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Office of the Attorney General

State of South Carolina
Opinion No. 84-41
April 11, 1984

***1** The Honorable Earl M. Middleton
Member
House of Representatives
416–B Blatt Building
Columbia, South Carolina 29211

Dear Representative Middleton:
You have asked that we review the applicable law concerning the requirements for voter registration as those requirements relate to college students who wish to be registered in the community where they attend college.

Based upon State law, this office has previously concluded that 'each individual registering to vote [must] be a resident in the county and polling precinct in which he appears to vote.' Op. Atty. Gen., Op. No. 3918 (December 11, 1974) [emphasis added]. We have further advised that
. . . college students must establish, as with all other voter registration applicants, that the locale within which they seek to register and vote is their . . . [place of residency].

Op. Atty. Gen., November 22, 1971.

Our Supreme Court has stated that for the purpose the voting, 'residence' generally means 'domicile.' Phillips v. S.C. Tax Commission, 195 S.C. 472, 12 S.E.2d 13 (1940). The Court has defined a person's domicile as 'the place where [he] . . . has his true, fixed and permanent home and principal establishment, to which he has, whenever he is absent an intention of returning.' O'Neill's Estate v. Tuomey Hospital, 254 S.C. 578, 176 S.E.2d 527 (1970).

Intent 'is a most important element in determining the domicile of any individual.' Ravenel v. Dekle, 265 S.C. 364, 218 S.E.2d 521 (1974). Intent is primarily an issue of fact, determined on a case by case basis. Ferguson v. Employers Mut. Cas. Co., 254 S.C. 235, 174 S.E.2d 768 (1970). A person may have but one domicile at any given time; to change one's domicile, 'there must be an abandonment of, and an intent not to return to the former domicile.' 28 C.J.S., Domicile, § 13. There must also be the clear establishment of a new domicile. Gasque v. Gasque, 246 S.C. 423, 143 S.E.2d 811 (1965). The Supreme Court has emphasized that '[o]ne of the essential elements to constitute a particular place as one's domicile . . . is an intention to remain permanently or for an indefinite time in such place.' Barfield v. Coker and Co., 73 S.C. 181, 53 S.E. 170, 171 (1906).

To date, no South Carolina Supreme Court case has faced the precise question of whether the above-referenced requirements of domicile are also applicable to college students who seek to register and vote in the college community. However, the Court, in an analogous situation, has recognized 'that the domicile of one away in the military service ordinarily remains unchanged during such absence.' O'Neill's Estate v. Tuomey, 254 S.C. at 584, citing 28 C.J.S., Domicile, § 129. And in the Tuomey case, the Court applied the same standard for the establishment of domicile, the intention to remain permanently or indefinitely, as it had in previous cases.

***2** Relying upon the Tuomey Hospital case and the other authorities cited above, this office in a 1971 opinion concluded that college students must establish that the

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locale within which they seek to register and vote is their domicile, i.e., that they are living in the college community with the intention of abandoning their former domicile and with the intention of remaining permanently, or for an indefinite length of time in the new location.

Op. Atty. Gen., November 22, 1971. The opinion explicitly recognized that '. . . college students, minors or non-minors must be treated as other citizens for voting purposes and can establish a legal residence for voting purposes within the locale in which his college or university is located . . .'; on the other hand, the opinion stated:

. . . a board of registration is not bound by the statement of residency sworn to by a student or any other applicant for registration on his application form, nor is a board bound by an applicant's oral declarations as to his intentions. Further inquiries can be made of an applicant to determine if the facts and circumstances are consistent or inconsistent with his stated intent, and based upon these inquiries, a registration board can make an independent determination of whether an applicant is qualified under the residency provisions.

The opinion then presented as guidance to local registration boards 'a list of some factors which may be relevant in determining whether domicile has been established for voting purposes by a student as well as any other applicant.' Although the list was admittedly not exhaustive, the factors included therein were, among others, whether the applicant was registered to vote elsewhere; where the applicant maintains his personal property; the applicant's community ties; the residence listed on the applicant's driver's license; where the applicant pays taxes; where the applicant's automobile is registered; and if the applicant is employed, where his job is located. The opinion noted that in the end 'the crucial issue boils down to the intent of the applicant', or in other words, whether he intends to remain permanently or indefinitely in the college community. Finally, the opinion observed that the right to vote is a fundamental right and therefore

[a]ny close case—one which could go either way, one which is a stand-off, one in which the board is at a virtual loss as to what to do because of the close facts—should be resolved in favor of the applicant because of the very fundamental nature of the right registration officials are dealing with.

Then in 1972, an action was brought in the United States District Court of South Carolina, contending that South Carolina's existing laws and practices concerning the registration of college students violated the United States Constitution. Dyer v. Huff, 382 F.Supp. 1313 (D.S.C. 1973), affd., 506 F.2d 1397 (4th Cir. 1974). Specifically at issue in Dyer were the legal criteria for registration of college students set forth in the November 22, 1971 Attorney General's opinion described above; these criteria were being used by local registration boards throughout South Carolina in determining whether college students met the requirements of domicile under South Carolina law necessary for them to be registered to vote in the community where they attended college. The plaintiffs in Dyer contended that they were being discriminated against on the basis of their status as college students; based upon the 14th and 26th amendments, the plaintiffs attacked South Carolina's residency requirements in contending that local registration officials could not constitutionally look behind their written declarations of residency by asking the suggested questions set forth in this office's 1971 opinion.

***3** Judge Chapman ruled otherwise, however. He stated that the Attorney General's opinion 'contained a fair presentation of the law on the question of residency . . ..' 382 F.Supp. at 1315. He further observed:

The County Registration Board is charged with the responsibility of registering only legally qualified persons and it is absolutely necessary that an applicant be a legal resident of the state and county in which he attempts to register. The Board would be derelict in its duty to blindly accept a statement of residency by each applicant. There is nothing wrong or even suspect in registration officials asking college boarding students, whose permanent addresses are outside the county, certain questions to determine residency and their qualifications.

382 F.Supp. at 1316. The Court continued:

Residency is a mixed question of law and fact and one that has given courts difficulty from the beginning of time. It is doubtful that any court has the wisdom to compose a list of questions which could be used by a registration board in determining every issue of residency that might be presented . . .. [T]hese questions and the procedures of the defendants are fair, reasonable and adequate to determine residency . . ..

382 F.Supp., supra. The Court quoted from the United States Supreme Court decision, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), which had upheld residency requirements with respect to military servicemen, as follows:
The declarations of voters concerning their intent to reside in the State and in a particular county is often not conclusive; election officials may look to the actual facts and circumstances . . .. By statute, Texas deals with particular categories of citizens who, like soldiers, present specialized problems in determining residence. Students at colleges and universities in Texas, patients in hospitals and other institutions within the State, and civilian employees of the United States Government may be as transient as military personnel. But all of them are given at least an opportunity to show the election officials that they are bona fide residents.

382 F.Supp., supra, quoting Carrington v. Rash, 85 S.Ct. at 780. In short, Judge Chapman, in Dyer, reviewed both South Carolina's case law relating to residency (domicile), as well as the procedures existing to determine residency, each of which were summarized in the 1971 Attorney General's opinion. He found the South Carolina authorities cited in that opinion controlling and the methods to determine whether college students met those requirements constitutional and fair. The Fourth Circuit Court of Appeals summarily affirmed Judge Chapman's decision, 506 F.2d 1397 (4th Cir. 1974).

In view of these authorities, this office must therefore conclude that, in order for students to be registered to vote in the community in which they attend college, they must show that they are domiciled in that community; in short, it must be demonstrated that 'they are living in the college community with the intention of abandoning their former domicile and with the intention of remaining permanently, or for an indefinite length of time in the new location.' Op. Atty. Gen., November 22, 1971. And in order to ascertain whether students meet this legal standard, the factors outlined in the 1971 opinion may be utilized. Dyer v. Huff, supra.

***4** Judge Chapman and the Fourth Circuit Court of Appeals have recognized this standard in the specific context of student registration. Our Supreme Court has repeatedly adhered to this standard of domicile in several other contexts. While our Court, it is true, has never squarely faced the question of student registration, it has employed the above requirements of domicile in the context of residency for servicemen which, as seen, has been deemed by the United States Supreme Court in Carrington v. Rash to be closely analogous. See, O'Neill's Estate v. Tuomey Hospital, supra.

Moreover, this office has consistently concluded, based upon the Tuomey Hospital case, as well as the other authorities cited, that students must establish that they are domiciled (intend to remain permanently or indefinitely) in their college communities in order to be registered to vote there. See, Op. Atty. Gen., March 11, 1971; Op. Atty. Gen., November 22, 1971; Op. Atty. Gen., December 12, 1974. Significantly, the General Assembly has not seen fit to modify this consistent interpretation, a fact which should be given considerable weight in determining this conclusion is correct. See, Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977). Indeed, only recently, the General Assembly enacted Act No. 466 of 1978, which employed this standard of domicile or residence with respect to student tuition and fees for State institutions of higher learning. See, § 59–112–10 et seq. In view of these clear and unwavering judicial and legislative precedents, this office, which is not a court, may simply advise that this is the law as it presently exists in this State and that there may be no departure therefrom until a court rules otherwise.

We should point out however that a number of courts in other jurisdictions, including North Carolina, have now modified the legal criteria for the establishment of domicile with respect to students who wish to register and vote in the community where they attend college. As will be shown, these courts, recognizing the fundamental nature of the right to vote, have generally concluded that students who are living in the college community and plan to remain there at least until graduation may be registered to vote there. We will briefly review those authorities.

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Courts in other jurisdictions recognize that certain difficulties arise when the general law relating to domicile is applied where college students seek to register in their college communities. Even though college students generally have been viewed as maintaining the residency of their parents, Worden v. Mercer Co. Bd. of Elections, (N.J.), 294 A.2d 233, 236 (1972), now [t]imes have changed; mobility has greatly increased. It is likely that fewer students will return to settle permanently in the communities in which they were raised than was once the case. Some students have few ties with the community in which their parents live . . .. Students, as well as other members of the populations, are directly and importantly affected by the . . . laws that govern the communities in which they reside while attending school.

***5** Shivelhood v. Davis, 336 F.Supp. 1111, 1116 (D.Vt. 1971).

Equally significant are the federal and state constitutional considerations which other courts have determined clearly distinguish domicile for purposes of voting from its application in other areas of the law. These courts recognize that while states unquestionably possess the constitutional power to require voters to be bona fide residents, Dunn v. Blumstein, 405 U.S. 330 (1972), still the right to vote is itself a fundamental right. Evans v. Cornman, 398 U.S. 419 (1970). Every citizen has a constitutionally protected right to participate in elections with other citizens in the jurisdiction. Dunn v. Blumstein, supra. The 'fencing out' from the franchise of any sector of the population because of the way they vote is constitutionally impermissible. Carrington v. Rash, 380 U.S. 89 (1965). And the 26th Amendment has sought not only to empower young persons to vote, but affirmatively to encourage their voting through the elimination of unnecessary burdens and barriers. Worden v. Mercer Co. Bd. of Elections, 294 A.2d at 243.

In Ramey v. Rockefeller, 348 F.Supp. 780 (E.D.N.Y. 1972), students sought to declare unconstitutional New York's election law relating to gaining or losing a residence; no person was deemed to have gained or lost a residence by being a student at an institution of learning. New York law, like South Carolina's, requires persons to be domiciled in the State prior to registration.

Unquestionably, said the Court, the State possessed a valid interest in requiring that those who vote be bona fide residents of the community. The real question was how residency must be defined. For other purposes, state law defined domicile as the place where a person intends to remain 'permanently' or 'indefinitely'. However, noted the Court, even 'if the test of indefinite intention is different' from an interest to remain permanently, 'there would undoubtedly be many citizens with 'definite' hopes of moving to better job opportunities, more pleasant climates and the like.' 348 F.Supp. at 788. It would irrationally penalize those who make definite plans to impose such a test on all citizens, concluded the Court. And if the test were in fact only applied to students, 'it would be an impermissible discrimination against them.' Supra at 788. Therefore,
. . . the only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future. The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern. The determination must be based on all relevant factors . . . The State may insist on other indicia, including the important one of abandonment of a home.

Supra at 788. The Court found the test set forth in the Restatement (Second) of the Conflict of Laws § 18 (1971) to be the one which falls within constitutional limits; that test states that for a person to be domiciled in a particular place, he 'must intend to make that place his home for the time at least.' Where the right to vote is concerned, '[t]he search in each instance is for the State to which the person is most closely related at the time.' Supra at 788.

***6** In Sloane v. Smith, 351 F.Supp. 1299 (M.D.Pa. 1972), Pennsylvania's practice to require college students to submit a great deal more documentation as proof of residency than other applicants was challenged on Equal Protection grounds. The Court stated that while it was beyond dispute that the State possessed the power to require that voters be bona fide residents of the community in which they vote, it was also true that 'where one group or class is required to meet a more stringent test of residency for voting purposes than another, such classification is said to be suspect and cannot be justified unless there is a

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compelling state interest in the imposed restriction or classification.' 351 F.Supp. at 1303. Moreover, the Court reasoned that, in Pennsylvania

If [students] . . . physically live in State College, are interested in the community, are anxious to vote there and nowhere else, and intend it as their legal residence, then there is no justifiable reason why they should not be allowed to vote.

Supra at 1304. Finding no compelling justification for the practice of treating students differently, the Court concluded such practice violated the Equal Protection Clause of the 14th Amendment.

Shivelhood v. Davis, supra, reaches a similar conclusion. There, the Court determined that registration officials must apply a standard of domicile which considers the student's present intention to remain in the community for the time being. Accordingly,

. . . an individual's knowledge that he will graduate from an institution of learning . . . after his graduation does not of itself preclude him from obtaining domicile in Middlebury if he has no definite plans to leave the Town and move elsewhere.

336 F.Supp. at 1114. While a residency determination need be based upon all the relevant facts and circumstances,

[i]n making this evaluation, the Board must bear in mind that election laws are to be liberally construed and that a very heavy burden of proof must be met if persons are to be disenfranchised.

Supra. Refusing to articulate 'exhaustive guidelines for the determination of domicile', the Court nevertheless was careful to enumerate certain considerations which could not in themselves be determinative:

The fact that a student lives in a dormitory, is unmarried, is supported financially by his parents who live elsewhere . . . and occasionally visits his parents even if all these factors occur together is not alone sufficient to preclude domicile [where] the student attends school although these factors may be considered with other relevant evidence. Furthermore, . . . it is important to note that such factors as the lack of a Vermont driver's license or car registration are irrelevant unless the individual has a license or registration in another state.

Supra at 1115. In addition, the Court, as had other courts, emphasized that students could not be required to fill out questionnaires not used with respect to other applicants and that there must be a general application equally relevant to all who sought registration.

***7** In United States v. Symm, 445 F.Supp. 1245 (S.D. Tex. 1978), affd. 439 U.S. 1105 (1979), Texas law mandated a presumption that college students were domiciled where their parents were resident; students in one county were required to complete a questionnaire in order to rebut the presumption. To be registered, students had to show factors such as being married and living with their spouse in the county and obtaining the promise of a job in the county upon graduation. Dormitory rooms could not be considered residences. The Court, relying upon decisions such as Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973), Bright v. Baesler, 336 F.Supp. 527 (E.D.Ky. 1971), Jolicoeur v. Mihaly, 488 F.2d 1 (1971) and numerous others, concluded the practices violated the 26th Amendment. Quoting from Bright v. Baesler, 336 F.Supp. at 533, the Court in Symm stated:

[There is no] . . . reason why it should not be presumed that student applicants for voter registration, like any other applicant, have made their application to register in good faith. Admittedly, a student may not be able to state with certitude that he intends to permanently live in the university community, but such a declaration is not necessary to establish domicile.

445 F.Supp. at 1255. The decision in Symm was summarily affirmed by the United States Supreme Court. 439 U.S. 1105 (1979).

Worden v. Mercer Co. Bd. of Elections, supra emphasized that the traditional presumption, where students were legally considered as being domiciled in their original homes, was outdated.

These statements were made in relatively immobile eras when it was generally assumed that the college student would lead a semicloistered life with little or no interest in noncollege community affairs and with the intent of returning, on graduation to his parents' home and way of living. Such assumption of course has no correct validity. . . .

294 A.2d at 236–7. The Court recognized that 'so much of pertinence . . . has recently happened elsewhere, constitutionally, legislatively and judicially' reconsideration of the presumption was required. In its review of other decisions, Newburger v. Peterson, 344 F.Supp. 559 (D.N.H. 1972) was found by the Court to be particularly persuasive. It was noted that Newburger had concluded the State had shown no compelling interest in applying to the context of voting a test for domicile requiring 'an intention to remain permanently or indefinitely.' Such a test applied indiscriminately would exclude persons such as

a newly-arrived executive with a firm intention to retire to . . . Florida at age 65, a hospital intern or resident with a career plan that gives him two or three years in New Hampshire, a construction worker on a long but time-limited job . . . a research contractor on a project with a deadline . . ..

294 A.2d 233, 242, quoting Newberger, 344 F.Supp., supra at 562. While the concept of domicile should not be abandoned, said the Court in Worden, neither should it be deemed inflexible; in the context of student registration; the concept had to account not only for constitutional requisites, but also the fact that students usually have had '. . . indefinite intentions . . . to move after graduating.' 294 A.2d, supra. Thus, the Worden Court concluded that unless there is a particularly strong showing to the contrary, a student should have the right to vote at his college residence if he actually lives there, is interested in and concerned with the college community and asserts in good faith his purpose of voting there and no place else. 294 A.2d at 244.

***8** Likewise, the Court in Hershkoff v. Bd. of Registrars of Voters, (Mass.), 321 N.E.2d 656 (1974) concluded that parental support or dormitory residence cannot 'be given effect to limit the young voter's freedom of choice of domicil . . .'. 321 N.E.2d at 663. College students are, instead, free to establish new homes in their domitories. The Court emphasized that its prior decisions concerning domicile, which had required an intention to remain permanently or indefinitely 'should not be taken literally.' 321 N.E.2d at 664. Further, added the Court, '[t]he requisite intention is to make the place one's home for the time at least. If young people have such an intention, even if they intend to move later on, nevertheless 'they have their home in their chosen abode while they remain.' Supra. The Court noted that, while registrars could consider criteria such as driver's licenses, past and current addresses, prior voting registrations, etc., none in themselves were determinative; more important was the idea that '[w]here a student of voting age declared that he intended to make [the college community] his home, we do not think the registrars were required to take an adversary position as to his intention solely because he was a student.' 321 N.E.2d at 665.

The North Carolina Supreme Court also recently dealt exhaustively with the question of domicile as applied to student registration in Lloyd v. Babb, (N. C.), 251 S.E.2d 843 (1979). The Court modified its prior decisions, adopting the Restatement Second view that the person must intend to make that place his home 'for the time at least'. The Court concluded as follows:

We now think the approach of these cases and the Restatement is constitutionally required insofar as the law of domicile relates to the right to vote . . .. We therefore hold that a person has domicile for voting purposes at a place if he (1) has abandoned his prior home (2) has a present intention to make that place his home, and (3) has no intention presently to leave that place. Applying this rule to the more specific case of students we hold that a student is entitled to register to vote at the place where he is attending school if he can show by his declarations and by objective facts that (1) he has abandoned his prior home (2) has a present intention of making the place where he is attending school his home and (3) intends to remain in the college town at least so long as he is a student there and until he acquires a new domicile.

251 S.E.2d at 864.

Our review of the foregoing decisions makes it clear that at least where the fundamental right to vote is concerned, the requirement of domicile focuses upon the student's present intent, not his long range plans. These courts conclude that constitutional considerations as well as those of public policy require the test for domicile to be whether the student intends

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to reside in the college community for the time being at least. They hold that as long as the student possesses the present intention to live in the college community and considers that community his home at least until he graduates, he is required to be registered to vote there.

***9** However, as stated, these cases from other jurisdictions do not presently reflect the law relating to residency in South Carolina. This office must advise you as to the law concerning residency in this State and only the court or the General Assembly may modify that law. We simply call your attention to these authorities from other jurisdictions.

CONCLUSION

As we read the law in this State and in the Fourth Circuit at present, a student may be registered to vote in the community where he attends college only if he establishes that he is a bona fide resident of that community. Based upon the South Carolina cases and the Fourth Circuit Court of Appeals decision in Dyer v. Huff, such residency may be established only if the student intends to remain in the community permanently or indefinitely. The State may require more than a simple declaration by the student to this effect and may review several criteria to insure that the student is validly domiciled in that community. Presently, these cases are controlling in South Carolina.

A number of courts in other jurisdictions have, based upon considerations of public policy and constitutional requirements, modified the law in those jurisdictions. It may be that our courts will adopt a similar modification, but they have not yet done so. Of course, a student or some other person having the requisite legal standing could seek to have the law in this area clarified or modified by a court. However, this office is not a court and thus does not possess the legal authority to make such a modification or a change. A court in this State would likely consider the strong public policy and constitutional arguments advanced on behalf of student registration in these cases; the Court would also take into account the fact that, for purposes of reapportionment, these persons would probably be counted as residents, yet would likely not be able to vote. But a court would also undoubtedly recognize that the State possesses a very strong interest in insuring that only qualified residents vote in its elections. Since the law concerning student registration appears to be undergoing some change, judicial or legislative clarification may now be advisable.

Sincerely,

T. Travis Medlock
Attorney General

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