

Legal Lines

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PRESIDENT'S MESSAGE

by Robert S. White

As we begin a new year we traditionally endeavor to wipe the old slate clean and begin anew: That may apply to our recent personal resolutions to overcome bad habits or to professional resolutions to restart our billing and financial efforts for a profitable new year. There is also no better time to consider renewing our commitment to civility in our profession.

We are privileged to be a part of what we consider a most collegial bar association. We routinely pick up a phone to speak to a colleague about a dispute. We make verbal agreements for extensions or other matters of courtesy without the need to "confirm in writing." I recall that when I was a young lawyer, I was given the advice that in Worcester County one must treat fellow attorneys with courtesy and professionalism because we would be practicing with those same lawyers for a long time to come.

And yet the Supreme Judicial Court Steering Committee's Report on Lawyer Well-Being released on July 15, 2019 reported, "Although civility is central to the ethical and public-service bedrock of the American legal profession, substantial evidence points to a steady rise in incivility within the American bar." I need only consider a handful of cases that I'm handling to find ample evidence of this unfortunate trend. These range from frustrating delays in responding to discovery, toxic letters between counsel, and requests for sanctions and costs in every motion.

Part of the problem lies in the fact that lawyers spend far less time interacting with each other in person. In the days of the motion sessions in Superior Court, I recall sitting in Room 203 as I waited for my case to be called. I met other lawyers who I would regularly see in court and who were often the opposing counsel in my cases. I believe that it is harder to act with incivility toward those who we've become acquainted with.

The task of promoting civility in the bar has been taken up by John J. Morrissey, President of the Massachusetts Bar Association. He has re-formed the MBA Civility and Professionalism Committee and has appointed an outstanding group of members to serve on it. The Committee will be planning and hosting a series of bench bar discussions around the state to discuss civility and efforts to combat incivility.

President Morrissey has also asked each county bar association to appoint a contact person to the Civility and Professionalism Committee. I would ask that if anyone wishes to participate in this important initiative, that he or she contact me to discuss the appointment. In the meantime, I would ask that all of you read the 2016 Civility and Professionalism Guidelines published in this issue of Legal Lines. Though the

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THANK YOU FOR MAKING THE WCBA TOY DRIVE A GREAT SUCCESS

Dear WCBA Members:

Thank you for your generous donations to the toy drive sponsored by the Worcester County Bar Association. The toys and books were delivered to Friendly House to be distributed to families in the community.

The donations collected from WCBA members and their staff helped to put a smile on the face of a child this holiday. This year the donations received were suited for small children as well as teenagers. The thought that went into the gifts collected this year was very impressive. In addition to the many toys for small children we also received jewelry and makeup sets for teenage girls, art supplies, sports equipment, and themed gift bags. I cannot thank you enough for your generosity!

We wish you a very happy and safe holiday season for you, your family and friends.

PRESIDENT'S HOLIDAY RECEPTION

The Worcester County Bar Association hosted its annual President's Holiday Reception on Thursday, December 5, 2019 at the Hilton Garden, Worcester.

This year's event was a huge success with over 160 people attending. Everyone was in the holiday spirit and enjoyed the opportunity to connect in an informal setting to celebrate the season together. Members enjoyed the convenience of the new location for the event.

Thank you to each of you for attending and making the evening so enjoyable.

Happy Holidays!

Season's Greetings

The officers, executive committee and staff of the Worcester County Bar Association wish you, your family and friends a very happy and safe Holiday Season!!

WCBA Family Law Domestic Relations Section
Submits the Following Case Summary

Case Summary: Rose v. Rose, Appeals Court No. 18-P-59 (Nov. 20, 2019)

By Kevin J. Powers¹

I. Issue

Under G.L. c. 208, § 5, a Massachusetts court may exercise subject matter jurisdiction over a divorce only if the plaintiff has satisfied either (1) the "one-year residency requirement" of G.L. c. 208, § 5; or (2) the "alternative jurisdictional requirements" of G.L. c. 208, § 5, including both (i) proof that the plaintiff was domiciled in Massachusetts at the commencement of the action and (ii) that the cause for divorce occurred within Massachusetts. See Caffyn v. Caffyn, 441 Mass. 487, 487-488 (2004). What factual circumstances satisfy the one-year residency requirement?

II. Facts

The husband and wife married outside of Massachusetts in 2011, while both were living outside of Massachusetts and working for the United Nations. In late 2011, in anticipation of moving overseas to be with the husband, the wife moved to her parents' home in Massachusetts. In December 2011, the wife moved overseas to be with her husband. Over the ensuing years, the wife lived in various foreign countries and sometimes traveled to the United States, where she stayed in her parents' home in Massachusetts. The husband traveled to the United States three times, joining the wife in Massachusetts for a total of twenty-four days.

III. Procedural History

In April 2017, the husband filed a petition for divorce in a foreign country. In May 2017, counsel for the wife filed a complaint for divorce in Massachusetts. On her complaint, the wife listed her parents' home in Massachusetts as her address. In July 2017, a deputy sheriff attempted to serve the husband's petition for divorce on the wife at her parents' Massachusetts address; however, the deputy sheriff was informed by "[t]he individual who answered" the door "that the [w]ife had moved to New York, works for the [United Nations], and [did] not live at that residence."

The husband moved to dismiss. The motion judge dismissed the wife's complaint due to lack of subject matter jurisdiction, finding that the wife had failed to meet the one-year residency requirement of G.L. c. 208, § 5 because she was "physically living in Switzerland" when the complaint was filed. The wife appealed.

IV. Analysis

Justice Desmond, writing for the Appeals Court and reviewing the decision of the motion judge *de novo*, first observed that the wife conceded that the couple never lived together as spouses in Massachusetts and that the cause for divorce—an alleged irretrievable breakdown of the marriage—did not occur in Massachusetts. Consequently, subject matter jurisdiction was good only if the wife satisfied the one-year residency requirement of G.L. c. 208, § 5.

The Appeals Court observed that nearly all states impose statutory durational residency requirements upon divorce actions, both in order to ensure that divorce plaintiffs are genuinely attached to the state and to insulate divorce decrees from collateral attack. Many state courts construe durational residency requirements as mandating "actual" and "continuous" residence during the statutory period, but "continuous" usually does not mean "literally

¹ The author, who has spent years developing a hair-trigger instinct for whether traffic from Foxborough to Worcester is heavier on Route 146 or on Interstate 495, handles appeals and complex trial motions for busy trial lawyers who love going into court but who lack the time to decamp to a law library. His practice, both as counsel of record and as consulting counsel working with trial counsel, encompasses a broad range of legal areas within both civil and criminal litigation.

This case summary quotes liberally from the summarized opinion. The vast majority of quotations pulled from the summarized opinion are not flagged as such with quotation marks.

uninterrupted." Instead, a plaintiff must generally maintain a meaningful physical presence in the state in order to satisfy the durational residency requirement.

V. Rule of Law

The Appeals Court held that the one-year residency requirement requires that a plaintiff must maintain an actual, continuous residence in the Commonwealth for twelve consecutive months immediately prior to commencement of the divorce action. Courts should apply the requirement of an actual, continuous residence reasonably, and certain temporary absences from the Commonwealth are permissible as long as a plaintiff has maintained a meaningful physical presence during the required twelve-month period.

Whether a plaintiff has maintained an actual, continuous residence in the Commonwealth sufficient to satisfy the one-year residency requirement is a question of fact that trial judges will determine on a case-by-case basis. Notwithstanding that the domicile concept contains an additional element of intent not part of the residence concept for purposes of G.L. c. 208, § 5, many of the domicile factors will apply to a residency analysis. Those factors include, but are not limited to: driver's licensure and automobile registration; ownership of a home or lease of an apartment; transportation of personal property into Massachusetts; receipt of mail; voter registration; physical address; rent payment; bank accounts; vehicle registration; storage of clothing and personal effects; tax payments; and prior history of residence. See Caffyn, 441 Mass. at 492; Fiorentino v. Probate Court, 365 Mass. 13, 22 n.12 (1974); Meyer v. Meyer, 68 A.3d 571, 583 (R.I. 2013). The Appeals Court held that these factors, along with evidence of a plaintiff's physical presence in the Commonwealth during the required twelve-month period, should allow a judge to make a reasonably accurate determination as to whether a plaintiff has maintained an actual, continuous residence for purposes of satisfying the one-year residence requirement.

VI. Policy

The Appeals Court stated that its construction ensures that a plaintiff seeking to initiate divorce proceedings has a "modicum of attachment" to the Commonwealth and furthers the Commonwealth's "parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." This policy echoes the policies behind durational residency requirements in other states.

VII. Holding

Because the motion judge did not hold an evidentiary hearing and lacked the benefit of the Appeals Court decision in this case, the motion judge did not make a factual determination as to whether the wife maintained an actual, continuous residence in Massachusetts for twelve consecutive months immediately prior to filing her complaint.

VIII. Disposition

The Appeals Court therefore vacated the judgment and remanded for an evidentiary hearing and findings of fact as to whether the wife satisfied the one-year residency requirement.

IX. Concurrence

Justice Rubin concurred in the majority opinion but wrote separately to warn that the Legislature may want to amend G.L. c. 208, § 5 because the current statutory language could give rise to an untenable situation if an active duty service member is deployed overseas within months of arrival in Massachusetts. In such a situation, an active duty service member, domiciled in Massachusetts, would fail to satisfy the one-year residency requirement and thereby find himself or herself unable to invoke the jurisdiction of Massachusetts courts, the court of any other court in the United States, and potentially any court other than the courts of the country in which the service member is deployed.