What You Think You Already Know: Virginia Residency and Domiciliary Requirements for Divorce
By: Richard E. Garriott, Jr.
Published in The Virginia Bar Association Journal - Winter 2011-2012

"To be a Virginian, either by birth, marriage, adoption, or even one's mother's side, is an introduction to any state in the Union, a passport to any foreign country, and a benediction from the Almighty God." – Anonymous
The anonymous poet touches on the myriad of ways many of us may have become fortunate enough to call ourselves Virginians. While the avenues to the Commonwealth are many, for any divorce case to proceed in Virginia, residency is a condition precedent to establishing divorce jurisdiction. It may seem elementary to review the domiciliary and residency requirements under Title 20 of the Code. However, the large number of military personnel who reside in Virginia and the increasingly transient nature of our society can occasionally give rise to issues pertaining to the residency requirement needed to proceed with a divorce in Virginia's courts.

Many practitioners take the seemingly simple and straight forward six month residency requirement for granted. But, with a significant segment of our community either serving in the armed forces or married to a service member, a review of the statutory requirements is helpful as it concerns those service members in Virginia. This is especially true while service members are at sea or deployed in foreign countries although they may be stationed here in Virginia.

Virginia's residency requirement is jurisdictional in nature and arises out of a strong public policy that there should be some nexus between the divorcing parties and the Commonwealth. This requirement has been established in order to avoid divorce mills, provide legal safeguards against subsequent collateral attack, and to lend uniformity and predictability to the concept of divorce jurisdiction. See *Swisher Deal Cottrell Virginia Practice Family Law: Theory, Practice and Forms, 2011 Ed. Sec. 6: 2*. In addition, the General Assembly has afforded non-native members of our Armed Forces the ability to avail themselves of Virginia's courts despite not being "citizens" of the Commonwealth.

Section 20-97 of the Code of Virginia establishes the domicile and residential requirements for maintaining a divorce action in the Commonwealth of Virginia. The code requires only one party to be a resident: "[n]o suit…for divorce shall be maintainable, unless one of the parties is and has been an actual bona fide resident and domiciliary of this Commonwealth for at least six months preceding the commencement of the suit." With a significant military population in the Commonwealth, the Code addresses the issue of a native from another state who is stationed in Virginia. Section 20-97(1) of the Code of Virginia states "if a member of the armed forces of the United States has been stationed or resided in this Commonwealth and has lived here for a period of six months or more in this Commonwealth next preceding the commencement of this suit, then such person shall be presumed to be domiciled in and to have been a *bona fide* resident of this Commonwealth during such period of time." Subsection (2) goes on, in part, to include those who may be deployed abroad on a vessel that is based out of a station in Virginia "[b]eing stationed or residing in the Commonwealth includes, but is not limited to, a member of the armed forces being stationed or residing upon a ship having its home port in this

Commonwealth ..."

It is not uncommon for a Service member to find himself or herself in a position where he or she pays his or her state income tax to New York, has his or her vehicle registered in Florida, but is stationed in and owns a home in Virginia. The code addresses this situation with a simple solution. If a service member has been stationed on a military facility in the Commonwealth or is stationed aboard a vessel which is home ported in a Virginia port for six months that service member's presence in Virginia satisfies the statute.

In *Behnke v. Behnke,* No. 0005-03-1, 2003 Va. App. LEXIS 547 (Ct. of Appeals Oct 28, 2003), the Court of Appeals held that the trial court had jurisdiction to adjudicate the divorce action when the husband was a member of the armed service and had been stationed in Virginia for at least six months prior to the commencement of the divorce action. In *Behnke,* the mother had relocated to Florida with the child they shared in common. After the husband filed suit in Virginia, the wife objected to the court's jurisdiction claiming that neither party had ever been a domiciliary of Virginia. She claimed that since both parties maintained their Florida residences that the Virginia Beach Circuit Court did not have jurisdiction.

The Court dismissed the wife's motion for dismissal for lack of jurisdiction based on the language in §20-97 (1) of the Code of Virginia specifically providing for jurisdiction for members of the armed forces who have been stationed in Virginia for six months preceding the commencement of a suit for divorce. On appeal, the Court of Appeals concluded that "[t]he evidence in the record clearly showed that the husband is a member of the armed forces, has been stationed or resided in Virginia, and has lived in Virginia for a period of six months or more 'next preceding the commencement' of the divorce suit. Therefore, husband was domiciled in and was a *bona fide* resident of Virginia. Accordingly, the trial court had subject matter jurisdiction to adjudicate the parties' divorce suit." *Id.* Therefore, a member of the armed forces who is stationed in or aboard a vessel that is home ported in the Commonwealth satisfies the residency and domiciliary requirements.

The statute clearly establishes that the armed forces member who is stationed or home ported at a Virginia military facility, and has been so for a period of at least six months, meets both the domiciliary and the residency requirements under the statute to proceed with the divorce. Another question can arise as to the residency status of the military member's spouse. In many instances when a member is deployed, or temporarily transferred to another station, the spouse may return to their state of origin to be closer to family and other support systems. While jurisdiction requires that one party be a *bona fide* resident of Virginia, sometimes that party may be the spouse who has been extremely transient during their time in Virginia.

In *Blackson v. Blackson,* 40 Va. App. 507, 579 S.E.2d 704 (2003), the Court of Appeals addressed the issue of residence and domicile as it pertained to a service member's spouse. In *Blackson,* the family had moved to Virginia where they resided for three years before being transferred to Guantanamo Bay, Cuba. After a year in Cuba, the husband, a member of the United States Marine Corps was transferred to his new assignment in California. As the couple's relationship deteriorated, the wife elected to return to Virginia and not to relocate to California with her husband. The trial court was affirmed by the Court of Appeals after finding "that wife had previously

established Virginia as her domicile, and left Virginia only as a temporary sojourn to accompany husband to his next military duty station." *Blackson* at 520. The Court upheld the trial court's determination the residency and domicile requirements were met.

For the divorce practitioner, jurisdiction is the foundation upon which all cases must rest. Unlike other civil litigation, even when the parties come to an ultimate settlement agreement, the court must make a finding that it has jurisdiction to conclude the divorce. Therefore, it is imperative for the practitioner to assess, especially in cases where the client is transient, a member of the armed forces, or the spouse of a service member, whether or not they meet the statutory jurisdictional residence and domiciliary requirements. By making this simple assessment at the beginning of the case, the practitioner avoids future headaches. Imagine receiving a call several years after entering a final decree of divorce from a party attempting to collaterally attack what you thought was a completed and closed case. Take the extra time to ensure that you got it right the first time. The implications could affect more than just your client.