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1. MARRIED WOMAN SEPARATED FROM HUSBAND IN ANOTHER STATE—NEITHER RECEIVED PUBLIC RELIEF OR AID FROM THE STATE—THE WOMAN RESIDED IN COUNTY OF STATE FOR ONE YEAR—SHE HAS ACQUIRED LEGAL SETTLEMENT IN COUNTY—SECTION 5113.05 RC.
2. MARRIED WOMAN SEPARATED FROM HUSBAND IN FOREIGN STATE—ACQUIRED LEGAL SETTLEMENT IN OHIO—HAS HAD CUSTODY OF MINOR CHILDREN—LEGAL SETTLEMENT OF CHILDREN FOR PURPOSE OF POOR RELIEF FOLLOWS THAT OF MOTHER.

SYLLABUS:

1. A married woman who, having separated from her husband in another state, has resided in a certain county of Ohio for one year without having received poor relief or relief from a private agency which maintains records of relief given, said husband not having during such year received public relief, care or support at the expense of the state of his residence or its subdivisions, has under the terms of Section 5113.05, Revised Code, acquired a legal settlement in the county where she has so maintained her residence.

2. When a married woman, having separated from her husband in another state, and having obtained a legal residence in Ohio, has for a number of years had the actual custody of her minor children, and has during all of such time been their sole support and no order of any court has been made in regard to their custody, the legal settlement of such children for the purpose of poor relief will follow that of the mother.

Columbus, Ohio, February 11, 1954

Hon Henry J. Robison, Director, Department of Public Welfare
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“Section 5113.05 of the Revised Code defines legal settlement for the purpose of poor relief. Periodically questions arise concerning the settlement of a married woman and of children who reside with a married woman separated from her husband. We would appreciate your opinion in the following case which is typical of problems which arise under this section of the law.

“The family lived in Kentucky and the husband and father entered a veterans’ hospital in that state. His wife moved to Ohio approximately ten years ago bringing the children with her. In Ohio she supported herself and the children. She took no action to secure a divorce but did claim that she considered herself permanently separated from her husband.

“During most of her residence in Ohio she lived in Montgomery County. Less than one year ago she moved into Clark County where she is now in need of relief. The question arises as to whether this woman has acquired legal settlement in Montgomery County during her separation from her husband or whether she still has legal settlement in Kentucky. If she has acquired settlement in Montgomery County, do her children derive settlement from her since she is their custodian in fact, or do they still derive settlement from their father who is in the other state?”

Section 5113.05, Revised Code, to which you refer, defines “legal settlement” for the purposes of the statutes relating to poor relief, to-wit, Sections 5113.01 to 5113.14, inclusive, Revised Code. A portion of this section reads as follows:

“Legal settlement for the purposes of sections 5113.01 to 5113.14, inclusive, of the Revised Code, is acquired by residing in one county for a period of one year without receiving poor relief or relief from a private agency which maintains records of relief given. A person having a legal settlement in any county in the state shall be considered as having legal settlement in the township or municipal corporation therein in which he has last resided continuously for three consecutive months without receiving poor relief. No adult person coming into this state and having a spouse or minor children residing in another state, shall obtain a legal settlement in this state so long as such spouse or minor children are receiving public relief, care or support at the expense of the other state or its subdivisions. Settlement once required shall continue until acquired in another county or until a person has been continuously absent from Ohio for a period of one year or has acquired a legal residence in another state. A woman who marries a man with legal settlement in any county immediately acquires the settlement of her husband.

“The legal settlement of a minor is that of the parents, surviving parent, sole parent, parent having custody awarded by a court, other adult having permanent custody awarded by a court, or guardian of the person of such minor, * * *.”

The first sentence of the above quoted section is general in its scope and appears to authorize any person to acquire a legal settlement in a

county in this state by residing therein for a period of one year, without receiving relief. Unless there is some limitation found elsewhere in the statutes, or in some principle of general law, this statute would appear to apply as well to a married woman who has separated from her husband, as to any other person.

The third sentence relates directly to an adult person who has come into the state having a spouse or minor children residing in another state. This sentence in effect prohibits such an adult person so coming into the state, from obtaining a legal settlement in this state, so long as such spouse or minor children are receiving public relief at the expense of the other state or its subdivisions; but it goes no further. If, therefore, an adult person comes into Ohio, leaving such spouse, who is not receiving public relief at the expense of the state of his residence, then there is nothing in this sentence which would in the slightest degree interfere with the acquisition of a legal settlement in this state.

It follows, therefore, that if the woman mentioned in your letter was justified either by his wrongful conduct or by the absolute necessity for finding a livelihood, in separating from her husband, and coming to Ohio, I can see no reason why her actual residence in Montgomery County did not give her legal settlement in that county. While it is true that under the provisions of the statute which I have quoted, "A woman who marries a man, with legal settlement in any county, (presumably Ohio,) immediately acquires the settlement of her husband," and that the husband has the primary right to select a domicile for himself and family, yet the authorities recognize the proposition that under certain circumstances it may become necessary or proper that she should acquire a residence away from the domicile of her husband.

The facts set out in your letter do not suggest that the husband abandoned his wife and children while they were residing in Kentucky. No presumption to that effect would arise from the fact that he entered a veterans' hospital in that state. However, it may be that he was permanently disabled and not able to support his family after entering the hospital, and that she was justified as a matter of necessity, in coming to Ohio, in order to find the means of supporting herself and her children. It is stated in your letter that she claims that there has been a complete separation, and it would appear that that condition has existed for ten years.

In 14 Ohio Jurisprudence, page 579, it is said:

“It is a general principle of law that a woman by marriage loses her own domicil and acquires that of her husband.” Citing *Sturgeon v. Korte*, 34 O. S., 525.”

In the same volume, at page 580, we find the following :

“Under modern laws it is clear that many exceptions to the rule that the domicil of the wife is determined by that of the husband must obtain. In general, the rule is that a wife may acquire a domicil different from that of her husband whenever it is *necessary or proper* that she should have such separate domicil, and away from the domicil of marriage. This right springs from the necessity for its exercise and endures as long as the necessity continues. For example, when a married woman is *justified in separating from her husband*, his marital control over her, which made his residence her residence, is broken, *and she can lawfully acquire an actual residence separate from his*. She then has a right to select any place for her residence that she may desire.. If she comes into this state and lives here the required time, with the intention of making her home here, she becomes a resident of this state and can prosecute an action for divorce, notwithstanding her husband remains in the state of their marital residence.”

(Emphasis added.)

In the same volume at page 581, it is said :

“A fairly common situation, justifying a departure from the general rule that the domicil of the wife is that of her husband, is that of an abandonment or desertion of the wife by the husband. * * *

“A wise exception to the general rule that the domicil of a wife is that of her husband has been established in cases where the husband becomes insane. The insanity of a husband and his confinement to an asylum make the wife the head of the family, and consequently vest in her the right to change her domicil. * * *”

The question of a wife's right to leave her husband in another state and acquire a legal settlement in Ohio, was presented to my predecessor, based on facts somewhat similar to the facts which you present. However, it appeared definitely that the husband had deserted his wife and children. In Opinion No. 2150, Opinions of the Attorney General for 1940, page 340, it was held :

“1. A married woman, residing outside of this state, may, on account of her husband's aggression, separate from him for

the purpose of establishing in the state of Ohio her own legal settlement and that of her children in her custody."

In support of the conclusion stated in the foregoing opinion, a number of cases were referred to, including the case of *Cache v. Cache*, 12 O. App., 140; *Chever v. Wilson*, Vol. 9 Wall., 108; *Ex Parte Bryant*, 106 Ore., 359. In the *Cache* case, the court held:

"When a wife is justified in separating from her husband by reason of his aggression, she may lawfully select and acquire a residence separate from his."

In the *Chever v. Wilson* case, the court said:

"The rule is that she may acquire a separate domicile *whenever it is necessary or proper* that she should do so. The right springs from a necessity for its exercise and endures as long as the necessity continues." (Emphasis added.)

In the case of *Cache v. Cache*, 14 Ohio App., 140, the court said:

"When a married woman is justified in separating from her husband, his marital control over her, which made his residence her residence, is broken, and she can lawfully acquire an actual residence separate from his. She then has a right to select any place for her residence that she may desire. If she comes into this state and lives here the required time, with the intention of making her home here, she becomes a resident of this state and can prosecute an action for divorce, notwithstanding her husband remains in the state of their marital residence."

It is obvious that her right to *secure* the divorce decree will depend in part upon *proof* of her residence, but the jurisdiction of the court to hear the case must depend on her assertion that she has the required residence qualifications and proof of that assertion.

Most of the cases arise out of the desire of a party to secure a divorce. It occurs to me that the necessity of providing a living for herself and children is at least as substantial evidence of a justifiable and bona fide intention to establish a residence as is the desire to secure a divorce. In my opinion, it is much more substantial.

In this connection, I would call attention to the well recognized principle that "residence" is largely a matter of intention, accompanied by actually living in a chosen locality. This principle was clearly ex-

pressed by an early decision of our Supreme Court, in a case dealing with poor relief. In *Henrietta Township v. Oxford Township*, 2 Ohio St., 32, it was held:

“In order to obtain a settlement in a township, under our poor-laws, the fact of residence is not sufficient, unless attended with the intention, on the part of the resident, of making such township his place of abode.”

The court in the opinion said:

“No special notoriety of residence is required, either by the letter or spirit of the statute, nor is it necessary that anything should be done to call the attention of the authorities of the township to the fact of such residence. A bona fide residence within the bounds of the township, in accordance with the convenience and circumstances of the party, is all that is necessary to gain a settlement.”

I call attention to the provisions of the election laws of Ohio regarding the residence of married persons who have separated. Section 3503.01, Revised Code, authorizes any citizen of the age of twenty-one years to vote at all elections provided he has been a resident of the state for one year, and of the county and voting precinct for forty days. Section 3503.02 Revised Code, provides in part:

“(D) The place where the family of a married man or woman resides shall be considered to be his or her place of residence; except that *when the husband and wife have separated and live apart*, the place where he or she resides the length of time required to entitle a person to vote shall be considered to be his or her place of residence.” (Emphasis added.)

While the question you submit is, of course, not governed by the election laws, yet the above provision does, in my opinion, indicate strongly the attitude of the legislature regarding the residence of persons who have married but are separated, and living apart, though not divorced.

In my opinion, the woman mentioned in your letter did acquire a legal settlement in Montgomery County, Ohio.

In reference to the legal settlement of the children, I call particular attention to that portion of Section 5113.05 supra, which deals with the legal settlement of minors. There it is provided that the legal settlement of a minor is that of the “*parents, surviving parent, sole parent, parent having custody awarded by a court,*” etc.

In the factual situation which you present, it is plain that the children are not in the custody of *both* of the parents; neither can they be said to be in the custody of the father, for so far as we are informed he has been in Kentucky and possibly in the Veterans' Hospital for ten years, while the children during all that time have been in Ohio and under the *actual* custody of their mother. There has been no court order as to their custody. Accordingly, the statute gives us no definite rule for determining their legal settlement.

Having already concluded that the mother has acquired a legal settlement in Montgomery County, Ohio, I feel impelled to hold that the legal settlement of the children for the purpose of public relief follows that of their actual custodian, their mother.

As to the construction of relief laws generally, I call attention to the statement found in 31 Ohio Jurisprudence, page 45:

“Acts for the relief of the poor are to be liberally construed in favor of the destitute and unfortunate poor, who are entitled to the commiseration and regard of the jury, court and legislature alike, in order to further their charitable objects.”

To like effect see Crawford on Statutory Construction, Section 351.

In the case you present, it would appear to be a very narrow and harsh construction of the laws relating to poor relief to arrive at any conclusion that would deny their benefit to the woman and her children mentioned in your letter.

Accordingly, in specific answer to your questions, it is my opinion:

1. A married woman who, having separated from her husband in another state, has resided in a certain county of Ohio for one year without having received poor relief or relief from a private agency which maintains records of relief given, said husband not having during such year received public relief, care or support at the expense of the state of his residence or its subdivisions, has under the terms of Section 5113.05, Revised Code, acquired a legal settlement in the county where she has so maintained her residence.

2. When a married woman, having separated from her husband in another state, and having obtained a legal residence in Ohio, has for a number of years had the actual custody of her minor children, and has

during all of such time been their sole support and no order of any court has been made in regard to their custody, the legal settlement of such children for the purpose of poor relief will follow that of the mother.

Respectfully,

C. WILLIAM O'NEILL

Attorney General