty-one years of experience under the IMDMA shows that forum shopping does not happen to the advantage of one party because of the right to object to wrong venue.

The objection to venue must be timely made. *In re Marriage of Jones*, 104 Ill. App. 3d 490, 60 Ill.Dec. 214, 432 N.E.2d 1113 (1st Dist., 1st Div. 1982). Typically, when venue is at issue, a party who is likely to initiate matrimonial proceedings has moved from the marital residence into a different county. Since he is a resident of a new county, that person may initiate matrimonial proceedings in the new county of residence. This may be done immediately and without any waiting period. In Illinois, the viability of a suit is determined by who files the action first, and not by first service of summons. *Abbott v. Abbott*, 52 Ill. App. 3d 728, 10 Ill.Dec. 464, 367 N.E.2d 1073 (3d Dist. 1977). The race to the courthouse in matrimonial law proceedings can be won by using the praecipe for summons procedure of §411 of the IMDMA. This procedure eliminates the need for the party initiating the proceedings to first sign a petition for dissolution of marriage or legal separation. The lawyer can sign the short form which is the praecipe for summons and file the praecipe with the circuit clerk. This starts the proceeding and, if filed first, will be the basis for dismissal of a later filed petition in another county.

Since venue is not jurisdictional, why are there still venue fights? It would seem it is largely because the parties or their lawyers see a venue advantage on account of geographic convenience (which may mean dollar savings), or an advantage of perceived clout. The issue in contested venue cases is in defining residency. Cases describing residence, or giving a definition, usually compare the term

"domicile" to the term "residence." Unfortunately there is no categorical definition of residence. The clearest definition of residence is found in Black's Law Dictionary, Sixth Edition:

Domicile compared and distinguished. As "domicile" and "residence" are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. 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. Fuller v. Hofferbert, C.A. Ohio, 204 F.2d 592, 597. "Residence" is not synonymous with "domicile," through the two terms are closely related; a person may have only one legal domicile at one time, but he may have more than one residence. Fielding v. Casualty Reciprocal Exchange, La.App. 331 So.22 186, 188.

In certain contexts the courts consider "residence" and "domicile" to be synonymous (e.g. divorce action, Cooper v. Cooper, 269 Cal.App.2d 6, 74 Cal.Rptr. 439, 441); while in others the two terms are distinguished (e.g. venue, Fromkin v. Loehmann's Hewlett, Inc., 16 Misc.2d 117, 184 N.Y.S.2d 63,65).

Elsewhere under the definition of residence, Black's Law Dictionary states that the term "residence" has no precise legal meaning. In Illinois case law, sometimes residence means domicile plus physical presence, and sometimes it means something less than domicile. Thus, while our law school training leads us to believe that they can be many residences and only one domicile, Illinois case law is not quite so clear-cut.

The essential element in all attempts to define residence, and apply the term, is physical or bodily presence.

The thread that runs through residency-venue cases in Illinois deals with physical presence in a new county of residency and an intent to abandon the prior county of residency. In the case of *Stillwell v. Continental Illinois Nat. Bank & Trust Co.*, 31 Ill.2d 546, 202 N.E.2d 477 (1964), the issue was whether an Arkansas divorce should be given full faith and credit. The issue turned on the question of whether Stillwell was a resident of Arkansas. This case is cited because it contains the phrase often repeated in residency cases that "... a person must physically go to the new home and live there with the intention of making it his permanent home." The *Stillwell* decision, in discussing the issue of residency, specifically points to the exact date when Mr. Stillwell "moved into the house."

The 1981 First Appellate District case of *IRMO Goldstein*, 97 Ill.App. 1023, 53 Ill.Dec. 397, 423 N.E.2d 1201 (1st Dist., 4th Div. 1981), in an opinion by Justice Johnson with Justices Jiganti and Linn concurring, defined residence much as did the *Stillwell* case, viz, "... to establish a new domicile a person must physically move to a new home and live there with the intention of making it his permanent home."

In the 1988 case of *Webb v. Morgan*, 176 Ill.App. 378, 531 N.E.2d 36 (5th Dist. 1988), a tort case (slip and fall), residency was in issue because there was a motion to transfer venue from one county to another. *Webb* states: "The person must physically move to a new home and live there with the

intention of making it his permanent home, and only when an abandonment has been proved does the person lose residence." *Webb* also speaks of the fact that the co-defendant, whose residence was challenged, could only reside in one place.

Residency requirements in election cases can be persuasive authority of what constitutes residency in venue cases. In the 1907 Illinois Supreme Court case of *Welch v. Shumway*, 232 Ill.54, 83 N.E. 549, a voter was employed at a restaurant, occupying the upper part of the building, with his wife, as a residence. Prior to election, he rented a house in another ward, intending however to keep his old residence until after the election. He moved some things into the new residence leaving one bed at his old residence. While cleaning up the new place he and his wife slept there, and while there he was quarantined for smallpox. On the night before election, he slept at his old residence, where he voted on election day, and his wife slept at the new residence. The court held he was a legal voter in the ward of his old residence.

Stein v. County Board of School Trustees of DuPage County et. al., 85 Ill. App. 2d 251, 229 N.E.2d 165 (1967), stated: "Two elements are necessary to create a residence: (1) a physical presence in that place and (2) the intention of remaining there as a permanent home." The Illinois Supreme Court case of *Pope v. Board of Election Com'rs*, 370 Ill. 196, 18 N.E.2d 214, speaks of being "lodged" at the residence and states: "Residence, for the purpose of registration and voting, means more than a mere technical domicile and does not permit registration and voting from an office or business location where the applicant has never lodged."

The divorce case in which the facts speak the most clearly of the requirement of a physical presence in the county of venue is *Horix v. Horix*, 256 Ill. App. 436 (1930).

In *Horix* the plaintiff-wife filed her divorce action in St. Clair County, Illinois, on October 1, 1928. In her bill for divorce she alleged that she was then an actual resident of St. Clair County. Under Illinois' former Divorce Act, venue was jurisdictional, and the defendant-husband appealed the granting of a decree of divorce on the basis that the plaintiff was not a resident of St. Clair County.

The plaintiff-wife in *Horix* testified she was, at the time of the trial, living in the Broadview Hotel in East St. Louis; her lawyer advised it would be necessary for her to be a resident of St. Clair County before she could file her suit; she made reservations at the Broadview Hotel in the middle of September, but did not get there until the first of October; she was never at that hotel before October 1, 1928 (the date the divorce proceedings were filed); she came to that hotel for the purpose of securing a divorce; and when she separated from her husband they were living in Chicago. The manager of the hotel testified that the plaintiff did not register until October 9, 1928 -- eight days after the suit for divorce was filed. The appellate court ruled the plaintiff-wife failed to prove she was a resident of St. Clair County and therefore the decree granting her divorce was reversed.

Residence at a new place, therefore requires physical presence, but abandonment of the old residence, which involves the physical presence issue, is also a matter of intent.

The Gitlin Law Firm, P.C., provides the above information as a service to other lawyers to assist with continuing legal education. A person's accessing the information contained in this web site is not considered as retaining The Gitlin Law Firm for any case nor is it considered as providing legal advice. The Gitlin Law Firm cannot guarantee the outcome of any case.

The Gitlin Law Firm
Practice Limited to Family Law
663 East Calhoun Street
Woodstock, IL 60098
815/338-9401
www.gitlinlawfirm.com
Last Updated: April 23, 2003G:\Docs\Writings\New Web Site\0Venue in Illinois Divorce Cases.wpd