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notwithstanding his or her fault.¹¹ Also, in the majority of states, alimony may be awarded in an action for absolute divorce.¹² Therefore, the husband may obtain a divorce even though the wife has not previously obtained an alimony decree.¹³

Although the North Carolina court may be achieving desirable results under its present policies, it is not the function of the court to determine what the social policy should be in an area in which the legislature has already made such determination. Since the legislature has provided in express terms that a divorce shall be granted after two years separation, the court should not qualify this in order to carry out another policy—that of protecting the wife's right to support from her husband rather than from society.

It is submitted that the legislature should amend our statutes to permit an award of alimony in an action for absolute divorce. This will permit the court to carry out both social policies and at the same time adhere to the express mandate of the two years separation statute.

BORDEN R. HALLOWES

Domestic Relations—Divorce and Adoption—Residence Requirement for Servicemen

Acquisition by service personnel of a domicile of choice has for many years presented vexing quandaries both to lawyers and to legislatures. For example, questions as to domicile may be of critical importance in resolving problems encountered by servicemen in such diverse areas as taxation,¹ establishment of voting rights in

¹¹ *E.g.*, *Schuster v. Schuster*, 42 Ariz. 190, 23 P.2d 559 (1933); *Sandlin v. Sandlin*, 289 Ky. 290, 158 S.W.2d 635 (1942); *Best v. Best*, 218 Ky. 648, 291 S.W. 1032 (1927); *Otis v. Bahan*, 209 La. 1082, 26 So. 2d 146 (1946); *Bernard v. Jefferson*, 191 La. 881, 186 So. 599 (1939); *Lemp v. Lemp*, 62 Nev. 91, 141 P.2d 212 (1943).

¹² *Northcutt v. Northcutt*, 262 Ala. 98, 77 So. 2d 336 (1955); *Schiebe v. Schiebe*, 57 Cal. App. 2d 336, 134 P.2d 835 (Dist. Ct. App. 1943); *Weintraub v. Weintraub*, 302 N.Y. 104, 96 N.E.2d 724 (1951); *Hyde v. McCoart*, 82 R.I. 426, 110 A.2d 658 (1955).

¹³ *Barrington v. Barrington*, 206 Ala. 192, 89 So. 512 (1921); *Rylands v. Rylands*, 65 Ariz. 97, 174 P.2d 741 (1946); *George v. George*, 56 Nev. 12, 41 P.2d 1059 (1935); *Dawson v. Dawson*, 62 Wyo. 519, 177 P.2d 200 (1947).

¹ See *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). See generally Baer, *So Your Client Wants A Divorce*, 24 N.C.L. REV. 1, 14 & n.55 (1945).

a particular location,² adoption³ or guardianship.⁴ Divorce cases, however, constitute possibly the largest single source of litigation involving determination of the place of domicile of military personnel.

The basic statutory provision in North Carolina respecting jurisdictional prerequisites in divorce actions⁵ requires that the plaintiff allege that the complainant or defendant has been a resident of this state for at least six months next preceding the filing of the complaint. The North Carolina Supreme Court in construing this statutory mandate has interpreted the word "resident" to mean "domicile," thereby necessitating concomitance of residence and animus manendi.⁶

In apparent recognition of the confusion engendered by application of this jurisdictional requirement in instances where one of the parties to the action was in military service the General Assembly in 1959 enacted G.S. § 50-18⁷ which provides,

In any action instituted and prosecuted under this chapter [Divorce and Alimony], allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirement set forth in this chapter

It seems permissible to assume that the legislature was aware of the interpretation that the North Carolina Supreme Court had placed on the provisions of the existing jurisdictional statute.⁸ Thus, enactment of G.S. § 50-18 seems clearly to evince legislative intent to authorize the granting of a divorce to a serviceman upon a show-

² See, *e.g.*, *Estopinal v. Michel*, 121 La. 879, 46 So. 907 (1908); *Dorsey v. Brigham*, 177 Ill. 250, 52 N.E. 303 (1898).

³ See, *e.g.*, *Johnson v. Smith*, 94 Ind. App. 619, 180 N.E. 188 (1932); *Cribbs v. Floyd*, 188 S.C. 443, 199 S.E. 677 (1938).

⁴ See, *e.g.*, *McMillin v. McMillin*, 114 Colo. 247, 158 P.2d 444 (1945); *Beringer v. Beringer*, 164 Misc. 413, 298 N.Y. Supp. 965 (Dom. Rel. Ct. 1937).

⁵ N.C. GEN. STAT. § 50-8 (Supp. 1959).

⁶ *Bryant v. Bryant*, 228 N.C. 287, 45 S.E.2d 572 (1947).

⁷ N.C. GEN. STAT. § 50-18 (Supp. 1959).

⁸ N.C. GEN. STAT. § 50-8 (Supp. 1959).

ing of something less than domicile as a basis for jurisdiction.⁹ Perhaps the presence of a substantial number of military bases in North Carolina, expectably resulting in a high percentage of divorce actions involving servicemen, motivated this apparent attempt to reduce the existing jurisdictional requirement. Other jurisdictions have enacted similar statutes,¹⁰ and still others have statutes which employ language seemingly broad enough to authorize divorce jurisdiction, under certain circumstances, without a finding of domicile.¹¹ From the serviceman's point of view, the desirability of such statutory allowance is obvious; utilization of provisions of this nature would circumvent the extreme inconvenience he would encounter if forced to initiate an action in his "home" state.¹²

Historically, divorce has been regarded as an action in rem, and domicile has been considered the core of divorce jurisdiction.¹³ Unfortunately, however, the United States Supreme Court never has ruled on the precise question of whether some other relationship between the state and litigants will provide an allowable foundation for the judicial power to grant divorces. Judicial opinion has divided sharply as to the effect of statutes purporting to authorize divorce jurisdiction on a basis other than domicile: some courts have regarded such legislative action valid to confer jurisdiction,¹⁴ while others have espoused the view that domicile is the only per-

⁹ For a full exploration of the probable intent underlying enactment of this statutory section, see Ligon, *Is Domicile a Jurisdictional Prerequisite to a Valid Divorce Decree?*, 3 JAG J. 9 (1961).

¹⁰ GA. CODE ANN. § 30-107 (Supp. 1961); KAN. GEN. STAT. ANN. § 60-1502 (1949); NEB. REV. STAT. § 42-303 (1960); N.M. STAT. ANN. § 22-7-4 (1954); OKLA. STAT. ANN. tit. 12, § 1272 (1961); TEX. REV. CIV. STAT. ANN. art. 4631 (1960); VA. CODE ANN. § 20-97 (1960).

¹¹ See ARK. STAT. ANN. § 34-1208.1 (Supp. 1961); COLO. REV. STAT. ANN. § 46-1-3 (1954); ME. REV. STAT. ANN. § 166-55 (Supp. 1959); N.Y. CIVIL PRACTICE ACT § 1166.

¹² Aside from additional expense, probably the greatest obstacle in this respect would be obtention of a furlough to coincide with the time of trial.

¹³ *Williams v. North Carolina*, 325 U.S. 226 (1945); *Bell v. Bell*, 181 U.S. 175 (1901).

¹⁴ *Wheat v. Wheat*, 229 Ark. 842, 318 S.W.2d 793 (1958); *Schaeffer v. Schaeffer*, 175 Kan. 629, 266 P.2d 282 (1954); *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959). Cf. *David-Zieseniss v. Zieseniss*, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

Many writers argue that the mandatory requirement of domicile is undesirable. See, e.g., COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 463 (1942); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); Lorzen, *Extraterritorial Divorce—Williams v. North Carolina II*, 54 YALE L.J. 799 (1945).

missible jurisdictional predicate.¹⁵ Since ample legal authority exists to support either view,¹⁶ there could only be speculation as to the position the North Carolina Supreme Court would adopt with reference to the provisions of G.S. § 50-18. The recent case of *Martin v. Martin*¹⁷ provides the answer.

In *Martin*, the plaintiff-husband, a United States Army officer, was assigned to Fort Bragg in July 1958, and served there continuously until August 1959. On July 6, 1959, he instituted an action for absolute divorce on the ground of two years' separation, and alleged that he had been a resident on the Fort Bragg Military Reservation for more than six months next preceding the commencement of the action. The defendant-wife, who was present at the trial, contended that the residence requirement set out in G.S. § 50-18 involved domicile and averred that the plaintiff did not intend to make North Carolina his permanent home.

In evident reliance upon G.S. § 50-18, the trial judge instructed the jury that if they found that the plaintiff had been stationed at Fort Bragg pursuant to military duty for six months prior to the bringing of the action, they should answer the issue of residence in favor of the plaintiff. The defendant excepted to this charge. The jury found for the plaintiff and judgment was entered in accordance with the verdict.

On appeal this portion of the charge was held erroneous in that it omitted the "requirement of intent to adopt North Carolina as legal residence,"¹⁸ and accordingly a new trial was awarded. Thus the court imported to the specialized provisions of G.S. § 50-18 the exact interpretation of residence requirement established under the basic statute applicable to divorce jurisdiction. Several cases¹⁹ from other jurisdictions that had vigorously denied effect to similar statutes which sought to establish jurisdictional bases for divorce on grounds other than domicile were cited with approval in the opinion. Although decisions²⁰ that had held valid such statutory provisions were

¹⁵ *Williams v. North Carolina*, 325 U.S. 226 (1945) (dictum); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953); *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948). See generally GOODRICH, *CONFLICT OF LAWS* § 396 (3d ed. 1949); *RESTATEMENT, CONFLICT OF LAWS* § 111 (1934).

¹⁶ For an excellent discussion that marshals the authorities supporting each side of this controversy, see 38 N.C.L. Rev. 154, 176-87 (1959).

¹⁷ 253 N.C. 704, 118 S.E.2d 29 (1961).

¹⁸ *Id.* at 710, 118 S.E.2d at 34.

¹⁹ *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953); *Jennings v. Jennings*, 251 Ala. 73, 36 So. 2d 236 (1948).

²⁰ *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936); *Wallace v. Wallace*,

alluded to, the court expressly disapproved the conclusion reached by these cases and stated, "We hold that in order for the courts of this State to exercise jurisdiction affecting the marital status, at least one of the parties to the action must be domiciled in the State. Mere presence is insufficient."²¹ This broad language seems effectively to sound the death knell for application of G.S. § 50-18 along the lines of the presumptive legislative intent underlying its enactment, *i.e.*, relaxation of the stringent "domiciliary" residence requirement in cases where a serviceman is a party to the divorce action.

In an effort to ascribe some effect to the statute involved the court stated that it regarded G.S. § 50-18 as "an expression of policy by the General Assembly that a serviceman stationed on a military reservation in the State is capable of establishing his domicile in North Carolina."²² Upon examination of the language employed in the statute, however, such a construction seems strained. Certainly there is nothing in the statute to imply that its application was intended to be limited to servicemen actually living on a military post who would thereby be under United States jurisdiction rather than that of the state. By express provision, the statute was designed to extend to servicemen located *anywhere* in North Carolina pursuant to military service. If the legislature had only intended that the statute should authorize the establishment of domicile within the state by armed forces personnel living on a military reservation, embodiment of such language is unexplainable.

As has been pointed out, the holding in *Martin* aborted an apparent attempt to confer divorce jurisdiction upon a basis other than legally defined domicile. This position may be justified in the light of traditional views regarding divorce: (1) dissolution of a marriage changes the status of the parties and thus touches the basic interests of society, and (2) domicile alone provides an inter-

63 N.M. 414, 320 P.2d 1020 (1958). The controlling premise in these cases was that since no definitive authority exists to establish domicile as the sole permissible basis for divorce jurisdiction it was within the power of the legislature to set other reasonable jurisdictional bases.

²¹ 253 N.C. at 709, 118 S.E.2d at 31.

²² *Ibid.* Conversely, the North Carolina Supreme Court recently held that a serviceman's domicile within the state is not lost merely because he leaves pursuant to military service. Rather, his domicile remains in the home state unless he takes appropriate action to effect a change. *Israel v. Israel*, 255 N.C. 391, 121 S.E.2d 713 (1961).

connection between the state and the parties sufficient to authorize control of such significant legal relations.²³

The considerations discussed above would seem to be as applicable to adoption as to divorce since an adoption also affects status.²⁴ This raises an interesting legal problem. In order to adopt a child in North Carolina, it is required by statute that the adopting parent be a resident of this state.²⁵ If the legislature may not base divorce jurisdiction on something less than domicile, does it necessarily follow that the same would hold true in the case of adoption? If so, is the validity of some of the adoptions by servicemen now in jeopardy?

Attacks upon adoption usually are made in one of two general forms: motion to vacate the decree²⁶ or habeas corpus proceeding for custody of the child.²⁷ In either proceeding the decisive question is whether the court which rendered the decree had jurisdiction. Since adoption is not a common law action,²⁸ the jurisdiction must be accorded by statute. Widely differing views have been advanced by courts as to the proper interpretation to be placed on the word "resident" (or "resides") as it appears in various adoption statutes. Although the better view would seem to be allowance of adoption on the basis of residence in the ordinary sense,²⁹ there is authority for the proposition that residence as included within a particular adoption statute must be interpreted to mean domicile.³⁰

²³ See *Williams v. North Carolina*, 325 U.S. 226 (1945); *Andrews v. Andrews*, 188 U.S. 14 (1903); *Bell v. Bell*, 181 U.S. 175 (1901).

²⁴ There seems to be a more or less inchoate notion that adoption operates in rem or quasi in rem, though agreement as to the identity of the res and as to its situs does not exist. For an exhaustive treatment of the cases in this area and the underlying rationale of the decisions, see Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1953).

²⁵ N.C. GEN. STAT. § 48-4 (1950).

²⁶ See, e.g., *Lambert v. Taylor*, 150 Fla. 680, 8 So. 2d 393 (1942); *Nealon v. Farris*, 131 S.W.2d 858 (Mo. Ct. App. 1939); *Strode v. Silverman*, 209 S.W.2d 415 (Tex. Civ. App. 1948).

²⁷ See, e.g., *Finn v. Rees*, 65 Idaho 181, 141 P.2d 976 (1943); *Watt v. Dunn*, 236 Iowa 67, 17 N.W.2d 811 (1945); *Brooks v. De Witt*, 178 S.W.2d 718 (Tex. Civ. App. 1944).

²⁸ *Wells v. Zenz*, 83 Cal. App. 137, 256 Pac. 484 (Dist. Ct. App. 1927). See generally PECK, *THE LAW OF PERSONS AND DOMESTIC RELATIONS* 352 (3d ed. 1930).

²⁹ *Rizo v. Burrue*, 23 Ariz. 137, 202 Pac. 234 (1921); *Van Matre v. Sankey*, 148 Ill. 536, 36 N.E. 628 (1893); *Succession of Caldwell*, 114 La. 195, 38 So. 140 (1905); *Waller v. Ellis*, 169 Md. 15, 179 Atl. 289 (1935); *In re Adoption of Russell*, 170 Pa. Super. 358, 85 A.2d 878 (1952).

³⁰ *In re Webb's Adoption*, 65 Ariz. 176, 177 P.2d 222 (1947); *In re Goodman*, 49 Del. 550, 121 A.2d 676 (Orphans' Ct. 1952); *Johnson v.*

Although the United States Supreme Court has not expressly ruled on the question, it appears that a decree of adoption, rendered with proper jurisdiction and without fraud on the court, is entitled to normal full faith and credit protection for all purposes.³¹ But such a judgment has no constitutional claim to a more conclusive or final effect in a sister state than in the rendering state.³² Before granting full faith and credit to the decree, a sister state may demand proof that the adoptions were valid under the law of the state granting the adoption.³³

Since the North Carolina court has never had occasion to interpret the word "residence" in our adoption statute, it would be unfortunate if a sister state should seize upon the decision in *Martin* as a basis for refusing to give full faith and credit to a child adopted by a serviceman in North Carolina. Until either the United States Supreme Court or the North Carolina Supreme Court interprets residence in regard to adoption, an attorney would be well advised to get into the record evidence sufficient to support a finding of bona fide domicile of the adopting parent. And in cases where it is clear that the adopting parents are not domiciled in North Carolina, it would seem advisable for the attorney to inform them of the possible "pitfalls" that they might face later.

C. EDWIN ALLMAN, JR.

Federal Income Taxation—Deductibility of Meal and Lodging Expenses as Medical Care

It is probable that during any given year a large number of people in the United States will encounter sickness or injury and will be advised by their physician to take a trip entirely for medical treatment. Since certain medical expenses are deductible for income tax purposes,¹ there arises a question as to what trip expenses may be properly classified as a medical care deduction. This is especially true when the taxpayer is *not* confined to a hospital or other institution and is accompanied on the trip by his wife and, possibly,

Smith, 94 Ind. App. 619, 180 N.E. 188 (1932); *Heirich v. Howe*, 50 N.M. 90, 171 P.2d 312 (1946); *Cribbs v. Floyd*, 188 S.C. 443, 199 S.E. 677 (1938).

³¹ I RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 645 (1945); *RESTATEMENT, CONFLICT OF LAWS* § 143 (1934).

³² *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614 (1947).

³³ *Welch v. Jacobsmeyer*, 216 La. 334, 43 So. 2d 678 (1949).

¹ INT. REV. CODE of 1954, § 213(a).