

QUESTIONS AND ANSWERS ON DOMICILE VS. RESIDENCE

Consider these questions and answers to help you identify your domicile:

Why is domicile important?

Your domicile is the state of your permanent home, or the state you consider your home whenever you are elsewhere. Your domicile is an important place. It is, for example, the place that usually has the power to tax your income or dissolve your marriage or distribute your property upon your death. The Servicemembers Civil Relief Act (SCRA), protects your military pay from being taxed by any state other than the military member's state of domicile. The SCRA further provides that no change in your State of legal residence/domicile will occur solely as a result of your being ordered to a new duty station. From a legal point of view, your domicile is often more important than the place where you are physically present or the place where you are living or the place in which you are stationed. Depending on the purpose and context when it is used, "residence" may mean the same as domicile. Look to the specific definition in a state or federal statute to determine how "residence" is defined for each and every purpose. You may be a resident of one state and a domiciliary of another at the same time. Your state of legal residence is one of the key factors in determining, among other things, your liability for state income taxes, eligibility for "in-state" tuition rates, eligibility for voting in state and federal elections, and where your will is probated.

Many people in the military are confused about their state of legal residence, probably because they move around so much that they don't have any close, continuous links to any particular state. Some people think they do not have a state of legal residence at all; others know they have one, but don't know where it is.

What do domicile, legal residence, home of record, & residence?

"State of legal residence" (SLR) and "domicile" mean the same thing, namely your true, fixed, and permanent abode. Many places inappropriately apply the term "legal residence" when they are referring to your domicile. There is no such thing as an "illegal residence," therefore any residence you acquire is considered to be legal. It means your permanent home, i.e., any place where you have lived and, while you are absent from it, you intend to return. For example, a soldier with a residence in Oregon who leaves the state on military orders, but intends to go back to Oregon after leaving the military, retains Oregon as his SLR or Domicile. Oregon is his permanent home, even though he is temporarily absent from it due to military orders. The soldier might never be stationed in Oregon during a thirty-year military career, and yet Oregon would remain the soldier's SLR for the entire thirty-year period. You **MUST** have lived in a state to claim that state as a domicile. You cannot claim Florida as your SLR/Domicile if you have never lived there.

"Home of record" is almost always the state where you first joined the military. Home of record (HOR) is an accounting term used by the military to determine a number of military benefits, such as travel allowances, transportation expenses, travel time to report to duty, etc. A soldier's HOR is sometimes the same as the soldier's SLR, but that's merely a coincidence, since most people just happen to join the military in the state that is also their SLR. Except in the military, home of record is usually a meaningless term. However, since the HOR can be the same as the SLR, some colleges have started asking for information about the HOR as evidence of a person's SLR.

"Residence" means the place where you are actually living. By itself, residence usually has little or no legal significance.

"Statutory resident" is very similar to "residence" in that it refers to the state where you are actually living. This term describes a certain category of persons who are liable for state income taxes. For example, in some states, someone who is physically present in that state for a specified period of time is considered to be a statutory resident and therefore liable for state income taxes in that state. This is one time that "residence" does have some legal significance. It is important to note that a statutory resident of State A may still retain State B as the

SLR and may be required to file a tax return in State B, too. The SCRA protects military members from becoming a statutory resident of a state other than their state of domicile so the second state may not tax the military member's military pay. Non-military spouses and family members can become statutory residents of the state where the military member is stationed when they live with the military member there, however this is usually limited by the Military Spouses Residency Relief Act of 2009. That state may tax any income the spouse and family members earn in that location.

How did I first get a domicile?

Everyone has a domicile. Most of us identify our domicile because it is where we call home, but for those of us who move a lot or who are in the military, it is sometimes difficult to determine our domicile. At birth we have the domicile of our parents, by operation of law -- without any choice in the matter, and until we are free to leave home we acquire any new domicile our parents may acquire, by operation of law. When we leave home however, to go to college, for example, we acquire a state of domicile by choice.

How may I acquire a domicile of my choice?

To acquire a domicile of choice in a new place two things must happen:

- (a) You must be in the state and
- (b) While you are there and before you leave, you must intend to make it your permanent home.

Those two requirements are all that's necessary. You don't have to buy property in the new state, open a bank account there, vote, get a driver's license, file a legal notice in the paper, or anything else. Physical presence, combined simultaneously with the appropriate mental intent, is all that's required.

Unfortunately, proving mental intent can be difficult sometimes. So to prove that you really did intend to make the new state your domicile, it might be a good idea to do some or all of the things mentioned below, with the understanding that those actions are not what make you a legal resident; rather they are simply evidence that you did intend to make the state your SLR/Domicile.

You do not need to live in the state for any length of time, own a home in the state, or to have an address in the state to be domiciled in it. You only need to be physically present in the state at the time you decide to make it your permanent home. You could for example, drive through the state and be so struck by its beauty that you immediately adopt it as your permanent home, but if you do not have feelings about it before you drive out of it, your domicile has not changed.

Domicile is primarily a state of mind that a certain place is your permanent home. It is a mental attachment that you carry around with you. Once you acquire a domicile it remains your domicile, even though you leave it, unless your state of mind changes while you are in another place.

How do I prove I changed my domicile?

If you change your state of domicile, you may have to prove it. You might, for example, have decided to stop paying state income taxes because you changed your domicile to a state with no income tax. Your old domicile, the state losing tax revenue, may question that change. Or your spouse, for example, might sue for divorce in your former domicile, and you might not like the divorce laws there. If you can prove your domicile changed, you might be able to get the case dismissed. In the case of taxes, if you cannot prove your domicile changed, you could end up owing taxes to two or more states, and require that a court decide the matter. Proving domicile is a question of proving your state of mind. We rely on external evidence or indications of your state of mind. Your statement that a certain place is your permanent home is evidence of your state of mind. The best evidence of your state of mind is the contacts that other people can see you have with a specific state. For the kinds of actions to help prove your state of domicile see the list below. You may not prove successfully that your domicile has changed unless you show contacts beyond just the benefit of the legal consequences that a change of domicile would give you. The issue of domicile is not a "shell game" to avoid taxes -- it is your real and honest intention to make a state your permanent home. You should have all your contacts with the one state you

call your permanent home. If you have contacts with multiple states, it may be difficult or impossible to prove your domicile. See the physical actions below that help evidence your intent change/establish your domicile.

Is domicile the same as my “Home Of Record”?

If you are a military member you have a “home of record” as well as a domicile. Home of record does not mean the same as domicile. Unlike domicile, the term “home of record” has a single purpose: “home of record” is used for fixing travel and transportation allowances. It is used to determine how far they will pay to ship your household goods when you leave active duty. A “home of record” must be changed if it was erroneously or fraudulently recorded initially. Enlisted members may change their “home of record” at the time they sign a new enlistment contract. Officers may not change their “home of record” except to correct an error, or after a break in service. It just so happens that in most cases service members join the military in their hometown or state. If this is the case with you, your home of record is same as your domicile. But this need not be the case. For example, you could be from Florida but entered the military in Virginia. In this case your home of record might be in Virginia, although you are still domiciled in Florida.

Should I update my military records to reflect my correct domicile?

Yes. The rules for changing your home of record are not the same as rules that apply when your domicile changes. Unlike domicile, you can only change your home of record at a certain time, when you reenlist for example. Because some military personnel in administrative jobs have a tendency to think that home of record and domicile mean the same thing, service members sometimes are told that they cannot change their domicile unless they reenlist. This erroneous advice has, in some cases, resulted in the military withholding income from the pay of a service member for state income tax purposes and paying the amounts withheld, perhaps for a period of several years, to a state that is not entitled to receive that money. To make sure that your active duty military pay is being correctly withheld and paid to a state entitled to receive it, you must file a DD Form 2058, State of Legal Residence Certificate. Once filed, this certificate will go through channels to finance where it will be used to determine whether pay should be withheld from your income and, if so, how much should be withheld and to which state it should be paid. If you declare a change in your domicile on this certificate you should know that the military will notify the state which was your former domicile about your action. You should therefore be prepared to prove that your domicile has indeed changed as discussed above.

What physical actions may indicate my domicile?

One or more of these may prove your intent that a particular state is your domicile (numbers 1 through 11 are important – others are not required, but may help in a questionable situation):

1. Expressed intent, oral or written and physical presence, past and present (including duration) [Prerequisite to establishing domicile].
2. Voter registration. [Important factor.]
3. Vehicle registration as a resident vice non-residence military [Important factor – but you have a choice.]
4. Motor vehicle operator’s permit. [Important factor.] (See the MLCP (II) information paper on California driving laws for military families.)
5. Location of bank and investment accounts.
6. Explanations for temporary changes in residence.
7. Submission of DD Form 2058 (Change of domicile form).
8. Payment of taxes (income and personal property). [Important factor.] But see *Wolff v. Baldwin*, 9 NJ Tax 11 (N.J. Tax Court 1986) (One cannot establish domicile by paying taxes alone; physical presence is also necessary.)
9. Payment of nonresident tuition to institutions of higher education
10. Declarations of residence on legal documents such as wills, deeds, mortgages, leases, contracts, insurance policies, and hospital records. [Important factor.]
11. Declarations of domicile in affidavits or litigation. [Important factor.]
12. Residence of immediate family.
13. Membership in church, civil, professional, service or fraternal organizations.
14. Ownership of burial plots.

15. Place of burial of immediate family members.
16. Location of donees of charitable contributions.
17. Location of schools attended by children.
18. Ownership of real property. [Important factor. However, ownership of property in another state will not disqualify.]
19. Home of record at the time of entering service.
20. Place of marriage.
21. Spouse's domicile.
22. Place of birth.
23. Business interests.
24. Sources of income.
25. Outside employment.
26. Address provided on federal income tax return.

Generally, unless you have taken at least some of these steps, it is doubtful that your State of legal residence/domicile has changed. Failure to resolve any doubts as to your State of legal residence/domicile may adversely impact on certain legal privileges which depend on legal residence/ domicile including among others, eligibility for resident tuition rates at State universities, eligibility to vote or be a candidate for public office, and eligibility for various welfare benefits. If you have any doubt with regard to your State of legal residence/domicile, you should contact your Legal Assistance attorney for legal advice before deciding to change your domicile.

May I change my domicile?

Yes, the formula for changing your State of legal residence/domicile is simply stated as follows: physical presence in the new State with the simultaneous intent of making it your permanent home and abandonment of the old State of legal residence/domicile. In most cases, you must actually reside in the new State at the time you form the intent to make it your permanent home. Such intent must be clearly established and the physical actions described above indicate your intent.

There is one situation where you may be able to change your domicile without meeting the physical presence test. If you marry a resident of a different state, you might be allowed to claim your spouse's domicile as yours, or vice versa, without ever having been physically present in that state. This is a somewhat aggressive strategy, but there is some support for it. The marital relationship is so significant that, by itself, it may give the spouse a close enough connection to the new state to justify claiming the new state as the domicile. There is substantial historical precedent for this argument. In the 1900's, when a woman married a man from a different state, the woman became a legal resident of the man's domicile by operation of law. Those laws no longer exist, but that helps demonstrate the legal significance of the marital relationship and the type of legal consequences that can result from marriage.

What actions should I take if I change my domicile?

If you wish to change your SLR, you should take these actions:

- a. You must be consistent. If you are a legal resident of State A, then you shouldn't keep your driver's license from State B or vote in State C. Inconsistency is probably the single biggest mistake that people make in this area.
- b. You should adjust your state income tax withholding by filing DD Form 2058 with your local military finance office.
- c. There is no need to publish a notice or file any documents with the state Attorney General's Office or anything like that.
- d. If both the old and new states have an income tax, and if you moved on any day other than January 1, then you will have to file part-year returns in both states. For the first state, you report the income you had before moving to the new state. For the new state, you report the income earned after becoming a resident of the new state.

Do military orders establish my domicile?

Being assigned in a state pursuant to military orders, even if it's for five or ten or fifty years, is not sufficient by itself to establish a new domicile. Being stationed somewhere is nothing more than mere physical presence, and mere physical presence is not enough, that is only a residence. However, if you have the mental intent to make the state where you are stationed your domicile, then you have met the requirements.

If you're overseas and want to change your SLR, you have to go back to the U.S., establish physical presence in a new state and have the appropriate mental intent while you are physically present there.

Bottom Line:

You can have 50 residences but only 1 domicile at any time. You are technically a resident wherever you live. However, many states, agencies and people use "residence" or "legal residence" interchangeably with "domicile." So, that being said, you can be a resident of MT just by living here, but if you want to be a legal resident, or a domiciliary, then you need to evidence what is called an "intent to remain/intent to return." That's the key difference. Residency is physically living somewhere. Domicile is physically living somewhere (or lived somewhere) and intent to remain (or intent to return if you're military). You CANNOT have a domicile for a state you have never lived in. You must have physically resided in a certain state to gain its benefits and protections.

