



# Residency Laws

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## Introduction

On the surface, residency appears to be a simple concept. However, being a "resident" or having "residency" can apply to many rights and responsibilities such as voting, hunting, fishing, education, taxes, marriage, divorce, wills, trusts, and welfare. Residency laws can vary depending on the context to which they are applied. A uniform definition, whether within a state or several states, could be difficult to achieve. Even the U.S. Supreme Court struggles with cases involving residency and what it means to be a resident. This issue memorandum will review the background of residency laws, what South Dakota's current residency laws are, and how they compare to other state residency laws.

## Domicile and How it Applies to Residency

Before discussing residency, it is important to understand the legal concept of domicile. Each state may describe it a little differently, either through statute or through court cases, but the basic premise is the same. According to Black's Law Dictionary, domicile is "the place at which a person has been physically present and that the person regards as home." Domicile encompasses two concepts: (1) a person physically resides within a certain jurisdiction; and (2) the person intends to reside in that jurisdiction permanently. The concept of domicile is broad and used in many legal contexts, which can be subjective.

The concepts of residency and domicile are often intertwined. The difference between them is residency describes the physical locations where a person lives, while domicile is a legal concept that considers the intent of the person.

Residence	"I Live Here."
Domicile	"I Live Here and Plan to Do So Permanently."

A person can never have more than one domicile because a person can never intend to permanently reside in two different places. However, a person can never lose a domicile without gaining another. Alternatively, a person can have multiple residences. For example, a person owns homes in Arizona and South Dakota. The person lives in South Dakota eight months of the year and has a South Dakota driver license but lives in Arizona four months during the winter. The person may reside in both states, but that person is only domiciled in South Dakota because South Dakota is where the person considers home.

In statute, states frequently define residency as being domiciled in the state's jurisdiction, so the terms often get confused for one another. Regardless, domicile is typically the standard that will be applied when residency is a requirement.

## Constitutional Considerations

There are several constitutional rights and protections that impact a state's ability to define and restrict residency. The U.S. Supreme Court has found three considerations that apply to residency: the right to interstate travel; federal jurisdiction over interstate commerce; and protection under the Privileges and



Immunities Clause. Because of these critical constitutional decisions, states must ensure any residency laws they impose have rational, compelling reasons to support them.

### **Right to Interstate Travel**

A critical aspect of residency requirements is the right of interstate travel. Essentially, states cannot impose unreasonable barriers that would restrict a person's ability to travel between states. In *Shapiro v. Thompson* (1969), the U.S. Supreme Court determined that unreasonably requiring a person to live in a state for an established period before receiving certain benefits is unconstitutional. These are called durational residency requirements (DRRs). In *Shapiro*, California imposed a one-year DRR before a person could receive welfare benefits. California argued the requirement was necessary to prevent people from temporarily moving to California for purposes of qualifying for welfare benefits. The Supreme Court disagreed and found DRRs were constitutional if they advanced a compelling state interest. Preventing people from receiving the assistance they would otherwise be eligible for was not a valid reason.

In the wake of this decision, several Supreme Court cases addressed DRRs, including access to non-emergency medical care, voting, and professional licensure. One crucial case was *Dunn v. Blumstein* (1972). In *Dunn*, a college professor attempted to register to vote after moving to Tennessee for a new job. He was denied the right to register because Tennessee imposed a one-year DRR before being allowed to vote. The Court agreed it was important for Tennessee to ensure election integrity and complete administrative requirements before an election, but that could be achieved in thirty days; a year was not necessary. Therefore, the Court stated that DRRs could be imposed, but only if they were reasonable. Since one year was not reasonable, the Court voided the law.

Notably, the Court treats certain DRRs differently. For example, the Court has allowed significantly longer DRRs for in-state tuition rates (12 to 24 months) or obtaining a divorce (12 to 18 months). There is no stated justification for distinguishing these cases from others. Analyzing the cases, the Court seems to balance the benefits received; compelling state interests; and disparate impact caused between residents and nonresidents.

### **Federal Jurisdiction Over Interstate Commerce**

Beyond the right of interstate travel, states must ensure they do not interfere with interstate commerce. Congress has the power over interstate commerce; therefore, states may not impose laws that would regulate or interfere with interstate commerce. In other words, states cannot favor in-state economic interests over out-of-state interests. For example, in *Tennessee Wine and Spirits Retailers Association v. Thomas* (2019), the court voided a Tennessee law that required a person to have lived in Tennessee for two years before being eligible to get an alcohol distributor license. This law protected resident alcohol distributors from out-of-state competition and thus violated the commerce clause of the U.S. Constitution.

### **Protection under the Privileges and Immunities Clause**

Art. IV, Sec. 2 of the U.S. Constitution states "*The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*" There are several U.S. Supreme Court cases that have restricted states' ability to impose residency requirements unless there is a compelling state objective because it would deny a nonresident the same "Privileges and Immunities" a resident has. For example,



in *Supreme Court of N.H. v. Piper* (1989), the U.S. Supreme Court ruled that New Hampshire could not require a person to be a resident in order to be a lawyer in the state.

## Residency Laws

### Voting and Elected Office

Voting laws use residency to determine who may vote in a state. States use domicile to determine whether a person is a resident of the state for purposes of voting. The major exception is about half of states impose a registration deadline. Because of the *Dunn* case discussed earlier, states only impose a deadline between ten and thirty days prior to the election.

South Dakota law defines residency under SDCL 12-1-4, which restates the legal concept of domicile. Additionally, under SDCL 12-4-5, a person must be registered to vote fifteen days prior to the election in order to vote. However, the South Dakota Constitution provides that a person does not lose the right to vote in one jurisdiction until that right is established in another (S.D. Const. Art. VII, Sec. 2).

Additionally, a person generally must be a registered voter or qualified elector in the jurisdiction where they are seeking elected or public office. Some examples are legislators (S.D. Const. Art. III, Sec. 3); judicial personnel (S.D. Const. Art. V, Sec. 6); county commissioners (SDCL 7-8-2); township offices (SDCL 8-4-1); mayors or aldermen (SDCL 9-8-1.1); sanitary districts (SDCL 34A-5-21.2); conservation districts (SDCL 38-3-39); and water districts (SDCL 46A-3B-2). An elected office becomes vacant when the person holding the office no longer maintains residence in the jurisdiction (SDCL 3-4-1). If a person is seeking to be a governor, lieutenant governor, or be a state senator or representative, S.D. Const. Art. III, Sec. 3 and Art. IV, Sec. 2 requires that the person be a resident for two years preceding the election.

### Taxes

Tax laws also use domicile to determine whether a person is responsible for paying certain state taxes. Even if domicile is used, most states impose a certain amount of time a person must live in the state to be considered a resident. Typically, it is at least six months; some states require at least seven to nine months.

South Dakota does not levy several taxes that other states impose, such as a state income tax. However, other states may tax people or property within South Dakota based on those states' laws. For example, some states may tax trust distributions originating from a South Dakota resident's trust if the distributions go to a beneficiary in another state. Or, states may tax the income of South Dakota residents who work in their state or residents who split their time between South Dakota and another state. Therefore, being aware of how other states may define residency for the purposes of taxes can be important to know the impact on South Dakotans.

### Hunting and Fishing Licenses

All states have two tiers of hunting and fishing licenses: resident and nonresident. To qualify for a resident license, almost all states apply the domicile standard in addition to a DRR. Some states have short periods, such as sixty days, while others require up to a year before one is eligible for a resident license. Almost all states specify that a person can only have a resident license from one state. South Dakota has similar laws.

According to SDCL 41-1-1(22), a resident is "a person having a domicile within this state for at least ninety consecutive days immediately preceding the date of application for, purchasing, or attempting to purchase



*any license required under the provisions of this title or rules of the commission, who makes no claim of residency in any other state or foreign country for any purpose, and other than for a person described in § 41-1-1.1, claims no resident hunting, fishing, or trapping privileges in any other state or foreign country, and prior to any application for any license, transfers to this state the person's driver's license and motor vehicle registrations."* Additionally, South Dakota statute provides a detailed list of categories of persons who qualify as state residents (SDCL 41-1-1.1) and what factors terminate South Dakota residence (SDCL 41-1-1.2).

### **In-State Tuition for Higher Education**

State higher educational institutions, in compliance with state statutes, are generally responsible for developing their own policies regarding residency and in-state tuition as well as making residency determinations. Typically, the institutions also use the concept of domicile to determine whether a student is considered in or out of state. However, the U.S. Supreme Court has found that in-state tuition is not subject to the same restrictions as other residency-related laws and policies. Because of that, institutions require a student to have resided in the state for six to twenty-four months, depending on state law and the student's intention to remain in the state after graduation. If a student moves to a different state to attend a college or university, there is not an intention to stay. Therefore, domicile is not established.

South Dakota law is like the vast majority of states. SDCL 13-53-23.1 defines residence as *"the place where a person has a permanent home, at which the person remains when not called elsewhere for labor, studies, or other special or temporary purposes, and to which the person returns at times of repose. It is the place a person has voluntarily fixed as the person's permanent habitation with an intent to remain in such place for an indefinite period. A person, at any one time, has but one residence and a residence is not lost until another is gained."*

Additionally, SDCL 13-53-24 requires a person reside in South Dakota twelve months before being able to claim resident status. However, according to SDCL 13-53-25, moving to South Dakota to obtain resident status will not establish residence.

There are a few clarifications regarding in-state tuition. First, children generally always adopt the domicile of their parents. So, if both parents (or the custodial parent, if separated) are state residents, the minor will also be a resident for in-state tuition purposes. Second, veterans and active military personnel are exempt from the DRR (SDCL 13-53-29.1 and 13-53-41.2).

### **Other**

As mentioned previously, other areas of law impacted by residency and domicile include:

*Divorce* - One party must be domiciled in the state to obtain a divorce decree (SDCL 25-4-30);

*Welfare* - The person applying for assistance must prove domicile through factors like voter registration in the county, having a state driver license, having a local bank account, or enrollment of their children in the local school (SDCL 28-13-3);

*Education* - Any person under the age of 21 whose parents are domiciled within a school district is entitled to free education through secondary school. For parents who are separated, the residence of the child is determined by which custodial parent has custody a greater portion of the school year (SDCL 13-28-9);



*Wills* - A deceased person's will is subject to the law where the person is domiciled. (SDCL 29A-2-401). Land and other real property are subject to the state law where it is located;

*Agricultural Land* - Only bona fide residents may own more than 160 acres of agricultural land, unless it is inherited (SDCL 43-2A-2);

*Driver License* - If someone has lived in the state 90 days, they are considered a resident eligible to obtain a driver license (SDCL 32-12-26.1); and

*Property* - Personal property is subject to the state law of the owner's domicile (SDCL 43-1-7).

## Conclusion

Residency requirements impact South Dakotans every day. Residency is often defined using the domicile standard, which makes it subjective. However, a person can only have one domicile at a time. Once domicile is established, a person's residency is easy to resolve. However, when implementing residency requirements, states need to ensure they are not interfering with a person's constitutional rights. Presently, South Dakota's residency laws are like those in the rest of the country, but the laws differ in the definition of residency.

This issue memorandum was written by Matthew Frame, Legislative Attorney, on November 16, 2020, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

