

1976 S.C. Op. Atty. Gen. 145 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4324, 1976 WL 22943

Office of the Attorney General

State of South Carolina

Opinion No. 4324

April 12, 1976

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Dear Mr. Bryan:

We are in receipt of your letter in which you requested an opinion concerning whether or not a woman living with her husband on a South Carolina military base can claim South Carolina as her domicile and her husband not claim South Carolina as his domicile. You have stated that two women, whose husbands are stationed at Shaw Air Force Base and whose husbands claim residency in states other than South Carolina, have registered to vote in South Carolina though their husbands do not vote here. These two women have subsequently become notary public for South Carolina.

The question of whether or not a married woman can establish a separate domicile from that of her husband has been the subject of a great deal of litigation. South Carolina, as you are aware, is a common law state and the common law does not recognize the right of a married woman to establish a separate legal domicile from that of her husband. In [Commonwealth v. Rutherford, 169 S.E. 909 \(1933\)](#) the court cited [Shute v. Sergeant, 36 A. 282 \(1892\)](#) for its definition of the common law theory.

By marriage, husband and wife become one person in law; that is, the very being or legal existence of the wife is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything. 1 Bl. Comm. 442. Such being the common law status of the wife, her domicile necessarily followed her husband's, and the maximum applied without limitation or qualification.

See also [Ashmore v. Ashmore, 251 So. 2d 15 \(1971\)](#).

This common law 'fiction' of the doctrine of the merging identity of the wife with the husband has been eroded by case law, 90 A.L.R. 358, 128 A.L.R. 1422, and by statutes. By statute a woman may now make contracts, sue, etc., which she was prohibited from doing under the common law theory of the husband and wife being one and that one being the husband. [Commonwealth v. Rutherford, supra](#), p. 914. However, in regard to a married woman's domicile the general rule is still considered to be that a woman's domicile is that of her husband's. 28 C.J.S. [Domicile](#), Section 16; [Cone v. Cone, 61 S.C. 512 \(1900\)](#); [Stone Manufacturing Company v. South Carolina Employment Security Commission, 219 S.C. 239 \(1951\)](#); [Deese v. Hundley, 232 F. Supp. 848 \(1964\)](#). The courts have consistently held that a woman may establish a separate domicile if she is not living amicably with her husband, or for purpose of obtaining a divorce. [Williamson v. Osenton, 232 U.S. 619 \(1914\)](#); [Commonwealth v. Rutherford, supra](#). And, several cases have held that a woman may establish a separate domicile for any purpose. [Commonwealth v. Rutherford, supra](#); [Spindel v. Spindel, 283 F.Supp. 797 \(1968\)](#); [Ashmore v. Ashmore, supra](#). However, these cases almost exclusively deal with amicable marriage arrangements where the husband and wife were not living together continuously but live together for some time and apart for some time. Whether a woman can establish a separate domicile while living amicably and consistently with her husband is still a virtually unanswered question.

\*2 The question you have presented is further complicated by virtue of two additional facts: (1) the issue is whether or not a married woman can establish a separate residence for the purpose of voting (2) when a husband is in the military and is retaining his domicile in another state. Domicile of person is not affected by the fact that a person enters the military service. A person entering the military

. . . does not thereby lose or abandon the domicile he had when he entered the service; nor does he acquire one at the place where he serves, irrespective of the duration of his actual residence at such place. His residence or domicile is a question of intent. The fact that he is on military duty does not preclude him from establishing his residence where he is stationed if he so desires, where both sufficient acts and intention concur to effect a change in domicile. 25 Am.Jur.2d Elections, Section 75.

Normally, a person acquires a residence wherever he is actually living; but, a person in the military may either retain or abandon the domicile, and residency for purposes of voting, he had when he entered the service. [Ferrara v. Ibech](#), 285 F.Supp. 1017 (1968).

In determining the residency of a married woman for the purposes of voting ‘. . . the doctrine that the domicile of the husband fixes the domicile of the wife is not conclusive, for in such case the distinction is made between domicile and voting residence.’ 25 Am.Jur.2d Elections, Section 70. The theory behind this statement is that every person must establish their own residency. Therefore, if a man moves to a new state several months ahead of his wife, he would be able to vote, but his residency would not be transferrable to his wife. Once his wife came to the new state, she would have to live within the state for the prescribed time required before she could also register to vote. Therefore, for purposes of voting the domicile and residency of the husband does not transfer to the wife.

It appears that the trend in law is to abandon the common law theory of merging the identity of the husband and wife to allow married women to establish their own domicile separate from their husbands for any reason. It is also a fact that every person must establish his own residency for the purposes of voting. Therefore, based on the above cited law, it would be my opinion, that a woman, amicably living with her husband would not be prohibited from establishing her own residency for the purposes of voting in South Carolina though her military husband did not declare the State of South Carolina his residency.

This opinion must be cautioned by the fact that the law pertaining to this area is less than clear within this State; therefore, this opinion cannot be free from doubt as to possible judicial interpretation.

Very truly yours,

Treva G. Ashworth  
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