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Nomadic Notaries, 32 J. Marshall L. Rev. 985 (1999)

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NOMADIC NOTARIES

MALCOLM L. MORRIS*

I. INTRODUCTION

“Residents Only!” With or without the exclamation point, the message is clear—limited access. Are such exclusionary restrictions enforceable? Courts have said that they are.¹

Generally, restrictive agreements among private individuals are permitted under the theory that individuals can determine with whom they want to associate, provided constitutional protections are not violated.² Individual litigants seeking enforcement of private, resident-based restrictions designed to prevent access by persons who are members of the public-at-large are accorded similar protection.³

Not all resident-based restrictions, however, are the product of private agreements. Some are creatures of statute or government rule. It is not uncommon for governmental units to impose residency-based restrictions.⁴ Localities may do so to accomplish a variety of objectives. For example, the goal may be to limit the use of access to property,⁵ to provide for reasonable job

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1. See generally *Zarogian v. Town of Marragansett*, 701 F. Supp. 302 (D.R.I. 1988); *McClain v. City of S. Pasadena*, 318 P.2d 199 (Cal. Ct. App. 1957); *Schreiber v. City of Rye*, 278 N.Y.S.2d 527 (1967) (holding that exclusionary restrictions are enforceable).

2. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

3. See, e.g., *Liebler v. Point Loma Tennis Club*, 47 Cal. Rptr. 2d 783 (Cal. Ct. App. 1995) (relying on *Nahrsted v. Lakeside Village Condo.*, 878 P.2d 1275 (Cal. 1994)). The *Liebler* court upheld a condominium restriction that precluded non-owners from use of condominium property. The *Nahrsted* court determined that such an arrangement between private landowners is enforceable, provided “it [did not] violate public policy, [bore] a reasonable relationship to the protection, preservation, operation or purpose of the affected land, or . . . otherwise [imposed] burdens on the affected land that are so disproportionate to the restriction’s beneficial effect that the restriction should not be enforced.” *Nahrsted*, 878 P.2d at 1287.

4. See generally 5 MCQUILLEN, MUNICIPAL CORPORATIONS, § 19.16 (Clark et al. eds., 2d ed. 1969).

5. See, e.g., *Hyland v. Allenhurst*, 372 A.2d. 1133 (N.J. Super. Ct. App. Div. 1977).

requirements⁶ or to regulate certain privileges such as the right to vote.⁷ States can also impose residency requirements with respect to those persons who serve as elected officials.⁸

Can similar restrictions be established for non-elected public officials, more specifically, for notaries public? Logic would seem to suggest that appointed officials would be subject to more stringent control than are elected ones. But that may not be the case. Whether and why notaries public should be excluded from residency requirements are legitimate inquiries. A conclusion that residency requirements are not needed will require that many state notary statutes be re-written.

II. RESIDENCY RULES: THE "WHATS" AND "WHYS"

A. What is "Residency?"⁹

In order to assess the efficacy of notary residency requirements, it is essential to first define what is meant by "residency." This is not as simple a task as one might suspect. There is not any one precise definition of the word that fits all contexts in which it is used.¹⁰ Different statutes or situations may require different connotations with respect to the use of the term.¹¹ Moreover, sometimes the attempts to define the word serve more to confuse than to clarify the issue.¹²

6. See, e.g., ALA. CODE § 12-17-22 (1998) (imposing residency requirements on circuit court judges); *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970); ARK. CODE ANN. § 12-8-22 (1997) (requiring applicants for the state police department to be residents).

7. See, e.g., VT. STAT. ANN. tit. 24, § 17-43-2121 (1997).

8. See, e.g., S.C. CODE ANN. §§ 14-1162, 14-3701 (Law Co-op. 1998); UTAH CONST. art. VI § 5 (1953); WIS. CONST. art. IV § 6 (1998).

9. For the purposes of this Article, the terms "residence," "residency" and "reside" are used interchangeably. Such usage has been recognized by the courts. See *United States v. Twelve Ermine Skin*, 78 F. Supp. 734, 738 (D. Alaska 1948).

10. See *Gallup Am. Coal Co. v. Lira*, 50 P.2d 430, 431 (N.M. 1935) (stating that "[t]he words "residence" and "resident" have no fixed meaning applicable to all cases, but are used in different and various senses, depending upon the subject-matter.") See also *Russell v. Holland*, 34 N.E.2d. 668, 670 (Mass. 1941) (providing the following definition of residence:

[t]he word 'residence' . . . is a word of various meanings and the meaning to be given it depends on the context in which it appears, and it must be construed in the light of the purpose of the statute in which it appears and the result designed to be accomplished by its use.)

accord *McGrath v. Stephenson*, 77 P.2d 608, 609 (Wash. 1938), *Switzerland Gen. Ins. Co. v. Gulf Ins. Co.*, 213 S.W.2d 161, 163 (Tex. Civ. App. 1948), and *In re Jones*, 19 A.2d 280, 282 (Pa. 1941).

11. *United States v. Rubinstein*, 166 F.2d 249, 254 (2d Cir. 1948).

12. See, e.g., *United States v. Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978) (approving a jury instruction defining "legal residence" to mean "the permanent fixed place of abode which one intends to be his residence and to

The dictionary is often a useful starting point when seeking to define a word. Indeed, courts often state that one should use a dictionary or a popular definition of a word unless a statute or other rule mandates otherwise.¹³ The dictionary defines "residence" as "the act or fact of dwelling in a place for some time."¹⁴ In this context, "dwelling" means to "to remain for a time" (*emphasis added*).¹⁵ Similar language is used in law dictionaries.¹⁶ Historically, the courts also have used this approach when defining "residence," calling it "the place where one actually lives or has his home,"¹⁷ a person's dwelling place or place of habitation¹⁸ or the person's established home.¹⁹

Whereas there is little dispute that residence means one's "dwelling place," determining how any given location becomes one's residence may not be easy. Courts consider residency to involve an element of intent on the part of the would-be resident.

Long ago, in *Klutts v. Jones*,²⁰ the New Mexico Supreme Court succinctly explained the role of intention in determining residence. It stated the common law rule to be:

[t]he question of whether a person is a resident of one place or another is largely a question of *intention*, and where the *intention* and the acts of the party are in accord with the fact of residence within a given place, there can be no doubt of the fact that such party is a bona fide resident of the place where he *intends* to and does reside . . . (*emphasis added*).²¹

In the context of determining residency, "intention" refers to a person's state of mind with respect to the relationship between person and place. Thus, being present at any given place does not,

return to it despite temporary *residences* elsewhere, or absences" (*emphasis added*). Given that this was a tax case, the use of the word "residence" in the definition defining "residence" should not be too surprising. After all, the most basic tax definition of all, that of "gross income," is itself a product of similar doublespeak. See 26 U.S.C.A. § 61 (West 1999) (defining "gross income" to be "income from whatever source derived" (*emphasis added*)).

13. See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcalá*, 420 U.S. 575, 580-81 (1975)). For state court approval of this proposition, see *People v. Broussard*, 856 P.2d 1134, 1136 (Cal. 1993).

14. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1003 (Merriam-Webster 1986).

15. *Id.* at 390.

16. See, e.g., BLACK'S LAW DICTIONARY 1308 (6th ed. 1990) (defining "residence" as the "[p]lace where one actually lives or has his home; a person's dwelling place . . .") (*emphasis added*).

17. *Jernigan v. Capps*, 45 S.E.2d 886, 890 (Va. 1947).

18. See *Buckheim v. Buckheim*, 43 N.W.2d 113, 115 (Minn. 1950).

19. See *Berry v. Wilcox*, 62 N.W. 249, 251 (Neb. 1895).

20. 158 P. 490 (N.M. 1916).

21. *Id.* at 492. See also *Perez v. Health & Social Servs.*, 573 P.2d 689, 692 (N.M. Ct. App. 1977) (citing *Berry v. Wilcox*, 62 N.W. 249, 251 (Neb. 1895)).

ipso facto, establish residency.²² With the requisite intent, however, a person can elevate mere physical presence into the status of residency. The controlling factor of intention appears to focus on the desire to create the status, not on the desire to be present at the given location.²³ Thus, residency requires two key elements: a physical presence at a given location and an intent to remain at the location indefinitely.²⁴

Intention also plays an instrumental role in determining one's domicile, which may or may not be the same place as one's residence. Thus, "residence" and "domicile" are often confused, and at times used interchangeably.²⁵ Although similar, the two are clearly distinct concepts and need to be distinguished from one another.

When comparing "residence" and "domicile," one senses that the latter is a stronger, more encompassing concept. At any given point in time a person may have numerous residences, but can have only one domicile.²⁶ The essence of the difference was stated by one court as follows:

{[r]esidence' means living in a particular locality, but 'domicile' means living in that locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile.²⁷

Again, the element of intent becomes essential. In this instance, however, intent distinguishes "residency" from "domicile" on the basis of permanency. Domicile is the chief place a person considers home, the permanent place to which he or she will return. Although the residency/domicile distinction is not critical to notary residency requirement issues, it is nonetheless worthwhile to keep the two concepts separate to avoid unnecessary confusion. As a rule, the statutes only speak of "residency" and never impose "domicile" as a pre-requisite to notary eligibility. Consequently, people with multiple residences can be notaries in more than one jurisdiction and are not limited to being

22. See *Bourgeois v. Manzella*, 17 A.2d 68, 69-70 (N.J. 1940) (maintaining that "a mere physical presence does not establish residency").

23. See *Ecker v. Atlantic Refining Co.*, 222 F.2d 618, 621 (4th Cir. 1955); *Perry v. Perry*, 623 P.2d 513, 515 (Kan. Ct. App. 1981) (holding "[o]ne does not lose one's residence by mere physical presence elsewhere unless that presence is accompanied by intent to abandon the old residence and adopt the new.")

24. See *In re Adoption of A.M.M.*, 949 P.2d 1155, 1159 (Kan. Ct. App. 1997). Accord *Harrison v. Chessir*, 316 S.W.2d 909, 915 (Tex. Civ. App. 1958), *rev'd on other grounds*, 320 S.W.2d 814 (1959).

25. See *Fuller v. Hofferbert*, 204 F.2d 592, 597 (6th Cir. 1953) (stating "[b]ecause 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning.")

26. See *In re Custody of Booty*, 665 So.2d 444, 446 (La. Ct. App. 1995).

27. *In re Newcomb's Estate*, 84 N.E. 950, 954 (N.Y. 1908).

commissioned only in their state of domicile.

B. Why Residency?

A fundamental question exists as to why residency requirements are imposed at all. What legitimate ends are served by excluding non-residents? Three supporting rationales merit review on this point.

First, there may be an economic justification for residency requirements. On a simplistic level, residents pay taxes that are used to supply services. Limiting access to those services may not only be fair (i.e., benefits should ensure only to those who pay for their costs), but may also be necessary (limited resources force restrictions on both the amount and allocation of services that actually can be supplied). In this way, residency requirements can help ensure that entitlements are directed to deserving recipients.

Additionally, residency requirements can serve a convenience function. For example, residents are allowed to bring suit in their own state courts for local causes of action. Thus, a resident seeking legal redress against a non-resident for a local matter does not need to bring suit in the foreign forum of the non-resident defendant. The resident's state will have appropriate jurisdiction over the matter.²⁸

Access to the courts is an important right for many prospective litigants. It can keep costs associated with legal actions down and allow residents to rely upon home counsel knowledgeable of local rules. Additionally, imposing residency requirements can keep dockets clear for matters germane to the jurisdiction. Divorce actions are illustrative.²⁹ By imposing a residency requirement for petitioners in these actions, arguably a state can confine application of its judicial processes to those actions in which it has a legitimate interest.

Lastly, some residency requirements might be justifiable under a public "need" argument. For example, requiring certain public employees to live within a reasonable distance of their workplace has been approved as appropriate to ensure proper execution of job duties.³⁰ However, not all geographic restrictions

28. Long-arm statutes will enforce this right by allowing personal jurisdiction to be obtained over the non-resident. *See, e.g.*, 735 ILL. COMP. STAT. 5/2-209 (West 1999).

29. *See* ARNOLD H. RUTKIN, 1 FAMILY LAW AND PRACTICE, § 3.01[1], at nn.4-6 (1998) (providing a compilation of the residency requirements needed to constitute a divorce or dissolution of marriage proceedings).

30. *See, e.g.*, *Dixon v. City of Perry*, 416 S.E.2d 279 (Ga. 1992); *State ex rel. Rudolph v. Lujan*, 512 P.2d 951 (N.M. 1973). *See also* *Salt Lake City Fire Fighters v. Salt Lake City*, 449 P.2d 239 (Utah 1969) (justifying residency requirements based on "convenience" and "economic" bases, holding that persons to whom the city supplies services, may be required to participate in and contribute support to the service-supplying city—not to the support of

are permissible. The restriction must bear a reasonable relationship to job needs. Thus, requiring a policeman to live within city limits was held void.³¹ On the other hand, imposing residency requirements for jurors can provide panels that are representative of local morals and views.³² A residency requirement for jurists is a laudable goal that relates to the needs of the public who use the court system.

In sum, residency requirements are justifiable in a variety of settings as legitimate means to achieve certain objectives. The three rationales suggested for evaluating this type of restriction, as applied to select situations, prove this point. However, some residency requirements are not supported by any of the suggested rationales. Thus, the central question at hand is on which side of the ledger do notary residency requirements fall.

III. NOTARY RESIDENCY REQUIREMENTS

A. *The Rules and Their Roles*

For the most part, notaries public are creatures of statute. Every state has legislation that governs notaries.³³ Although some are more extensive than others, each statute details the commissioning requirements for its jurisdiction.³⁴ Residency is addressed by most of the statutes, but in different ways.

The two main approaches to residency requirements are "residents only" and "non-residents may qualify." The latter group can be further subdivided into five less well-defined categories. Each category has a different basis for allowing a non-resident to be commissioned as a notary public.

The majority of jurisdictions have "resident only" statutes.³⁵

other cities).

31. See *City of Atlanta v. Myers*, 240 S.E.2d 60 (Ga. 1977).

32. See *United States v. Ross* 468 F.2d 1213, 1215-16 (9th Cir. 1972).

33. See generally CHARLES N. FAERBER, *NOTARY SEAL & CERTIFICATE VERIFICATION MANUAL* (National Notary Association, 3d ed. 1995) (giving an overview of statutory provisions of each state).

34. See, e.g., COLO. REV. STAT. § 12-55-104 (1998); DEL. CODE ANN. tit. 29 § 4301 (1998); FLA. STAT. ANN. § 117.01 (West 1998); 5 ILL. COMP. STAT. 312/2-102 (West 1998).

35. See ALA. CODE § 36-20-2 (1998); ALASKA STAT. § 44.50.130 (Michie 1998); CAL. GOV'T CODE § 8201 (West 1999); COLO. REV. STAT. § 12-55-114 (1998); DEL. CODE ANN. tit. 29, § 4301 (1998); FLA. STAT. ANN. § 117.01(1) (West 1998); GA. CODE ANN. § 45-17-2 (1998); HAW. REV. STAT. § 456-2 (1998); 5 ILL. COMP. STAT. 312/2-102 (West 1998); IND. CODE § 33-16-2-1 (1998); KY. REV. STAT. ANN. § 423.01 (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 35:191 (West 1998); ME. REV. STAT. ANN. tit. 5, § 82 (West 1997); MONT. CODE ANN. § 1-5-402 (1997); NEB. REV. STAT. ANN. § 64-101 (Michie 1998); N.H. REV. STAT. ANN. § 455:2 (1998); N.M. STAT. ANN. § 14-12-2 (Michie 1998); TEX. GOV'T CODE ANN. § 406.004 (West 1997); UTAH CODE ANN. § 46-1-3 (1998); VT. STAT. ANN. tit. 24, § 441 (1997); WIS. STAT. ANN. § 137.01 (West

Some specifically require that the notary applicant be a resident of the state,³⁶ while others employ an indirect route to impose the requirement.³⁷ A few go so far as to impose county residency restrictions as well.³⁸

The balance of states have liberalized the residency requirements, finding a variety of ways for non-residents to qualify as notaries. Each of these jurisdictions allows its own residents to become commissioned. It is the eligibility of non-residents for notary positions that is the distinguishing characteristic.

The most common exception to personal residency requirements is to permit non-residents who are employed or doing business in the state to become commissioned, regardless of where they call home or their actual state of residence.³⁹ A handful of jurisdictions allow non-residents who are employed in the state to become notaries public if they are residents of bordering states.⁴⁰ A few jurisdictions allow non-residents who also have their principal place of business in the state to become notaries.⁴¹ Two states combine the requirements, only allowing non-residents of bordering states who have a principal place of business in the state to become notaries.⁴² Two states only allow non-resident attorneys who are admitted to practice in the state to become notaries.⁴³ One state allows non-residents who have either a principal place of business, or perform other activities within the

1997); WYO. STAT. ANN. § 32-1-101 (Michie 1998).

36. *See, e.g.*, ALASKA STAT. § 44.50.130 (Michie 1998); FLA. STAT. ANN. § 117.01(1) (West 1998); HAW. REV. STAT. § 456-2 (1998).

37. *See* NEB. REV. STAT. ANN. § 64-101 (Michie 1998) (requiring a petition signed by residents of the county in which the applicant resides).

38. *See, e.g.*, ARIZ. REV. STAT. § 41-312 (1998); KY. REV. STAT. ANN. § 423.01 (Baldwin-Banks 1998); WYO. STAT. ANN. § 32-1-101 (Michie 1998).

39. *See* IDAHO CODE § 51-104 (1998) (requiring that an out-of-state notary be employed or doing business in state); MD. CODE ANN., STATE GOV'T § 18-102 (1998) (requiring that notary live or work in state); MO. REV. STAT. § 486.22 (1997) (requiring that an out-of-state notary have a Missouri work address); N.Y. EXEC. LAW § 130 (McKinney 1999) (requiring that an out-of-state notary have an office or place of business in state); N.C. GEN. STAT. § 10A-4 (1998) (requiring that an out-of-state notary reside or work in state); OKLA. STAT. tit. 49, § 1 (1998) (requiring that an out-of-state notary reside or work in state); VA. CODE ANN. § 47.1-4 (Michie 1998) (requiring that an out-of-state notary be regularly employed in state).

40. ARK. CODE ANN. § 21-14-101 (Michie 1997); NEV. REV. STAT. § 240.015 (1997); N.J. STAT. ANN. § 52:7-13 (West 1998); OR. REV. STAT. § 194.022 (1989); WASH. REV. CODE § 42.44.020 (1998).

41. CONN. GEN. STAT. § 3-94b(2) (1999); MICH. COMP. LAWS § 55.107 (1998); W. VA. CODE § 29C-2-201 (1998).

42. IOWA CODE ANN. § 9E.3 (West 1998); KAN. STAT. ANN. § 53-101 (1998).

43. OHIO REV. CODE ANN. § 147.01 (Banks-Baldwin 1998); R.I. GEN. LAWS § 42-30-5 (1998).

state requiring notarial services, to become notaries.⁴⁴ Finally, one state allows non-residents from other specified states to become notaries,⁴⁵ while another allows non-residents to become notaries if they are from states that have a reciprocity agreement with the state in which they seek to be commissioned.⁴⁶

Notwithstanding the substantial number of exceptions, a majority of American jurisdictions require the notary to be a resident of the state in which he or she is commissioned. Do compelling interests to justify a residency requirement exist, or is the requirement a historic vestige? Regrettably, there is little authority on this point.

In support of a residency requirement, the Oregon Attorney General ruled that "[t]he state has a compelling interest in ensuring that notaries public are familiar with the people and processes they serve, that the appointee's character, dependability, and familiarity with the subject matter can be ascertained, and that notaries public can be reasonably nontransient [sic]."⁴⁷ Ironically, after this opinion was issued, Oregon amended its notary statute to allow non-residents to be commissioned as notaries.⁴⁸

In *Cook v. Miller*,⁴⁹ a federal district court found that a state has a legitimate interest in imposing notary residency requirements to ensure its ability to subpoena notaries. The state suggested that a notary's testimony might be needed when "circumstances surrounding the creation of a legal document or the validity of the notary's seal" were at issue.⁵⁰

The four identified reasons in support of notary residency requirements are to ensure that the notary is familiar with the people and processes served; can be determined to have the requisite character, dependability and familiarity with the subject matter for the position; will be reasonably nontransient; and is available for service of process.⁵¹

A review of each reason should demonstrate that the stated justifications for imposing notary residency requirements are not

44. MICH. COMP. LAWS § 55.107 (1998).

45. See MINN. STAT. ANN. § 359.01 (West 1998) (permitting an out-of-state notary if the person is a resident of Wisconsin, Iowa, North Dakota or South Dakota, and of a county that shares a boundary with Minnesota).

46. N.D. CENT. CODE § 44-06-01 (1997). Out-of-state notaries must reside in a county that borders North Dakota and in a state that extends reciprocity to a notary public who resides in a border county of this state. *Id.*

47. 37 Op. Att'y. Gen. 1223 (Or. 1976).

48. OR. REV. STAT. § 194.022 (1989).

49. 914 F. Supp. 177 (W.D. Mich. 1996).

50. *Id.* at 180.

51. The first three reasons are from the Oregon Attorney General's Opinion and the fourth reason is the view of the *Cook* court. See *supra* text accompanying note 47.

particularly compelling.

Consider first the desire to have the notary be familiar with the people served and the processes used in the jurisdiction. If familiarity with the people is designed to ensure more accurate identification of signatories, it falls well short of the mark. Today, the likelihood that a notary will actually know the person who seeks notarial services is almost nonexistent. Granted, a few individuals personally known to the notary may well need notarial assistance, but the lion's share of users in even moderately populated areas will be strangers to the notary. Legislatures are aware of this reality and have provided ample ways to overcome the identification issue by requiring people not personally known to the notary to provide satisfactory proof of identity.⁵²

Adequate knowledge of local processes is an equally feckless justification for residency requirements. Routinely, notaries are required to acknowledge their familiarity with applicable rules when applying for the commission.⁵³ Additionally, some states go so far as to require notaries to pass qualifying exams prior to being commissioned.⁵⁴ Clearly, better protection against ignorance of legal processes germane to the office can be afforded without resorting to residency requirements. Education requirements and appropriate training satisfy this need.

The second justification listed can be attacked equally as easily. Whether a resident or a non-resident, the commissioning authority has to undertake a character investigation of a notary applicant before granting the commission. There is no basis to believe non-residents are any less dependable, or of weaker character, than residents. The concern over knowledge of subject matter suffers the same defect as the familiarity of process position. Residency, by itself, does not give any person a better knowledge or understanding of applicable rules. Education does that, and as noted above, adequate education can be required of all applicants regardless of residency status.⁵⁵

The third justification, non-transience, also is without merit.

52. *See, e.g.*, N.C. GEN. STAT. § 10A-3(8)(a) (1998) (requiring a current document issued by the federal or a state government); OR. REV. STAT. § 194.505(8) (1989) (requiring a document issued by a federal and state government with the individual's physical description, picture and signature, or two documents issued by a business, institution or government with the individual's signature).

53. *See, e.g.*, 5 ILL. COMP. STAT. 312/2-104 (West 1998) (requiring notary applicant to submit to an oath that includes the following: "[t]hat I have carefully read the notary law of this State"); W. VA. CODE § 29C-2-204 (1998).

54. OR. REV. STAT. § 194.022 (1989).

55. North Carolina requires non-attorney notary applicants to take a training course. *See* N.C. GEN. STAT. § 10A-4(b)(3) (1998); VA. CODE ANN. § 47.1-11 (Michie 1998) (requiring handbooks be published and made available to notaries).

Theoretically, when notaries move out-of-state, they reduce the number of notaries available to serve the public. Thus, promoting non-transience helps provide a stable notary population base and eliminates the negative impact transient notaries can have on the availability of notarial services.

Unfortunately, the argument is self-defeating. Limiting commissions to residents, in turn, limits the overall number of notaries. By allowing non-residents to become commissioned, more notaries are available to the public regardless of the number of transients who never return to render notarial services in the state. Access to services is decreased, not increased, by imposing residency requirements and the measure becomes counterproductive.

Finally, the availability for service of process argument is similarly inadequate to justify residency requirements. Notaries, like anyone else who transacts business in the state, are subject to jurisdiction under the long-arm statutes.⁵⁶ Thus, their availability for service is not a real issue. Furthermore, non-resident notaries can be likened to foreign corporations. The latter must submit themselves to local jurisdiction by appointing a registered agent for service of process.⁵⁷ Notaries could be required to do the same.⁵⁸

Notary residency requirements face constitutional challenges, as well. Although the *Cook* court sustained the general validity of the residency requirement,⁵⁹ its final order granted the parties leave to brief the question "whether the requirement was unconstitutional as applied to the petitioner."⁶⁰ The petitioner was an Ohio resident licensed to practice law in both Ohio and Michigan. She argued that being precluded from obtaining a Michigan notary public commission prevented her from practicing law on equal terms with Michigan attorneys who were also notaries.

Ms. Cook subsequently convinced the court that the residency statute as applied to her denied her equal protection and therefore was unconstitutional.⁶¹ Apparently in response, Michigan eliminated its "residents only rule" and expanded the pool of

56. *In re Newcomb's Estate*, 84 N.E. 950, 954 (N.Y. 1908).

57. COLO. REV. STAT. § 7-115-103(e) (1998); FLA. STAT. ANN. § 607.1503(1)(e) (West 1998); 805 ILL. COMP. STAT. 5/13.15(4) (West 1998).

58. See MO. REV. STAT. § 486.220.2(6) (1997) (requiring non-resident notaries to register in the state).

59. See *Cook v. Miller*, 914 F. Supp. 177, 182 (W.D. Mich. 1996) (ruling that "the residency requirement for notaries public found in [the Michigan statute] is constitutional on its face").

60. *Id.*

61. A copy of the unpublished order can be found in CLOSEN, AHLERS, JACOBS, MORRIS AND SPYKE, NOTARY LAW PRACTICE: CASES AND MATERIALS, 78-80 (National Notary Association 1997).

eligible notary applicants to anyone who performs activities within the state that requires notarial services.⁶²

The only other officially addressed instance of a constitutional challenge to a notary residence requirement was dismissed out of hand.⁶³ Thus, it seems that except for those limited cases where the petitioner can prove unequal protection, residency requirements are on *terra firma*.

B. Durational Considerations

Although perhaps not always justifiable, a notary public residency requirement is not per se unconstitutional even though, as seen in *Cook*, its application to a specific individual may be. A different issue arises when the statutes establish a minimum term of residency as a pre-requisite to being commissioned. Such a durational requirement may be constitutionally suspect on its face.

At the outset, it should be noted that almost all notary statutes imposing residency requirements are silent as to duration of the residency. Along this line, it has been ruled that an applicant need only be a resident for a day in order to satisfy the statutory residency requirement.⁶⁴ Since there is no official procedure that must be satisfied in order to become a resident, the determination of residency is thrown back into the mix of "presence with requisite intent," discussed earlier.⁶⁵ Since it is not particularly difficult to establish residency in general, satisfying the residency test of most notary statutes should be fairly easy and something that is not likely to be challenged.

A number of states, however, specifically require that an applicant be a resident for a set period of time in order to be eligible for a notary commission.⁶⁶ These durational requirements can raise constitutional equal protection challenges. When such restrictions are invalidated, it is because they discriminate against those in a class of individuals who exercise their right to travel from state to state.⁶⁷ Three leading United States Supreme Court

62. MICH. COMP. LAWS § 55.107 (1998).

63. *Schockman v. Richards*, 1992 WL 21240 (Ohio App. 6th Dist.).

64. N.M. Op. Att'y. Gen. No. 89-16, 1988 WL 407485 (N.M.A.G.).

65. See *supra* text accompanying notes 13-24.

66. See 5 ILL. COMP. STAT. 312/2-102(d) (West 1998) (requiring 30 days' residency); MONT. CODE ANN. § 1-5-402 (1997) (one year); 57 PA. CONS. STAT. § 149 (1999) (requiring one year); UTAH CODE ANN. § 46-1-3(b) (1998) (requiring 30 days). A few states may indirectly impose a durational residency requirement for notary applicants. These notary statutes require the applicant to be a "qualified elector," which is a classification that may itself carry a durational residency requirement. Wittingly or not, this effectively imposes the same durational obligation on prospective notaries. See N.D. CENT. CODE § 44-06-01 (1997); W. VA. CODE § 29C-2-201 (1998).

67. See *Passenger Cases*, 7 How. 283, 492 (1849); *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *Crandal v. Nevada*, 73 U.S. 35, 43-44 (1867)

cases, *Shapiro v. Thomas*,⁶⁸ *Dunn v. Blumstein*⁶⁹ and *Memorial Hospital v. Maricopa County*,⁷⁰ have helped shape the landscape for constitutional challenges to durational residency requirements.

In *Shapiro*, the issue was whether welfare benefits could be withheld from indigents who had not resided in the jurisdiction for at least one year.⁷¹ The Court found that the financial basis for the restriction (i.e., imposing a waiting period for benefits will deter those from entering the jurisdiction who will be a continual burden on the welfare program and jeopardize its continued financial feasibility) did not justify the discriminatory classification. The Court said, "if a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."⁷² The Court also dismissed the state's claim that administrative and other government objectives justified the waiting period,⁷³ ruling that "any classification which serves to penalize the exercise of [a constitutional] right, unless shown to promote a *compelling* government interest, is unconstitutional."⁷⁴

In *Dunn*, the issue was a durational residency requirement with respect to voting. Although the Court recognized that jurisdictions had the authority to regulate voter qualification,⁷⁵ the Court held that the jurisdiction "must show a substantial and compelling reason for imposing durational residency requirements."⁷⁶ The Supreme Court could not see how imposing a dual durational residency requirement, one for the state and another for the county, met the test. The state argued that the requirement would prevent quick invasions into the state by non-resident persons simply for the purpose of voting,⁷⁷ and that it would assure an informed electorate.⁷⁸ The Court concluded that the residency requirement failed to accomplish both goals and invalidated it.

Finally in *Maricopa County*, the Court struck down a durational residency requirement relating to qualification for county-paid medical care. After concluding that the requirement

(discussing the fundamental right to travel from state to state).

68. 394 U.S. 618 (1969).

69. 405 U.S. 330 (1972).

70. 415 U.S. 250 (1974).

71. *Shapiro*, 394 U.S. at 627 (1969).

72. *Id.* at 631 (citing *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

73. *Id.* at 633-34. The state argued that the waiting period facilitated welfare budget planning, provided an objective test for determining residency, deterred fraud and encouraged individuals to enter the work force quickly. *Id.*

74. *Id.* at 634.

75. *Id.* at 636 (citing *Carrington v. Rash*, 380 U.S. 89, 91 (1955)).

76. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

77. *Id.* at 345.

78. *Id.* at 360.

impeded interstate travel, the Court turned its attention to whether a compelling state interest justified the requirement. As in *Shapiro*, the state claimed there were financial and administrative benefits to support the restriction. And as in *Shapiro*, the Court again disagreed.⁷⁹

Not all durational restrictions are unconstitutional. Only those that create “a classification which operates to *penalize* those persons . . . who have exercised their constitutional right of migration [and cannot] be justified by a compelling state interest” are unconstitutional.⁸⁰ For example, in *Sosna v. Iowa*,⁸¹ a durational residency requirement pertaining to bringing a divorce action in the jurisdiction passed constitutional muster. In upholding the Iowa residency requirement, the Court distinguished *Shapiro*, *Dunn* and *Maricopa County*, claiming they were decided on the grounds that budgetary and administrative justifications did not constitute compelling state interests.⁸² In *Sosna*, the Supreme Court found that given the potential impact of a divorce decree on the parties, their property and minor children, the state does have a compelling interest in seeing that the petitioner has a “modicum of attachment to the State”⁸³ Similar results have been reached when durational residency requirements for jurors have been challenged.⁸⁴

It is unlikely a state could demonstrate a compelling state interest to sustain a durational residency requirement for notaries public. The justifications for residency requirements themselves are flimsy at best, and adding the durational aspect only makes them more difficult to justify. Clearly, durational residency requirements for notaries public are vulnerable to constitutional attack.

79. *Id.*

The Arizona residence requirement for eligibility for non-emergency free medical care creates an ‘invidious classification’ that impinges on the right to interstate travel by denying newcomers ‘basic necessities’ of life. Such a classification can only be sustained on a showing of a compelling state interest. [The State has] not met [its] heavy burden of justification, or demonstrated that the state, in pursuing legitimate objectives, has chosen means which do not unnecessarily impinge on constitutionally protected interests.

Id.

80. *Id.* at 258 (separate opinion of Justices Brennan, White and Marshall) (citing *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970)).

81. 419 U.S. 393 (1975).

82. *See id.* at 406. (reasoning that the “divorce residency requirement is of a different stripe.”)

83. *Id.* at 406.

84. *Williams v. Florida*, 399 U.S. 78 (1970); *Hampton v. State*, 569 P.2d 138 (Alaska 1977); *Williams v. State*, 282 So.2d 349 (Ala. 1973).

IV. ANALYSIS AND ASSESSMENT OF THE RESIDENCY REQUIREMENT

If nothing else, it is clear that imposing stringent residency requirements for notaries public is fraught with uncertainty. First, the mere fact that so many jurisdictions have walked away from "resident only" notary eligibility without experiencing any reported problems makes one wonder if the hold-outs are guarding something that does not need protection. Second, the requirements themselves are infected with constitutional concerns that make their enforcement problematic. One must wonder whether notary residency requirements are worthy of retention.

One way to determine the worthiness of the requirement as applied to notaries is to measure it against the three rationales presented earlier for all residency restrictions: economic benefit, convenience and public need.⁸⁵ This type of analysis should help assess the efficacy of the requirements. If none of the rationales support notary residency requirements, then one is left to defend the restriction only with the justifications suggested for specifically imposing notary residency requirements.⁸⁶ Since these have already been dismissed as meritless, in order to justify the residency requirements, one would be forced either to invent new supporting arguments for them or demonstrate that they serve a compelling purpose. Since neither of these are likely prospects, the following analysis should show notary residency requirements to be unjustifiable.

Notary residence requirements cannot be defended on economic grounds. There are not any readily identifiable additional costs attributable to commissioning non-resident notaries. If there were, a state would have no difficulty in surcharging the registration fee for non-resident notaries by an amount necessary to cover the extra costs associated with commissioning them. Notary fee differentials based on county of residence have been approved,⁸⁷ and there is no reason to believe state residence differentials would be treated any differently. Moreover, non-resident notaries do not siphon-off state resources that would otherwise be directed to residents. Therefore, this putative justification is neutral on the resource receipt/allocation issue.

Likewise, the convenience rationale does not support residency requirements. There are no additional burdens placed on residents (e.g., clogging of court dockets forcing residents to suffer delayed justice) by allowing non-resident notaries. Indeed,

85. See *supra* notes 28-32 and accompanying text (discussing the rationales of residency restrictions).

86. See *supra* notes 51-58 and accompanying text (discussing the justifications for residency requirements).

87. *In re State ex rel. Wootan*, 313 So.2d 621 (La. Ct. App. 1975); *Manes v. Goldin*, 400 F. Supp. 23 (E.D.N.Y. 1975).

if anything, allowing for non-resident notaries provides a convenience to the general population in that there are more notaries available to service the public's needs.

Finally, notary residence requirements are not supported by a public need argument. It cannot be said that resident status will make a person a better notary than one who is a non-resident. Knowledge of applicable rules and education requirements are the same for resident and non-resident notaries alike. It is the proper enforcement of these requirements, and not the establishment of a residency eligibility rule, that will best serve the public good.

Perhaps a more appealing and, as yet, undiscussed argument, for notary residency requirements focuses on notary journals. Although highly recommended for notaries in all jurisdictions,⁸⁸ only several states require notaries to maintain journals.⁸⁹ These journals, whether or not required, can be likened to public records. Indeed, in some jurisdictions they must be made available for public inspection.⁹⁰ Given the public or quasi-public nature of such journals, allowing notaries to be non-residents raises an interesting question. Should a non-resident notary be allowed to take a public state record outside of the state?

Generally, public records are to remain with their custodian, subject to removal in certain instances by authorized individuals.⁹¹ Similar rules apply to notary journals.⁹² There is inherent difficulty in allowing a non-resident notary to take the journal to her residence outside of the jurisdiction. Essentially, official records are being removed to another state. This poses a serious theoretical challenge to commissioning non-resident notaries.

But the problem disappears if states require the journal to be housed at the non-resident notary's place of business in the jurisdiction. If the non-resident notary does not have a place of business, then arrangements can be made to designate a trusted in-state agent to be custodian of the journal. A resident notary would be a logical choice, but other possibilities exist as well.⁹³ With some prudently established safeguards, the journal concern is no longer an issue.

88. NOTARY CODE OF PROFESSIONAL RESPONSIBILITY § VIII (1984).

89. ALA. CODE § 36-20-7 (1998); CAL. GOV'T CODE § 8206 (West 1999); COLO. REV. STAT. § 12-55-111 (1998); 57 PA. CONS. STAT. § 161(a) (1999).

90. ARIZ. REV. STAT. § 41-319 (1998); MISS. CODE ANN. § 25-33-5 (1998); MO. REV. STAT. § 486.26 (1997); NEV. REV. STAT. § 240.12 (1998); 57 PA. CONS. STAT. § 161(b) (1999); TENN. CODE ANN. § 8-16-306 (1998).

91. ALA. CODE § 12-20-25 (1998).

92. See, e.g., CAL. GOV'T. CODE § 8206(d) (West 1999) (making the journal the exclusive property of the notary).

93. For example, the journal could be kept by the non-resident notary's registered agent or by a commercial enterprise established for custodial services.

There are simply no compelling reasons to impose notary residency requirements. Indeed, as Internet commerce increases, there will be a greater need for verification of electronic and digital signatures. These types of transactions know no home-base like the commercial dealings of yesteryear. States should be eager to commission qualified notaries to handle the burgeoning need generated by cyberspace, regardless of where the notary calls home.

Understandably, states may not want to open their doors to any and all comers. There are administrative burdens associated with processing applications and maintaining notary rosters. Thus, rules mandating that the notary have some nexus to the state make sense. Whereas residency is too high a threshold, a minimum contacts test might be too low.

Establishing a standard that forces the non-resident to demonstrate a reasonable need to be a notary related to his or her activities in the state may be a satisfactory middle ground. Such a test will keep the frivolous applicant away, but will be sufficiently flexible to avoid unequal protection arguments. Regardless of the standard chosen, the calculus used to select it should include consideration of the needs of the public being served—not just the benefit that will flow to the prospective notary public individually, or to his or her employer.

V. CONCLUSION

Prudence dictates that certain licensed authorities satisfy competency standards. The purpose of this type of requirement is to protect the public. The general welfare of the public demands that only qualified professionals be permitted to perform their duties. Thus, imposing license qualification requirements is both permissible and sensible.

Notaries public can play an important role in validating many personal and business transactions. Consequently, there is a genuine public interest in ensuring that notaries are competent. It logically follows that notaries, like other professionals licensed by the state, ought to satisfy qualification requirements. The public's protection should demand no less. The question at hand, however, is not whether notaries must meet eligibility requirements, but instead, what requirements meaningfully address the goals to be achieved.

It is suggested that strict residency requirements for notaries are of limited, if any, value in modern society. Such requirements do not in any way guarantee that higher quality notarial services will be provided. They can, however, limit the number of available notaries in any given jurisdiction and thereby reduce the public's access to notarial services, especially in non-densely populated areas. Thus, a requirement putatively designed to protect the

public could in fact work to injure it.

The best way to ensure competent notaries is through education, not residency, requirements. This is not to say that a state should commission as a notary someone who has no contacts with the jurisdiction whatsoever. Some reasonable standard can be established that ties together the state's interest in regulating notaries with the public's need for access to notarial services and an individual's right to become a notary. Something more than minimum contacts, but far less than actual residency, can satisfy all concerns.

Given that "resident only" notary statutes can be unconstitutional as to specific individuals, states that have them may want to re-think their positions. To the extent these jurisdictions have concerns about eliminating their restrictions, they can take heart in the fact that many states have moved away from "resident only" notary statutes without much difficulty. Given the pace and direction of today's transactions and the impact of cyberspace on tomorrow's, residents of all states may well need more, and better-qualified, notaries. Restrictions like residency requirements should not become an impediment to satisfying that need. The time is ripe to lift state boundaries and instead welcome nomadic notaries.

