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Alaska Durational Residency Requirement Held Unconstitutional.

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CONSTITUTIONAL LAW—Equal Protection—Alaska Durational Residency Requirement Held Unconstitutional

State v. Adams, 522 P.2d 1125 (Alaska 1974).

Rayann Adams, a resident in the state of Alaska for a period of 3 continuous months, filed suit for divorce alleging that Alaska's 1-year residency requirement for divorce actions[1] infringed on her fundamental rights of interstate travel, equal protection, and due process of law as guaranteed by the United States and Alaska Constitutions. The Superior Court of the First Judicial District held that the statute violated the equal protection clauses of the United States and Alaska Constitutions, and ordered that plaintiff be allowed to prove that she was a bona fide Alaskan domiciliary. The state appealed to the Supreme Court of Alaska. Held—*Affirmed.* Since all durational residency requirement statutes inherently infringe on the fundamental right to interstate travel, they are prima facie invalid as violative of the 14th amendment, and will be countenanced only where they serve a compelling state interest.[2] Since no compelling state interest was served by maintenance of the statute, Alaska's test of domicile will henceforth be a "subjective" one wherein the proponent's actual state of mind rather than the time he has resided in the state will be determinative.[3]

Within the confines of the Equal Protection Clause, states have the right to classify persons for legitimate governmental purposes.[4] When a discriminatory classification is alleged, the United States Supreme Court has created two tests for determining the statute's validity. Under the "traditional" or "reasonable basis" test, a classification is void if it is without reasonable basis and therefore purely arbitrary.[5] This less restrictive standard allows a classification to stand if *any* facts can be reasonably conceived to sustain it.[6] A much more precise test must be met where a classification infringes on a constitutionally guaranteed fundamental right such as the right to vote[7] or the

1. ALAS. STAT. 09.55.140 (1973) provides: "*Residence requirement for divorce.* No person may commence an action for divorce until he has been a resident of the state for at least one year before the commencement of the action."

2. State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974).

3. *Id.* at 1132.

4. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The court explained that states have a wide scope of discretion to classify persons under their police power.

5. *Id.* at 78-79; *see* Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

6. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 104 (1973) (Marshall, J., dissenting); McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

7. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

right to a fair trial.[8] In such a case the statutes will be held unconstitutional unless the classification is necessary to further some "compelling state interest."[9] Once this requirement has been fulfilled, it must also be shown that the statute is drawn with such precision as to constitute the most minimal restriction on the constitutional right in question.[10]

State durational residency requirement statutes automatically divide residents into two classifications: old and new.[11] Whether the reasonable basis or the compelling state interest test is to be applied when a discriminatory classification is alleged depends on the nature of the right affected by the classification.

In *Shapiro v. Thompson*,[12] the Supreme Court found that residency requirements as a prerequisite to receiving welfare constituted a restriction on interstate travel.[13] This right, though not explicitly mentioned in the Constitution, has nevertheless been held to be a fundamental one not to be denied any person absent a showing of compelling state interest.[14] Since the state interests were not sufficiently compelling, the statutes were held unconstitutional.[15]

In 1972 the Supreme Court in *Dunn v. Blumstein*[16] greatly expanded the scope of *Shapiro*.[17] A new Tennessee resident successfully attacked the state's residence requirement which precluded him from voting in state elec-

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8. *See* Roberts v. La Vallee, 389 U.S. 40 (1967).

9. Dunn v. Blumstein, 405 U.S. 330, 335 (1972); *see* Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

10. Dunn v. Blumstein, 405 U.S. 330, 343 (1972); *see* McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964). For a general discussion of both the traditional and strict scrutiny tests see Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?*, 31 WASH. & LEE L. REV. 359, 360-61 (1974); Note, *Family Law—The Constitutionality of State Durational Residence Requirements for Divorce*, 51 TEXAS L. REV. 585, 588-89 (1973).

11. Dunn v. Blumstein, 405 U.S. 330, 334 (1972).

12. 394 U.S. 618 (1969).

13. The court dealt with the District of Columbia and other state statutes: *e.g.*, CONN. GEN. STAT. REV. § 17-2c (Supp. 1974-75); D.C. CODE ANN. § 3-203 (1967).

14. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Courts generally agree that the right to interstate travel is a fundamental one. United States v. Guest, 383 U.S. 745, 757-59 (1966) held that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.* at 758; *accord*, Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958). *See generally* Comment, *Travel: The Evolution of a Penumbral Right*, 5 ST. MARY'S L.J. 84 (1973).

15. Shapiro v. Thompson, 394 U.S. 618, 633-38 (1969). Proposed state interests were found by the Court not to be compelling. The state contended, for example, that residency requirements deterred indigents from migrating into the state and that they limited welfare benefits. *Id.* at 633-38.

16. 405 U.S. 330 (1972).

17. Where *Shapiro* confined itself to the constitutionality of welfare statutes, *Dunn* suggests that all residency requirement statutes are violative of equal protection. Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?*, 31 WASH. & LEE L. REV. 359, 363-65 (1974).

tions[18] as being restrictive of interstate travel. The state contended that a proper reading of *Shapiro* showed that the compelling state interest test should be activated only where the *goal* of the residency statute is to penalize interstate travel. Justice Marshall, writing for the majority, disagreed, suggesting that since the right to travel is unconditional, strict scrutiny should be triggered *whenever* the right to travel is penalized, rather than only when the restrictions are imposed intentionally on the migrant.[19]

Durational residency statutes for divorce have been passed by state legislatures for a number of reasons, the primary one being to prevent their state courts from becoming the battleground for "forum shoppers" who fraudulently assert domiciliary intent in order to obtain "quickie" divorces.[20] After *Shapiro,* newly arrived divorce litigants began challenging the constitutionality of these residency requirements. Because *Dunn* has been assumed to be authority on this question, several jurisdictions have held that divorce residency statutes penalize interstate travel, and as such are subject to strict scrutiny.[21]

A three-judge district court in *Mon Chi Heung Au v. Lum*[22] found Hawaii's 1-year residency statute[23] violative of the 14th amendment. Unnecessary discrimination against newly arrived individuals honestly intending to establish Hawaiian domicile, coupled with the resultant infringement on inter-

18. TENN. CODE ANN. § 2-304 (1971).

19. Dunn v. Blumstein, 405 U.S. 330, 340-41 (1972). An opposite decision was reached several months prior to *Dunn* in Whitehead v. Whitehead, 492 P.2d 939 (Hawaii 1972). There Hawaii's divorce statute was upheld after application of the reasonable basis test. The court held that the purpose of a residency statute for divorce is not to deter interstate travel, but to insure proper establishment of domicile. Since it is improbable that a person would be deterred from moving to another state simply because he could not get an immediate divorce there, interference with the right of travel by a residency statute was seen to be too unlikely for the compelling state interest test to be actuated. *Id.* at 944-45. This statute was later invalidated in Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973).

20. *See, e.g.,* Sosna v. Iowa, 360 F. Supp. 1182, 1184 (N.D. Iowa 1973); Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 222 (D. Hawaii 1973); Whitehead v. Whitehead, 492 P.2d 939, 943 (Hawaii 1972). *See generally* Note, *Family Law—The Constitutionality of State Durational Residence Requirements for Divorce,* 51 TEXAS L. REV. 585, 592-93 (1973).

Other stated reasons are to preserve marriages and further chances for reconciliation, to ensure fairness to absent spouses and third parties, to preserve the integrity of the state's decrees, and to give the family court ample time to gather information about children who may be involved. *See, e.g.,* Sosna v. Iowa, 360 F. Supp. 1182, 1184 (N.D. Iowa 1973); Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 221 (D. Hawaii 1973); Wymelenberg v. Syman, 328 F. Supp. 1353, 1356 (E.D. Wis. 1971). *See generally* Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?,* 31 WASH. & LEE L. REV. 359, 381 (1974).

21. *See, e.g.,* Larsen v. Gallogly, 361 F. Supp. 305, 306 (D.R.I. 1973); Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 221 (D. Hawaii 1973); Fiorentino v. Probate Court, 310 N.E.2d 112, 117 (Mass. 1974).

22. 360 F. Supp. 219 (D. Hawaii 1973).

23. HAWAII REV. STAT. § 580-1 (1968).

state migration, necessitated application of the compelling state interest test.[24] Although Hawaii's interest in preventing fraudulent assertions of domicile by "forum shoppers" was judged to be clearly compelling, the statute was nevertheless held unconstitutional.[25] The court found that the language of the statute was imprecisely tailored, and therefore did not constitute the least restrictive method for promoting state interests.[26]

Disagreement over residency requirement divorce statutes apparently arises not from the type of test to be applied, but rather from divergent interpretations of the compelling state interest standard.[27] Iowa's residence requirement[28] was upheld through a partial application of the compelling state interest test in *Sosna v. Iowa*.[29] Having found that the prevention of fraudulent domicile is a significant state interest, the Iowa court completely disregarded that part of the strict scrutiny test requiring that the statute must be so carefully drawn that it represents the least restrictive means for furthering that interest.[30] Thus, although the courts in both *Sosna* and *Mon Chi Heung Au* found compelling state interests in maintaining their respective durational residency requirements, they reached opposite results.

Constitutional attacks on residency requirements for divorce have not been limited to alleged violations of the Equal Protection Clause.[31] A new avenue of approach to the 14th amendment issue was opened in 1971 with the Supreme Court's ruling in *Boddie v .Connecticut*.[32] The Court held that a statute requiring that certain filing fees be paid before divorce proceedings could be instituted[33] deprived indigents of *due process* by unreasonably denying

24. Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 222 (D. Hawaii 1973).

25. *Id.* at 222.

26. *Id.* at 222. The court faithfully applied the second half of the compelling state interest test as suggested in *Dunn*. The language of the statute was overbroad, and thus restricted the rights of valid domiciliaries. The statute was also held invalid because the court, citing Carrington v. Rash, 380 U.S. 89 (1965), held that it raised an impermissible presumption that domicile could not be established in less than a year's time. Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 222 (D. Hawaii 1973).

27. In Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Fla. 1973), Florida's 6-month residence statute for divorce was upheld. The court found the 6-month requirement to be such a negligible restriction of interstate travel that the statute should be maintained. A less strict version of the compelling interest test was applied because its application was tempered by considerations of convenience. *Id.* at 1235; *see* Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?*, 31 WASH. & LEE L. REV. 359, 373-75 (1974).

28. IOWA CODE ANN. § 598.6 (Supp. 1974-75).

29. 360 F. Supp. 1182, 1185 n.8 (N.D. Iowa 1973). The court contended that the duration of a residence requirement is of minimal import and thus ignored the precision test suggested in *Dunn*.

30. *Id.* at 1185 (McManus, C.J., dissenting). Chief Judge McManus in his dissent called the test which was applied an unidentified one, less stringent than the strict scrutiny test.

31. *See* Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?*, 31 WASH. & LEE L. REV. 359, 375 (1974).

32. 401 U.S. 371 (1971).

33. CONN. GEN. STAT. REV. § 52-261 (1960).

them access to the Connecticut divorce courts.[34]

Efforts have been made to extend the reasoning of *Boddie* to apply in cases where persons have been prevented by residency requirements from initiating divorce actions.[35] In *Wymelenberg v. Syman*,[36] a federal district court held that if the state has seen fit to preempt the means for dissolving the marital relationship by permitting divorce only through its courts, it may, then, limit access to its divorce courts only where there are "countervailing interests of overriding significance."[37] The court concluded that whether judged by the "*equal protection* compelling interest standard" or by the "*due process* countervailing interest of overriding significance formula," the Wisconsin divorce residency requirement[38] was unconstitutional.[39]

When a durational residency requirement for divorce is examined in the light of the Equal Protection Clause, it is clear that a new resident is penalized simply for his decision to travel from one state to another. Examining the same statute in the light of the Due Process Clause, a new resident's right to be heard in state divorce courts is also restricted. Thus, whether the issue is viewed as an equal protection or as a due process question, the fact remains that a fundamental right is being violated by a discriminatory classification.

An analogous line of reasoning led the Alaska Supreme Court in *State v. Adams*[40] to find the state's residency requirement statute inherently violative of fundamental constitutional rights, and consequently subject to the strict scrutiny required by the compelling state interest test.[41] The opinion's discussion of the state interests involved in retaining the 1-year residence statute represents a careful application of the strict standard as suggested by *Dunn*

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34. Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971).

35. Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973); Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971). *Contra*, Mon Chi Heung Au v. Lum, 360 F. Supp. 219, 220 n.3 (D. Hawaii 1973) (*Boddie* did not apply to divorce residency requirements because the prohibition declared invalid in *Boddie* represented a *total* denial of access to the divorce courts, whereas residency laws represent only a *limited* denial); Whitehead v. Whitehead, 492 P.2d 939, 947 (Hawaii 1972) (denied application of *Boddie* reasoning that divorce residency requirements are substantive, not procedural, and failure to satisfy them does not deny access to the courts).

36. 328 F. Supp. 1353 (E.D. Wis. 1971).

37. *Id.* at 1356, *quoting* Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

38. WIS. STAT. § 247.05(3) (1974-75). This statute called for a 2-year residence prior to filing suit for divorce.

39. A similar line of reasoning led the court in Larsen v. Gallogly, 361 F. Supp. 305, 308-309 (D.R.I. 1973), to strike down Rhode Island's 2-year residence requirement for divorce. The court found that the statute violated the equal protection *and* due process clauses of the 14th amendment and opted to apply the equal protection compelling interest test. *Id.* at 308-309.

40. 522 P.2d 1125 (Alaska 1974).

41. The Alaska court found the decisions in Dunn v. Blumstein, 405 U.S. 330 (1972); Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (D. Hawaii 1973); and Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971) to be persuasive. State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974).

v. Blumstein.[42]

The state's first contention was that the statute served to protect the basic family unit.[43] Although it must be acknowledged that there is a strong public interest in preserving the marital relationship and in guaranteeing the welfare of affected children, the residency requirement did nothing to further those state interests. Only the marriages of those persons who had not resided in the state for 1 year were protected, while nothing was done to preserve the marriages of longtime residents. Furthermore, the statute did not purport to distinguish between divorce actions where custody of children is an issue and where it is not. Thus, even though protection of the basic family unit is a real state interest, the statute did not effectuate that interest.

Turning next to the state's contention that residency requirements assure the validity of state divorce decrees, it should be noted that domicile on the part of the complainant is an adequate minimum contact to satisfy due process, and to entitle a divorce decree to full faith and credit.[44] Since domicile is established by actual physical presence in the state coupled with the intent to make that state one's home, a strong presumption of domicile arises merely from physical presence.[45] It follows that Alaska's divorce decrees would be given full faith and credit even if domicile were established by a subjective test. Therefore, the need for a statute setting out an objective test of domicile to assure the validity of divorce rulings is hardly compelling.

Even if Alaska's residency statute could be viewed as promoting a compelling state interest, it has not done so within a narrow enough framework to accomplish its goals without needlessly infringing on fundamental constitutional rights. For example, there was no showing by the state that its purported interests could not have been advanced by a statute requiring a shorter residency period.

When a state statute for objectively determining domicile is held unconstitutional, all tests of domicile, with the exception of the subjective test, are eliminated.[46] This subjective test, which examines the complainant's state of mind in order to establish domicile, is a more reasonable, less restrictive alternative to the objective test which does not penalize the fundamental right of interstate travel.[47] The Alaska Supreme Court, however, has implemented this subjective test for domicile seemingly oblivious to the abuses and

42. 405 U.S. 330 (1972).

43. State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974).

44. Williams v. North Carolina, 325 U.S. 226, 229-30 (1945) held that domicile of one spouse within a given state gives that state the power to dissolve the marriage wheresoever it was contracted.

45. *See generally* Annot., 2 A.L.R.2d 271 (1948).

46. *See* Dunn v. Blumstein, 405 U.S. 330, 340 (1972). A 6-month residency statute will be just as invalid as a 1-year residency statute since even the slightest impairment of interstate travel will activate the strict scrutiny test.

47. State v. Adams, 522 P.2d 1125, 1132 (Alaska 1974).

difficulties the test invites. The primary problem, according to many courts, is presented by forum shoppers who have been unable to institute divorce proceedings in their home states.[48] They are attracted to sympathetic states where no objective evidence of domicile is required and where a mere recital of domiciliary intent, no matter how fraudulent, will establish domicile. State courts fear that they may become divorce mills, grinding out one divorce after another, each based on the amorphous concept of subjective domicile which is likely to be fraudulently alleged. Courts also wish to avoid the possibility of interfering with marriages not properly within their domain.[49]

In addition, some argue that the subjective test will require a painstaking case by case analysis of each divorce litigant's assertion of domicile.[50] Since such examinations of data indicating domiciliary intent will be too time-consuming for divorce courts, their already great burden will be strained to the breaking point.

The *Adams* decision does not reflect a full appreciation of these problems. In fact, the court completely ignores them. A subjective test of domicile, however, could prove workable in Alaska, or in any state, if *properly* implemented. The fears of opening the doors of state courts to dishonest forum shoppers and the resultant increase in litigation are greatly exaggerated. Since domiciliary intent is not really that difficult an assertion to investigate,[51] there is no reason why courts cannot handle divorce litigation both accurately and efficiently. Surely courts which have proven themselves competent to determine complicated matters of law are capable of correctly interpreting questions of domicile.[52] Such indications as whether the plaintiff has registered to vote, purchased a new home, or secured a permanent job should be examined.[53] There is no reason why this process cannot be proficiently accomplished. As Justice Marshall has written:

> In most cases, it is no more difficult to determine whether one recently arrived in the community has sufficient intent to remain to qualify as

48. Cases cited note 20 *supra.*

49. Sosna v. Iowa, 360 F. Supp. 1182, 1184 (N.D. Iowa 1973); Note, *Family Law—The Constitutionality of State Durational Residence Requirements for Divorce*, 51 TEXAS L. REV. 585, 592 (1973).

50. Comment, *State Durational Residence Requirements for Divorce: How Long Is Too Long?*, 31 WASH. & LEE L. REV. 359, 381 (1974).

51. Note, *The Problem of the "Newcomer's Divorce,"* 30 MD. L. REV. 367, 380 (1970).

52. *Id.* at 380.

53. Hall v. Beals, 396 U.S. 45, 55-56 (1969) (Marshall, J., dissenting). Justice Marshall suggests investigating to see if the claimant has bought a new home, registered a car, obtained a driver's license, entered his child in school, or secured a permanent job. *Id.* at 55-56. C. Clinton Clad has suggested investigation of the litigant's former domicile to see if he has published a notice of change of residence, sold a cemetery lot, canceled his checking accounts, or resigned club memberships. Note, *The Problem of the "Newcomer's Divorce,"* 30 MD. L. REV. 367, 380 n.113, *citing* C. CLAD, FAMILY LAW 136-38 (1958).